

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Canada Council of Teamsters and its Locals 419 and 1999 (the union)

-and-

Servisair Inc.

Regarding the grievances of Adrian Mapp (the “grievor”) dated January 1, 2013 and June 28, 2013

Before: Brian McLean

Appearances

For the Union: Mike Biliski and others

For the Employer: Donald Jarvis and others

Dates of Hearings: November 25, 2014, May 27, 2015, December 15, 2015, August 23, 2016 and September 1, 2016

Date of Decision: November 11, 2016

1. I have before me two grievances. The first grievance concerns a five day disciplinary suspension issued against the grievor on or about January 1, 2013 regarding an alleged improper absence from his workstation and disrespectful and unprofessional conduct towards a supervisor. The second grievance was filed with respect to the grievor's discharge from employment on or about June 28, 2013. The grievor's employment was terminated for alleged refusal to follow instructions, improper use of company property, and disrespectful and unprofessional behaviour.

2. The company's business is the loading, offloading and servicing of commercial aircraft at Pearson airport. The grievor was employed as a ramp attendant. His job was primarily the loading and offloading of baggage and cargo on and off aircraft. In his job he worked as part of a crew which was guided by a lead hand. He was represented in his employment relations with the employer by the union.

3. An underlying element of this case was the fact that Servisair had purchased a competitor, Handlex, in or about mid 2012 (hereafter referred to as the "merger"). The grievor worked at Handlex for several years prior to the merger and then became a Servisair employee after the merger. It is clear to me that the amalgamation of the Servisair and Handlex operations did not go entirely smoothly on the ground. It would seem that Servisair and Handlex had different work cultures; as a result following the merger there was

also some sense among some former Handlex employees that they were not being treated fairly in comparison to their Servisair counterparts. Whether or not this was true, the feelings that it was true were real. I note that Servisair has itself since been purchased by another competitor, Swissport, but this has no bearing on the matter before me.

The Five Day Suspension Grievance

4. The five day suspension was meted out for an incident which occurred on December 31, 2012. The parties each called evidence regarding the incident, but in the end many of the facts were not in dispute.
5. The grievor and his crew were assigned to a KLM “turnaround” for the entire shift. That meant the grievor would first unload the plane when it arrived in Toronto and then load the plane for its return trip to Amsterdam. Due to the size and type of the aircraft, baggage for the flight was first loaded into containers and then the containers were loaded into the aircraft.
6. The grievor and his crew offloaded the aircraft without issue and then returned to the crew room (the Servisair area where the company has its ground operations and employees punch in and out, receive

work assignments and take breaks) for a break. There would be some period of time (perhaps as much as three hours) until the aircraft had to be loaded.

7. Following the break the grievor's crew returned to the tarmac and loaded the aircraft for its return flight which was scheduled to depart at around 6:35 pm. At about 6pm the ramp supervisor (the supervisor who oversees all the loading and unloading operations) called the crew room and spoke with Richmond Arhin, a Servisair duty manager / resource coordinator, who was located in the office near the crew room, and asked him if he had seen the grievor or reassigned him. Mr. Arhin answered that he had not seen the grievor and had not reassigned him. Mr. Arhin suggested that the ramp supervisor check with the lead hand of the grievor's crew to see if he knew where the grievor was; he did so and called Mr. Arhin back to let him know that the lead hand did not have any information.

8. Mr. Arhin told the supervisor to look around the ramp and that he would look around the crew room. This was well before the grievor's shift was scheduled to end. When Mr. Arhin checked the crew room he saw the grievor, with his jacket off, checking his cell phone which was plugged into a wall socket. Mr. Arhin said: "Mapp-your supervisor is looking for you on the ramp". It is at this point where there is a serious divergence in the parties' positions about what happened.

9. Mr. Arhin testified the grievor went into a “violent rage”. He testified that the grievor’s every second word was a curse word and that he had never been spoken to in that way in his life. The context of what the grievor was saying were complaints about the fact that his break had been interrupted and that he couldn’t even charge his phone. According to Mr. Arhin, this conversation took place in front of several other employees (as many as ten) and was loud. The tirade lasted 30-45 seconds.

10. Mr. Arhin testified that he replied “ Mapp are you upset with me for telling you to do your job?”. Mr. Mapp kept cursing. Mr. Arhin then told Mr. Mapp that he did not want him to go to the ramp, but instead wanted to speak with him in his office. He told the grievor to stay, that he was going to get a union steward. According to Mr. Arhin, the grievor put on his jacket and left the crew room and went outside, cursing the whole way. After the grievor left, Mr. Arhin went to get a steward, Ahmen Kwjaah.

11. Following the grievor’s outburst, a couple of the employees in the crew room went to speak to Mr. Arhin. They told him “don’t take it to heart. He did not mean it. That is how he is and that’s how he talks to people”.

12. Mr. Arhin testified that the grievor was entitled to punch out at 7:25 for a shift that ended at 7:30. The grievor returned to the crew room at about 7:15 and went to the punch-out clock at about 7:20. Mr. Arhin told the grievor "I need to speak to you in the office. Your steward is en route and we are going to talk about what happened earlier". The grievor went to the office, but at 7:25 said "I am off shift- I have to go". Mr. Arhin said "I need you to stay- we need to talk about this". The grievor replied "No- I have to go- talk to my union". Mr. Arhin replied- "no we have to do this". The grievor then punched out and left.

13. The next day was Mr. Arhin's day off, but he came to work to meet with the grievor and the union. At the meeting they talked about what happened. Mr. Arhin testified the grievor did not deny that he was swearing. In fact the grievor took the position that because he was swearing in general and not at any particular individual he had not engaged in culpable conduct. He told Mr. Arhin: "If I said 'fuck you Richmond' then you would have me". According to Mr. Arhin, the grievor was not remorseful and did not explain his behaviour including why he had left in the first instance when Mr. Arhin told him he wanted a meeting.

14. Mr. Arhin testified that in the past the two men had a number of discussions about the grievor being late for flights. These discussions were not recorded as discipline because, Mr. Arhin testified, he wanted to speak with the grievor and not issue discipline

because of the new relationship following the merger (Mr. Arhin was with Servisair prior to the merger). One of these discussions occurred when Mr. Arhin asked the grievor to go for a ride with him in a truck so that they could have a “heart to heart” talk about the grievor improving his attitude. Mr. Arhin testified that he took this action because he overheard the grievor talking in the crew room about how the former Handlex employees were being treated unfairly. Mr. Arhin said that he referred the grievor to the company’s code of conduct which he was required to follow.

15. Under cross examination it was put to Mr. Arhin that the grievor would testify that the two men had spoken prior to December 31 one or two times about the grievor getting to his flight on time. Mr. Arhin agreed that was about right. It was also put to the grievor that the grievor asked for the ride in the truck on the day the two had a discussion about the grievor’s attitude. Mr. Arhin denied that the grievor had asked for the ride. It was also put to Mr. Arhin that the grievor would deny in his evidence that there was any reference to the company’s code of conduct. Mr. Arhin acknowledged that he might not have specifically referenced the code of conduct but made general comments that the company has rules and the grievor had to follow them.

16. Mr. Arhin was also told that the grievor’s testimony would be that the grievor had permission to leave the KLM flight because it

was finished and therefore he was properly in the crew room. Mr. Arhin had no information about that but noted that the grievor had not raised that when he met with him and his union steward on January 1. Mr. Arhin's assertion was not contradicted in later evidence.

17. Mr. Arhin was also challenged on the fact that there were ten employees in the crew room when the grievor responded to the Mr. Arhin's request that the grievor return to the ramp. It was suggested to him that there were only two. Mr. Arhin did not agree. It was also suggested to him that the loud discussion took place in the hallway and that the only time he swore was in the hallway when he said "whenever something happens they fucking call me". Mr. Arhin said that was not the truth and that the grievor swore a number of times.

18. Under cross examination Mr. Arhin revealed that when he decided that a five day suspension was appropriate discipline he did not look at the grievor's employee file to see if the grievor had a previous disciplinary record. In other words, he viewed the five day suspension as appropriate on its own for the grievor's conduct and not as a result of progressive discipline.

19. Michael Currie also gave evidence for the employer. He was the supervisor that contacted Mr. Arhin to try to locate the grievor on December 31. He testified that normally a crew is allowed to leave

the tarmac once the aircraft has been loaded and it has been pushed back and the gate cleaned up. It is normal for two ramp attendants to guide the aircraft out of the gate using hand held illuminated “wands” and for the other crew members to tidy up the gate while that is going on.

20. The crew would normally start loading the aircraft on this flight at about 5:15, just over an hour before the aircraft’s scheduled departure time. The grievor was the loader operator on the flight in question. The grievor left the gate prior to the aircraft’s departure and no other member of the crew did so. Mr. Currie did not give permission for him to leave and was not aware that he had left.
21. After the grievor left the flight, Mr. Currie was told that a bag had to be removed from the airplane. This involved removing the appropriate baggage container from the aircraft and locating the specific bag. Since the grievor was the loader operator on that crew Mr. Currie wanted him to take the container out of the aircraft using his loader. It was getting close to the flight’s departure time and they needed “all hands on deck”, since other crew members were taking care of last minute additions to the cargo hold such as baby strollers.
22. Once the bag pull call came in, Mr. Currie did a quick look around for the grievor, did not find him, and then called Mr. Arhin in the office. The call occurred around 6:05 or 6:10. Mr. Arhin called

back and said the grievor was not coming out and he was sending someone else out. According to Mr. Currie, the grievor never returned to the aircraft.

23. Under cross examination Mr. Currie acknowledged that they typically had two loader operators on a crew, but not always, as a result of manpower challenges. He was also asked whether crew members sometimes were given permission to take a break once the aircraft was secure but before the aircraft had pushed back. Mr. Currie acknowledged that sometimes they were granted permission but it was not standard practice. Later in cross examination, he testified that it had been normal practice for a loader operator to leave early to go back to the office once the loading was done, but it was frowned upon. Nevertheless, it had been a habit for some loader operators and that it was happening so often it was becoming hard to control. He denied that he had given permission for the grievor to leave.

24. In this case, Mr. Currie testified, the aircraft was not secure since the rear baggage hold door (which is where they loaded last minute luggage, strollers etc), was not closed.

25. Mr. Currie was also asked whether he had any further contact with the grievor that night. Mr. Currie denied that he did. It was put to him that the grievor would testify that he went back to the flight but

that Mr. Currie waved him off. Mr. Currie testified: “it did not happen”.

26. In examination in chief, the grievor testified that he had asked Mr. Arhin for the ride in which Mr. Arhin claimed they had their earlier discussion about the grievor’s attitude. Mr. Arhin told him that he did not know he was a belligerent kind of guy. The grievor’s evidence was that Mr. Arhin told him that if he did not like working at Servisair he should find himself another job. The grievor also testified that, apart from this one occasion, Mr. Arhin had never spoken to him previously. He denied that Mr. Arhin had ever spoken to him about getting to flights on time, as Mr. Arhin had testified to (I note that this evidence was generated when Mr. Arhin agreed with a statement put to him by union counsel).

27. The grievor testified that the unloading and loading of the KLM flight on New Year’s Eve had gone pretty smoothly. On his evidence the flight was loaded 15 minutes before departure, which was a bit early in his experience. He was then waiting for other crew members to bring the strollers down. All the strollers were put on and they were waiting for one passenger to board- he knew this because Mr. Currie told him (a proposition that had not been put to Mr. Currie in cross examination). He then told Mr. Currie his section was done and he closed the aircraft’s door, which was the aft door, and checked to see if it was secured. He then told Mr. Currie that he was taking the loader back to the gate near where the crew room was

located and Mr. Currie said ok. The front loader operator, who was a Servisair employee before the merger, also closed his door and left. It took him about five to ten minutes to get back to the crew room.

28. He then parked the loader, walked to the crew room, took off his jacket, plugged his phone in and started talking to fellow employees Sean Joseph and Monte Morgan. Nobody else was in the crew room.

29. Mr. Arhin then came in the crew room and said “Mapp- they are looking for you on the flight”. The grievor said “why are they looking for me?” Mr. Arhin replied: “there is a bag pull and they need you outside”. He then told Mr. Joseph to watch his phone, he got his coat and went to the hallway. Once there he said to himself, but out loud: “I don’t believe they don’t know where I was”. Mr. Arhin opened the door to the hallway and said “what did you say?” The grievor said: “I said nothing”. Mr. Arhin replied: “I have to see you in the office”. The grievor replied “for what?” According to the grievor, Mr. Arhin gave no answer, so the grievor left.

30. The grievor was asked about Mr. Arhin’s evidence that he told the grievor that he wanted him to remain and not go to the flight. The grievor denied this occurred and said the suggestion was not logical because he was the only qualified loader operator on the flight. I note that this evidence was inconsistent with the thread of some of

the questions asked of Mr. Arhin in cross examination where it was suggested to him that there was another loader operator who loaded the front hold. The grievor said that the reason Mr. Currie called him back to the gate was because he was the only qualified employee and if Mr. Currie had another qualified loader operator available, Mr. Currie would never have insisted that the grievor return. He testified that Mr. Arhin's testimony that he went on a tirade was "fabricated". On his evidence, the bag pull never happened because he did not operate the machine to open the plane up and take the container off. It was unclear why someone else could not have done the bag pull.

31. The grievor then went outside of the restricted zone to try to find a union steward at Tim Horton's where he believed he might be having a coffee because he knew that Mr. Arhin wanted to meet him. He then went outside and had a smoke and waited for the time to punch out. He went back to the crew room to punch out and was told that Mr. Arhin wanted to see him in the office. The grievor refused to go, on his testimony, because he had no union steward. At this point, according to the grievor, Mr. Arhin told him that he was off tomorrow but he would come in and have the meeting with him "because that is how we do things around here". The grievor then punched out and left and the Mr. Arhin said nothing else to him.

32. The next day he met with Mr. Arhin and a union steward. At the meeting Mr. Arhin told the steward that he swore at him. The grievor told the steward that he had two witnesses who saw the whole

incident who would say he did not swear at Mr. Arhin. The grievor asked Mr. Arhin if he could go get the two witnesses but Mr. Arhin denied his request. Mr. Arhin then gave him a letter suspending him for five days. The union steward did not testify.

33. The grievor was asked if the letter which had been entered into evidence as an exhibit without issue was the letter of suspension. The grievor denied that it was, intimating the letter put into evidence was fraudulent. Counsel for the employer objected on the basis that the suggestion that the letter was a fraud had never been put to any company witness. The union did not oppose the objection.

34. In cross examination, the grievor claimed for the first time that there was a double crew working the KLM flight because certain co-workers made too many mistakes and there were a lot of strollers. This testimony was inconsistent with his explanation about why Mr. Currie wanted him to go back (he was the only loader operator), was inconsistent with what he says he told Mr. Arhin (that there were four other guys- why did they pick him) and was raised for the first time in his cross examination.

35. In cross examination the Grievor also confirmed that he had told Mr. Currie that he was leaving the flight. The Grievor denied he was frustrated Mr. Arhin told him to go to work. He acknowledged

that there was a lengthy gap between the offload and the load of the KLM flight on December 31. He denied ever using the word “fuck” during his exchange with Mr. Arhin and denied going into a loud tirade or outburst.

36. He also denied that when Mr. Arhin asked him to stay for a meeting he stormed off. He confirmed that he went to the gate to do the flight and Mr. Currie gave him a signal to indicate that he was no longer needed because the bag pull had been resolved.
37. Further, in cross examination, he acknowledged that when he came back to the crew room Mr. Arhin asked to meet with him in the office and that he did not go because he had no union steward. He believed that he had the right to refuse because he had no steward present, although he did not suggest to Mr. Arhin that was why he was not meeting. He then punched out and left.
38. The grievor acknowledged that he met Mr. Arhin the next day with his union steward but claimed to have “no idea” why Mr. Arhin wished to meet with him. The union steward was not called as a witness to verify this rather improbable claim. He claimed that during the meeting he told Mr. Arhin that he had Mr. Currie’s permission to leave.

39. In cross examination the grievor improbably testified that he could not remember if he had a 1.5 years break in service during 2007-2009 and claimed not to remember why he was not employed during that period. He also took the position that each of the employer witnesses were not just mistaken or were misremembering, but lied under oath and fabricated their evidence.

40. The grievor engaged in a lengthy debate with employer counsel about whether he was expected to work while at work. In addition, his answer with respect to many questions was not yes or no, but “they have no proof” or “there is no document”. He nitpicked over obvious evidence like whether 6pm was a busy time for a flight that was scheduled to leave at 6:35. When asked if 6:00 was a busy time, rather than answering the question, he answered “5:00 is busy too”.

41. He claimed the first time he ever spoke to Mr. Arhin was when he asked him for a ride (and that was because he was the only supervisor available to give him a ride) but the union in cross examination of Mr. Arhin said the grievor’s evidence would be that he had spoken to him a couple of times.

42. A coworker of the grievor’s, Mr. Morgan, was called to testify by the union. In examination in chief he testified that he was present during the incident between the grievor and Mr. Arhin that is at the

heart of the five day suspension grievance. He confirmed that Mr. Arhin came into the crew room and told the grievor that he had to go back to his flight. In response, the grievor complained about the fact that he was asked to go back when there were four or five other employees on the flight - he thought it was unfair. Mr. Arhin then told the grievor "go back to the flight or there will be consequences" and the grievor repeated that it was unfair. They went "back and forth" like this and they ended up in the hallway. They started shouting at each other; then the grievor went back to the flight. Mr. Morgan knew the grievor went back to the flight because he was aware from his radio what was going on. According to Mr. Morgan he did not hear any swearing and that the grievor did not swear at Mr. Arhin.

43. According to Mr. Morgan, after the grievor left for his flight, Mr. Arhin then came back to the crew room. At that time Mr. Morgan and Mr. Joseph intervened with Mr. Arhin on the grievor's behalf. They told Mr. Arhin that it "was nothing personal" and that the grievor was just frustrated because they only called back one guy. Mr. Arhin did not respond.

44. Mr. Morgan also gave general testimony about how employees dealt with supervisors in this workplace. He said that employees knew what supervisors would tolerate in terms of attitude and language. If you knew the supervisor you knew what you could get

away with, but if you were not familiar with the supervisor, then you had to “know your place”. In other words, he said, “if you don’t know the supervisor you have to be careful”. There was no suggestion that Mr. Arhin was a supervisor who they knew to be lenient with coarse language or who accepted “push back” by employees.

45. Mr. Morgan claimed not to be a friend of the grievor. He had the grievor’s telephone number but only to let him know that his flight was ready to be worked if he was not in the crew room.

46. Under cross examination, Mr. Morgan claimed that the grievor was no more his friend than anyone else he worked with. He hung out with everyone and played dominos with everyone who played dominos.

47. He was asked about whether, following the merger, Servisair had told employees that it did not want them to drive tractors following their shift. Mr. Morgan said that everyone did it but that he was aware there were notices on the bulletin board in the crew room about the issue. He did not recall the issue being raised at a crew meeting. He was not sure the date on which the notices were put up.

48. He also acknowledged that he could not remember whether the grievor actually went to his flight following the shouting match although he resisted the obvious point that he actually had no idea whether the grievor went to his flight but simply assumed that he had.

49. In cross examination, Mr. Morgan also recalled Mr. Arhin saying “that was no way for him to be talking to me” which is what caused him and Mr. Joseph to intervene on the grievor’s behalf. He said there were about 20 people in the crew room at the time and that other employees were talking about the incident. He claimed that people were talking about the incident not because of the shouting match but only because Mr. Arhin said that he was going to come in on his day off to deal with the grievor.

Decision: Five Day Suspension Grievance

50. Much of the evidence and argument before me concerned whether the grievor swore in his conversation with Mr. Arhin. I do not find the resolution of that issue to be a significant one in determining whether the employer had cause to discipline the grievor and whether the five day suspension imposed was appropriate. That is because, even on the union’s evidence, I am satisfied the employer had grounds to

discipline the grievor and that the five day suspension imposed was appropriate in the circumstances.

51. There were a number of issues with the evidence given by Mr. Morgan. It became clear during his cross examination that he was there on Mr. Mapp's behalf and not to give evidence in a clear and forthright manner. Nevertheless, I accept his testimony that the grievor's response to Mr. Arhin's request that he return to work (approximately 1.5 hours before his shift was to end) was to engage in a heated, loud exchange with Mr. Arhin which started in the crew room and ended in the hallway. I also accept his evidence that this took place in front of at least ten other employees (and not two as the grievor claimed). On these points, at least, I believe his evidence was honest.

52. I also find it likely that there was swearing involved in this exchange (as the union initially conceded in its examination of company witnesses) but, whether or not there was such swearing, it was not directed at Mr. Arhin. In other words, the culpability of the grievor's conduct was not that he swore, but that he effectively resisted, through his rather severe outburst, the legitimate management direction that he return to his flight. The fact that there was an outburst of some severity is demonstrated by the undisputed evidence (given by both Mr. Morgan and Mr. Arhin) that Mr. Morgan and Mr. Joseph tried to placate Mr. Arhin by explaining the grievor's behaviour. It is clear they spoke to Mr. Arhin because they believed

the grievor had behaved improperly, that Mr. Arhin was upset about the way he had been spoken to, and that it might result in discipline against the grievor.

53. The employer relies on *Volvo Canada Ltd. v. C.A.W., Local 720* ([1990]12 L.A.C. (4th) 129 (Outhouse)) at para 18 where the arbitrator had before him similar facts to those before me and stated the following in the conclusion of a passage I agree with:

Rather he was making a point and the point was that he was most unhappy with the work assignment he had just been handed and was not about to take it lying down, so to speak. In effect, he was venting his frustration at Mr. Breakspear and he did so openly in the presence of other employees. Such flouting of authority even though not accompanied by direct obedience of an order, is impermissible and, if left unpunished, could easily undermine management's right to direct the work force. Accordingly, I am satisfied on the evidence before me that the grievor's conduct on the occasion in question was blameworthy and that the employer had proper and sufficient cause to impose some discipline in relation thereto.

54. In addition, even on the grievor's own testimony, he was disobedient and likely refused a request to meet with Mr. Arhin immediately following their interaction on that day. The grievor acknowledged that Mr. Arhin asked to meet him at that time and the grievor asked him why. Even accepting the grievor's unlikely evidence that Mr. Arhin gave no response, in these circumstances, it was the grievor's obligation to comply and not question.

55. Finally, there is the final incident where the grievor refused to meet with Mr. Arhin near the end of the shift. His refusal to meet also constitutes insubordination. Although he may have had a right to union representation during the meeting (under the collective agreement that right may or may not have been dependent on whether the meeting was disciplinary, investigatory or simply cautionary), he had no right to simply refuse to attend the meeting and leave the workplace because there was no steward immediately on hand. If his staying resulted in overtime owing or some other violation of the collective agreement that would have properly been the subject of a request for payment or a grievance but was not proper grounds for him to leave in the face of Mr. Arhin's instruction that he meet.

56. I turn now to the appropriateness of the penalty imposed by the company. There is no dispute that the grievor had on his disciplinary record a written warning for an unsubstantiated absence and a three day suspension for improper absence from his workstation, a refusal to follow instructions and disrespectful and unprofessional behaviour towards, among others, a supervisor . The suspension had been issued in March of 2012 and the disciplinary letter warned that "any future incidents of a similar nature will result in progressive disciplinary action up to and including termination". Interestingly, it appears that Mr. Arhin was not aware of the three day suspension when he decided to impose a five day suspension; he believed that the grievor's misconduct standing alone justified a five day penalty.

57. Given the principles of progressive discipline I am satisfied that the penalty imposed by the company was appropriate. The grievor refused to follow instruction and engaged in disrespectful and unprofessional behaviour towards a supervisor in front of other employees. In these circumstances, as Mr. Arhin believed, it is possible that a five day suspension was warranted on its own, but it is clearly appropriate given that he had a three day suspension for similar behaviour on file.

58. As noted, given these conclusions, I need not determine whether the grievor was away from his workstation improperly or engaged in swearing.

The Discharge Grievance

59. The employer terminated the grievor's employment as a result of two incidents. The first incident occurred on or about June 9, 2013 and involved a Caribbean Airlines flight. The second incident occurred on June 24, 2013 and involved a situation where, after the grievor had punched out, he used a tractor to transport himself from the crew room area to an area that was closer to the exit from the airport. These incidents are unconnected and need to be evaluated separately.

June 9 2013 - Caribbean Airlines

60. On June 9, 2013 the grievor and his crew were assigned to load a Caribbean Airlines flight. The type of aircraft involved meant that the baggage was not put in containers (as in the KLM flight) but had to be hand loaded into the baggage compartment in the bottom of the aircraft. Loading the aircraft involved the work of three or four employees: one person to place the luggage onto a conveyer belt (which was part of a tractor so that it could be moved from one aircraft or one cargo hold to the next); a second employee to sit in the cargo hold door and remove the luggage from the belt as it arrived at the cargo hold door, a third employee to stand in the middle of the luggage hold and take the luggage from the employee in the door and hand it to a fourth employee (the stacker) whose job was to stack the luggage in the hold. There was also a lead hand who directed the work and assisted in the loading.

61. On the occasion in question, a bargaining unit employee named Marston Clarke was the lead hand of the grievor's crew which had a total of six employees (including the lead hand Mr. Clarke). Three employees were engaged in loading the aircraft's aft cargo hold and two employees loaded the forward hold. Mr. Clarke testified under summons to the events on June 9.

62. Mr. Clarke testified that the stacker was the most strenuous of the jobs while the employee at the door and the employee in the hold had easier jobs. Mr. Clarke also testified that there were no issues, to his recollection, with the grievor during the offload which is less strenuous than the loading. However, at the start of the loading, which in accordance with normal practice was started about 20 minutes before departure time, Mr. Clarke told the grievor to go work at the cargo hold door position. The grievor “pretty much refused to do it”, claiming that his back was hurting. Accordingly, after asking him to do the job, Mr. Clarke told the grievor to go away. The grievor left in accordance with the direction. In his view the absence of the grievor slowed down the loading process which, although it did not result in a delayed departure, caused the airline representative to express concern. The grievor had not complained of a back problem when he unloaded the aircraft.

63. Under cross examination Mr. Clarke agreed that he had not filed a report about the incident (it appears to have come to the employer’s attention through a report by a Caribbean Airline supervisor), but that he had spoken to the grievor later in the day because he was “quite annoyed”. He also agreed that he could not specifically remember if the grievor complained about his back during the offload, but that he has heard such complaints before.

64. Mr. Clarke denied the suggestion that the bags were late getting to the flight and the grievor had offered to help out, despite

his bad back, by working the cargo hold door. He also denied that the grievor complained the bags were moving too fast and this is why he refused to work anymore. Mr. Clarke disagreed; his evidence was that the grievor did not start to work. Mr. Clarke did not know whether the grievor worked on another flight following the flight in question. His evidence was that he did not report the incident because he likes to deal with his crew himself.

65. The grievor's evidence was that he advised Mr. Clarke that his back was bothering him at the start of the shift. He worked the off-load and then at the start of the on-load was assigned lighter work like picking up strollers at the departure gate. At a certain point it looked like the loading was behind schedule so he offered to help in the baggage hold. He went to the hold door but found that the conveyer belt had been turned to its highest speed and he could not keep up, given his back issues. Accordingly, he alerted Mr. Clarke and asked him to slow it down. Mr. Clarke got angry and told him to get off the flight and he complied with that direction. Thereafter, he worked another flight which did not involve manual labour as he was assigned to operate a machine.

66. Under cross examination, the grievor acknowledged that he had worked the day before and the day after without incident regarding his back. He also acknowledged that he did not seek medical assistance for his back and never sought formal work

restrictions from the company as accommodation. He denied that he was faking his back issues to get out of doing manual work.

67. There is no dispute that the grievor followed the lead hand's instructions to leave the flight after the grievor refused to work. It is therefore unnecessary for me to determine whether the grievor had started work or not.

68. In order to succeed in this part of the case the employer must demonstrate that the grievor was faking his back pain. In my view it has not done so. The grievor claimed and claims that he had a hurting back on that day. There is simply no evidence before me from which I can draw the opposite conclusion, other than the argument that since the grievor is not truthful about other aspects of his evidence, he also cannot be trusted on this point. While, as noted, I have considerable concerns about the truthfulness of the grievor's evidence before me, it is not such that I am prepared to reject everything the grievor says. I also note a few other points. First, the grievor worked the day before, the day after and the offload without incident. To the extent he was trying to get out of work he was trying to get out of small piece of work. This suggests he may not have been trying to get out of work at all. Second, he followed the lead hand's instruction to leave the flight. Third, the lead hand did not report the incident which suggests that he did not view it as serious or warranting of discipline. Fourth, the lead hand did not engage in the processes that ought to have been applied in this case

- he did not refer the grievor to seek medical attention; he did not conduct a health and safety work refusal investigation (as may have been required under Part 2 of the *Canada Labour Code*), he did not require the grievor to supply medical evidence that he was hurt and he did not report the incident to management. He simply dealt with the matter in a practical way designed to ensure the flight was loaded on time. But for the concern expressed by the airline, no discipline would have issued and the employer would not have been aware of it.

69. Accordingly, I find that the employer has failed to discharge its onus that the grievor had engaged in misconduct on the day in question and that therefore, no discipline for his actions was warranted. This grievance is therefore dismissed.

June 24, 2013-the Tractor Incident

70. The incident on this date arose out of the fact that the grievor punched out following his shift and then drove a tractor from the crew room to a gate closer to where employees exit the secured area of the airport. There is no real dispute that this was against the employer's rules, although there is dispute about whether the rule was enforced, whether the employer advised employees about the rule, and more specifically, whether the grievor was aware of the rule. In any event, when the grievor arrived at the gate close to the

exit he was seen by a supervisor, Jason Forsyth, who, undisputedly, told the grievor to take the tractor back to where he had taken it from and the grievor refused to do so and left the airport (since he had punched out and, in his view, was no longer under the obligation to take the employer's directions). The words used by the grievor to indicate to Mr. Forsyth that he was not going to take the tractor back are in dispute. In particular, the company takes the position the grievor said "fucking fire me" while the grievor denies that he said anything at all in response to the direction.

71. The company's main witness on this issue was Mr. Forsyth, a ramp supervisor. He testified that the company's rule against employees using tractors after their shift was based on the fact that the airport authority was concerned because a number of tractors tended to be parked in the area of the exit at gate B22. He testified that the airport authority frequently called the employer to remove tractors from the area in front of gate B22 and that they were threatening to tow and impound them. Once the airport authority made such a demand, the company then had to assign other employees to retrieve the tractors. In addition, the practice was a problem for the employer because there were times where there were not enough tractors near the crew room where they were needed by crews to use to service aircraft.

72. Mr. Forsythe testified that in response to the issue the company posted notices in the crew room in a couple of places advising

employees that tractors were not to be used after shift to drive to the exit and that employees caught doing so were subject to disciplinary action. He did not note the dates postings had been made but testified that as of June 2013 the notices had been posted for at least a month. In addition, it was his belief that employees had been verbally warned about the issue in meetings.

73. Mr. Forsythe testified that on June 24 he saw the grievor drive a tractor to gate B22. Mr. Forsythe pulled up behind him and told him to drive the tractor back to the area where it belonged. The grievor responded to his request by saying “fucking fire me”, walking away and exiting the secure area of the airport. Mr. Forsythe was angry and responded “you got it”. Mr. Forsythe then directed another employee to drive the tractor back and reported the incident to senior management.

74. In cross examination Mr. Forsythe was asked about the notices and the fact that there were often many pieces of paper on the boards where the notices were posted. He also was questioned about how he remembered the notices had been posted a month before June 2013 given that he was testifying nearly two years later. Mr. Forsythe confirmed he did not know exactly when the notices were posted, that they were not dated and there was no record of them being posted. He also had no personal specific recollection of

when employees were told about the notices or the company's expectations regarding tractor usage in meetings prior to June.

75. Mr. Forsythe also confirmed that the road used by the grievor to drive the tractor to gate B22 was a one way road. It was inside adjacent to the terminal building inside the area where aircraft were serviced and loaded passengers and cargo. On the other hand, the route the grievor would have used to drive the tractor back (had he complied with the direction) was in between the aircraft servicing area and the gates and runways. As a result, returning the tractor would involve taking the tractor on a route which could involve delays while the tractor driver waited for aircraft to push back from the gates. Mr. Forsythe agreed he had not disciplined another employee for taking tractors, but said this was so because other employees who had been caught agreed to take the tractor back. Under vigorous cross examination Mr. Forsythe held firm to his testimony that the grievor said "fucking fire me" in response to his direction to return the tractor, had not returned the tractor and this was why he had been disciplined in contrast with other employees who had improperly driven a tractor to the exit.

76. The grievor testified that he took the tractor to gate B24 (he disputes that it was B22 but the difference is not relevant) on the day in question and that "everyone" does it because it saves a lot of walking and time. He was unaware that the company prohibited the

practice, never heard it referred to in any meeting and did not see any of the notices. In his experience notices were often taken down by employees or covered over with other pieces of paper. In any event, there were a lot of notices on the board and he was not in the habit of looking at them.

77. The grievor made a distinction between the way he drove the tractor when he was on the clock and after he had punched out. He felt comfortable driving the tractor on the inside route after he had punched out because it was safe since he did not have to drive behind aircraft. He never drove in the other direction after he had punched out because driving that way required him to be amongst the aircraft and significant vehicle traffic and he was concerned that if he got in an accident he would be unprotected vis a vis workers compensation coverage. On the other hand, traveling to B22/24 on the inside route was safe.

78. He testified that he refused to take the tractor back because of this safety issue. He would be unprotected if he got in an accident while taking the tractor back. He recognized that he was also “unprotected” on the interior route (to B22/24) but since it was much safer he “took the chance”. He denied that he told Mr. Forsythe “fucking fire me”. He claimed that Mr. Forsythe was “fabricating and lying”.

79. The first issue which must be determined is a factual one: did the grievor tell Mr. Forsythe “fucking fire me”. I conclude that he did. Mr. Forsythe testified in a straight forward credible way. He was willing to admit that he did not know certain things (like the dates meetings were held) and was not shaken in cross examination on what had happened. He reported the grievor’s conduct at the time and only reported him because of his language and the fact that he refused to return the tractor. There was no suggestion that prior to this incident Mr. Forsythe had any animosity towards the grievor. Quite simply there was no reason for Mr. Forsythe to lie about what the grievor did and said.

80. On the other hand, the grievor’s evidence is problematic in several respects. These general problems with the manner in which the grievor gave his evidence are discussed above. They include the way he responded to questions and his lack of truthfulness in the evidence given in support of the five day suspension grievance. As a result of these concerns I find it difficult to prefer the evidence given by the grievor over the evidence given by Mr. Forsythe. Moreover, I also have specific concerns which cause me to doubt the grievor’s evidence in this part of the case. In this regard, the grievor’s claim that he did not take the tractor back for health and safety/ workers compensation coverage reasons is simply not believable because it was not given as an excuse to Mr. Forsythe at the time. Had the grievor really believed it was unsafe for him to return the tractor or that he was concerned that he would not be covered under workers

compensation law if he got in an accident (in fact he was covered), it would have been simple for him to explain his concerns to Mr. Forsythe (or to the union for that matter). The fact that he did not do so strongly suggests to me that these explanations were invented by the grievor while he gave his evidence in order to excuse his conduct.

81. I am satisfied it is more likely than not that there were two reasons why the grievor did not want to take the tractor back. First, it would mean a delay in leaving work and second; he had already punched out and, as a result, did not believe he was subject to Mr. Forsythe's authority.

82. As for the issue of whether the grievor knew he was not supposed to take the tractor after his shift ended, I believe he was aware of the company's policy whether or not he actually saw a notice or heard about it in a meeting (neither of which was demonstrated by the employer). If he was unaware of the company's policy and believed that he had the right to take the tractor to B22, his reaction to Mr. Forsythe's direction would likely have been entirely different. He would not have responded "fucking fire me", a retort which suggests in its own right that he knew the company might have some reason to discipline him. Instead he would likely have said "why do you want me to take the tractor back- I am off the clock?". That would be a normal response of an

employee who genuinely believed he was in the right and was surprised by a direction (although the grievor did not testify that he was surprised by Mr. Forsythe's direction which also suggests he knew what he was doing was wrong, at least on some level).

83. Support for the conclusion that all employees, including the grievor, were aware of the company's rule can be found in all of the evidence given by all of the witnesses. Of particular note was Mr. Morgan's testimony which left me with the distinct impression that employees knew the company's position regarding the use of tractors.

84. That being said, it is clear to me that the fact was that the rule was not being enforced in the way the employer seeks in this case. It was clear on the evidence before me (given both by the witnesses called by the union and the company) that in fact, "everyone" used the tractors to drive to gate B22 after their shift ended. The company was trying to put an end to the practice, was not imposing discipline, but was simply telling employees, when they were caught (which did not seem to be often) to return the tractors. In these circumstances, I find no basis for discipline that would result in an employee's termination for the mere fact of driving the tractor to gate B22.

85. The real issue therefore, in this part of the case, is what to make of the statement the grievor made to Mr. Forsythe and of his refusal to return the tractor as directed to do.
86. On the first issue, I find that telling a supervisor whether when off the clock or not, “fucking fire me”, in connection with a work issue constitutes insubordination, is culpable conduct and is properly the subject of discipline. Indeed, the fact that this was improper conduct, if it occurred, was properly not disputed by the union.
87. On the second issue, the union strenuously argues that as the grievor was off duty he was under no obligation to follow Mr. Forsythe’s direction and he cannot be disciplined for his failure to do so. It asserts that the circumstances of the case are no different than had the grievor and Mr. Forsythe been in a bar off work and the grievor had refused Mr. Forsythe’s demand that the grievor get him a drink. Surely, he could not have been disciplined for his refusal to get his supervisor a drink and this similarly involves off duty conduct where the grievor was, as a result of having punched out, under no obligation to follow Mr. Forsythe’s instructions.
88. While the union’s argument is clever, in my view it does not stand up to close scrutiny. The point is that the grievor and Mr. Forsythe were not in a bar. They were at the worksite and, most critically, the grievor was operating the company’s equipment. In doing so, the grievor was subject to the company’s direction and liable to discipline

if he did not follow that direction. The grievor cannot claim the right to drive the tractor without also accepting the responsibility that went with it. One of those responsibilities was to follow the company's direction in the operation of that equipment, including the direction to return it to its proper place. Once again, were those directions improper or involved the working of overtime, the union could have filed a grievance on behalf of the grievor. It was, however, not open to the grievor to simply disregard the directions.

89. The circumstances are akin to those in *Avenor Inc. and Pulp & Paper Workers of Canada, Local 11* ([1994] B.C.C.A.A.A. No. 411 (Albertini)) where the facts before the arbitrator were that the grievor in question refused to attend a discipline meeting with management following work, explaining that he was not "going to get fucked on his own time". The arbitrator stated at para. 34:

"His obligation under the circumstances was to accept the directions of [his supervisor] and, if he was concerned over a possible breach of his rights as an employee, that is if he felt he did not have to report after his shift ended he should have pursued the matter through the grievance procedure".

90. Having found that the grievor engaged in misconduct in the tractor incident I must now turn to the possibility of reducing the penalty of discharge which was imposed by the company. While there are factors which might have caused me to exercise my discretion to reinstate the grievor to his employment (including his

length of service, the merger and the grievor's lack of understanding of his new obligations) the grievor does not seek to be reinstated. Moreover, the union acknowledges that if I find the grievor was properly disciplined in connection with the five day suspension (which I have) and I find that the grievor engaged in insubordinate behaviour in the tractor incident (which I also have), the grievance ought to be dismissed given the grievor's desire not to be reinstated. I agree and, for the reasons set forth above, dismiss the grievances.

Brian McLean

Brian McLean

Toronto

November 11, 2016

