IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE LABOUR RELATIONS ACT, 1995

BETWEEN:

CARGILL LIMITED
Dunlop Road Plant
("the Employer")

AND

UNITED FOOD AND COMMERCIAL WORKERS CANADA,
LOCAL 175 and 633
("the Union")

GRIEVANCES OF DAN AGAR
SUSPENSION AND DISCHARGE

ARBITRATOR: Peter Chauvin

APPEARANCES FOR THE EMPLOYER:

Daniel Leone	Counsel
Leslie Knarr	Employee Relations, Senior Specialist

APPEARANCES THE UNION:

Adam Veenendaal	Counsel
Jason Hanley	Union Representative
Brian Dennis	Chief Union Steward
Paul Alexander	Union Steward
Dan Agar	Grievor

Hearings conducted on February 6 and 13, 2023

AWARD

The Issues

[1] The main issue in this case is whether the Employer had just cause to discharge Dan Agar, the Grievor, for having parked his motorcycle in the lower guard house (the "Guard House"). Two incidents are considered in this Award:

1. The failure of the Grievor to lock-out a trailer on January 13, 2021, and;
2. The Grievor parking his motorcycle in the Guard House on June 6, 2022.

The Employer

[1] The Employer is a large meat processing facility that processes, or harvests, approximately 1,800 cows per day. The cows are killed, the meat is butchered, and then the processed meat is packed and shipped on to large tractor trailers, for delivery to customers.

[2] Ms. Leslie Knarr, the Employer's Employee Relations, Senior Specialist testified that this process is effectively a relatively fast paced production line, in which each employee in this process has a special task to perform, and must keep up with the overall speed of the production process. Throughout that process many of the employees use very sharp knives, sharp saws and other sharp cutting implements to butcher the meat. Then the butchered meat is boxed. The boxes of the meat can be quite heavy. They are moved throughout the plant, to the shipping area, and then onto tractor trailers. Heavy equipment, such as forklifts and other lifting and moving equipment, are used to move these boxes of meat.

[3] In view of all of this, the Employer considers workplace safety to be very important, and has a "disciplinary stream" in which the Employer's practice is to impose a three-day suspension for a first safety violation, and then discharge for a second safety violation. This "disciplinary stream" is not contained in the Collective agreement or in any written policy of the Employer. However, the employees are aware of this Employer practice. Also, Article 4.06 states that safety incidences are removed from an employee's record after 18 months.

The Grievor

[4] The Grievor was hired by the Employer on June 10, 1991, and was discharged on June 10, 2022, being the day that he had exactly 31 years of service with the Employer. The Grievor was 59 years of age when he was discharged.

[5] The Grievor has always worked in the shipping department. In January 2021 his classification was Order Picker. Generally, his job included picking the boxes of packaged meat to fill an order, and then loading that order of meat onto a tractor trailer. In doing this, the Grievor used forklifts and other mechanical devices to assist him in lifting and moving the boxes of meat within the shipping area and onto the tractor trailers. In doing so, the Grievor had to generally keep up with the pace of the plant, that was providing the boxes of meat.

1. FAILURE TO LOCK-OUT A TRAILER - JANUARY 13, 2021

[6] On January 13, 2021 the Grievor committed a safety violation while he was loading an order onto a trailer. There is no question that prior to entering the trailer, the Grievor was required to place a "Glad Lock" on the trailer. The Glad Lock is a safety measure. It prevents the tractor shuttle driver ("the driver") from being able to move the trailer while the Grievor is in the trailer, because the trailer cannot be moved when there is a Glad Lock on it. Once the Glad Lock is removed from the trailer, that indicates to the driver that it is now safe to move the trailer. It could be dangerous if the driver commences to move the trailer while the Grievor is in the trailer. Heavy stacked boxes of meat within the trailer could shift and fall on the Grievor, or the Grievor could fall off the end of the trailer, a four-foot drop, possibly while he was operating a lifting device.

[7] On January 13, 2021 the Grievor initially placed a Glad Lock on the trailer, and he later removed it, because he thought that he was finished loading the trailer. However, the Grievor subsequently realized that there was one more thing that he needed to do in the trailer, and he thought that he could quickly re-enter the trailer, and to do it, without having to put the Glad Lock back on the trailer.

[8] The Grievor radioed the driver to tell him that he was re-entering the trailer, and told him to not move the trailer. The Grievor also made eye contact with the driver, and believed that the driver understood what he was saying. However, the radio transmission was not clear, and there may have been a language barrier between the Grievor and the driver. The driver did not hear or understand what the Grievor was trying to tell him. However, the Grievor thought that the driver did understand. As such, the Grievor thought that it was safe to re-enter the trailer without putting the Glad Lock back on it.

[9] Unfortunately, the driver did not understand that. Rather, the driver saw that the Glad Lock was no longer on the trailer, and commenced to move the trailer, while the Grievor was in the trailer. The driver moved the trailer only a few meters, and then got out of the tractor and walked to the back of the trailer to close the trailer door, as usual. When he did this, he saw that the Grievor was in the trailer. The Grievor got out of the trailer, with no injury.

January 14, 2021 - The Discipline Meeting

[10] The Employer considered this to be a serious safety violation, and had a meeting with the Grievor on January 14, 2021. In an Employee Statement regarding this incident, the Grievor stated that there was "just some miscommunication and language barrier problem" and "no harm no foul", given that no injury had occurred. At the meeting, the Employer felt that the Grievor did not sufficiently acknowledge the seriousness of his actions, and did not express remorse for it.

[11] The Employer also considered the Grievor's safety record. In doing so, it considered Article 4.06 that states that safety incidences are removed from an employee's record after 18 months. On March 25, 2020 the Grievor was given a three-day suspension for a safety violation. That three-day suspension would remain on the Grievor's record until September 25, 2021. Accordingly, as of January 2021 that three-day suspension was still on the Grievor's disciplinary record, and the Glad Lock incident would be the second safety violation on his disciplinary record.

[12] Pursuant to the Employer's practice regarding its "disciplinary stream", this second Glad Lock safety violation would normally result in the Grievor's discharge. However, rather than

following its disciplinary stream, the Employer decided that, in view of the Grievor's 30 years of service at that time, it would instead make an exception. The Employer decided to give the Grievor a second three-day suspension dated January 14, 2021, rather than discharge the Grievor.

[13] However, the Employer told the Grievor that it was making this exception to its disciplinary stream, and that the second three-day suspension for the Glad Lock incident was also a final warning, and that should he have another safety violation, it would result in his discharge. The Union disputed that the Grievor was also given a final warning on January 14, 2021. However, I find that the Employer told the Grievor that he was also receiving a final warning.

[14] On January 29, 2021 the Union grieved this second three-day suspension for the Glad Lock incident ("the Three-Day Glad Lock Suspension Grievance").

[15] On February 13, 2023, at the arbitration, the Grievor clearly acknowledged the seriousness of his conduct on January 13, 2021, he took responsibility for it, stated remorse for it, and stated that he would never do something like that again. The Grievor also acknowledged that although he had radioed the driver, and made eye contact with him, and that his communication may have been misunderstood due to a language barrier between them, that none of those circumstances, and the lack of warning lights on the doors, exonerated his conduct. Rather, the Grievor acknowledged that "the buck stops with him", and there was simply no excuse for entering the trailer when he had not re-put the Glad Lock on the trailer. The Grievor also acknowledged that the incident could have resulted in injury, but luckily did not. The Union submitted that in view of these statements, and his then 30 years of seniority, the three-day suspension should be reduced to lesser discipline.

[16] The Employer submitted that the Grievor did not express these sentiments at the January 14, 2021 discipline meeting, and that it was "too little too late" to express them at the arbitration. The Union disputed this, saying that the Grievor did express those sentiments at that meeting. Also, the Employer submitted that given that the Employer made an exception to its disciplinary stream, to impose a second three-day suspension rather than a discharge, the three-day suspension should be upheld.

[17] There is no question that the Grievor engaged in a safety violation on January 13, 2021. There is no exception to placing a Glad Lock on the trailer before entering the trailer. The Grievor acknowledged that at the arbitration. I find that the three-day suspension that the Employer chose to impose is appropriate. The fact that at the arbitration the Grievor acknowledged the seriousness of his conduct, took responsibility for it, stated remorse for it, and stated that he would never do something like that again, is commendable. However, it does not lessen the three-day suspension, in view of all of the facts. The Three-Day Glad Lock Suspension Grievance is dismissed.

2. PARKED HIS MOTORCYCLE IN THE GUARD HOUSE

[18] On July 5, 2021 the Grievor injured his back while he was performing his Order Picker job, moving sometimes heavy boxes in the shipping area, and loading them onto the tractor trailers. As a result of this, the Grievor was given a "combo" job, which was a less physically demanding job. The Grievor may have been doing the combo job as of June 6, 2022.

[19] On September 25, 2021 the three-day suspension for a safety violation that the Grievor was given on March 25, 2020 should have been removed from his discipline record.

[20] In May 2022 the Grievor received a Safety Award from the Employer. The Employer explained that it gives these Safety Awards to employees when it considers that the employee is working safely, and to acknowledge and reward, in a small way, the employee's safe work. A small acknowledgement and reward, such as a Tim Horton's gift card, is commonly given to employees who receive a Safety Award. The Grievor received this Safety Award in May 2022, one month before the June 6, 2022 motorcycle incident.

[21] The June 6, 2022 incident pertains to the Grievor parking his motorcycle in the Guard House. The Guard House is a large structure. It is basically a long covered hallway, with a roof and four sides, and a large garage-door-like opening at each end (hereinafter referred to as "the opening"). The employees park their car or motorcycle in the adjacent parking lot, and then walk on an asphalt pathway to go through the Guard House, and then go on to enter the plant. There is no Guard in the Guard House.

June 6, 2022 – Parking his Motorcycle

[22] On June 6, 2022 the Grievor was scheduled to commence work at 6 AM. He decided to drive his motorcycle to work. It had rained earlier in the morning. A video shows the Grievor arriving on his motorcycle at 5:43 AM at the parking lot next to the Guard House, and then driving his motorcycle into the Guard House. The Employer agreed that the video shows that the Grievor was riding his motorcycle slowly and carefully through the parking lot. The Grievor then drove his motorcycle slowly across the asphalt pathway directly in front of the Guard House, for only a few meters, so that he could enter the large opening to the Guard House. There were no signs stating that motorcycles cannot be parked within the Guard House, and no one had ever parked their motorcycle in the Guard House before.

[23] The video shows that there were only two people in the parking lot at that time, being 5:43 AM. Neither of these two people were near the Grievor and his motorcycle, and were not at risk of any harm by the Grievor. There were no employees walking on the asphalt pathway in front of the Guard House when the Grievor entered the Guard House on his motorcycle.

[24] There was ample room for the Grievor, on his motorcycle, to enter through the opening to the Guard House. It appears that the opening is large enough to allow for a car to pass through it. I was not given the actual dimensions of the opening to the Guard House.

[25] The Grievor then parked his motorcycle just inside the opening, and close to the inside wall of the Guard House. There was ample room for the Grievor's motorcycle. The Guard House is quite wide. There was no evidence that there were any persons in that area of the Guard House when the Grievor passed through the opening to the Guard House, and parked his motorcycle there. A picture that was taken of the Grievor's motorcycle parked in the Guard House shows the motorcycle to be completely alone, and out of the way. It was not impeding foot traffic in any way.

[26] At about 6:45 AM, the Grievor's supervisor asked the Grievor to remove his motorcycle from the Guard House, and to instead park it in the motorcycle parking spots just outside of the

Guard House. The Grievor immediately did so. In total, the Grievor's motorcycle was parked in the Guard House for not more than 70 minutes.

[27] At about 10:30 AM, the Grievor was sent home, pending an investigation. There was no further meeting with Grievor until a meeting on June 10, 2022, at which he was discharged.

June 10, 2022 – The Discharge Meeting

[28] On June 10, 2022, the Grievor was called in for a meeting to discuss this incident. The Grievor said that he thought it was a small thing, as he had done the same type of thing at Walmart, and that he moved his motorcycle as soon as he was asked to. He said that he now knew that he shouldn't have done it, but he thought it was going to rain again, and he wanted to keep his motorcycle dry. The Grievor acknowledged that he made a "bad decision" in doing it.

[29] The Employer stated that they considered it to be a safety violation, because an employee could have been injured. The Grievor responded that he was driving slowly and carefully, and that there were no persons in the area when he entered the opening to the Guard House.

[30] The Employer had already prepared, prior to the meeting, a discharge Discipline Notice for the Grievor. The entire meeting took less than 30 minutes. At the end, the Employer presented the discharge Discipline Notice to the Grievor, and informed him that he was discharged.

[31] A Disciplinary Event Summary was attached to the Discipline Notice. It cited the following two three-day suspensions as being on the Grievor's disciplinary record:

1. March 25, 2020 – Three-day suspension for a safety violation.
2. January 14, 2021 – Three-day suspension for the Glad Lock safety violation.

[32] However, pursuant to Article 4.06, the March 25, 2020 three-day suspension would normally have been removed from the Grievor's record after 18 months, being September 25, 2021, almost 9 months before motorcycle incident on June 6, 2022.

[33] The Union noted this, and submitted that the Employer relied upon the March 25, 2020 suspension that should have been "sun-setted" on September 25, 2021, and in doing so, rendered the June 10, 2022 discharge invalid.

[34] In response to this, the Employer explained that the March 25, 2020 suspension was included in the Disciplinary Event Summary only because it was relevant to establishing that the January 14, 2021 three-day suspension was also a final warning, for the reasons stated above.

[35] The Grievor testified that he was "dumbfounded" that he was being discharged for parking his motorcycle in the Guard House, to keep it dry if it rained again. He testified that he didn't even understand that he was being discharged, because he said that he would be on vacation and not available on a future date that was proposed for a grievance meeting for this matter, and that his Union Representative had to explain to him, during the meeting, that he had been discharged, and therefore would be available, because he would no longer be employed with the Employer.

[36] The Grievor testified that he thought that he would retire with the Employer, having exactly 31 years of service, and being 59, only a few years away from retirement, and that he couldn't believe that he was being discharged for this.

[37] It was disputed what the Grievor said at the June 10, 2022 discharge meaning. The Grievor testified that he accepted that he should not have parked his motorcycle in the Guard House, and sincerely apologized for it. The Employer maintained that the Grievor did not apologize for having parked his motorcycle in the Guard House.

[38] On June 10, 2022 the Union filed the Discharge Grievance against the discharge.

[39] On February 13, 2023, at the arbitration, the Grievor acknowledged that he should not have parked his motorcycle in the Guard House, and that entering the opening to the Guard House could have presented a hazard to a pedestrian, if there had been a pedestrian in the area, and stated that he would not do it again, and apologized for it.

THE EMPLOYER'S SUBMISSIONS

[40] The Employer submitted that the Grievor's act of parking his motorcycle in the Guard House was a serious safety violation that warranted his discharge. The Employer noted that the Grievor drove on the asphalt pathway in front of the opening to the Guard House, and submitted that persons could have been injured by the Grievor doing this.

[41] The Employer submitted that the safety violation was real and serious, even though no injury to anyone actually occurred. The Employer submitted that the case law is clear that a safety violation remains serious, even if no one is injured. For example, the Employer noted that in *Imperial Tobacco Canada Ltd. and BCTW and GM International Union, Local 364T (Paul Lambert Discharge*) (2001, unreported), Arbitrator Lynk stated, at page 10, that "there does not have to be a physical injury or actual harm to establish the seriousness of the incident", and that in *BFI Canada Inc. and TC, Local 362* (2015), 253 L.A.C. (4th) 382, Arbitrator Ponak also stated, at page 387, that "the fact that nothing happened in this case is immaterial".

[42] The Employer submitted that something could have happened, and that it could have resulted in serious injury. For example, the Employer stated that an employee could have been leaving the Guard House, to go back to their car, because they forgot something in their car. The Employer submitted that the Grievor would not have been able to see the employee leaving the Guard House, and could have hit that employee.

[43] Also, the Employer noted that the Grievor was given a final warning on January 14, 2021, when the Employer decided to give him only a second three-day suspension for his Glad Lock safety violation, rather than a discharge. The Employer submitted that in view of this, discharge for this motorcycle parking safety violation is appropriate.

[44] The Employer submitted that at the June 10, 2022 meeting the Grievor did not acknowledge the seriousness of the safety violations in his actions, and did not apologize for them. The Employer submitted this amounts to a serious aggravating factor that further warrants the discharge of the Grievor. In. this regard, the Employer relied upon *BFI Canada. (supra)* in which the employee

was using his cell phone while driving his vehicle. The employee argued that his actions were not unsafe because he was moving very slowly in a very quiet area at the time. However, Arbitrator Ponak found that the employee's discharge was appropriate, partly due to the employee's failure to accept the seriousness of his conduct, stating at pages 387 and 401, that:

> In the grievor's case, attitude was another important factor in the termination. In Mr. Martens' view, the grievor attempted to make excuses or downplay the seriousness of each of the incidents for which he had been disciplined rather than accepting responsibility and correcting his actions.… Third, I am particularly troubled by the grievor's apparent inability to have learned from the incident. He simply could not say, in response to very straightforward question, what he would do differently next time.

[45] The Employer submitted that the Grievor's acknowledgements and apologies at the arbitration were "too little, too late", and instead should have been, but were not, expressed at the June 10, 2022 discharge meeting. In this regard, the Employer relied upon *Sifto Canada Corp. and CEP, Local 16-0 (Glousher)* (2010), 200 L.A.C. (4th) 305 in which Arbitrator Luborsky did not accept statements of remorse and an apology expressed for the first time at the arbitration hearing, stating at page 324 that: "I can have little confidence in the truthfulness of anything the grievor tells me now, which reflects poorly on the likelihood of re-establishing the essential trust that must exist between the grievor and the company in any future relationship".

[46] Also, the Employer noted that in *National Steel Car Limited and USW, Local 7135 (Faiazza Discharge)*, 2012 CanLII 25292 (ON LA) I stated, at para 51, that the factors that an Arbitrator should consider in determining whether it is appropriate for the Arbitrator to substitute a lesser penalty include (paraphrased):

1. The grievor's previous disciplinary record.
2. The seriousness of the culminating incident.
3. Was the grievor open and honest with in the investigation?
4. Did the grievor acknowledge, show remorse and apologize for his misconduct?
5. The likelihood of recurrence.
6. Can the grievor be a productive and trustworthy employee in the future?
7. Have earlier attempts at corrective action been unsuccessful?
8. Was the grievor forthright and truthful at the arbitration hearing?

[47] Taking these factors into consideration, the Employer submitted that I should find that the Grievor was not open and honest at the investigation and the arbitration, has not sincerely acknowledged his misconduct, shown remorse, and apologized for it, and cannot therefore be trusted to be a productive and trustworthy employee in the future. In view of all of this, the Employer submitted that I should not substitute lesser discipline in place of the discharge.

THE UNION'S SUBMISSIONS

[48] First, the Union submitted that the Grievor did not engage in wrongdoing because he was not aware that he was not allowed to park his motorcycle in the Guard House, because there were no signs or rules or warnings stating that doing so was prohibited, and no-one had ever done it before, so the Grievor was not aware that it was not allowed.

[49] In the alternative, the Union submitted that this incident is not a work-related safety violation, because the Grievor's actions were neither "work-related", nor a "safety violation". The Union submitted that this incident was not "work-related", because it did not occur during the Grievor's working hours, and was not part of his employment. Rather, it occurred prior to his work hours, and had nothing to do with his work. As such, the Union submitted that the Grievor's actions in parking his motorcycle cannot be considered to be "work-related".

[50] Similarly, the Union submitted that, even if this incident can be considered to be "work related", this incident is not, in fact, what the Employer normally considers to be a "safety violation", and is therefore not in fact a safety violation. The Union noted that Ms. Knarr testified about how the employees in the plant work with very sharp knives, and sharp saws, and other sharp cutting tools, and operate heavy equipment, such as forklifts, in a relatively fast paced process, and as such safety must be taken very seriously. The Union acknowledged the Employer's need to maintain safety for such work, and where there are such "safety violations" regarding that work, the Union acknowledged the need to have penalties for such "safety violations". However, the Union submitted that the Grievor's act of parking his motorcycle in the Guard House is not analogous to such a "safety violation". The Union noted that the Grievor's actions had nothing to do with mis-using sharp cutting implements, or mis-using heavy equipment, or in any other way

performing his actual work in an unsafe manner. As such, the Union submitted that Grievor's actions cannot be considered to be such a "safety violation", and should not be subject to any strict discipline that the Employer imposes for true "safety violations".

[51] The Union submitted that the Employer characterized the Grievor's actions as a safety violation only so that the Employer could use its strict "disciplinary stream" to discharge the Grievor, and that this fabricated and improper characterization and use of the disciplinary stream has resulted in a highly unfair and excessive discharge. The Union noted that the Employer had already prepared, prior to the June 10, 2022 discharge meeting, its Discipline Notice for the Grievor, that states that the Grievor's actions amounted to a safety violation, and therefore warranted discharge. The Union submitted that the Employer had already decided, in advance of the June 10, 2022 meeting, that it wanted to discharge the Grievor, and that it characterized the Grievor's actions as being a safety violation so that it could discharge the Grievor. The Union submitted that the fact that the meeting took less than 30 minutes in total supports this conclusion.

[52] The Union submitted that this incident should have instead been considered to be a normal disciplinary event, and that regular discipline should have been imposed. The Union noted that there were no signs stating that motorcycles cannot be parked within the Guard House, and that the Grievor drove his motorcycle slowly and carefully in the parking lot and into the opening to the Guard House. The Union noted that even though the Grievor did ride onto a pathway that is used by pedestrians to enter the opening to the Guard House, he did so for only a few meters, so that he could enter the Guard House, and there were no pedestrians in the area at 5:43 AM. The Union submitted that there was no real risk to anyone, no safety violation, and no lost production.

[53] Also, the Union noted that the Disciplinary Event Summary that was attached to the Discipline Notice included the March 25, 2020 three-day suspension for a safety violation as being on the Grievor's disciplinary record. The Union noted that pursuant to Article 4.06 that suspension should have been removed from the Grievor's record almost 9 months earlier, on September 25, 2021. The Union stated that it does not accept the Employer's explanation regarding this, and instead submitted that the Employer wrongly relied upon this March 25, 2020 three-day suspension in deciding to impose the discharge. The Union submitted that this renders the discharge invalid.

[54] The Union stated that it is aware of the Employer's "disciplinary stream", but submitted that I am not bound to follow the disciplinary stream, because it is only a practice of the Employer, that is not included in the Collective Agreement, or in any written policy. Also, the Union noted that the disciplinary stream is unacceptably rigid, in that it does not take into consideration all of the other factors that an Arbitrator should consider in determining what discipline is appropriate. Accordingly, the Union submitted that the disciplinary stream is only one fact, among the many other facts, that I can consider in determining the appropriate discipline.

[55] Similarly, the Union submitted that I am also not bound to follow the final warning that the Employer gave the Grievor on January 14, 2021 with the three-day suspension for the Glad Lock incident. Again, the Employer submitted that this is just another fact, among the many other facts, that I can consider in determining what discipline is appropriate.

[56] The Union disputed the Employer's position that at the June 10, 2022 meeting the Grievor did not acknowledge that his actions were improper, or express any remorse or apology for them. Rather, the Union noted that the Grievor testified that he did express such an acknowledgment, remorse and apology at the June 10, 2022 meeting.

[57] Also, the Union noted that at the arbitration the Grievor acknowledged that he should not have parked his motorcycle in the Guard House, that doing so was "a bad decision" and presented a possible hazard to a pedestrian, apologized for it, and said that he would not do it again.

[58] The Union submitted that the Grievor's acknowledgements, remorse and apologies, at both the June 10, 2022 meeting and at the arbitration, are sincere, and are mitigating factors that I can have confidence in and rely upon in exercising my discretion to impose a lesser penalty.

[59] Finally, and importantly, the Union noted that the Grievor had 31 years of service when he was discharged, on the 31st anniversary of his date of hire, and when he was 59 years of age, and that the discharge has created a special economic hardship for the Grievor in the light of his

circumstances. In view of all of this, the Union submitted that the discharge is highly unfair and excessive discipline, and should be reduced to no discipline at all, or to greatly reduced discipline.

[60] In support of its submissions, the Union relied upon: *F.H. v. McDougall*, 2008 SCC 53 (CanLII); *Saskatchewan Assn. of Health Organizations v. CUPE, Local 3967*, 2011 CarswellSask 81; *William Scott & Co. v. CFAW, Local P-162*, 1976 CarswellBC 518; *Canadian Broadcasting Corporation v. CUPE*, 1979 CanLII 4015 (CA LA); *The Steel Equipment Co. v. USW, Local 3257*, 1964 CanLII 984; *Canadian Waste Services Inc. v. Teamsters, Local 419*, 2005 CanLII 78292 (ON LA); *Invista (Canada) Company, Kingston Site v. Kingston Independent Nylon Workers Union*, 2019 CanLII 104636, and; *Stericycle ULC v Teamsters Local 847*, 2023 CanLII 190.

[61] The *F.H. v. McDougall* case and the *Saskatchewan Assn. of Health Organizations* case address the issues of who bears the onus of proof and what that onus of proof is. This is not disputed in this case. In *Saskatchewan Assn. of Health Organizations* the board of arbitration stated that:

> 60. We do not agree that the onus shifts to the Union to support a penalty lesser than the discipline imposed. In our view, the Employer, in order to satisfy its onus that discharge is justified in the circumstances, must also prove on a balance of probabilities there are no facts or insufficient facts to support the substitution of a lesser penalty. To put this another way, the Employer's onus to justify discharge subsumes by inference that the Employer must demonstrate the factors relied upon to support the penalty imposed, which mitigate against a lesser penalty. The Employer bears the onus to prove those facts necessary to show the discipline levied was just and reasonable. The onus does not shift to the Union to prove those facts that show a lesser penalty is just and reasonable and should be substituted.

[62] *William Scott*, *Canadian Broadcasting Corporation*, and *Steel Equipment* all address the factors that an Arbitrator should consider in determining what discipline is appropriate. Similar factors are also discussed in the *National Steel Car* case, quoted above, that was relied upon by the Employer. There is no significant dispute between the parties that those factors apply. However, the Parties disagree with regard to how those factors should be assessed on the facts of this case, and what effect they should have upon the discharge that was imposed. In *William Scott* the board of arbitration cited the following 10 mitigating factors (paraphrased), and states that they are not "exhaustive or conclusive", and that "every case must be determined on its own merits":

1. The previous good record of the Grievor.
2. The long service of the Grievor.
3. Whether the offence was an isolated incident.
4. Provocation.
5. Whether the act was a momentary aberration, committed on the spur of the moment, due to strong emotional impulses, or whether it was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent, e.g. the grievor misunderstood the order.
9. The seriousness of the offence in terms of company policy and obligations.
10. The grievor readily apologized and settled the matter, with remorse.

[63] Finally, in *Canadian Waste Services* Arbitrator Harris substituted a five-day suspension for a discharge, for having failed to wear seatbelts, without addressing whether the grievor was also entitled to any back pay. And in both *Invista* and *Stericycle* the grievors had engaged in a safety violation, and the Arbitrators reinstated the grievors, but with no back pay. In *Invista,* Arbitrator Silverman found that the grievor's length of service, his lack of disciplinary record, and his genuine understanding of and remorse over the incident, were sufficient mitigating factors to warrant the reinstatement of the grievor, but without any back pay.

ANALYSIS AND RULINGS

[64] For the reasons that follow, I find that the Employer did have grounds to discipline the Grievor for parking his motorcycle in the Guard House. However, I also find that the penalty imposed of discharge is excessive, and in its place I substitute a five-day disciplinary suspension, and that the Grievor will be reinstated to employment, as soon as possible, without loss of seniority or service, but without any back pay for lost wages.

[65] As the cases cited above state, there are many factors that must be considered in determining whether the discipline imposed by the Employer is appropriate. Some of these factors support that the discharge could be considered to be appropriate. Other factors support that less

severe discipline is appropriate. In this case, the factors that support that the discharge could be considered to be appropriate are as follows.

[66] On June 6, 2022, being the day that the Grievor parked his motorcycle in the Guard House, the Grievor had, on his disciplinary record, a three-day suspension dated January 14, 2021 for his safety violation of having entered a trailer when he had not applied a Glad Lock to it.

[67] Also, he had been told that this January 14, 2021 three-day suspension as well served as a final warning. This was so because on January 14, 2021 the Grievor also had, on his disciplinary record, another three-day suspension dated March 25, 2020 for another safety violation. As such, pursuant to the disciplinary stream, the Glad Lock incident was his second safety violation, and this would normally have resulted in his discharge. However, rather than discharge the Grievor for the Glad Lock second safety violation, the Employer decided to make an exception, and only gave the Grievor, on January 14, 2021, a second three-day suspension for the Glad Lock safety violation. However, in view of that, the Employer told the Grievor that the January 14, 2021 second three-day suspension was also a final warning, and that should he engage in another safety violation, he would be discharged.

[68] I do not accept the Union's submission that the discharge is totally invalid because the Employer considered the March 25, 2020 three-day suspension, when it should have been sun-setted on September 25, 2021 pursuant to Article 4.06. If the Employer had considered discipline that it should not have considered, because it had already been sun-setted pursuant to Article 4.06, that would be a significant issue. However, I do not find that that is what happened in this case. Rather, I accept the Employer's explanation that it included the March 25, 2020 three-day suspension on the disciplinary record only because it explained why the final warning was given with the January 14, 2021 three-day suspension. Accordingly, including the March 25, 2020 three-day suspension on the Grievor's disciplinary record that was attached to the June 10, 2022 discharge Disciplinary Notice does not render the June 10, 2022 discharge invalid.

[69] The January 14, 2021 second three-day suspension, and the final warning, was the very serious disciplinary record that the Grievor had on June 6, 2022, when he chose to park his

motorcycle in the Guard House. In view of this very serious disciplinary record, one would expect the Grievor to be very careful, and to observe all of the Employer's rules, and to not make any safety or non-safety violations. However, the Grievor still decided to park his motorcycle in the Guard House, rather than parking it in one of the parking spots outside of the Guard House designated for motorcycles. The Grievor readily admitted at the arbitration that he now understands and accepts that he should not have parked his motorcycle there, and that he made a "bad decision" in doing so.

[70] The Grievor's act of parking his motorcycle in the Guard House was a safety violation. Even though the Grievor was driving his motorcycle carefully when he crossed the asphalt pathway and entered the Guard House, there remained the possibility that, for example, someone could have been unexpectedly leaving the Guard House, and that the Grievor could have not seen and collided with that person. Accordingly, this incident was another safety violation. All of the above are facts that support that the discharge could be considered to be appropriate.

[71] However, there are also several facts that support that lesser discipline is more appropriate. The first is that it was not perfectly clear that the Grievor was not allowed to park his motorcycle in the Guard House. There were no signs or rules or warnings stating that parking a motorcycle in the Guard House was prohibited. No-one, including the Grievor, had ever done it before. So the issue had never come up. This was a first and an isolated incident. All this supports a diminished or a lack of intent to commit an act of misconduct. Consistent with this, the Grievor testified that he was "dumbfounded" that he was being discharged for it at the June 14, 2022 discharge meeting. However, and importantly, the Grievor also testified that he now understands that he should not have parked his motorcycle there.

[72] Second, there is a safety aspect to the Grievor's act of parking his motorcycle in the Guard House. However, I do not find that the Grievor's conduct is fully analogous to the type of safety violations that the Employer referred to at the arbitration in connection with its disciplinary stream. I do not find that the Grievor's actions are fully analogous to the safety violations pertaining to driving a forklift recklessly in the plant, or to using very sharp knives, saws or other sharp cutting implements carelessly, thus creating a risk of harm to the employee, or to other employees.

Considering all of the facts regarding the Grievor's actions, I find that the Grievor's actions amounted to a lesser safety violation than the other safety violations discussed above.

[73] Third, the Employer's disciplinary stream, while important, is not binding on me. It is not included in the Collective Agreement, or in any written policy. Rather, it is only a practice of the Employer to discharge an employee upon their second safety violation. The Union acknowledged that it is aware of this practice, but submitted that the disciplinary stream is not binding on me, for the reasons stated above, and also because it is too rigid and inflexible, in that it fails to consider any of the other factors that Arbitrators must consider in determining what discipline is appropriate, under all of the circumstances. I find that although the disciplinary stream serves the useful purpose of warning the employees that they may or will be discharged for a second safety violation, I still have jurisdiction to substitute a lesser discipline pursuant to S. 48(17) of the *Labour Relations Act, 1995*, if it is just and reasonable, and therefore appropriate, to do so.

[74] Fourth, the verbal final warning that the Grievor was given with the January 14, 2021 three-day suspension is also not binding on me. It is a fact that I have considered above in assessing the seriousness of the Grievor's disciplinary record, and in assessing whether the discharge is appropriate. However, it is only one fact, and all of the other facts must also be considered.

[75] Fifth, I do not accept the Employer's position that the Grievor, at both the June 10, 2022 discharge meeting, and at the arbitration, failed to acknowledge that his actions were improper, and failed to show any remorse for them, or apologize for them. The Union disagrees that the Grievor failed to do this at the June 10, 2022 discharge meeting, and it is difficult to resolve this factual dispute between the Parties. However, it is clear that at the arbitration the Grievor did acknowledge that his actions were improper, did express remorse for them, did apologize for them, and stated that he would not do such a thing again. I found the Grievor's testimony and sentiments at the arbitration to be sincere, and to serve as a mitigating factor.

[76] Sixth, the Grievor had 31 years of service, and was 59 years old, when he was discharged. The Grievor testified that he has experienced difficulties in obtaining other work since his discharge, and that the work that he was able to obtain, for a limited period, was at significantly

less pay, and ultimately proved to be too physically demanding, and he re-injured himself doing the work, and the job came to an end. It is likely that the Grievor will find it very difficult to obtain suitable or comparable replacement work in the future. As such, the discharge has created a special economic hardship for the Grievor, in the light of his particular circumstances.

[77] For all of the reasons discussed above, I find that the discharge imposed by the Employer is excessive. In its place I substitute a five-day disciplinary suspension, with the Grievor being reinstated to employment as soon as possible, without loss of seniority or service, but without any back pay for lost wages. I remain seized with regard to the interpretation, implementation and enforcement of this Award.

Signed at Toronto on March 21, 2023.

Peter Chauvin, Arbitrator