Case Name:

Winton Global Inc. (Town Division) v. United Steelworkers of America, Local 1-424 (Mikolajczyk Grievance)

IN THE MATTER OF an Arbitration
Between
Winton Global Inc. (Town Division) ("the company"),
and
United Steelworkers of America, Local 1-424
("the union")

[2005] B.C.C.A.A.A. No. 121
Award No. A-090/05

British Columbia
Collective Agreement Arbitration
R.B. Blasina (Arbitrator)

Heard: May 9, 2005.
Award: May 19, 2005.
(25 paras.)

Re: Roland Mikolajczyk - Grievor

Appearances:

Counsel for the Union: Marjorie Brown

Counsel for the Company: Donald Jordan, Q.C.

AWARD

I

¶ 1 The Grievor, Roland Mikolajczyk, was employed as a forklift operator at the Company's planermill at Prince George, B.C. He was discharged on January 3, 2005 for an asserted culminating incident of negligence occurring on December 10, 2004 which resulted in damage to the forklift he was operating. Mr. Mikolajczyk was feeding the planermill, and he picked up three stacks of lumber stored on top of each other. Company rules required that no more than two stacks be taken at any one time. The rails of the forklift boom are perpendicular to the forks, and the boom leans slightly back when the

operator has taken hold of a load, so that the load will lean back against the boom and will be more secure. However, when three stacks of lumber are taken, more than the top two-thirds of the top stack would be higher than the boom. On December 10, 2004, much of the top load fell over onto the forklift roof damaging the cover to the air conditioner system, and bending over the exhaust pipe. The Company conceded that the incident in isolation would not have justified a discharge; but, that as a culminating incident, it brought into consideration other circumstances, most critically the discipline record. The Union conceded that some discipline was deserved, but that the discharge was excessive in all of the circumstances of the case.

¶ 2 The Company called two witnesses; Dan Penner, Yard Supervisor, and, Rob Malm, Planermill Manager. The Union called Mr. Mikolajczyk.

II

¶ 3 Mr. Mikolajczyk is 56 years old. He has worked for the Company, or its predecessor "The Pas Lumber Company Ltd." since April 1981. He started as a lumber piler and went on to be a lumber grader and later a forklift driver. He took courses and qualified as a certified lumber grader, first aid attendant, and air brake licensee. He has been a forklift operator for about eleven or twelve years. He is also familiar with a number of other jobs at the planermill.

¶ 4 On December 10, 2004, Mr. Mikolajczyk started his shift on his regular forklift. He had placed a doorbell system on the forklift boom such that a switch at the top of the boom would be activated if placed against a stack of lumber piled to the third tier, thus causing the bell to chime. Mr. Mikolajczyk had been disciplined before for attempting to transport lumber three stacks high. Mr. Mikolajczyk was feeding 2in. x 4in. x 10ft. lumber to the planermill. Partially through his shift, his forklift was taken to the shop for servicing and he continued to work with one of the new forklifts.

¶ 5 Afterward, Mr. Mikolajczyk was directed to switch from feeding 2in. x 4 in. x 10ft. lumber to feeding 2in. x 8in. x 16ft. It was snowing at the time, and Mr. Mikolojczyk was at the end of the kiln area about 100 yards from the lumber alleys. He testified, "I took a glance down and I could see the [2in. x 8in. x 16ft.] alley through the heavy snow". He testified that at the ends of the alleys the lumber is stored two stacks high for safety reasons, but otherwise the lumber is stored three stacks high.

¶ 6 Mr. Mikolajczyk then proceeded to the lumber alleys to collect some 2in. x 8in. x 16ft.; but, he erroneously went to the 2in. x 6in. x 16ft alley. The lumber there was stored three stacks high. Mr. Mikolajczyk placed the forklift forks at the bottom and when he took hold of the load, the better part of the top stack fell over onto his forklift causing damage to the air conditioner cover and the exhaust pipe. Mr. Mikolajczyk testified that he could not see; that the window on top of the forklift was covered with snow.

¶ 7 I am not satisfied that snow covering a window on top of the forklift prevented Mr. Mikolajczyk from seeing the top stack of lumber. Photographs of the scene were entered as an exhibit, and Mr. Mikolajczyk would have had sufficient opportunity and visibility to look through his windshield as he approached closer in order to see that there were three stacks of lumber which he would be taking. Mr. Mikolajczyk failed to explain why he had failed to notice that there were three stacks, if indeed he had acted without intent. He also failed to explain why he had driven to the wrong alley, i.e. the 2in. x 6in. x 16ft. alley, instead of the 2in. x 8in. x 16ft. The best that can be said is that Mr. Mikolajczyk was guilty of simple negligence; and, for this, he did deserve some measure of discipline.

III

¶ 8 The British Columbia Labour Relations Board, in the case of Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162, [1977] 1 Canadian L.R.B.R. 1 (B.C.L.R.B.), stated at p. 5:

> Instead, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

It is the second question which is critical here: was the discharge an excessive response in all of the circumstances of the case? An arbitrator is not restricted to the prior discipline record; and, an arbitrator is required to consider if the discharge was "excessive". An arbitrator is therefore required to determine whether the discharge fell within the range of reasonableness given all the circumstances. An arbitrator may only substitute some lesser form of discipline if he/she has determined that the discharge did exceed the range of reasonableness in all of the circumstances of the case. Both Counsel for the Company and Counsel for the Union submitted that the issue here was whether the employment relationship was restorable, and that an arbitrator should take into account a balancing of interests. I agree with Counsel, while I do not see their expression as undermining or diminishing the principles expressed in Wm. Scott, supra; nor did Counsel so argue.

¶ 9 The Company's policy is to provide for progressive discipline, tempered by a "stepping down" of the severity of discipline for each intervening six months of discipline-free service. The progression would go from verbal warning to written warning to increasing measures of suspension and ultimately discharge. However, if an employee after six months of discipline-free service had committed an infraction which might have merited a written warning following an earlier verbal warning, only a verbal warning would be issued instead. Mr. Mikolajczyk's discipline record is as follows:

March 18, 1986	Verbal Warning (lateness);
December 1, 1987	Verbal Warning (lateness);
November 3, 1988	Verbal Warning (not wearing hardhat);
November 22, 1988	Written Warning (defacing Company property);
June 21, 1990	Verbal Warning (knocking another employee's hat off);
January 24, 1991	Suspension - 8 days;
May 12, 1993	Written Warning (using profane and abusive language over the radio);
November 29, 1994	Verbal Warning (work performance unsatisfactory);
December 5, 1994	Verbal Warning (work performance unsatisfactory);
July 15, 1996	Written Warning (unsafe operation of mobile equipment);

February 16, 1998	Verbal Warning (work performance poor);
August 15, 1998	Verbal Warning (work performance poor);
September 17, 1998	Verbal Warning (work performance unsatisfactory);
September 30, 1998	Verbal Warning (lateness);
November 9, 1998	Written Warning (lateness);
December 9, 1999	Written Warning (improper modification of equipment);
January 11, 2000	Suspension - 1 day (work performance unsatisfactory);
June 26, 2000	Written Warning (work performance poor);
December 3, 2001	Written Warning (unsafe operation of mobile equipment);
November 8, 2002	Written Warning (work performance poor);
December 2, 2002	Suspension - 1 day (damage to forklift loading three stacks of lumber);
May 1, 2003	Suspension - 2 days (absenteeism);
May 5, 2003	Written Warning (profanity and aggressive behaviour);
September 18, 2003	Suspension - 2 days (damage to forklift loading three stacks of lumber);
April 27, 2004	Suspension - 3 days (improper work procedure and inattentiveness causing accident);
July 12, 2004	Suspension - 10.5 days (damage to forklift loading three stacks of lumber); and,
October 5, 2004	Written Warning (not wearing personal protective equipment).

¶ 10 The December 3, 2001 written warning advised Mr. Mikolajczyk "that future safety violations of any kind will result in your removal as a forklift operator." The evidence was that the Company did remove Mr. Mikolajczyk from the forklift on January 22, 2002, however this was not noted in the discipline record. The removal was temporary, lasting some number of weeks, after which Mr. Mikolajczyk returned to the forklift in March, 2002. Mr. Mikolajczyk agreed in cross-examination that he had the seniority and skills to apply for some other job. He agreed that it was his choice to stay on the forklift in the planer infeed area after he had already had a number of accidents.

¶ 11 The discipline record reveals examples of repeated discipline for similar conduct. Specifically with respect to damaging the forklift by loading three stacks of lumber, the discharge for the incident of

December 10, 2004 was the fourth discipline for such conduct. Preceding the final incident, there had had been a one-day suspension issued on December 2, 2002, a three-day suspension issued on September 18, 2003, and a 10.5-day suspension issued on July 12, 2004. With respect to traveling to a wrong alley there were three previous incidents of misplacing or mixing loads.

¶ 12 The Union reviewed the discipline record in some detail, attempting to demonstrate that Mr. Mikolajczyk has been responsive to progressive and corrective discipline, and that the record was not as poor as it might seem at first glance. Unfortunately, the record does not demonstrate responsiveness to progressive and corrective discipline; and, if it can be said that Mr. Mikolajczyk is eventually responsive, he then seems to give some other cause to be disciplined. On December 10, 2004 he had already had three suspensions for picking up three stacks of lumber and damaging the forklift, the last suspension of 10.5 days having occurred less than six months earlier. He was at the doorstep of discharge, and he should have known that.

¶ 13 The Union asserted that the Company had discriminated against Mr. Mikolajczyk in the industrial sense of treating him differently from other employees who had accidents. Mr. Mikolajczyk is not the only forklift operator to have had accidents; but, the evidence was that such incidents were "common" with him, and less so with others. There was no evidence regarding the discipline record of any other employee. It cannot be concluded that Mr. Mikolajczyk was the victim of "special" treatment.

¶ 14 Mr. Mikolajczyk considered himself to be an "excellent" employee, and referred to being complimented as such by his supervisor. He testified, "I got nothing but praise." Although it is accepted that he has received compliments for his work, his discipline record fails to fulfill his self-image as an excellent employee.

¶ 15 When questioned by Mr. Penner on December 10, 2004, after the incident, Mr. Mikolajczyk offered him no explanation. Mr. Mikolajczyk again offered no explanation to Mr. Malm at a later investigatory meeting, although he did say he was sorry and would be willing to pay for the damage to the forklift.

¶ 16 Mr. Mikolajczyk has had a long-term poor relationship with two employees whom he has accused of harassing him. The Company investigated his complaints only to hear the others accuse Mr. Mikolajczyk instead. No grievance was ever taken under the collective agreement, but Mr. Mikolajczyk did file a complaint against one of the employees under the Company's recently promulgated "Policy on Harassment". An independent investigator was appointed, and he concluded in his report of October 7, 2004 that the respondent had been "bullying" Mr. Mikolajczyk. The Union suggested that the Company considered Mr. Mikolajczyk as a troublesome employee for having made complaints, and that the Company took this as a factor in its decision to terminate him. Mr. Mikolajczyk did not express this opinion himself; and, there was no evidence to support the Union's suggestion.

¶ 17 Mr. Mikolajczyk did opine that during the latter part of his employment he was depressed, and that his doctor had prescribed an anti-depressant. This was not evidence upon which one could make a finding of disability, nor was that submitted. Mr. Mikolajczyk has been displaying repeated unsatisfactory conduct over the last nineteen years; e.g. lateness in 1986, 1987, 1998, aggressive or profane conduct 1990, 1993, 2003. The first recorded discipline for damaging the forklift due to picking up three stacks of lumber was two years earlier in December 2002.

¶ 18 Mr. Malm testified that in considering the measure of discipline, it had been noted that Mr. Mikolajczyk had been removed from the forklift before. Mr. Malm testified that with the preceding training and discipline which Mr. Mikolajczyk had received, "... we felt things were not going to

change." In cross-examination, Mr. Malm explained that "It would just be a matter of time before he goes back on, and it would be the same all over." Mr. Malm was asked if he had considered permanently placing Mr. Mikolajczyk in another position. Mr. Malm said he had not.

¶ 19 In a non-culpable case, i.e. where the employee is simply unable to adequately perform the duties associated with his/her position, a permanent demotion or transfer would be an acceptable employer response. However, where the employee's poor work performance is culpable, a demotion that is temporary would be an acceptable employer response. Otherwise the grievor's seniority rights would be permanently fettered, and the discipline would never have been fully served. Although it is simple negligence which the evidence discloses with respect to Mr. Mikolajczyk's operation of the forklift on December 10, 2004, and the three earlier dates when he loaded three stacks of lumber, negligence is characterized as a culpable act.

¶ 20 Nevertheless, the Union would accept a permanent demotion in the present case should a more favourable remedy not be available. Mr. Mikolajczyk is 56 years old; he has worked for the Company for twenty-four years; he has not found another job; and, a permanent demotion would at least return him to gainful employment. The Wm. Scott case, supra, provides three questions to be considered. First, was there just cause for some measure of discipline; and that has been answered affirmatively. Second, was the discharge an excessive response in all of the circumstances of the case? This is where the parties joined issue, and this is where an arbitrator may consider both aggravating and mitigating factors. Third, if the discharge was excessive, then the arbitrator would consider alternative measures. The Union's suggestion of a permanent removal from the forklift seems to go to the third question. The possibility of a permanent demotion is not a circumstance that is relevant and material to determining whether the discharge was excessive. The Union's suggestion is not a mitigating factor.

¶ 21 The Union also urged consideration of the "significant" economic hardship visited upon Mr. Mikolajczyk as a result of his termination. As stated, he is 56 years old; has worked for the Company for the past twenty-four years; and, he has not found other work. At the same time, Mr. Mikolajczyk candidly conceded that he had not made much effort to seek other employment.

¶ 22 "Special" economic hardship is considered to be a mitigating factor: Re United Steelworkers of America, Local 3257 -and- The Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356 (R.W. Reville C.C.J., E. Park, A.A. White) cited in Wm. Scott, supra. The sense of it is that individualization of penalty is one of the standards by which one measures the discharge for its justice and reasonableness. The same measure of discipline may have harsher consequences for one person because of his/her individual circumstances, than for another. There is also a school of arbitral thought that an individual should be taken to be cognizant of his/her particular circumstances; and, bearing that in mind, the individual should be guided accordingly. In any event, the test is "special" economic hardship. Presumably Mr. Mikolajczyk will have difficulty finding future employment after having been discharged by his previous employer - especially when he has worked for that employer for twenty-four years. However, the twenty-four years have been marred by a significant discipline record. Presumably Mr. Mikolajczyk will have difficulty finding future employment because of his age. However, Mr. Mikolajczyk's age had no bearing on the Company's decision to terminate him; and, age does not immunize an employee from an employer's right to terminate for just and reasonable cause. Although it is anticipated that Mr. Mikolajczyk would have economic hardship, one cannot find here a compelling case of special economic hardship.

¶ 23 Mr. Mikolajczyk was remorseful at the Company's investigatory meeting. He said he was sorry, and he offered to pay for the damage.

¶ 24 I thank Counsel for their submissions; and, I note the cases which were referred to me: Wm.

Scott, supra; Brown & Beatty, Canadian Labour Arbitration, 3d. ed., [paragraph] 7:4310 "The doctrine of culminating incident", [paragraph] 7:4312 "The final incident", and [paragraph] 7:4314 "Use of the prior record"; Re Livingston Industries -and- International Woodworkers of America (1982), 6 L.A.C. (3d) 4 (G.W. Adams, Q.C., J.M. Bedard, M. Tait); Re International Forest Products Ltd. -and- Industrial Wood and Allied Workers Union, Local 1-3567 (1996), 60 L.A.C. (4th) 184 (R.B. Blasina); Re Crane Canada Inc. -and- United Association of Plumbing & Pipefitting Industry, Local 170 (1990), 14 L.A.C. (4th) 253 (M.A. Hickling, D. Dougan, M. Tevlin); British Columbia Transit v. Independent Canadian Transit Union, Local 1, [1993] B.C.C.A.A.A. No. 37 (V.L. Ready); British Columbia Transit -and- Independent Canadian Transit Union, Local 11 (Easton Grievance), [1997] B.C.C.A.A.A. No. 25 (V.L. Ready); MacMillan Bloedel Ltd. -and- Communications, Energy and Paperworkers Union, Local 76 (Lentz Arbitration), [1997] B.C.C.A.A.A. No. 510; Pirelli Cables and Systems Ltd. v. United Steel Workers of America, Local 25952 (sic) (Richardson Grievance), [2001] B.C.C.A.A.A. No. 146 (G. Somjen); Pirelli Cables and Systems Ltd. v. United Steel Workers of America, Local 2952 (sic) (Richardson Grievance), [2001] B.C.C.A.A.A. No. 333 (G. Somjen); and, Re Canadian Forest Products Ltd. -and- Industrial Wood & Allied Workers of Canada, Local 1-424 (2000), 89 L.A.C. (4th) 367 (D.L. Larson).

¶ 25 In conclusion, there was a culminating incident of negligence on December 10, 2004 which justified some measure of discipline and which therefore brought into consideration a broad review of the circumstances of the case. Having considered all of the circumstances, the Company has established that its discharge of Mr. Mikolajczyk was not excessive. Therefore the grievance is dismissed.

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