

**IN THE MATTER OF ARBITRATION BETWEEN**

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<b>CULLIGAN SOFT WATER</b>	)	
<b>COMPANY,</b>	)	
	)	
	)	
<b>Employer,</b>	)	<b>ARBITRATION</b>
	)	<b>AWARD</b>
<b>and</b>	)	
	)	<b>GUTZKE TERMINATION</b>
	)	<b>GRIEVANCE</b>
<b>INTERNATIONAL ASS'N OF</b>	)	
<b>MACHINISTS AND AEROSPACE)</b>	)	
<b>WORKERS, DISTRICT LODGE</b>	)	
<b>NO. 77,</b>	)	
	)	
<b>Union.</b>	)	<b>FMCS Case No. 100330-55239-3</b>

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Arbitrator: Stephen F. Befort

Hearing Date: August 26, 2010

Briefs Received: September 17, 2010

Date of decision: October 5, 2010

**APPEARANCES**

For the Union: John Steigauf

For the Employer: Scott Paulsen

**INTRODUCTION**

International Association of Machinists, Local 77 (Union) is the exclusive representative of a unit of installers and drivers employed by Culligan Soft Water Company in Minnetonka, Minnesota (Employer). The Union claims that the Employer

violated the parties' collective bargaining agreement by terminating Gary Gutzke without just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUES**

1. Did the Employer have just cause to discharge the grievant?
2. If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE VIII.**

##### **Seniority**

8.05 Discharge or discipline shall be for just cause. However, any employee disputing the validity of said discharge or discipline may do so under the grievance procedure as outlined in Article XIII.

### **FACTUAL BACKGROUND**

The Employer is a franchise operator of Culligan Soft Water Company situated in Minnetonka, Minnesota. The Employer sells, installs, and services water softening and drinking water equipment. The Union represents approximately twenty employees working for the Employer in the field as installers and drivers.

Gary Gutzke has worked for the Employer for more than 21 years. For the past decade, he has worked as a service technician responsible for installing and servicing water conditioning systems at customer sites. His daily shift began at 7:00 a.m. and concluded at 3:00 p.m. He drove a F350 service truck each day while performing his duties.

The trucks used by service technicians are leased by Culligan from Ryder Truck Rental and Leasing (Ryder). Ryder also is responsible for maintaining the fleet which is accomplished through the work of a full-time Ryder mechanic who works at the Culligan site. As commercial vehicles, the trucks and their drivers are subject to Department of Transportation rules. Among other requirements, these rules obligate drivers to complete an inspection of their vehicle both at the beginning and the close of each shift. Any problems or repair needs are supposed to be noted on the report. Drivers are instructed to drop off completed copies of the inspection reports with the Employer and the Ryder representative at the close of each work day.

Following the end of Mr. Gutzke's shift on February 23, 2010, John Garbatt, a co-worker and Union Steward, observed a dent in the tailgate area of Mr. Gutzke's truck which was parked in the Employer's shop. Mr. Garbatt alerted Don Wargo, the Ryder mechanic, who saw on closer inspection that the damage also included a broken rear light bar. Mr. Wargo, who was unhappy with the damage to a new truck that had been in service for less than two weeks, then reported the damage to Culligan Service Manager Adam Johnson. Mr. Johnson consulted Mr. Gutzke's inspection report for February 23, but the report noted no deficiencies and was simply marked "ok."

Mr. Gutzke worked his normal shift on the following day and again submitted an inspection report indicating that everything was "ok" with his vehicle. Mr. Johnson scheduled a meeting later that afternoon with Mr. Gutzke and the two Union Stewards – Mr. Garbatt and Joe Van Eyll. Mr. Johnson asked the grievant about the damage to the truck, but Mr. Gutzke denied having any knowledge of the damage or how it could have occurred. He indicated that he simply must have failed to see the damage while making

his inspections. Mr. Johnson concluded the meeting by stating that he would look into the matter further and decide what action should be taken. Mr. Gutzke was not suspended, and he continued to work until he was discharged on March 2, 2010.

According to Mr. Johnson, he considered the appropriate response for several days in light of Mr. Gutzke's prior disciplinary record. During Mr. Gutzke's 21 years of employment, he received thirteen warning notices and nine suspensions for performance-related deficiencies. The most recent suspensions included a one-day suspension issued on September 22, 2008, another one-day suspension issued on December 22, 2009, and a three-day suspension issued on January 18, 2010. On January 28, 2010, Johnson met with the grievant and union representatives Garbett, Van Eyll, and John Steigauf to discuss the recent suspensions. Mr. Johnson advised Mr. Gutzke that, in light of his numerous performance problems, one more performance issue would result in termination. Stewards Garbett and Van Eyll both testified that they also warned the grievant that he needed to avoid any further performance deficiencies if he wanted to keep his job.

As it turned out, Mr. Gutzke never served the three-day suspension imposed in January of 2010. Because of a heavy work load and an injury to another service technician, Mr. Johnson contacted Union Business Agent Steigauf and they agreed that Mr. Gutzke could return to work with the parties treating the suspension as already served. According to Mr. Johnson, he conditioned this agreement on the understanding that the return to work was not meant to diminish either the severity or importance of the disciplinary incident.

The Employer terminated Mr. Gutzke at a meeting held on March 2, 2010. At the meeting, Mr. Johnson noted Mr. Gutzke's failure to perform his truck inspection duties properly along with the recent "last chance" warning, as the bases for the termination decision. In the discharge notice, Mr. Johnson stated that "if the pre and post trip inspections were completed the broken light and damaged tailgate would have been noticed."

The Union filed a grievance challenging the Employer's action on March 9, 2010. At the arbitration hearing, Mr. Gutzke testified that he had found a LED light cover on the floor of the shop on February 22, 2010, but did not connect it at the time to the damage later discovered with respect to this truck. He surmised that someone likely had backed his truck into a pallet while attempting to park it in the shop. Mr. Johnson testified in rebuttal that Mr. Gutzke had never previously mentioned finding a lens cover on the shop floor or suggested that another employee had damaged the truck. Finally, Union Stewards Garbatt and Van Eyll both testified that they believed that the Employer held Mr. Gutzke to the same standard of conduct as it did other employees.

## **POSITIONS OF THE PARTIES**

### **Employer:**

The Employer contends that Mr. Gutzke violated a reasonable work rule by failing to inspect his vehicle and to note the existence of readily visible damage in his inspection report. The Employer claims that discharge is warranted in this matter due to the grievant's extensive disciplinary record and the Employer's explicit warning that any further performance shortcomings would result in discharge. Since the Employer's repeated attempts at progressive discipline failed to correct Mr. Gutzke's behavior, the

Employer argues that his inspection failure on February 23, 2010 constituted a justifiable “last straw” basis for termination.

**Union:**

The Union initially argues that the Employer failed to establish the identity of who caused the damage to Mr. Gutzke’s truck and when that damage occurred. In addition, the Union maintains that discharge is too severe of a sanction in any event. In this regard, the Union points to Mr. Gutzke’s long period of service (21 years) with the Employer. While acknowledging Mr. Gutzke’s numerous performance problems, the Union additionally argues that the Employer engaged in an erratic pattern of progressive discipline which included the cancellation of discipline at the suspension stage.

**DISCUSSION AND OPINION**

Arbitral review of an Employer’s termination decision typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 948 (6<sup>th</sup> ed. 2003). Each of these factors is discussed below.

**The Alleged Misconduct**

The misconduct alleged by the Employer as the basis for discipline is Mr. Gutzke’s failure to conduct an inspection of his vehicle that noted the damage to the tail gate and the rear light bar. Pursuant to testimony elicited by the Employer, several co-workers observed damage to Mr. Gutzke’s work vehicle shortly after the completion of

his February 23, 2010 work shift. Mr. Gutzke, however, failed to report this damage on either his February 23 or February 24 inspection reports.

For its part, the Union argues that the Employer has failed to show who caused the damage to Mr. Gutzke's vehicle or when such damage occurred. At the arbitration hearing, Mr. Gutzke suggested in his testimony that another employee may have caused the damage while parking the vehicle. In the end, this assertion, even if true, is irrelevant. The Employer terminated Mr. Gutzke, not because he caused damage to his truck, but because he violated company policy by failing to report that damage. This allegation is undisputed and constitutes an adequate basis for the imposition of discipline.

### **The Appropriate Remedy**

The Employer maintains that discharge is an appropriate sanction based upon the totality of Mr. Gutzke's disciplinary record. The Employer points out that Mr. Gutzke has received thirteen warning notices and nine suspensions for performance-related deficiencies over the course of his employment. Service Manager Johnson testified that the Employer imposed gradually increasing doses of progressive discipline which were followed by periods of good behavior only to have the performance problems begin anew. Most recently, this pattern reemerged as Mr. Gutzke received a one-day suspension issued on December 22, 2009 and a three-day suspension issued on January 18, 2010. This prompted Mr. Johnson to warn Mr. Gutzke on January 28, 2010 that any further performance problems would result in termination. The Employer claims that Mr. Gutzke's erroneous inspection report constituted a "last straw" violation that, when combined with the many earlier infractions, warrants the penalty of discharge.

In general, the notion of just cause requires that Employers utilize progressive discipline for performance-related deficiencies. DISCIPLINE AND DISCHARGE IN ARBITRATION 65-67, 185 (Brand & Biren, eds., 2<sup>nd</sup> ed. 2008). The Union argues that the Employer did not follow an escalating path of progressive discipline because it did not require Mr. Gutzke to serve the three-day suspension imposed in January 2010. The apparent import of this claim is that the grievant did not have sufficient warning that continued problems could result in further discipline, including discharge. That argument fails in this instance for two reasons. First, the Employer and the Union agreed that the decision to treat the pending three-day suspension as time served was not meant to lessen either the importance or the severity of the disciplinary sanction imposed. Second, Mr. Johnson testified that he expressly warned Mr. Gutzke on January 28 that any further infraction would result in discharge.

The Union also contends that discharge is too severe of a sanction in light of Mr. Gutzke's 21 years of service. Mr. Gutzke's lengthy work record certainly raises the disciplinary bar, but the ultimate question in a case such as this is whether a lesser form of discipline is likely to correct the grievant's pattern of performance problems. The pertinent standard is aptly described as follows:

In some instances, an employee will have been put on notice that he can expect to be discharged for an additional incident of specified misconduct. In cases commonly referred to as "last-straw" discharges, an employee engages in some misconduct that would not, by itself, be just cause for discharge. However, based on the accumulation of offenses, the employer decides termination is appropriate. This decision reflects the employer's conclusion that past efforts at rehabilitation have failed and there is no reasonable alternative to discharge. Arbitrators will uphold last-straw discharges when the employer has sufficient evidence to show that an employee's pattern of unsatisfactory conduct warrants discharge.

DISCIPLINE AND DISCHARGE IN ARBITRATION 83 (Brand & Biren, eds., 2<sup>nd</sup> ed. 2008).

This case is a classic example of a justifiable last-straw termination. The grievant has been cited for more than twenty performance-related problems resulting in discipline. Following attempts at progressive discipline, the Employer warned the grievant that any further rule infractions would result in termination. Even though the faulty inspection report is not so severe as to warrant discharge by itself, it is a last straw point at which the Employer was justified in concluding that any further forms of lesser discipline were unlikely to result in an improvement in behavior. The fact that the two union stewards found the Employer's action not to be arbitrary or capricious additionally bolsters this conclusion.

**AWARD**

The grievance is denied.

Dated: October 5, 2010

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Stephen F. Befort  
Arbitrator