

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

- and -

IN THE MATTER OF AN ARBITRATION

BETWEEN

ERIE FLOORING AND WOOD PRODUCTS
- the Employer

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, LOCAL 3054
- the Union

AND IN THE MATTER of an individual grievance of Jason Szabo

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Neal B. Sommer	- Counsel
Alan Vandenbrink	- General Manager
Chris Reynolds	- Plant Manager
Allan Zoller	- Employee

On behalf of the Union:

Anthony F. Dale	- Counsel
Ken Fenwick	- Business Representative
Bob Mulcaster	- Chief Steward
Jason Szabo	- Grievor

Hearing held in London, Ontario on October 8, 1996.

AWARD

I. INTRODUCTION

In this grievance Jason Szabo grieves his August 7, 1996 dismissal.

On August 6, 1996 the grievor used one of the Employer's vehicles - the JCB, a type of fork lift - to move dirt from the Employer's premises to his home. After he had made two return trips with the JCB he spoke with Alan Vandenbrink, the General Manager, who expressed concerns about the risk the Employer was exposed to in having the JCB operated on the highway in this manner and reminded the grievor that the JCB was only to be used with permission. The grievor then made a third trip driving the JCB from the workplace to his home.

There were three major matters in dispute between the parties:

- Was the grievor disciplined on August 6 for taking the first two trips with the Employer's vehicle without having first obtained permission so as to prevent the Employer from later dismissing him for that same conduct?
- Did the grievor receive permission for the third trip? and,
- If there were grounds for the Employer to impose discipline on August 7, was dismissal the appropriate penalty?

II. THE EVIDENCE

The grievor began work with the Employer on August 29, 1994. At the time of his dismissal on August 7, 1996 the grievor was working on the trim saw. As part of his employment he had been trained to operate the fork lifts which are used at the Employer's plant in West Lorne. One of those fork lifts is referred to as the JCB. The JCB has larger tires and can more easily be driven over rough ground than can many fork lifts. In 1996 the JCB was

about 10 years old and had a "book value" of about \$20,000. It was not licensed to be operated on the road and was not prepared for road use; the brake lights and turn signals were often not in working order.

The JCB was usually kept near the boiler room as it was frequently used by the boiler room staff. After finishing his shift on August 6, 1996 the grievor went to the boiler room to inquire about the JCB. He met Matthew Potvin and asked him if he needed the JCB. Mr. Potvin indicated he did not need the JCB.

The grievor took the JCB, removed the forks and added the bucket, effectively converting it from a fork lift to a front end loader. He went to the back of the plant where excavation was being done for new construction and he loaded the JCB with dirt to use as fill for a hole on his property. He drove the JCB off the premises, took Highway 76 south and travelled about one and one-half miles through West Lorne to his home, using the back streets where possible. He returned by the same route. He then made a second trip.

Alan Vandenbrink, the General Manager, first observed the JCB leaving the plant shortly after 4:00 pm. while he was in his office attending a Health and Safety Committee meeting. Mr. Vandenbrink inquired of those present as to why the JCB was leaving. No one present at the meeting knew; no one present had authorised its use. Mr. Vandenbrink next saw the JCB about 4:30 when it was again headed off the premises.

Later that afternoon after his meeting had finished, Mr. Vandenbrink walked through the plant to inquire who had taken the JCB. He asked, among others, Matthew Potvin who advised that the grievor had taken it. Mr. Vandenbrink also made inquiries as to whether anyone had authorized the grievor's use of the JCB. He found no one who had authorized its use.

Mr. Vandenbrink returned to the boiler room and was speaking with Mr. Potvin when the grievor entered the room. At that time the grievor had returned from his second trip and had loaded the JCB with soil in anticipation of a third trip. He had stopped to inquire whether Mr. Potvin needed the JCB.

The grievor and Mr. Vandenbrink agreed on much of their conversation on August 6. Mr. Vandenbrink asked the grievor who had given him permission to use the JCB. The grievor said he had not obtained permission from anyone. Mr. Vandenbrink explained the seriousness of the grievor's actions, and the potential liability to which he was exposing the Employer. The grievor said he was using the JCB in a safe manner and had used back streets where possible. Mr. Vandenbrink told the grievor he should have arranged for Art Zoller, who was doing the excavation at the plant, to take the dirt to the grievor's home using Mr. Zoller's truck. Mr. Zoller was taking the dirt from the Employer's premises by truck anyway and the grievor's home was closer to the plant than was the disposal site.

Mr. Vandenbrink clearly told the grievor his actions were wrong and that he should not repeat this conduct. Mr. Vandenbrink did not indicate that he would do more investigation, nor did he indicate that discipline might be imposed. Mr. Vandenbrink testified that he planned to do more investigation. When asked in cross examination why he did not take action on the spot, he indicated it was in part because no shop steward was present.

The grievor asked Mr. Vandenbrink for permission to take a third load. Both testified that Mr. Vandenbrink's first reply was the direction to see Art Zoller, the contractor doing the excavation. The grievor testified that when he repeated his request to take the third load, he was given permission. Mr. Vandenbrink denied this.

Matthew Potvin was in the boiler room throughout this conversation and testified at the

request of the Union. Mr. Potvin testified that the grievor repeated his request for permission for a third load and Mr. Vandenbrink repeated his advice that the grievor ask Art Zoller to truck it for him. Mr. Potvin described Mr. Vandenbrink's answer as an "insinuating no". When he was asked a second time about the response, Mr. Potvin testified that Mr. Vandenbrink told the grievor it would be best if he had gone through the proper chain of authority and to use Art Zoller "to bring it [the dirt] to the house." Mr. Potvin testified that at this point the grievor told Mr. Vandenbrink that he was sorry and that it would not happen again. When asked a third time about Mr. Vandenbrink's response, Mr. Potvin testified that he could only go by his understanding, that there had been no official answer, and that he "had assumed it to be along the lines of a no."

Within minutes of his conversation with the grievor, Mr. Vandenbrink went home. He had not yet decided how he would respond to the grievor's actions.

The grievor then took the JCB and made a third trip to his home. The grievor testified that Mr. Vandenbrink passed him while he was taking the third load in the JCB. The grievor said Mr. Vandenbrink was driving his truck toward Mr. Vandenbrink's home and that he recognised Mr. Vandenbrink's truck. Mr. Vandenbrink said he did not pass the grievor and the JCB. I heard considerable evidence on this point and it was addressed in argument, but I will dispose of this now. I think both testified to their honest beliefs. I believe Mr. Vandenbrink did not notice passing the grievor on the JCB. I also believe the grievor saw someone in a vehicle which was similar to Mr. Vandenbrink's vehicle. I do not find that a resolution of this issue assists me in dealing with the merits, nor does it assist me in resolving any issue of credibility.

The next morning (August 7) Mr. Vandenbrink spoke with Chris Reynolds, the plant manager, who confirmed that he had not given the grievor permission to take the JCB. Mr.

Reynolds spoke with Ted Walker, the foreman, who said that he had not given permission. Mr. Vandenbrink then met with Mr. Reynolds to discuss the matter and they reviewed the grievor's employment record.

The grievor's record indicated that he had been given a written warning on March 6, 1995 for throwing wood at another employee, contrary to the Employer's Rules, Category 2, Section 8. On June 11, 1996 he had been warned for becoming angry and throwing wood against the wall, contrary to the Rules, Category 1, Section 3. The June warning reads, in part, as follows:

This is grounds for immediate dismissal, however this is a written warning. A re-occurrence will result in immediate dismissal.

At their meeting on August 7, Mr. Vandenbrink and Mr. Reynolds decided to dismiss the grievor for taking the JCB on the first two trips. Mr. Vandenbrink prepared a letter of dismissal. The Employer later learned that the grievor had taken a third load of dirt to his home using the JCB.

At about 3:00 pm on August 7 a meeting was held with the grievor and the shop steward, Bob Mulcaster. The dismissal letter, which referred to only the first two trips, was given to the grievor. At the meeting Mr. Vandenbrink and Mr. Reynolds advised the grievor of his right to grieve.

The evidence presented at the hearing indicated that prior to August 6 permission had been given to employees to use the JCB away from the Employer's premises. Permission for the earlier use had sometimes been given orally, notwithstanding Company Rule Category 1, Section 8, which contemplated written authorization.

Finally, the grievor had previously sought and obtained permission to use another piece of the Employer's equipment, a chain saw, off the Employer's premises.

III. PROVISIONS OF THE AGREEMENT AND THE RULES AND REGULATIONS

The relevant provisions of the Agreement are as follows:

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The Union acknowledges that it is the exclusive function of the Company to:

- (a) maintain order, discipline and efficiency;
- (b) hire, discharge, classify, demote, direct, transfer, assign, promote, lay-off and suspend, or otherwise discipline employees who have acquired seniority, for a just and reasonable cause, may be the subject of a grievance and dealt with as hereinafter provided;
- (c) The Company shall have the right to make, alter, publish and enforce rules and regulations to be observed by its employees. Such rules and regulations may be reviewed by the Company, and the Union shall be advised in writing prior to their implementation. The reproduction of the Company's rules and regulations in the back of this booklet is for convenience only and it shall not be construed or implied that they form part of this Collective Agreement.

...

ARTICLE 19 - DISCHARGE AND DISCIPLINARY PROCEDURES

19.01 The Company shall not take any disciplinary action without first warning the employee in the presence of a shop steward, if one is available, unless the circumstances justify immediate suspension or discharge. In the event of a claim by an employee, that he has been suspended or discharged unreasonable or unjustly, the grievance shall be filed at Step 3 of the grievance procedure within five (5) working days. All warnings shall be confirmed in writing in the presence of and witnessed by a shop steward or a designated alternate in the event that a shop steward is not available. . . .

...

19.03 . . .

(b): In the event that the disciplinary action is being administered in writing, it must be imposed within five (5) working days of the infraction. . . .

(c): . . . The record of any disciplinary action shall not be referred to or used against him at any time after eighteen (18) months following such action. . . .

The collective agreement is printed in booklet form. As noted in Article 2, the Company

Rules and Regulations, dated April 22, 1992, are printed in the back of the booklet after the collective agreement. They read in part as follows:

1. PREAMBLE

...

The following will be considered violations and employees committing these violations will be subject to disciplinary action ranging from reprimand to immediate dismissal, depending on the seriousness of the offence in the judgement of management. A third disciplinary notice is cause for dismissal.

...

CATEGORY 1 - Company Rules

Violations of the following rules are grounds for immediate dismissal:

...

3. Any employee found responsible for wilful destruction of Company property or employee property.

...

8. The removal of Company property, e.g. tools, equipment, materials, without written authorization.

CATEGORY 2 - Company Rules

Five (5) warnings within a twenty-four (24) month period will be considered grounds for immediate dismissal:

...

8 "Horseplay" being defined as an irresponsible action by physical or mechanical means, will not be tolerated.

IV. POSITION OF THE EMPLOYER

The Employer submitted that the actions of the grievor were serious and grounds for dismissal. The grievor had no permission to take the JCB for the first two trips. It was a dangerous activity; the machine was not licensed for, nor fit for, road use.

The Employer submitted I should conclude that no permission was given for the third load.

The Employer submitted that the grievor knew the Company rules and the expected conduct. The Employer needed to be able to trust its employees to act in a safe manner.

The Employer submitted that the first two trips in the JCB were clearly improper and justified dismissal. When considering whether another lesser penalty might be substituted, the grievor's final trip with the vehicle should serve as a reason not to show compassion. In any event, the grievor was a relatively junior employee and had a poor disciplinary record.

V. POSITION OF THE UNION

The Union submitted firstly that the grievor was disciplined on the afternoon of August 6. Having selected and imposed a form of discipline, the Employer could not impose a different and harsher discipline the next day. The fact that the discipline was imposed without the presence of a steward was not relevant.

In the alternative, the Union said the dismissal was not just. The grievor made a full and frank admission. He had checked to see if the JCB was needed before he took it. He had been trained in the use of the JCB and he felt it was safe. He took steps to follow a safe route. He now realised his error and realised that he had acted improperly.

The Union submitted that it made no sense for the grievor to have taken the third load unless he had obtained permission for its use and that I should find that the grievor did have permission to use the JCB for the third load.

Finally, the Union submitted that if I found cause for discipline I should nevertheless substitute a lesser form of discipline, and relied on the principle of progressive discipline.

The Union relied on the following cases: *Re United Electrical, Radio & Machine Workers, Local 520 & A. H. Tallman Bronze Co. Ltd.* (1957), 7 L.A.C. 253 (Laskin); *Re Oxford Pendaflex Canada Ltd. and Printing Specialties & Paper Products Union, Local 466* (1976), 14 L.A.C. (2d) 104 (Schiff); *Re Galt-Brantford Malleable Ltd. and International Molders and Allied Workers, Local 29* (1974), 6 L.A.C. (2d) 302 (Charney); *United Automobile, Aircraft and Agricultural Implement Workers of America and Fruehauf Trailer Company of Canada Ltd.* (1951) 3 L.A.C. 847 (Cross); and *Re Ontario Store Fixtures and United Brotherhood of Carpenters & Joiners of America, Local 1072 (Phinn)* (1993), 35 L.A.C. (4th) 187 (MacDowell).

VI. CONCLUSIONS

I begin by addressing the Union submission that the Employer had disciplined the grievor on August 6, and that the August 6 discipline served to prevent any later discipline being imposed for the first two trips with the JCB. When Mr. Vandenbrink prepared the dismissal letter he was only aware that the grievor had driven to his home twice. If the Union's submission was successful, it would have a major impact on the outcome of the grievance. The Employer would then be unable to rely on the grievor's first two unauthorized trips with the JCB as a basis for the dismissal.

Was the grievor disciplined on August 6, thereby preventing the Employer from imposing a second, and more severe, form of discipline on August 7?

I accept as a general rule the Union's submission that when an employer has dealt with a matter by imposing discipline in a final manner, the employer is not then free to reconsider and impose a more serious penalty. An employer might initially dispose of a matter by indicating that it would not impose discipline or it might impose a mild form of discipline

such as a oral warning. It is not then free to later impose a more severe penalty such as a suspension. To permit an employer to impose a different form of discipline after it has finally disposed of a matter would not be conducive to industrial relations harmony. On this issue I agree with the thrust of the *Re A. H. Tallman Bronze*, *Re Oxford Pendaflex*, *Re Galt-Brantford Malleable* and *Re Fruehauf Trailer* decisions relied upon by the Union.

In this case Mr. Vandenbrink advised the grievor of the dangers and the risks in taking the JCB on the road as the grievor had done and Mr. Vandenbrink advised the grievor not to repeat this action. Mr. Vandenbrink also advised the grievor that if he wanted to obtain fill he should have it taken to his home by truck. There was thus a clear indication that the grievor had done something which the Employer felt was inappropriate and the grievor was advised how he should reach the result he wished to achieve.

I do not believe that an employer who advises an employee of the dangers or risks in a particular action and advises the employee of the appropriate conduct has thereby disciplined that employee. Assume, as an example, that Mr. Vandenbrink had instead observed the grievor working on the trim saw and that Mr. Vandenbrink had felt the work was being done in a dangerous and unsafe manner. Assume further that Mr. Vandenbrink then advised the grievor that the grievor was doing the work in a dangerous manner and that he was not to do it in that manner again, and that he further advised the grievor how he should do the work. In this example I do not think there would be any basis for arguing that the advice was discipline. In my view the situation before me is similar. Mr. Vandenbrink told the grievor that what he had done was unsafe, that he should not do it again and he advised the grievor how to obtain his dirt. The evidence did not indicate that any discipline or penalty was imposed. Mr. Vandenbrink certainly did not think he had imposed discipline.

I conclude that the Employer, through Mr. Vandenbrink, did not impose a final form of

discipline on August 6. In fact Mr. Vandenbrink did not impose any discipline on the grievor that day.

As there was no discipline imposed on August 6, I conclude that the Employer actions of August 6 did not prevent the Employer from imposing discipline on August 7, 1996 for the grievor's use of the JCB.

Having disposed of the Union's preliminary submission, I now turn to the question of whether the Employer had cause to dismiss the grievor.

Did the Employer have grounds for discipline and, if so, was the penalty of dismissal appropriate in all the circumstances?

The remaining issues are those issues which commonly arise in a discipline case. Those three common issues are:

- 1) Did the grievor do what he is alleged to have done?
- 2) If so, did the conduct justify a disciplinary response? and,
- 3) If it did justify a disciplinary response, is the form of discipline selected by the Employer appropriate or should a lesser penalty be substituted?

1) There was very little factual dispute in this case. The only important disputed matter was whether permission was given for the grievor to take the JCB for the third trip to his home.

The evidence on the issue of permission for a third trip is recounted above. The subsequent actions of both the grievor and Mr. Vandenbrink were consistent with the testimony they each gave. The grievor's actions were entirely consistent with his belief that he had been

given permission. On the other hand, Mr. Vandenbrink's actions were entirely consistent with his belief that he did not give permission. I think that both testified on this issue as they honestly recalled the conversation, but I also think their recollections may have been coloured by the subsequent events.

Mr. Potvin also testified on this aspect of the conversation. I found Mr. Potvin to be a very credible witness and I accept his testimony as to what was said on this issue by the grievor and Mr. Vandenbrink. Mr. Potvin's testimony is also recounted above.

I find that Mr. Vandenbrink gave an answer which was not clear; he did not provide a clear "no" to the grievor's request nor did he provide a clear "yes." The grievor, however, required permission from the Employer; this was not a situation in which he was free to use the JCB in all instances except when permission was explicitly refused. The grievor may have interpreted Mr. Vandenbrink's failure to clearly refuse permission as implicitly granting permission to take the load but, in my view, a failure to categorically refuse the request cannot be converted into permission. Thus I conclude from Mr. Potvin's testimony that Mr. Vandenbrink did not give the grievor permission to take a third load in the JCB.

I thus find that the grievor took the JCB for two trips without permission and that, after being reminded of the need for permission, he took the JCB for a third trip without having obtained permission.

2) I now turn to the question of whether the grievor's actions justify a disciplinary response from the Employer.

I deal first with the grievor's conduct in taking the JCB on the first two trips. The grievor took the JCB without any permission. Because he had asked for permission to use a chain

saw in the past, and because his earlier reprimands had drawn his attention to the Employer's Rules, I conclude that he knew he was required to first obtain the Employer's permission before he took the JCB from the Employer's premises.

The JCB was not licensed for road use. At times it had no working turn signals or brake lights. While I heard evidence as to the general condition of the JCB, the precise condition of the JCB as of August 6, 1996 was not clear. Nevertheless, I conclude that some of those safety features one would ordinarily expect on a highway vehicle were not operational.

In driving the loaded JCB on the road without it being licensed, without the usual safety devices, and without permission, the grievor exposed the Employer to considerable risk. His actions were wrong and, in my view, the first two trips using the JCB to move fill to his home justified a disciplinary response from the Employer.

The grievor then took a third trip without permission. He had been advised by Mr. Vandenbrink not to use the JCB without permission and was advised how he could obtain more dirt. The third trip was also a matter which could justify a disciplinary response. While the third trip was not known to the Employer at the time the dismissal letter was prepared, it was known when the dismissal was communicated to the grievor. The major importance of the third trip is in the resolution of the final issue to which I now turn.

3) Having decided that the grievor did the actions he is alleged to have done, and that those actions justified a disciplinary response, I now consider whether the form of disciplinary response (dismissal) was too severe and a lesser form of discipline should be substituted.

Relying in part on *Re Ontario Store Fixtures, supra*, the Union submitted that if I found

grounds for discipline, as I have found, I should apply the concept of progressive discipline and substitute a lesser form of discipline. In using progressive discipline, an employer imposes increasingly stronger forms of discipline on an employee in order to both impress upon the employee the seriousness of the issues involved and to change the employee's behaviour. For example, an Employer who used progressive discipline might first give an oral warning, followed by a written reprimand, then a short suspension, a longer suspension and finally dismissal.

I accept the principle of progressive discipline; I accept that generally an employer should use discipline as a corrective tool, a means to change an employee's behaviour or conduct, and bring it within the established norms. Progressive discipline is but a means to an end. It is one way of ensuring that there is just cause for an employer's disciplinary response, one method of ensuring that the "punishment" fits the "crime."

However the concept of progressive discipline does not dictate that every employer must necessarily follow along a set pattern of discipline, such as that pattern described in the example above, before the employer can move to terminate the employment relationship for cause. For example, assume an employer had given an employee an oral warning for coming to work late. Two weeks later the employee deliberately ransacked the employer's premises and caused great damage. That employer might reasonably move from the oral warning directly to a much more severe form of discipline, including dismissal.

The Union submitted that if I found that the grievor's actions merited some form of discipline I should consider the grievor's frank admission to Mr. Vandenbrink in acknowledging that he (the grievor) had not obtained permission for the use of the JCB and the grievor's apology and indication that it would not happen again. I have considered both. Unfortunately for the grievor, I have found that almost immediately after his admission and apology he took the

JCB for a third trip without having obtained permission. His apology and statement that it would not happen again are, under the circumstances, not persuasive.

I am left then with an assessment of whether in all these circumstances I should confirm the dismissal or substitute a lesser penalty. The Employer has been very clear about its expectations for the conduct of its employees though the production and distribution of its Rules and Regulations. The Employer has been especially clear about its expectations for the grievor through its earlier discipline of him. The removal of Employer property without permission is something which the Employer has clearly indicated will not be tolerated. The grievor knew this. The grievor took the JCB for two trips without permission. He was advised by Mr. Vandenbrink that he needed permission and was advised as to how he should obtain more dirt and then, again without having obtained permission to use the JCB, he took the JCB for a third load. The third trip was also a matter which would justify a disciplinary response.

A major factor in any consideration of substitution of another form of discipline is the individual's employment record. The grievor had less than two years seniority. During that time he had been disciplined on two occasions. The second discipline was imposed on June 11, 1996 less than two months before his dismissal. In June the grievor was advised that the Employer felt his actions merited immediate dismissal and that a re-occurrence would result in immediate dismissal. While I do not rely on the June 11 reprimand's indication that a re-occurrence would result in dismissal as justifying the dismissal, I do find that it put the grievor on clear notice that his conduct was not up to the standard which his Employer expected and that his continued employment was "hanging by a thread," as Mr. Sommer, the Employer's counsel, expressed in argument. The grievor was thus a relatively junior employee with a poor disciplinary record.

In order for me to substitute another penalty there would have to be one or more factors which persuade me that dismissal was too severe and that a lesser penalty is more appropriate. For example, I would have to believe that the grievor's conduct could reasonably be explained in some way, or that it was an unusual event, or that it was unlikely to happen again, or that the grievor was an employee who had over time built up a positive employment relationship with the Employer.

In this case the grievor does not have a long clean employment record. Nor do I not think the grievor's actions were an unusual change from his normal conduct. In particular I am troubled by the grievor taking the JCB for the final time. He appears to have heard what he wanted to hear, not what he was told. That third trip does not give me any confidence that the Employer could rely upon the grievor to act in a more responsible manner in the future. In all the circumstances I cannot find any reasonable basis to justify the substitution of a lesser form of discipline in the place of the dismissal.

For the above reasons, therefore, the grievance is denied.

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

Howard Snow, Arbitrator