

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

IMPERIAL PARKING LIMITED  
doing business as IMPARK

- The Employer

-and-

LONDON AND DISTRICT SERVICE WORKERS' UNION,  
LOCAL 220

- The Union

AND IN THE MATTER OF the termination grievance of Mengistu Deneke

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

David G. Cowling - Counsel  
Rick Landrigan - City Manager

On behalf of the Union:

Barrie Chercover - Counsel  
Ken McLeod - Union Representative  
Mengistu Deneke - Grievor

Hearing held January 8, February 18 and April 2, 1998 in London, Ontario.

# AWARD

## I. INTRODUCTION

Mengistu Deneke, the grievor, worked as a cashier at one of the Employer's parking lots. When the Employer conducted an audit of the grievor's work, it uncovered numerous irregularities. The Employer concluded from its audit that the grievor had engaged in theft from the Employer. The Employer then discharged the grievor. The grievor has consistently denied the theft.

The issue before me is whether the Employer had cause to dismiss the grievor for theft.

## II. THE EVIDENCE

The Employer's business is the operation of parking lots. At the time of the grievor's discharge, he was employed as a cashier at one of the Employer's parking lots at the Galleria London, London's major downtown shopping centre. The Employer dismissed the grievor when it concluded the grievor was stealing money he had received as a cashier.

There was no direct evidence of theft. Instead all the Employer's evidence in this case was circumstantial and I was asked to infer from those circumstances that the grievor had stolen. Due to the nature of the Employer's allegations and its evidence, it is necessary to first provide considerable detail about the parking business at the Galleria lot. I then review the evidence from which the Employer reached its conclusion of theft.

Most of the customers who use the Galleria parking lots are shoppers who park there for only a short time. There are several entrances to the lot in which the grievor worked and at each entrance is a machine which dispenses parking tickets. When a customer drives up to the

ticket dispenser on the way into the lot, the dispenser prints the time of the customer's arrival on the front of a ticket and that ticket is then partially ejected from the machine. The customer removes the ticket from the dispenser thereby causing a barrier to lift which in turn allows the customer to drive into the parking lot.

The tickets are made of thick paper and are about 2.5 by 6 inches in size. Tickets are numbered consecutively, are loaded into the dispensers in lots of 2,000 and, in this instance, the numbering consisted of the letter A and six numbers.

Customers leave this parking lot through one of the three exits. At each exit is a cashier's booth. On arrival at the cashier's booth the customer presents the ticket received when entering the lot. The cashier is then required to read the customer's arrival time printed on the front of the ticket and enter that time into the cash register. The cash register has a built-in clock and is programmed to determine how long the customer was in the parking lot and the charge. Thus when the arrival time is entered the register calculates the amount the customer owes. That amount is shown on the cash register and on a screen located on the side of the booth facing the customer. The cash register is also connected to a barrier and when a sale is made at the register the barrier rises allowing the customer to leave.

In this Galleria parking lot, during the day customers are charged for each thirty minutes (or part thereof) of parking time (with a short grace period not relevant here). For parking less than thirty minutes the charge is \$0.60. Between thirty minutes and one hour the charge is \$1.20; between 60 and 90 minutes the charge is \$1.80; and so on until the maximum rate of \$5.00 is reached.

As an example, assume that a customer enters the lot on November 19, 1997 at 10:14 and leaves at 10:35. On arrival the customer receives a ticket with the time printed on the face,

together with the month and day - in this example 10:14 NO 19. On departure the customer presents that ticket to the cashier who reads the time and enters 10:14 in the cash register. The register determines the time the customer has parked (21 minutes) and calculates that \$0.60 is owed. The amount owing is displayed on the cash register and also on the separate screen facing the customer. The customer pays the amount owing. When payment is made the barrier is raised and the customer leaves. All of the above can be observed by the customer.

Because of the large number of cash transactions the Employer has a major concern about theft. As theft is a common problem in the parking industry, the Employer has certain procedures in place to track revenues and prevent theft. When the cashier receives the ticket and enters the customer's arrival time in the cash register, the cashier is required to insert the ticket itself into the cash register printer. The cash register then prints certain information on the reverse of the ticket - the year, month, day, arrival time, departure time, a "transaction number", a rate code, the tax and the amount collected.

In the above example the information printed on the back of the ticket would be as follows:

1997/11/19	10:14HR	
1997/11/19	10:35HR	
#01234		<i>[the transaction number]</i>
RATE 1	\$ .60	
TAX	\$ .08	
CASH	\$ .60	

The cashier is required to retain all the tickets, separating them by the amount of each sale. All \$0.60 tickets are kept together, all \$1.20 tickets are kept together, etc. Tickets of each value are placed in a different slot during the shift and then bundled together at the end of the shift. Because customers can enter the lot through any of the three entrances, at the end of a shift cashiers have tickets from all three ticket dispensers.

In addition each cash register has what is known as a journal tape. All transactions are recorded on this journal tape. In the above example, information similar to that which is printed on the back of the ticket would have been printed on the journal tape as follows:

11/19 10:14HR  
11/19 10:35HR  
#01234 CO1 U08  
RATE 1 \$.60  
TAX \$.08  
CASH \$.60

*[the "CO1 U08" is of no relevance here]*

The journal tape, which remains in the cash register during the cashier's shift, records the details of all customer transactions. At the end of the shift the journal tape is removed and is stored with the tickets.

The transaction numbers mentioned above are in numerical order for each cash register. If a cashier handled 500 transactions in a shift the transactions numbers would run consecutively from, for example, 02001 to 02500, and would appear on the journal tape in that order showing a complete record of all the transactions handled during the shift. The journal tape can then later be compared with the parking tickets themselves in the event the Employer wished to audit the employee's work.

At the end of the shift the cashier "logs off" the cash register and obtains a "Cash Report" printed by the cash register. The Cash Report indicates the time the cashier logged on the cash register, the first and last transaction numbers, the time the cashier logged off, and various details as to the money received during that shift.

After logging off at the end of the shift, the cashier takes all the tickets collected during the shift, the journal tape and the Cash Report and goes to a small office near the booth. In the office the cashier completes a "Daily Parking Report" on which is recorded various details

of the day's work. All the \$0.60 tickets are counted and the number is recorded, along with the value of those tickets. For example, if there were 88 tickets at \$0.60 the cashier would record in the appropriate columns:

88 (tickets at) \$0.60 (for an amount of) \$52.80

and make a similar record of the other tickets. (Information is also recorded about validations and stamps not relevant to this case.) The tickets and journal tape are placed in a plain brown 9 inch by 12 inch envelope which is sealed and left in the office. The Daily Parking Report is filed, as is the Cash Report. Finally the cashier counts the money received during the shift, completes a bank deposit slip, and then places both the money and the deposit slip in a bank bag and deposits the bag at the bank. In due course the bank counts the money and confirms the deposit.

The Employer takes security measures. For example, cashier's tickets are routinely reviewed to verify that the cashier is entering customers' times of arrival properly and is generally following the appropriate procedures.

I now move to the evidence specific to this grievance.

Rick Landrigan was the Employer's only witness. He has worked in the parking industry since 1976. In November, 1997 the Employer appointed Mr. Landrigan as the new City Manager for the London area. Mr. Landrigan arrived from Montreal to commence his new duties in mid-November and on arrival he lived in a hotel in downtown London. As part of his duties, he decided on the evening of November 21, soon after his arrival in London, to audit the work at the Galleria lot. Mr. Landrigan asked his staff for the tickets from three Galleria employees for a recent day. He was given three employees' tickets for their shifts on November 19, 1997. Among those tickets were the grievor's.

Mr. Landrigan reviewed the tickets of all three employees - no issue arises regarding the other two employees' tickets.

However, Mr. Landrigan had concerns about the grievor's tickets. In summary, Mr. Landrigan found 28 tickets which were missing some of the information normally printed on the reverse. Those tickets all indicated sales of \$0.60, the lowest possible amount, the amount which allows the greatest opportunity for employee theft. Mr. Landrigan tried to match the arrival times of those tickets with the arrival times recorded on the journal tape, but he could find no matching transactions. He concluded that the grievor:

- had collected those tickets at a time when more than \$0.60 was owed;
- had entered an incorrect arrival time so that the tickets would be recorded as only \$0.60 transactions;
- had collected more than \$0.60 from the customers; and,
- had then "pocketed", or stolen, the difference.

I move now to the details of Mr. Landrigan's investigation.

On reviewing the grievor's tickets, Mr. Landrigan noted that a number of tickets were missing the information normally printed on the back. Some 28 of the 110 tickets for \$0.60 transactions had only limited information printed on the back, as follows:

RATE 1	
TAX	\$.08
CASH	\$.60

or,

TAX	\$.08
CASH	\$.60

or,

TAX	
CASH	\$.60

or simply,

CASH	\$ .60
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In addition one ticket, about which more will be said later, was as follows:

#03025	
RATE 1	\$ .60
TAX	\$ .08
CASH	\$ .60

Mr. Landrigan then tried to match the above 28 tickets with the transactions recorded on the journal tape. For example, if the ticket showed an arrival at 10:35 he would look for a transaction on the journal tape showing a 10:35 arrival time. He was unable to match the tickets with the journal tape. The first difficulty he encountered on the journal tape was with transaction #02627. The journal tape shows as transaction #02627 a \$0.60 charge for a customer who arrived at 12:20 and left at 12:44. Mr. Landrigan could find no ticket for a customer who arrived at 12:20. He did however have four tickets for customers who had entered the lot at 11:14, 11:36, 11:43, and 11:55 among the 28 tickets which did not have the normal printing on the back and had been recorded as \$0.60 sales. Given those arrival times and the price charged, or at least the price printed on the reverse of the tickets, all four of those customers should have left the lot before 12:44. But there were no \$0.60 transactions recorded on the journal tape prior to 12:44 which had not been accounted for among the properly printed tickets. As there were no unaccounted transactions on the journal tape prior to 12:44, Mr. Landrigan concluded that the four customers who had arrived at 11:14, 11:36, 11:43, and 11:55 and whose tickets showed \$0.60 had actually left the lot later than 12:44.

Mr. Landrigan continued his review of the remaining journal tape attempting to match the 28 tickets and next noted that transaction #02634 on the journal tape showed a customer arriving at 12:17 and leaving at 12:49. However, there was no ticket with a 12:17 entry and

no ticket with transaction #02634 printed on the reverse.

Mr. Landrigan concluded that when the \$0.60 tickets were collected at the cashier's booth the arrival time entered by the grievor was a later time than the actual arrival, that the customer was charged the full amount, and that the grievor had "pocketed" the difference. As an example, Mr. Landrigan believed that one of the unaccounted for tickets described above, such as the ticket with an entry time of 11:36, may have been collected at 12:49. If it had been the 11:36 ticket, the customer would have been charged the correct amount of \$1.80. However, Mr. Landrigan believed the sale was incorrectly recorded on the cash register as \$0.60 and he concluded that the grievor had pocketed, or stolen, the other \$1.20. The journal tape recorded an incorrect 12:17 arrival.

If an employee wished to engage in such a theft it would be necessary to avoid having the full information printed on the reverse of the tickets since, if the full information were printed, it would be easy to audit the work and discover that incorrect arrival times were being entered. Mr. Landrigan believed the grievor had inserted something (perhaps a piece of paper) between the ticket and the printer so that the printer could not properly print on the ticket, but rather printed partially on the paper insert. Such an action would make it more difficult to audit the grievor's work and discover the errors, as the easiest way of matching the tickets is by the transaction number. In the above example, if the information had been properly printed on the reverse of the ticket as required, 1) the time that the customer actually left and 2) the time which the cashier entered as the arrival time, would have been obvious.

In addition, Mr. Landrigan felt that the grievor had done something to block the screen which faced the customer, or perhaps had disconnected the screen entirely, so that the customer had not realized the amount being charged differed from the amount calculated at the cash register.

A third discrepancy on the journal tape occurred at transaction #02712 which showed an arrival at 14:00 and a departure at 14:11. Mr. Landrigan could find no ticket for a 14:00 arrival. He did have 12 tickets with arrival times which, if the proper charge was \$0.60, meant the customers should have left the lot before 14:11. However, as of 14:11 there were only 2 unaccounted for transactions on the journal tape, and he thus concluded that 10 of those 12 customers had left after 14:11.

Mr. Landrigan reviewed the rest of the tape and tickets and found in total 27 tickets for which there were no matches on the journal tape - that is 27 of the 28 tickets on which the information did not print properly. The exception was the ticket printed with transaction #03025 noted above. To repeat, on the back of that ticket was the following:

#03025	
RATE 1	\$.60
TAX	\$.08
CASH	\$.60

The front of the ticket shows an arrival at 16:05. The journal tape, however, records the following information:

11/19	18:00HR
11/19	18:15HR
#03025	CO1 U08
RATE 1	\$.60
TAX	\$.08
CASH	\$.60

Thus the journal tape for transaction number #03025 shows that the grievor entered an incorrect arrival time of 18:00, not 16:05 as is printed on the front of the ticket. Mr. Landrigan felt this ticket clearly demonstrated what he concluded had been the grievor's practice of entering incorrect arrival times. But in this instance Mr. Landrigan felt the grievor had "slipped up" and only partially covered the ticket when printing the information on it, thereby allowing the printer to print the transaction number. Because the transaction

number was printed on this ticket, unlike the other 27 tickets, it was obvious that the grievor had entered the wrong time for the customer's arrival at the lot. Mr. Landrigan concluded that the customer had been charged and paid the correct amount (\$3.00), that the grievor entered the late arrival time so as to record a \$0.60 sale, and that the grievor stole the difference.

In total, Mr. Landrigan found 27 instances in which he could not match the ticket with the journal tape by using a transaction number, as no transaction numbers were printed on those tickets, and which he could not match by the arrival times printed on the front of the tickets. Those remaining tickets were similar to the ones described earlier and I will not provide details of them here.

More generally, on comparing the journal tape for the earlier part of the grievor's shift with the tape for the latter part of the shift, Mr. Landrigan found that later in the shift there were a larger number of \$0.60 transactions for which there was no corresponding ticket. In the latter part of the shift there are normally more customers who have parked for longer periods of time, which in turn provides an opportunity for a larger amount to be stolen for each ticket. Mr. Landrigan concluded that the grievor had charged the customers the proper amount but recorded the arrival time improperly so that the tickets would be shown as \$0.60 tickets, and he believed that the grievor had pocketed the difference.

In addition Mr. Landrigan noted that for many of the 27 transactions recorded on the journal tape for which tickets could not be found, the entry time was expressed in "round" numbers. There were, for example, two instances in which entry times were recorded as 14:00 but there were no tickets showing a 14:00 arrival. In the transaction #03025, dealt with above, the incorrect time which had been entered was 18:00. Mr. Landrigan concluded that the grievor frequently entered times ending on the hour or at ten minute intervals when entering

a false arrival time.

Based on this review of the tickets for November 19, Mr. Landrigan decided the grievor was stealing from the Employer. He arranged a meeting with the grievor on November 22, 1997. Mr. Landrigan testified that when the grievor was confronted he had no explanation other than that his printer had jammed. Mr. Landrigan terminated the grievor's employment for having "knowingly misappropriated company funds".

Mr. Landrigan testified that he later reviewed the grievor's tickets for other days and found problems similar to those for November 19 described above. He concluded that the grievor had stolen from the Employer not only on November 19 but on other days as well.

To complete Mr. Landrigan's testimony about tickets, Mr. Landrigan testified that he reviewed several other sets of tickets for other employees and he found no other employee who had tickets similar to the grievor's 28 tickets of November 19, tickets on which only the price was printed. In particular the employee who used this cash register immediately after the grievor had no similar tickets.

Mr. Landrigan testified that he had received many customer complaints during his first few days in London. Customers had complained that they had been charged the wrong amount, or that the display screens were not working, or that the amount charged differed from the amount on the screen. While he could not say that those complaints involved the grievor, he did indicate that such complaints had largely stopped after the grievor's discharge. Mr. Landrigan speculated that the screen facing the customer might have been turned off or covered with a piece of cardboard as part of the grievor's plan of theft.

In cross examination Mr. Landrigan testified that he had not specified which employees'

tickets he wished to review and when he did his audit he did not know that the grievor was Union chairperson. He agreed that if the customer screen was turned off or not working it would have been recorded on the journal tape and he noted that the grievor's November 19 journal tape had no record of the screen having been turned off, nor any record of other problems with the screen. He agreed that he had no witness who could testify as to any theft by the grievor. He agreed as well that if a cashier wished to do so he could enter the wrong time, charge the amount then calculated, giving a benefit to the customer and thus not steal any money. With respect to the suggestion that it would be possible to "frame" the grievor, Mr. Landrigan felt it could not have been done in this instance. As for the envelope that contained the grievor's tickets, Mr. Landrigan testified there was no indication that it had been touched by anyone before he did his audit. Finally, Mr. Landrigan also testified that following the grievor's termination the number of \$0.60 tickets had decreased immensely from the number which the grievor had received and the number of \$5.00 tickets had increased.

Hayat Yacob is another cashier who works at the same parking lot. She testified that she had worked in the same booth as the grievor and she had had printer problems. She worked in the same booth on November 20. On that day she had no tickets similar to those described above on which only the amount was printed, or tickets on which the time in and time out had not been printed. She did say, however, that in the past she had had tickets with only the amount, and not the time in or out, printed.

Jamie Hassen also works in the same lot as a cashier. He said he was aware of printer problems in the booth in which the grievor worked. He also testified that the grievor and the site manager, Bill Filias, had "difficulties". As an example, Mr. Hassen testified that in an earlier meeting the grievor had expressed the opinion that Mr. Filias was the reason for the Union, a statement which had upset Mr. Filias who was then present.

The grievor testified as well. He is 44 years old, was born in Ethiopia and moved to Canada 7 years ago. He worked in this job for 4 years.

The grievor agreed that the cashier's job was as described above. The grievor said that he always tried to enter the correct time and that he was good at so doing. He testified that he had never stolen money from the Employer, had never knowingly entered the wrong time, and had never blocked the printer from printing. He had, however, had printer problems.

As for the tickets for November 19, reviewed above, the grievor was not able to say that they were his. He stated that he did not know what had happened to the tickets from the time he put them in the envelope until they were audited by Mr. Landrigan. Unlike the tickets, the grievor agreed that the journal tape was his. He was unable to offer any explanations for the concerns raised by Mr. Landrigan.

The grievor did suggest that on occasion he may have given a friend a discount on the parking and paid the difference himself. It was not clear how often, or if at all, he had done this but at most this would have occurred only occasionally.

### III. PROVISIONS OF THE AGREEMENT

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

#### ARTICLE 5 - MANAGEMENT RIGHTS

5.01 The Union recognizes and acknowledges that it is the exclusive function of the Employer to . . . discharge any employee for reasonable cause . . .

#### ARTICLE 9 - DISCHARGE AND DISCIPLINE

...

9.02 ...

Any grievance with respect to the exercises [sic] of this right to discharge or discipline shall

be limited to the question of whether or not one of the offenses occurred and shall not include whether the type of discipline selected by the Company was appropriate and any Board of Arbitration or Arbitrator shall not have jurisdiction pursuant to section 48(17) of the Labour Relations Act to modify the discharge of [sic] discipline.

...

#### IV. POSITION OF THE EMPLOYER

The Employer submitted that this case primarily involved a factual determination - was it more probable than not that the grievor misappropriated funds, as Mr. Landrigan had concluded? The Employer said the evidence was overwhelmingly convincing and compelled the conclusion of misappropriation.

The parking business is a cash business, cashiers are in a position of trust, and the Employer is vulnerable to theft. Against that backdrop, the Employer submitted that the following facts had been proven.

Rick Landrigan arrived in London as the new manager. He heard numerous complaints and decided to do an audit. He reviewed three sets of tickets, one from each of three employees, for November 19. Among the grievor's tickets he found 28 of the 110 tickets for \$0.60, a price at which there is a greater chance of fraud, with the transaction number or other important information missing. Mr. Landrigan tried to match those tickets with the journal tape but was unable to match 27 of the 28 tickets. There were no comparable times of arrival. The grievor had many tickets with no time in, no time out and no transaction number. With respect to possible printer problems, there were no similar printer malfunctions for any other employee. Even if the grievor had printer problems, printer problems would provide no explanation for the inability to match the tickets by the arrival time printed on the front with the arrival time information recorded on the journal tape. There was no explanation for the fact that there were a larger number of tickets that could

not be accounted for during the latter part of the shift as compared with the earlier part. Nor was there any explanation why so many of the journal entries for which there were no tickets had entry times on the hour or ending in "0". Transaction #03025 showed that in that instance the grievor had incorrectly entered an arrival time of 18:00 when it should have been 16:05. The grievor recorded a sale in that instance of \$0.60 when it should have been higher. Following the grievor's discharge the number of \$0.60 tickets had decreased and the number of \$5.00 tickets had increased. Finally, the number of customer complaints had decreased after the grievor's discharge. While there was no direct evidence of "money out of the till", nevertheless the inescapable conclusion was that the grievor was misappropriating funds.

The Employer submitted that there were no other plausible explanations. Printer problems could not provide an explanation. The grievor suggested that the tickets may have been tampered with but there was no evidence to support this. The grievor did suggest he may have provided a discount for friends, but he appeared to have back-tracked on that testimony. In any event, that idea defies logic, the testimony came "out of the blue", and the testimony was consistent with a person who was aware of the process, was guilty and was searching for a plausible explanation.

The Employer referred to the following authorities: *Re Work Wear Corporation of Canada Ltd. and Laundry & Linen Drivers & Industrial Workers Union, Teamsters, Local 847* (1993), 35 L.A.C. (4th) 373 (Starkman); *New Dominion Stores, A Division of the Great Atlantic & Pacific Company of Canada, Limited, and Retail, Wholesale and Department Store Union, Locals 41, 429 (Timmins), 545 (North Bay), 579 (Sudbury), 582 (Sault Ste. Marie), and 915 (New Liskeard) AFL-CIO-CLC* (November 6, 1992) unreported (Carrier); *Re Toronto Harbour Commissioners and Toronto Harbour Commissioners Employees Union, Local 186* (1992), 29 L.A.C. (4th) 428 (McLaren); *Re Honey Bee Sanitation Inc. and United Steelworkers* (1991), 20 L.A.C. (4th) 103 (H.D. Brown); *Re Ontario Produce Co.,*

*Oshawa Foods Division, Oshawa Group Ltd. and Teamsters Union, Local 419* (1992), 26 L.A.C. (4th) 377 (Barton); *Re New Dominion Stores (Division of Great Atlantic & Pacific Co. of Canada Ltd.) and Retail, Wholesale & Department Store Union, Local 414* (1992), 28 L.A.C. (4th) 53 (Grant); *The Great Atlantic & Pacific Company of Canada Limited and United Food and Commercial Workers International Union, Locals 175 and 633* (May 20, 1993) unreported (Carrier); and *Workers Union of Queen Elizabeth Hospital and Marriott Corporation of Canada, Ltd.* (June 24, 1993) unreported (Baum).

The Employer submitted that the above was sufficient to dispose of the grievance. However, the Employer made an alternative submission which it acknowledged I would not need to address if I found in its favour on its primary submissions. Relying on *Rasanen v. Rosemount Instruments Limited* (1994), 17 O.R. (3d) 267 (C.A.) the Employer submitted the doctrine of "issue estoppel" applied to the question of whether the grievor had engaged in misconduct.

Issue estoppel applies to prevent the re-litigation of a question. The purpose behind this doctrine is to ensure an end to litigation by preventing a party from having to prove the same matter in two separate proceedings between the same parties, or their privies. When a question has been determined in one proceeding, it is taken as having been conclusively established.

After his discharge the grievor had sought Employment Insurance under the *Canada Employment Insurance Act*. The grievor's insurance claim was initially denied and was then considered by a Board of Referees where the issue was described as "Did the claimant lose employment due to misconduct?" The Board of Referees, in its March 17, 1998 decision, concluded as follows:

The claimant did lose employment due to misconduct. The employer dismissed the claimant for misappropriation of funds. Although the claimant denies the offenses the employer's

evidence is compelling. An audit was conducted and it was discovered that the claimant's receipts did not balance with the journal tape. . . . It is notable that the only problems that occurred were with the \$0.60 tickets. The employer points out that this allowed for maximum profit for some one involved in fraud. . . . The claimant was in a position of trust as he was constantly handling cash. To misappropriate funds was deliberate and wilful and as such constitutes misconduct. (p. 4-5 - exhibit references deleted)

In this instance the Employer said the question of misconduct had been determined in the Board of Referees' decision.

The Employer noted that it had attended before the Board of Referees, that the grievor had been present, and that Ken McLeod, the Union representative appearing at this arbitration, had attended as the grievor's representative before the Board of Referees. Thus the Employer submitted the three requirements for issue estoppel were present:

1. the same question had been decided;
2. the Board of Referees decision was final; and
3. the parties or their privies were the same in both the Board of Referees proceedings and in this arbitration;

and thus the Union was not allowed to dispute the conclusion of misconduct.

In support of this alternative argument the Employer referred to the following: *OPSEU (Gallina) and The Crown in Right of Ontario (Ministry of Correctional Services)* (Oct. 6, 1995) unreported (GSB, Samuels); *McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Ltd., Aaroport Limousine Services Ltd. and Mr. Y. Zahavy* [1994] O.L.R.D. No. 2878; *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Court of Justice, Sharpe J.) (Appeal dismissed by the Divisional Court, November 21, 1997); and *Hough v. Brunswick Centres Inc.* [1997] O.J. No. 1387.

In reply to the Union's submissions that the Employer had moved too quickly and should have waited until it had some direct proof of theft, the Employer submitted it did not need

to "set up" and "trap" the grievor. The Employer also submitted that it did not need to disprove every other possible explanation, and did not need to prove the precise method of the theft. The Employer submitted its only obligation was to lead evidence to prove that the grievor had engaged in theft; it had done so.

## V. POSITION OF THE UNION

The Union first addressed the Employer's argument on issue estoppel. The Union submitted that, although the Board of Referees had found misconduct, it was not clear that the Board of Referees had found the type of misconduct which the Employer alleged in its termination letter. In proving its case before me the Employer was required to show that the grievor had knowingly misappropriated funds. While the decision of the Board of Referees was a finding of misconduct, that finding does not resolve the issue of whether the grievor knowingly misappropriated funds from the Employer.

In addition the Union said it was not a party to, or privy to, the Board of Referees decision. While Mr. McLeod had been present as the grievor's representative, the Union had not been involved. The parties at the Board of Referees hearing had been the grievor in his personal capacity, the Employer and the Federal Government.

Relying on those two grounds, the Union submitted that issue estoppel did not apply in this instance.

The grievor knew of the journal tape and knew that whatever he entered in the cash register would be reflected on the journal tape. The grievor denied the Employer's allegations and he denied tampering with any tickets. The tickets had been left for some two days and the grievor was not able to say if they were his tickets. He speculated that the tickets were not

his. In his testimony the grievor had asked rhetorically why he would have stolen. Likewise the Union wondered why anyone in the grievor's position would steal, knowing that his work could be audited.

The Union pointed to weaknesses in the Employer's theory of what had occurred. Mr. Landrigan had speculated that the grievor had unplugged the screen but in cross examination he had agreed that the screen had not been unplugged on November 19. The Employer had engaged in similar exaggeration when Mr. Landrigan had claimed before the Board of Referees that some \$120 to \$170 per day had been stolen by the grievor. But the maximum amount per ticket was \$4.40 (that is \$5.00 less \$0.60) and with 28 tickets that amounted to a maximum of \$123.20. It was clear that the Employer had reached conclusions which did not stand scrutiny.

Under Article 9 of the agreement an arbitrator has no power to modify the penalty imposed by the Employer. Since a dismissal must be based on "reasonable cause" the Employer should be cautious, careful and thorough in imposing discipline. The Employer had failed to do this. In this case the seriousness of the allegation of theft meant the Employer's evidence should be clear and convincing. The evidence presented was equivocal.

The Union had offered theories as to how the ticket problems could have occurred. Mr. Landrigan had agreed that it was possible for a cashier to charge a customer less than was required thereby giving a benefit to the customer and not engaging in theft. While the Union said such an action would be misconduct, it would not amount to stealing money as had been alleged in this case. Therefore the Employer had only proven that the matter was suspicious and had not proven that it was a case of theft.

While the Employer alleged theft, there was no evidence as to how the grievor might have

stolen money. While there had been a suggestion that the screen was unplugged, it was not. There was a suggestion, but there was no proof, that the display screen was covered. Similarly there was talk, but no evidence, that the tickets had been covered preventing the tickets from being properly printed.

Thus the Union submitted the Employer had moved too quickly and had been unable to prove its case. The Employer had the onus in this case but had not met it, and thus the grievor should be reinstated under Article 9.

The Union referred to the following authorities: Brown and Beatty *Canadian Labour Arbitration*, 3rd ed., looseleaf (Aurora: Canada Law Book Inc.) Section 7:2500 and 7:3300; *Re Rockliffe Nursing Home and Service Employees International Union, Local 204* (1997), 62 L.A.C. (4th) 316 (Abramsky); *Re Zellers Inc. and United Food & Commercial Workers Union, Local 175* (1996), 54 L.A.C. (4th) 176 (R.L. Levinson); Krashinsky and Sack *Discharge and Discipline*, (Lancaster House) page 1; and *Re Treasury Board (Solicitor General) and Kahlon (File No. 166-2-20871)* (1991), 19 L.A.C. (4th) 231 (PSSRB, Kwavnick).

## VI. CONCLUSIONS

This is a discharge case. In considering a discharge case, I believe an arbitrator should follow a three stage analysis, as follows:

1. Did the grievor engage in conduct which merits discipline?
2. If so, is discharge too severe a penalty? and,
3. If so, what should be substituted as a penalty?

1. Did the grievor engage in conduct which merits discipline?

The Employers' case rests on the disputed tickets. The grievor did not acknowledge those tickets as his. Thus the first issue is: were they his tickets? If not, then the Employer's case falls apart. However, if the tickets were the grievor's, the second issue is: what conclusion should be drawn from the evidence?

The grievor acknowledged that the journal tape for November 19 was his but he did not accept that all the tickets were his. There can be no doubt that most of the tickets were his as the transaction numbers and other details on those tickets match the information on his journal tape. It is also clear that the ticket with transaction #03025 was the grievor's ticket as the same transaction number appears on his journal tape. The question remains: Were the other disputed tickets ones which were handled by him during the shift in question?

At the end of each shift employees normally bundle the tickets and file the tickets, the journal tape, the Cash Report and the Daily Parking Report. As I heard no evidence to the contrary, I conclude that the grievor did that in this instance. The tickets were stored in the usual manner in a brown manila envelope. The evidence about Mr. Landrigan's audit indicates that he simply asked for three employees' tickets. The tickets were promptly provided to him. Mr. Landrigan said there was no indication that anyone had tampered with the tickets. There was no other evidence to suggest the tickets had been tampered with prior to Mr. Landrigan's audit.

If the tickets were not the grievor's, then how did they come to be included in the envelope with the vast majority of tickets which were the grievor's tickets? There was a suggestion that they had been planted there in advance of Mr. Landrigan's audit by someone who wished to frame the grievor. There was no suggestion that Mr. Landrigan had replaced tickets.

Dealing with the possibility of someone putting the tickets in the envelope in order to frame the grievor, I note first that there was no advance warning that Mr. Landrigan wanted to audit the tickets of Galleria employees. There was insufficient time between the time Mr. Landrigan sought the tickets and the time they were provided to him for anyone to have replaced the tickets. If someone else placed the tickets in the envelope it would have had to have been done before the audit and without any clear knowledge that the tickets would later be audited. While there was a suggestion of difficulties between the grievor and Mr. Filias, the site manager, I note in particular that there was no evidence that Mr. Filias had placed the tickets in the envelope.

Moreover it would have been difficult to have put the 27 disputed tickets in the grievor's envelope before Mr. Landrigan asked for tickets to audit. As noted earlier there are three entrances to the parking lot in which the grievor worked. Tickets are put into the dispensers in lots of 2,000 and they are numbered consecutively. Among both the grievor's good tickets and the 28 disputed tickets are tickets with the following numbers:

A 471-673 and following

A 472-000 and following

A 485-995 and following

A 500-137 and following

In other words, the numbers on the good tickets and the numbers on the disputed tickets show that they all came from the same four lots of tickets. Thus if the disputed tickets were not the grievor's tickets, but rather had been placed there by someone else, it appears it would have been necessary for that person:

1. to have pulled the disputed tickets out of the three dispensers, or otherwise to have obtained those tickets;
2. to have printed varying arrival times on the front;
3. to have put them through a cash register while blocking part of the printer, or

- otherwise have had the limited information printed on the back; and then,
4. to have removed the corresponding number of good tickets from the grievor's envelope and replaced them with the disputed tickets.

While it is theoretically possible that someone went to that effort to replace the grievor's tickets with the 27 disputed tickets, and did likewise with the grievor's tickets for the other days that Mr. Landrigan audited and on which he found similar tickets, perhaps in an effort to frame the grievor, I repeat that there was no evidence of it. That lack of any evidence of someone having placed the tickets in the grievor's envelope, coupled with the complexity of the effort which would have been required in order to do so, all at a time when there was no indication that the grievor's tickets were to be audited, cause me to reject this idea that someone else placed the tickets in the envelope prior to the audit. I reject the idea that the grievor was framed. Instead I conclude that all the disputed tickets were the grievor's tickets, even though he declined to acknowledge them as his.

The conclusion that all the tickets were the grievor's tickets leads me to the question of what conclusions should be drawn from the evidence. Mr. Landrigan decided, based on his audit and his years of experience in the parking industry, that the grievor had been stealing. Clearly Mr. Landrigan's conclusion of theft is consistent with the ticket problems and with all the evidence except the grievor's denial. What else might provide an explanation? There were various suggestions:

- ! The grievor suggested that he may on occasion have charged a friend a lesser amount and paid the difference himself. I did not find this evidence persuasive when it was presented and the grievor appeared later to deny that he had engaged in such actions. In any event, even if the grievor had done so, it provides no explanation as to why the tickets were printed in the manner they were, and I reject it as an explanation for the problems identified by Mr. Landrigan.
- ! Similarly the Union suggested that the grievor might have simply given customers a

benefit by charging them less than the proper amount. There was no evidence from the grievor or anyone else to indicate that this had happened. Moreover the idea makes little sense to me and it provides no explanation for the information which is missing from the reverse of the 28 disputed tickets. I thus reject this as an explanation for the tickets.

! The evidence indicated there had been problems with the grievor's printer. However there is nothing to suggest that the printer problems were the cause of the bad tickets in this instance. Moreover there is nothing to explain why the bad tickets only occurred on the grievor's shifts and not on other shifts. Nor is there any explanation why the printer problems would have occurred only on \$0.60 tickets. Finally there is nothing to explain why the problem differed from one disputed ticket to the next with varying amounts of information missing from the back of the tickets. I reject this as an explanation for the problems with the 28 tickets.

Thus I conclude that none of the suggestions above are plausible and none of them explain the evidence.

As this is a dismissal case the onus is on the Employer and the onus in a case of theft is well established. It is expressed in *Re Zellers Inc, supra*, also a theft case, as follows:

The company has the onus to establish its case by clear and convincing evidence on the balance of probabilities and not on the criminal burden of proof, namely beyond a reasonable doubt. (at p. 189)

Apart from his denials, the grievor asked rhetorically why he would do such a thing as steal, knowing that his work was subject to audit. I have no answer for that and the Employer offered none. Nevertheless, because theft is a serious allegation, because the grievor denied the allegation, and because it is difficult to know why a person in the grievor's situation, aware that his work might be audited, would engage in such an action, this allegation of theft must be considered carefully.

While I acknowledge certain difficulties in the Employer's case, nevertheless the Employer's evidence was clear. That evidence and the conclusions reached from it by Mr. Landrigan were explained in detail at the hearing and are summarised above. Mr. Landrigan concluded that the only possible explanation in this case was theft by the grievor. As noted above his conclusion explains all the evidence (excluding the grievor's denial), although the evidence does not go so far as to explain how the grievor actually accomplished his theft, or why. But the Employer need not prove precisely how the grievor accomplished his theft or why. It need only prove theft by clear and convincing evidence, on a balance of probabilities.

The only part of the evidence which is inconsistent with the Employer's conclusion of theft is the grievor's denial. While the grievor denied theft, he offered no plausible explanation for the disputed tickets. I am thus left with the following question:

Do I accept the grievor's denial in which case there is no other plausible explanation for the evidence, or do I reject his denial in which case the other evidence makes complete sense?

I find the grievor's denial simply not plausible. It is not in harmony with the other evidence. Thus I do not believe the grievor's denial.

The grievor acknowledged he was good at his work and that he normally entered the arrival times correctly. I note that in transaction #03025, described earlier, the grievor entered the wrong arrival time. The difference between the arrival time of 16:05, printed on the face of this ticket, and the arrival time of 18:00, which the grievor entered and is recorded on the journal tape, is not the type of mistake which one might make in haste or error. I conclude this "mistake" was done deliberately.

If one mistake was deliberate, the chance that the 27 "mistakes" on the other 27 tickets were deliberately made increases. Looking at all the 27 disputed tickets, which I concluded above

were the grievor's, and noting:

1. the differences in the amount of information printed on the back of those tickets,
2. the increase in the number of problems on the journal tape later in the shift,
3. the number of unaccounted for entries where the time entered was in round numbers (i.e. ending on the hour or at ten minute intervals),
4. the decrease in customer complaints after the grievor was dismissed,
5. the decrease in \$0.60 tickets since the grievor's dismissal, and
6. the comparison between the apparent "mistakes" in the arrival times on all 27 disputed tickets with the grievor's high level of accuracy in entering the arrival times on the tickets on which the information was printed properly,

I do not find the grievor's denial believable. I conclude instead that he deliberately entered the wrong arrival times for all 28 tickets and then caused the printer to print only part of the information on the reverse. I conclude he did this by manually inserting something between the printer and the ticket. I conclude further that he did not always insert the paper or other similar object in exactly the same place, thus explaining why the tickets have differing amounts of information printed on the reverse, and also explaining why the transaction number was printed on the ticket for transaction #03025. In the end result I simply reject the grievor's denial of theft.

Thus I am persuaded on all the evidence that the grievor engaged in theft from the Employer or, in the words of the discharge letter, that the grievor had "knowingly misappropriated company funds". It follows that the Employer had grounds to discipline the grievor.

Having reached this conclusion it is not necessary to address the interesting argument regarding issue estoppel which arose from the conclusion of the Board of Referees that the grievor had engaged in misconduct.

2. Was discharge too severe a penalty?

This collective agreement provides in Article 9 that an arbitrator does not have the power under section 48(17) of the *Labour Relations Act* to modify the penalty. I conclude that I cannot modify the penalty of discharge selected by the Employer.

In any event, given that this is a theft case and that the grievor denied the theft, the Union acknowledged that if I were to find that the grievor had engaged in theft there would be no basis for me to modify the penalty. Prior to modifying a penalty an arbitrator normally has to be persuaded that a lesser penalty will bring home to the grievor the seriousness of his actions, that the grievor will reform if reinstated, and that the employment relationship can be restored. Given the grievor's denials there is nothing to suggest the grievor could be trusted in the future, there is nothing to suggest he would act differently if a lesser penalty were substituted, and no basis for me to modify the penalty even if I had authority to do so.

3. What penalty should be substituted?

Given my conclusions above, this question does not arise.

The grievance is denied.

Dated at London, Ontario this 30th day of April, 1998.

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Howard Snow, Arbitrator