

IN THE MATTER OF THE *CANADA LABOUR CODE*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

DETROIT & CANADA TUNNEL CORPORATION

- 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 J. P. Sylvestre

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Jean Leslie Marentette - Counsel

Carolyn A. Brown - Vice-President, Administration & Operations

Donna Bratt - Manager, Human Resources

On behalf of the Union:

Debbie Fields - National Representative

Paul Adams - Plant Chair

J. P. Sylvestre - Grievor

Hearing held November 29, November 30 and December 8, 2005, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This grievor had been dismissed for “smuggling” into Canada items purchased at the Windsor duty free shop. The Union alleged that the grievor had been unjustly dismissed.

II. THE FACTS

The Detroit & Canada Tunnel Corporation, the Employer, operates the international tunnel connecting Windsor and Detroit.

The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), and its Local 195, the Union, represents the employees on the Windsor side of the tunnel, including J. P. Sylvestre, the grievor.

There was little dispute as to the relevant facts.

The grievor has worked for the Employer for some 13 and a half years, nearly all that time as an electrician in the maintenance department. All the Employer’s maintenance department employees are employed in Canada on the Windsor side of the tunnel but frequently cross the border to work on the U.S. side of the tunnel. The grievor had the use of an Employer vehicle and he was often required to cross the border to perform work in the U.S. Some days he crossed the Canada-U.S. border several times.

On the Windsor side of the tunnel there are toll booths and a Duty Free Shop for those headed to the U.S., Canada Customs inspection locations for those entering Canada, and also buildings for the Employer’s operations. In addition, the Employer has off-site buildings

in Windsor, such as a ventilation building, where the grievor and other maintenance employees sometimes work. These maintenance employees have some latitude in organizing their work day; rather than taking their breaks and lunch at a specific time, the maintenance employees fit the breaks around their work. The maintenance employees may leave the Windsor tunnel work area using the Employer vehicles during the work day to visit the other Employer buildings, to purchase parts needed to make repairs, or to buy lunch, etc.

Because the grievor and other maintenance employees work in close proximity to the Canada Customs employees, and because they cross the border so frequently, the grievor and other maintenance employees are allowed greater freedom crossing the border than are others. In particular, some maintenance employees do not report to Customs on their return to Canada but instead go directly to one of the Employer's buildings in the tunnel area, or even leave the area directly without reporting to Customs. However, the grievor normally reported to Canada Customs on his return to Canada.

In addition, the tunnel employees work in close proximity to the Duty Free Shop employees who are employed by another company. There has been a practice of the Duty Free Shop providing gift certificates to tunnel employees at Christmas. The grievor has received such a gift each year for several years.

Monday August 8, 2005, the grievor began his work by making a repair on a toll booth on the Windsor side. After that he was to cross the border to the U.S. to work.

However, the grievor had not yet spent his \$50.00 Duty Free Shop gift certificate for Christmas 2004. He had previously been in the duty free store looking for a particular lipstick for his wife but it had been out of stock. The morning of August 8 he stopped at the duty free to check for the lipstick. After he learned that the particular lipstick was no longer

being made, he selected two packages of a similar colour lipstick. As the value of the lipstick was less than the value of his gift certificate and the Duty Free Shop did not give change, the grievor also bought some perfume for a total sale of \$67.05. In addition to his gift certificate, the grievor used a 10% discount card provided to tunnel employees.

A large sign posted in the Duty Free Shop indicated that all products were for immediate export to the U.S. and if they were returned to Canada they had to be reported to Canada Customs and were subject to duty and taxes. That message was also printed on the cash register receipts. The export and reporting requirements were known by tunnel employees, including the grievor.

When the grievor left the Windsor Duty Free Shop after making his purchase he did not go immediately to the U.S. Instead he made a U-turn in his Employer truck as he came out of the Duty Free Shop, left the area, and headed north on Goyeau Street. The normal tunnel traveller would not have been allowed to make this U-turn, but the grievor, as a tunnel employee driving an Employer truck, was permitted to make the turn.

The grievor testified that he was unable to recall much about his activities that day. He speculated that he was headed to a nearby Tim Hortons to purchase a coffee, something which tunnel employees often did. The grievor also said that he may have gone to the ventilation building which was in the same direction.

In any event, later that day the grievor crossed to the U.S. and he testified that he still had his purchases in the truck with him. He said he probably did not declare them when entering the U.S. and he probably did not declare them when returning to Canada. He was unable to say whether he removed the duty free purchases from the truck that day or a day or two later.

Debbie Dunbar, a Duty Free Shop employee, noticed that the grievor made a U-turn when leaving and observed that he did not immediately take his purchases to the U.S. Ms Dunbar telephoned Carolyn Brown, the Employer's Vice-President, Administration and Operations. Ms Brown was not in and Ms Dunbar left a message. Later that week Ms Brown spoke to Ms Dunbar and Ms Brown was provided both with documents regarding the grievor's purchase and also with video recordings of the sale and the grievor leaving the Windsor tunnel area without crossing to the U.S.

Wednesday August 10 the Employer notified the Union that there was an issue with one of the employees but the Employer did not advise which employee.

Friday August 12 the Employer provided Paul Adams, the Union plant chair, with a letter outlining the Employer concerns about the grievor's conduct.

Later that day the Employer, the Union and the grievor met to discuss the issues. At the meeting the grievor provided no reasonable explanation for his failure to immediately take his purchase to the U.S., although he did make a comment to the effect that neither alcohol nor tobacco was involved. The Employer interpreted this comment as indicating that the grievor felt the duty free rules about export only applied to alcohol and tobacco. On the other hand, the grievor and Mr. Adams, the plant chair, testified the grievor's comment was simply an attempt to downplay the significance of what had occurred. The grievor had no explanation beyond a "what was I thinking?" comment. At that meeting the grievor did offer an apology to the Employer, to Customs, and to the Duty Free Shop.

The Employer decided to dismiss the grievor and in the dismissal letter provided four reasons, each of which was a repetition of a section of the Employer's rules:

1. Smuggling: using Company vehicles, equipment, or employment position with the Company

- to engage in, or assist in smuggling activities;
- 2. Leaving the work area or Company property without authorization;
- 3. Misuse of Company Vehicles, equipment or facilities;
- 4. Acting in a manner unbecoming to the position and status of the employee, including any action considered detrimental to the best interests of the Company or to any employee of the Company.

The Employer's rules state that the first matter - smuggling - will "result in immediate dismissal." The latter three items are said to result in progressive discipline, the first step being a written reprimand.

It is important to the Employer, which operates this tunnel connecting the U.S. and Canada, to maintain a good working relationship with Canada Customs. The Employer advised Canada Customs of the grievor's actions. As of the hearing Canada Customs had taken no action against the grievor.

At the hearing there was additional evidence concerning two members of management who had had recent problems with Canada Customs. The Employer promotes the use of NEXUS, a special Customs lane for those who cross the border on a regular basis. People considered low risk and who are pre-approved may use the NEXUS lane. There are restrictions on the items a person using the NEXUS lane may import. Both management employees ran afoul of the NEXUS rules - one had a number of items for a golf tournament and the other had a gift which he had intended to mail in the U.S. before entering Canada. One lost his NEXUS privileges for a short time. Neither suffered employment repercussions.

Finally, I heard limited evidence as to the grievor's efforts to find alternative employment. It appeared that he has made little, if any, effort to secure other work since his dismissal.

III. PROVISIONS OF THE AGREEMENT

The relevant provisions of the parties' 2003-2006 collective agreement are as follows:

MANAGEMENT'S RIGHTS

4.01 The management of the Company and the direction of the working force, including the right to hire, . . . discharge or discipline for just cause, . . . is vested exclusively in the Company . .

RULES AND REGULATIONS

14.01 The Union recognizes the right of the Company to make and alter from time to time reasonable rules and regulations to be observed by employees, which reasonable rules and regulations shall not be inconsistent with the provisions of this agreement.

IV. POSITION OF THE EMPLOYER

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

The grievor engaged in serious misconduct in violation of the Employer rules which clearly prohibit smuggling. The grievor smuggled using the Employer's vehicle. He smuggled by leaving the Employer premises without any authorization. Finally, this conduct was detrimental to the interests of the Employer.

Maintenance employees are given greater freedom of activity and must act within the law. The Employer works in partnership with the Duty Free Shop and Canada Customs and has a role in enforcing the Customs rules.

There was no dispute that the grievor made a purchase and did not take it directly to the U.S. Moreover, it appeared that when he did take it to the U.S. he did not declare it and he had

not declared it on his later return to Canada. The grievor's suggestion in the meeting August 12 that he thought the rules applied only to alcohol and tobacco was not persuasive. As his apology was offered only after he had been caught, it carried no weight.

The Employer addressed the issue of whether buying something in Canada at the Duty Free Shop can be said to be smuggled into Canada by failing to export it to the U.S. as required. The *Customs Act* requires every person arriving in Canada to report to customs. That *Act* requires persons to report all goods being imported, including any goods which have been taken out of Canada and are being returned. The *Act* also authorizes the making of regulations for duty free shops. The regulations governing duty free shops require the shops to post notices advising purchasers that goods sold are for immediate export (as the Duty Free Shop did here) and further states that goods may only be sold to persons about to leave Canada. The dictionary meaning of smuggle is "to convey goods clandestinely into or out of a country to avoid payment of legal duties or in contravention of some enactment." In this case the grievor smuggled the goods.

The Employer argued that its rules clearly forbid smuggling. The rule was well known. The rule was critical to the Employer's ongoing business relationship with Canada Customs. Enforcement of that rule was important in order to deter other employees from smuggling.

The Employer asked that I uphold the dismissal and submitted that this was not a suitable case for me to exercise my discretion to substitute a lesser penalty.

In the alternative, the Employer submitted that the least possible penalty should be reinstatement without compensation.

In reply to the Union submission concerning the two management employees who had acted

in contravention of the NEXUS rules, the Employer noted differences between the grievor and the management employees. The management employees had presented themselves to Customs, they had nothing to gain personally from the goods they were importing, and they voluntarily informed the Employer as to what had happened.

The Employer relied upon the following: the Canada *Customs Act*, as amended; *Duty Free Shop Regulations*, made under the *Customs Act*; *A guide for residents of Canada returning to Canada*, a publication of the Canada Border Services Agency; the definition of “smuggle” from *the Shorter Oxford English Dictionary*; *Re Canada Post Corporation and Canadian Union of Postal Workers* (2001), 94 L.A.C. (4th) 290 (Ponak); and *Re Victoria Hospital Corp. and Ontario Nurses’ Association* (1989), 3 L.A.C. (4th) 403 (Bryant).

V. POSITION OF THE UNION

The Union noted that the grievor admitted he had committed a wrong. But the Union submitted this was a case where other factors suggested that the penalty of dismissal should be reduced.

The grievor was a long term employee with a clear record.

The dismissal hinges on a finding of smuggling. It was unclear that this was smuggling. There was a requirement to report to Customs and the grievor may have done so as he normally reported to Customs.

While the *Customs Act* requires persons to report, the *Act* applied equally to all three employees - the grievor and the two management employees. The management employees also violated the Customs rules, but they suffered no employment repercussions.

Here the grievor bought the items and provided his own name, he used the gift card with his name on it and used the discount card which included his name. There was nothing to suggest an intent to smuggle.

At the August 12 meeting the grievor had no credible explanation and he had no real explanation at the hearing. But sometimes a comment such as the grievor's "what was I thinking?" is all that can realistically be offered. He did offer an apology at the meeting. While the grievor made statements attempting to minimize the problem, all those comments were consistent with this being unplanned and unintentional.

At the hearing the grievor acknowledged that he probably did not declare the items on his way into the U.S. nor on his return to Canada. He could easily have testified that he declared the goods on his trip to the U.S. later that day and also on his return to Canada. However, the grievor's responses at the meeting and his testimony at the hearing had been truthful.

The grievor had learned a lesson and there was nothing to suggest that the employment relationship had been irrevocably broken. The Union asked that I substitute a lesser penalty and reinstate the grievor.

The Union relied upon the following authorities: Brown and Beatty, *Canadian Labour Arbitration, Third Edition*, (Canada Law Book) Section 7:3314 *Penalty; Re McManus and Treasury Board (Revenue Canada, Customs and Excise)* (1980), 25 L.A.C. (2d) 150 (Adams).

VI. CONCLUSIONS

I consider three questions when dealing with discipline grievances.

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

1. *Did the conduct of the grievor justify a disciplinary response?*

This point was conceded by the Union and I accept that the conduct of the grievor merited discipline.

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

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

The purpose of an Employer discipline regime is to correct behaviour, not simply to punish an employee. If discipline is to be for just cause, the discipline should be intended to motivate the employee to modify his or her behaviour. Discharge suggests either that there is no chance the employee will modify his behaviour, or that the misconduct itself is so serious that the employee simply cannot be allowed to remain employed.

In order for discipline to be for cause, the measure of discipline must bear a reasonable relationship to the gravity of that employee's wrong. A mild wrong ordinarily merits a mild response, and a serious wrong ordinarily merits a serious form of discipline.

Finally, in order to be just the discipline must relate not simply to the wrong committed. Discipline must also be appropriate to the particular employee, given his or her length of

service, previous employment record, etc. Because of this, employees with more seniority or with better discipline records receive better treatment, in the sense that what is just for those employees may be a milder form of discipline than that given another employee.

I believe that the above is the correct approach in interpreting and applying this collective agreement which requires just cause for discipline.

Applying the above concepts to this case, I look first to the purpose to be served here by a dismissal. The Employer rules - which do not form part of the collective agreement and are not binding - have a section in which progressive discipline (e.g. a warning as a first disciplinary response, followed by a three day suspension for a subsequent incident meriting discipline, then a ten day suspension, and finally dismissal) is contemplated. Three of the four grounds relied upon here call for a written warning. Each of those three were, however, aspects of the grievor's smuggling. While the grievor left the Windsor work site after his purchase, that was a common occurrence and on its own would not merit discipline. Similarly, the use of the Employer vehicle was not a separate concern. Vehicle use is expressly incorporated in the smuggling rule so that it need not be separately considered. Finally, the allegation that the grievor acted in a manner unbecoming an employee was in relation to the smuggling. Therefore it is only necessary to consider the one allegation. The Employer rules call for dismissal in the case of smuggling.

The rules and the Employer decision in this case suggest that the grievor's conduct here, and smuggling in general, are so serious that there is no possibility that the grievor or anyone else who engaged in smuggling might learn from a lesser penalty and change his or her behaviour.

There was an issue at the hearing as to whether what the grievor had done amounted to

smuggling. The grievor purchased items in Canada and he kept them in Canada. Smuggling as it is commonly understood involves taking an item from one country to another, something which did not occur here. However, in the context of this Employer which operates an international tunnel, I do not think that common view of the word smuggling in the Employer's rules is appropriate. The evidence indicated the grievor and other employees understood the Duty Free Shop rules regarding the purchase of goods and in particular that the duty free goods were for sale only to persons going directly to the U.S. and that if those goods were then returned to Canada the purchaser was required to report them to Canada Customs. I think smuggling was intended by the Employer to include, and was understood by the employees to include, what took place here - that is a breach of other rules regarding the movement of goods between the U.S. and Canada. In other words, smuggling covered a violation of the rules regarding duty free shop goods. It was clear that the grievor breached the rules regarding the sale of duty free goods. I conclude that what took place here was smuggling under the Employer rules.

While the grievor smuggled, it is necessary to consider more fully the nature of his smuggling. When making his purchase the grievor clearly indicated who was buying the items; apart from providing his name, he used both his tunnel employee discount card and his Christmas gift certificate, each with his name on it. The dictionary meaning of smuggle uses "clandestine" - ie. secret, hidden or concealed - but there was nothing clandestine about the grievor's purchase.

After making his purchase the grievor got in the Employer vehicle and made a U-turn out of the parking lot. No only did this take place during daylight hours but the existence of closed circuit television cameras in the duty free shop and in the tunnel area was known to the employees including the grievor. His conduct after the purchase was similarly neither clandestine nor secretive. Instead his actions throughout were quite open and unlike the

actions of a person who was trying to smuggle. If the grievor had been intending to smuggle it seems more likely he would have taken the goods to the U.S. and then on his return to Canada said nothing to Customs about his purchase, perhaps not even stopping at a Customs booth.

The grievor had no explanation for his actions when asked at the August meeting, nor did he at the hearing. I note that the tunnel employees do not follow all the Canada Customs rules which most people crossing the border must follow. For example, some employees, including the grievor on occasion, do not report to Customs on their return from the U.S. In this work environment it seemed that crossing the Canada-U.S. border was far less formal than for those who cross the border infrequently. Although the grievor's actions were consistent with someone who simply forgot that he was required to cross the border immediately, the grievor's actions were also, of course, consistent with a person who felt no harm would come to him by deliberately flouting the known rules. I would be more concerned about the situation of an employee who had deliberately flouted the rules rather than someone who simply forgot - a person who flouted the rules would be less likely to learn from a lesser form of discipline.

Unfortunately, in this case I am unable to make a firm conclusion as to what the state of the grievor's mind was that day. While it is possible the grievor decided to deliberately ignore the rules, I am not persuaded that this was the situation. If I had to make a decision, I would think it more likely he simply forgot. In any event, I simply note that while the grievor's actions were consistent with both an accidental smuggling and with a deliberate smuggling, I am persuaded that the grievor could learn from a lesser penalty, in either situation. I believe that if he was reinstated he would take duty free purchases directly to the U.S. and that he would be more conscious of the border and follow the various border rules. I think it most unlikely that the grievor would again engage in this type of misconduct if he were

to remain employed by the Employer.

Whatever the grievor's motivation, was his conduct itself so serious that he cannot be allowed to remain an employee? It is helpful to assess just how serious this smuggling was. Both lipstick and perfume are common in Canada and it was suggested at the hearing that the items which the grievor purchased here could have been readily purchased elsewhere in Windsor. The value of the items was not high. Little damage was done to the Canadian economy by the failure to follow the export and return rules. It is quite possible that had the grievor taken the goods to the U.S. and then reported them to Canada Customs on his return he would have been waived through without being required to make any payment. Such a response would be consistent with the Canada Customs' response after being advised of his conduct, as they have taken no action against the grievor. While following the border rules is important, this particular breach is, among possible breaches, less serious than many. The offence itself does not suggest to me that an employee who commits it needs to be removed from employment.

The grievor had considerable seniority (13 and a half years) and a good work record. As such he would ordinarily be entitled to a lesser penalty than would other employees who had less seniority or who had a discipline record.

The Employer also submitted that a serious penalty was needed in order to deter other employees from committing similar offences. While there is value in the notion of deterrence, I am confident that dismissal is not the only penalty that would serve to deter employees from engaging in similar misconduct.

Finally, consistent treatment of employees is desirable and is an element of a just cause regime. Recently two members of management ran afoul of other Canada Customs rules,

that is the NEXUS rules, by appearing at a Customs NEXUS lane with items they were not allowed to bring into Canada through that lane. Both were caught by Customs, but neither of the two management employees suffered any employment consequences. All three employees broke rules of the same government department, and while I accept that the grievor's misconduct was more serious, the difference is simply one of degree. In my view, it is unfair for the Employer to take no action against the two members of management who broke Customs rules and yet to dismiss the grievor. This point also suggests the grievor's dismissal was unjust.

My review of all the above factors persuades me that the dismissal was an excessive response in this instance.

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

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

In my view a substantial suspension without pay would have served equally well in deterring others and would have been adequate to bring home to the grievor the seriousness with which he must treat border crossing rules such as the one involved here. I substitute a one month suspension without pay for the dismissal. I direct the Employer to reinstate the grievor forthwith, with full seniority, and to compensate the grievor for the period from the end of his one month suspension to the date of his reinstatement.

As is the normal practice, I leave the calculation of any compensation to the parties. On the issue of compensation, I would note that the grievor appeared to have made little, if any,

effort to mitigate his damages. The grievor may therefore be entitled to little or no compensation in this instance. Nevertheless, I leave it to the parties to consider the amount of compensation, if any.

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

Dated at London, Ontario this 12^h day of January, 2006.

Howard Snow, Arbitrator