

**IN THE MATTER OF ARBITRATION BETWEEN**

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	)	<b>FMCS Case No. 120305-53813-3</b>
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<b>ELECTROLUX HOME PRODUCTS, INC.</b>	)	<b>Issue: C.B.'s Termination</b>
	)	
<b>(“Company” or “Employer”)</b>	)	<b>Site: Saint Cloud, MN</b>
	)	
<b>&amp;</b>	)	<b>Hearing Date: July 10, 2012</b>
	)	
<b>INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS, DISTRICT LODGE 165</b>	)	<b>Briefing Date: August 20, 2012</b>
	)	
<b>(“Union” or “IAM”)</b>	)	<b>Award Date: October 11, 2012</b>
	)	
	)	<b>Arbitrator: Mario F. Bognanno</b>

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**JURISDICTION**

The Company, Electrolux Home Products, Inc. is a manufacturer of freezer appliances and its plant and maintenance employees are represented by the Union, International Association of Machinists and Aerospace Workers, District Lodge 165. The Company and Union are parties to a Collective Bargaining Agreement (hereafter “CBA”) with effective dates of November 19, 2009 through November 18, 2012. (Joint Exhibit 1) Article 6, Management Responsibilities, Section 6.1 in the CBA provides in part,

[T]he Company retains the sole right to manage its business, including the right ... to establish and enforce reasonable policies ... subject only to such restrictions governing the exercise of these rights as are expressly provided in this Agreement.

(Joint Exhibit 1) In agreement with Article 6, Section 6.1, the Company has promulgated safe LockOut/TagOut (hereafter “LOTO”) procedures to prevent employee injury when working in machine dangerous zones and/or when the employee puts any part of his/her body in an area on a machine or piece of equipment. (Employer Tab A; Employer Tab C [See: PowerPoint page heading, “When Should I Use LOTO?”])

In addition, the parties have negotiated “rules and regulations” that are a part of the CBA. These rules and regulations appear as Schedule “2” in Article 20, General Provisions, Section 20.5 in the CBA. (Joint Exhibit 1) The rules in Schedule 2 govern employee conduct and the disciplinary consequences for rule violations. Schedule 2 divides offenses into three (3) parts, namely, “**Minor Offenses**”, “**Major Offenses**” and “**Offenses Subject to Immediate Discharge**”. The negotiated penalties for minor, major and offenses subject to immediate discharge vary in severity. The penalties for minor and major offenses are progressive. A “written warning” and “final warning notice” is meted out for the first occurrence of a minor and major offense, respectively. Subsequent occurrences of minor and major offenses evoke three (3) and two (2) progressive steps of increasingly harsh discipline, respectively. For both subsets of offenses the last step of progressive discipline is employee discharge. Schedule 2 also lists a subset of twelve (12) offenses that are subject to first occurrence immediate discharge, as opposed to progressive discipline.

Among the offenses subject to immediate discharge are offenses #10 and #12, namely:

10. Violating the LockOut/TagOut procedures in a manner that exposes the Employee, another Employee or other Employees to bodily harm.

12. Intentional disregard for any safety policy that results in or could result in an injury.

(Joint Exhibit 1)

The Grievant, C.B., was an eight and one-half (8 ½) year employee, who was working as an Electronic Technician (i.e., “Maintenance”) when, on December 15, 2011, his employment was terminated for “[V]iolation of LockOut/TagOut procedure.” (Joint Exhibit 2, p. 1) Because the matter involved a termination, on December 19, 2011, the Union initiated grievance negotiations at Step 2, requesting that C.B. be reinstated and made whole. (Joint Exhibit 2, p. 2)

On January 13, 2012, the Company denied the grievance, insisting that the termination of C.B.'s employment was justified. (Joint Exhibit 2, p. 3) Unable to resolve the grievance, the matter was submitted to arbitration for a "binding" determination. (Joint Exhibit 1)

Under relevant provisions of Article 14, Arbitration, in the CBA, the undersigned heard the grievance in Saint Cloud, MN on July 10, 2012. Appearing through their designated representatives, the parties were given a full and fair hearing. The parties agreed that the Grievant would be identified by his initials, C.B., because a copy of the present Award will be sent to the Bureau of Mediation Services, State of Minnesota, for electronic posting: Publication. A verbatim transcription of the hearing was prepared. Witnesses were sequestered, sworn and cross-examined. Exhibits were accepted into the record. The parties escorted the Arbitrator on a tour of relevant parts of the plant. The parties waived their "arbitration board" option, *per* Article 14. The parties filed timely post-hearing briefs on or before August 20, 2012. Thereafter, the Arbitrator took the present matter under advisement.

#### **APPEARANCES**

##### **For the Company:**

Keith L. Pryatel  
Joe Kunkel  
Beverlee Steffy

Attorney  
Tooling Engineer (By subpoena)  
Director, Human Resources

##### **For the Union:**

Colleen Murphy-Cooney  
Janice Lehr  
Les A. Wolf  
C.B.  
Robert Jaeger  
John Murray, Jr.  
Joseph Dwenger

Directing Business Representative  
Shop Chair  
Shop Recording Secretary  
Grievant  
Maintenance Mechanic  
Tool & Die Maker (By subpoena)  
Tool & Die Maker (By subpoena)

I **RELEVANT CBA PROVISIONS**

**Article 14 Arbitration**

**Section 14.3** The arbitration board or Arbitrator acting under this Article shall not have the power to add to, to disregard or to modify any of the provisions of this contract, and shall have authority to decide only the issues submitted.

**Article 20 General Provisions**

**Section 20.5** ... Schedule "2" covering rules and regulations is attached hereto and made a part of this Agreement.

**Schedule "2"**

**Section 1** The following rules are hereby established governing the conduct of Employees during the life of this Agreement.

**Minor Offenses**

1. Willfully and without either reason or excuse going to parts of the plant away from assigned working areas.
2. Failure to clock in or out.
3. Soliciting funds or selling tickets in the plant for any commercial purposes.
4. Failure of an Employee to report an accident in which the Employee is involved.
5. Failure, without reasonable excuse, to give the Company at least thirty (30) minutes advance notice when unable to report to work as scheduled, including overtime.
6. Deliberate loafing.

The penalties for violation of the above rules are:

First Offense	Warning notice
Second Offense	Final warning notice
Third Offense	Three (3) workday suspension
Fourth Offense	Discharge

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**Major Offenses**

1. Insubordination, including refusal to carry out work orders or instructions from Supervisors.

2. Hiding Company tools or parts or secreting them in places where they obviously do not belong.
3. Violation of safety rules.
4. Careless use of Company property.
5. Defacing Company property, marking washrooms, etc.
6. Reporting for work under the influence of alcohol or illegal drugs, including abuse of legally prescribed drugs.
7. Willful unauthorized entry on Company premises.
8. Deliberately clocking another Employee in or out.
9. Smoking in unauthorized places at unauthorized times.

The penalties for violation of the above rules are:

First Offense	Final warning notice
Second Offense	Five (5) workday suspension
Third Offense	Discharge

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#### **Offenses Subject to Immediate Discharge**

Employees who commit any of the following offenses are subject to immediate discharge. Generally, the Company will suspend an Employee believed to have committed such an offense pending investigation before discharging the Employee.

1. Introduction, possession, or use of intoxicating liquors or illegal drugs or drug paraphernalia on Company premises.
2. Any willful damage to or unauthorized removal of property belonging to the Company or to others.
3. Committing any act of violence or threat of violence.
4. Giving false testimony in accident reports.
5. Willfully falsifying personnel or other records.
6. Having given false answers to questions in applications for employment, providing discharge is during first year of employment.
7. Conviction of a felony or of a crime involving moral turpitude.
8. Bringing any type of firearms onto Company premises.
9. Violation of the Company's Harassment Policy.
10. Violating the LockOut/TagOut procedures in a manner that exposes the Employee, another Employee, or other Employees to bodily harm.
11. **Attempting by fraudulent means to collect worker's compensation insurance for injuries or illness not contracted in the course and scope of employment with the Company.**
12. **Intentional disregard for any safety policy that results in or could have resulted in an injury.**

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(Joint Exhibit 1; Emphasis in Original)

**II. ISSUE**

The parties jointly stipulated to the following statement of the issue, paraphrased as follows:

Whether the Grievant violated the Schedule “2” LOTO rule on December 11, 2011? If not, what is an appropriate remedy?

**III. FACTS & BACKGROUND**

**A. Machines No. 230 and No. 340**

Machines No. 230 and No. 340 are large assemblies that are located side-by-side. (Tr. 25) The function of Machine No. 340 is to make the “exterior back and bottom” of freezer cabinets: A fabrication process that involves open (i.e., exposed), moving heavy-duty steel machine parts. Machine No. 340’s shaped metal is transferred to Machine 230 for continued fabrication. Further, the machines’ motors and moving parts are gated to prevent injury, possibly death, should anyone make contact with the moving parts. Indeed, nobody, including “authorized” employees<sup>1</sup>, may go inside their gated confines, for whatever reason, without first performing the LOTO operation. (Tr. 20-21; Tr. 26, Tr. 36-37, Tr. 60-61, Tr. 79-80; Company Tab D)

**B. LOTO of Machines No. 230 and No.340**

On December 10-11, 2011, an unspecified small number of employees from each of Electrolux’s Maintenance, Tool and Die, and Electronic Technicians job classifications volunteered to work overtime to upgrade machines, as required by new federal “energy

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<sup>1</sup> An “authorized” employee is one who has the authority to activate LOTO safety procedures. See: 29 C.F.R. §1910.147(b).

standards". Machines No. 230 and No. 340 were among the machines to be upgraded. The Grievant was an "authorized" volunteer. Moreover, in addition to Electrolux staff, the authorized employees of outside contractor, RWC, participated in the weekend's upgrading work. (Tr. 18-20, Tr. 61-62)

Before the upgrading work began, these employees powered-off, locked out and tagged out the referenced machines: Doing so for their own safety; to prevent injury or death. (Tr. 21, Tr. 26-28, Tr. 123) That is to say the employees, including the Grievant,<sup>2</sup> shut down each source of power to the machines' moving parts; then they locked out each shutdown power source and, finally, tagged same, identified said action. (Tr. 29)

Regarding machines No. 230 and 340, the single *electrical* source serving both machines was shut down: An operation that also cut the power to the two (2) machines' internal *hydraulics*. (Tr. 26-28, Tr. 58) In addition, each of the two (2) machines' "dump valve" was pulled – releasing the *pneumatics* or pressurized air that helped to power it – was locked out and each valve was tagged. (Tr. 30, 61-62, Tr. 78, Tr. 123) As each of these power sources was shut down, the employee(s) who was (were) assigned to work on the specific machine used his/her (their) keyed padlock to physically lock out that particular power source, preventing the risk of injury or death that could result if the machine was mistakenly re-energized. In addition, the employee(s) attached a tag to the lock, which indicates that that power source was shut down by the identified employee(s). (Tr. 21; Company Tab C)

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<sup>2</sup> Each authorized employee was equipped with the security devices (i.e., locks with keys and tags).

**C. Events of December 10-11, 2011**

Joe Kunkel, Tooling Engineer, supervised the December 10-11, 2011 work to be performed on the so-called RWC line of machines, including that of the Grievant who worked both weekend days. (Tr. 26) On December 10, 2011, the Grievant followed the requisite de-energizing and LOTO procedures on machines No. 230 and No. 340: The machines on which he would be working. Other employees who worked on these same machines followed suit. (Tr. 123-124; Tr. 131; Tr. 138-139) In uncontroverted testimony, Mr. Kunkel stated that the upgrading work was completed on December 11, 2011, during the early afternoon, sometime before 2:00 p.m. He further stated that at that time, the referenced machines were re-energized, including machines No. 230 and 340, and that fabrication was about to commence, on a “test run” basis. (Tr. 30-31; Tr. 38-39)

Mr. Kunkel further stated that around this time, he told the Grievant that he could leave work, and at around 1:55 p.m., the Grievant indicated that he was leaving. (Company Tab H; Tr. 31) Next, Mr. Kunkel testified that at about 2:10 p.m., he, John Murray and Joe Dwenger<sup>3</sup> were standing about 30 feet away from machine No. 340 when the latter two (2) men called his attention to machine No. 340: Mr. Kunkel turned around and saw the Grievant with one (1) foot on the top step of a ladder and the other on top of machine No. 340, the machine onto which he was climbing.<sup>4</sup> (Tr. 33-34)

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<sup>3</sup> Messrs. Murray and Dwenger are Tool and Die Makers and members of the bargaining unit.

<sup>4</sup> To be clear, machines No. 230 and No. 340 do not have “tops” *per se*. Rather than being “boxed in” machines, they are better described as assemblies of motors and moving parts that are ‘crowned’ with overhead structural steel girders that trim a “platform”. (Tr. 60) A fall from the platform into machine parts, moving or not, or onto the cement floor about 15 or 16 feet below could cause serious injury or death. (Tr. 37-38, Tr. 51, Tr. 79, Tr. 87, Tr. 126; Company Tab C)

Based on the evidentiary record, it is unequivocally clear that when Mr. Kunkel turned toward machine No. 340, he noted that (1) the step ladder in question was about two (2) feet too short for the unassisted climb in question – a safety violation – and (2) machines No. 230 and No. 340 were energized, as easily discerned because their hydraulic pumps were audibly running. (Tr. 34-37, Tr. 41, Tr. 65, Tr. 68; Tr. 83; Company Tab C, Company Tab E, Company Tab H) Continuing, Mr. Kunkel stated that he “immediately” walked toward machine No. 340; that, by the time he arrived at the machine, the Grievant was already on top of machine No. 340, crawling on its overhead platform *en route* to machine No. 230: Crawling because there was inadequate vertical, head room to stand. (Tr. 51) When asked what he was doing, the Grievant responded that he was “...looking for his tool” (i.e., “channel lock pliers”). (Tr. 35)

Critically, Mr. Kunkel testified that machines No. 230 and No. 340 were powered on when the Grievant was atop them – the Grievant had not powered-off the machines and did not execute the LOTO procedures, as arguably he should have, and the Grievant had been standing on the top step of the ladder he was using – a second alleged safety violation because as posted on every ladder in the plant, employees are cautioned not to use the top two (2) rungs of any step ladders. (Tr. 53, Tr. 67; Company Tab E) Mr. Kunkel stabilized the ladder as the Grievant climbed down from machine No. 340 and, upon his descent; Mr. Kunkel told the Grievant that he had just violated at least two (2) safety rules: not following the LOTO procedures; and stepping on the top step of a step ladder. (Tr. 53; Company Tab H) Finally, Mr. Kunkel testified that he sent the Grievant home, called Clay Northrup, Safety Manager, to report what had just happened, and he prepared a written statement of events for Kelly Fleming, then the plant’s HR Director. (Tr. 46-47; Company Tab H)

The testimony by Messrs. Murray and Dwenger corroborated most of the substantive dimensions of Mr. Kunkel's testimony regarding the Grievant's alleged December 11, 2011 safety violations. Both witnesses provided Mr. Fleming with written accounts about what they observed. (Company Tabs I and J)

The Grievant stated that as he was preparing to leave work for the day, he discovered that his channel lock tool was missing; he returned to the shop floor, mounted the step ladder in question and proceeded to climb onto machine No. 340 and then crawl over to machine No. 230 to retrieve said tool. Further, he acknowledged that he did not power off the two (2) machines and failed to LOTO either of them. (Tr. 133, Tr. 136, Tr. 143) He also acknowledged that as he climbed onto machine No. 340, he heard someone ask, "What are you doing?" However, given the position he was in, he "... didn't want to have a conversation, so [he] ... continued to the top of the machine and turned around and noticed Mr. Kunkel..." Continuing, he testified that Mr. Kunkel again said, "What are you doing up there?" To which the Grievant replied: "... looking for a tool that I was missing." (Tr. 127)

The Grievant indicated that he was discharged for his LOTO violation and, specifically, because the LOTO violation could have resulted injury had he fallen off the upper platform. In this vein, the Grievant also noted that (1) he has never been trained to use fall-prevention equipment, (2) he has never been given fall-prevention equipment, and (3) he knew of no safety procedure requiring the use of fall-prevention equipment. (Tr. 124-125) The foregoing notwithstanding, the Grievant acknowledge that a fall might have resulted in serious injury. (Tr. 126)

#### IV. POSITIONS OF THE PARTIES

##### A. The Company's Arguments

The Company began by observing that the Grievant was discharged for violating Schedule 2's offense #10, namely, "Violating the LockOut/TagOut procedures in a manner that exposes the Employee, another Employee or other Employees to bodily harm."<sup>5</sup> (Joint Exhibits 1 and 2) Offense #10, the Company continued, was newly added to Schedule 2's set of **Offenses Subject to Immediate Discharge** during 2006 collective bargaining negotiations. Further, the Employer observed that violation results in immediate discharge: A warning the Grievant should have observed in the present case. (Joint Exhibit 1; Company Tabs F and G)

The Company also pointed out that its LOTO policy conforms to federal OSHA statutes and regulations and to State of Minnesota's OSHA standards *per* 29 U.S.C. § 667(c) and Minn. Rules §5203.0011, respectively; that it instructs "authorized" employees on its safety policy, rules and regulations and, in particular, on safety procedures governing the LOTO of equipment. These instructions, the Company urged, begin with new employee orientation and continue periodically throughout the employee's term of employment with Electrolux. Further, as the Grievant acknowledged, he has received Employer provided LOTO training and he has seen some, possibly all, of the PowerPoint presentation "Lockout/Tagout Standard Management Overview" that is occasionally used by safety instructors. (Tr. 135, Tr. 142) Of significance, the Company averred, is that this PowerPoint presentation also includes the warning:

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<sup>5</sup> Secondarily, the Company contended that the Grievant violated rule #3 on the list of enumerated **Major Offenses** in Schedule 2. According to this rule, the "Violation of safety rules" is a major offense. The safety rule in question is that prohibiting employees from using the top two (2) rungs of a ladder. (Joint Exhibit 1; Company Tab E) The Grievant was observed on the top step of the undersized ladder he used to climb to the top of machine No. 340.

**Any employee who fails to follow the prescribed procedures or tampers with a lockout/tagout procedure will be subject to disciplinary action up to and including termination.**

(Company Tab C; Emphasis in original)

Next, the Company itemized the Grievant's uncontested history of LOTO training, which included no fewer than ten (10) training sessions. Also, he was LOTO-trained whenever a "new" machine was brought online; in addition, there are LOTO instructions affixed to each piece of equipment in the plant, particularly machines No. 230 and No. 240. (Company Tabs A and B) The Grievant knew "why" it was necessary to LOTO machines and equipment and he knew "how" to LOTO same.

Further, the Company pointed out that even though machine No. 230 and No. 340 were not in production mode when the questioned incident occurred, they were powered-on and production "test run" could have commenced at any moment. Moreover, the rule, to repeat, is that when a machine is fully energized and work is to occur within the confines of its safety gates, it must be de-energized and fully locked out and tagged out. As the parties themselves negotiated, a single violation of the LOTO rule, because of its serious implications, can result in the termination of the offending employee's employment.

Still further, anticipating arguments the Union might posit in its post-hearing brief, the Company observed that if the Union alleges that the Grievant was "confused" about the proper LOTO procedures applicable to machines No. 230 and No. 340, the Arbitrator should be cognizant of the fact that said claim was raised for the first time at the hearing; that the Grievant had locked out both machines a day earlier, on December 10, 2011; that the Grievant admitted making no effort whatsoever to LOTO the two (2) machines. Also, in anticipation of

the “I Couldn’t Fall Defense”, the Company points out that even though the Grievant may have been careful, using good “common sense”, as he crawled across the tops of the two (2) machines, he could have fallen, as he himself admitted.

Finally, for the above-stated reasons, the Company urged that the grievance should be denied.

**B. The Union’s Arguments**

Initially, the Union pointed out that when the Grievant was working on machines No. 230 and No. 340, they were both de-energized, and locked and tagged out, as required. Indeed, this was so, as he worked inside the machines’ gated confines as well as when he was running cables from the top of the two (2) machines to their respective motors. However, the Union continued, once the Grievant completed his work, removed his locks and the two (2) machines were re-energized, there is no Company policy that requires implementation of the LOTO procedure “... while on top of a machine when one is not performing any work or when one is performing work above the confined space area of the machine.”

Next, conceding the fact that the Grievant used an incorrectly sized ladder to climb onto machine No. 340, the Union argued that as dangerous as it was to be atop of machine No. 340, when Mr. Kunkel was asked, “[D]id you tell him to get down now?” Mr. Kunkel replied, “I did not tell him to get down right now because at that point he was already on the machine.” (Tr. 51) Continuing, the Union argued that if C.B. was seriously in harm’s way, Messrs. Kunkel, Murray and Dwenger should have/would have immediately told him that standing on the ladders top step and crawling across the machine’s top platforms was unsafe without first having gone through the LOTO procedures: But they did not. This defensive response to a co-

worker unsafe actions is the lesson communicated in the video “I Could Have Saved a Life That Day”, which all employees see. (Union Exhibit 1)

Further, the Union pointed out that *whether or not* the LOTO procedure was followed, to have fallen from the heights of the two (2) machines could have resulted in “... anywhere from losing his life to, you know, a scratch.” (Tr. 51-52) Yet, as dangerous as it was to be on top of the two (2) machines, the Union pointed out that “... there was no ‘fall equipment training’ provided C.B. ...” (Union Exhibit 2) And, Mr. Kunkel, under cross-examination, testified that he was “... not aware of training related to fall protection.” (Tr. 52) Thus, the Union claimed that it was the Company who was at fault in this case. Because C.B. was not provided fall protection training, the Company was the at-fault party. By not providing the Grievant with fall protection training, the Company violated Schedule 2, **Offenses Subject to Immediate Discharge**, #10, because absent said training, C.B. was “... exposed... to bodily harm.” (Joint Exhibit 1)

Still further, the Union noted that *per* the Company’s “Plant & Safety Rules” is a rule that provides:

Employees who have not been trained in LOCKOUT/TAGOUT procedures should not perform the cleaning, servicing, or maintenance on the equipment. Machines and equipment must be shut off before cleaning, servicing, and repairs begin. LOCKOUT/TAGOUT procedures must be followed.

(Union Exhibit 3; Emphasis in original) On point, the Union argued, when C.B. was on top of the machines in question he was not performing maintenance work, that is, he was not *cleaning, servicing or repairing* the machines: He was simply retrieving a tool that he had left on top of machine No. 230. In addition, the Union urged, the Grievant was not inside the gated, confined space where LOTO is required.

For the above-stated reasons, the Union urged that the grievance should be sustained and the Grievant should be reinstated and “made whole”.

**V. DISCUSSION & OPINION**

The central facts of the present case are not in dispute. First, on December 11, 2011, from the top step of an undersized ladder, the Grievant climbed to the top of machine No. 340 and, from there, he crawled over to machine No. 230 to retrieve the channel lock tool that he previously used to run cables to the two (2) machines’ motors. This occurred around 2:10 p.m. *after* all of the RWC line of machines had been re-energized, including machines No. 230 and No. 340, and., momentarily, could have begun fabricating the “exterior back and bottom” part to freezer cabinets, on a “test run” basis. Second, before climbing to the top of machines No. 230 and No. 240, the Grievant admitted that he neither shut them down nor effected LOTO procedures.

The Grievant’s use of the referenced undersized ladder was a safety rule violation. Rule #3, namely, the “Violation of safety rules”, is a Schedule 2 major offense. Shop rules prohibit employees from using the top two (2) rungs of a ladder, which the Grievant did. (Joint Exhibit 1; Company Tab) Critically, however, it was the violation of rule #10, **Offenses Subject to Immediate Discharge**, Schedule 2 that triggered the Grievant’s discharge. (Joint Exhibit 2) Rule #10 provides: “Violating the LockOut/TagOut procedures in a manner that exposes the Employee, another Employee, or other Employees to bodily harm.” (Joint Exhibit 1; Joint Exhibit 2) On point, affixed to machines No. 230 and 340 were rules requiring that they must be shut down and locked out before an authorized employee may begin to service or maintain them: The Grievant did not perform the required LOTO procedures before retrieving his channel lock

tool. (Company Tab A) Further, there is no dispute that the Grievant's objectionable conduct in this case could have resulted in "bodily harm" to himself.

Based on the foregoing analysis, the Company maintained that the Grievant's termination should be sustained. The violated rule commends C.B.'s immediate discharge and not progressive discipline, as do the offenses enumerated as **Minor Offenses** and **Major Offenses** in Schedule 2: The offenses and their corresponding penalties, the Company reminds, were jointly negotiated by the parties and incorporated into the Agreement. (Joint Exhibit 1) On point, *per* Article 14, Section 14.3 in the CBA, the Company maintained that the Arbitrator cannot "disregard" the discharge outcome attached to the violation of rule #10, **Offenses Subject to Immediate Discharge**. (Joint Exhibit 1) Further, the Company pointed out, the Grievant had multiple trained sessions on LOTO procedures and he knew that failure to follow LOTO procedures, where required, would result in immediate discharge. (Company Tabs B and C)

However, the Union demurred, contending that the Grievant did not violate any LOTO rule or regulation. Initially, the Union argued that the LOTO rules affixed to machines No. 230 and No. 340 apply only to machines that are to be serviced. (Company Tab A) Further, the "Plant & Safety Rules" state in part, "Machines and equipment must be shut off before cleaning, servicing, or repairs begin. LOCKOUT/TAGOUT procedures must be followed." (Union Exhibit 3) On point, the Union observed, that the Grievant was not "working" (i.e., cleaning, servicing or repairing) when he was on top of the machines in question. He was merely retrieving his channel lock tool. Further, the Union argued, the Grievant was not in the proximity of the fabricating motors, which are gated; he was on top of the two (2) machines.

The problem the Arbitrator has with these contentions is that if the LOTO rules apply when an employee is “working”, would not they also apply, by inference, when the employee is “not working”? At work or not, if machinery is not de-energized, locked out and tagged out, an employee who crawls on top of the machinery during non-work time certainly risks “bodily harm”, which after all, is what the LOTO procedures are designed to prevent. In addition, the Union’s limited “at work” interpretation of the LOTO rules ignores the fact that some employee conduct (e.g., crawling on top of heavy machinery) is so obviously prohibited that formalizing an explicit rule is unnecessary. Thus, C.B.’s conduct is not excused because there was no specific Company policy that required LOTO compliance while on top of a machine when not performing work.

Similarly unpersuasive is the Union’s argument that, when retrieving his tool, the Grievant was above the two (2) machines’ gated confines and not inside the gated confines, at ground level. But to be several feet above energized motor parts that are possibly moving is every bit as dangerous as being behind the machines’ ground level security gates. The Union’s argument in this instance presents a difference without substance. C.B.’s conduct is not excused because he was crawling *above* the two (2) machines rather than being within the confined *ground level* area of the machines.

Further, the Union observed that none of the Grievant’s three (3) co-workers, Messrs. Kunkel, Murray and Dwenger – witnesses from afar of the Grievant’s ascend up an incorrectly sized ladder and the climb to the top of machine No. 340 – told him to “Stop” or “To get down now.” Event timing is significant, however. The machines were (1) energized when the Grievant’s co-workers saw him climb the ladder and climb to the top of machine No. 340, (2)

the hydraulic pumps were humming, and (3) the three (3) men were standing about 30 feet away at the time: It was too noisy and they were too far away to shout out and be heard. However, the evidence suggests that before C.B. began to crawl toward machine No. 230, he did have a limited exchange with Mr. Kunkel. Thus, Supervisor Kunkel could have/should have, but did not, issued a “Stop” order because the Grievant’s behavior was not safe.

Ultimately, the Arbitrator agrees with the Union. Mr. Kunkel and the Grievant’s other co-workers should have **directed** him to stop what he was doing and reverse course. To acknowledge this fact, however, does not alter the basic fact that the Grievant did not de-energize and perform the required LOTO procedures before climbing on top of machine No. 340. Also, the Grievant should have taken Mr. Kunkel’s “What are you doing?” remark to mean that his behavior was being questioned. When the Arbitrator physically viewed the two (2) machines on which the Grievant had crawled, he was stuck by the frightening hazard the Grievant’s conduct presented: Conduct that a reasonable person would have found to be hazardous. Critically, however, the record is void of any genuine sense of hazard and wrongdoing or remorse on the Grievant’s part, which is troublesome. Workplace safety is not a matter that can be taken lightly. Indeed, in argument, the Company observed that the parties’ new, 2006 rule #10 was negotiated after “... a tragic amputation that happened at another Electrolux facility.” (Tr. 7)

Still further, the Union argued that the Company should have, but did not provide the Grievant with “fall protection” training and equipment. It is true that the Company did not provide said training and protective equipment, but this fact is not dispositive of the matter. The Union failed to proffer any evidence showing that such training and equipment was legally

required protection, given the scope of the Grievant's maintenance duties. Moreover, the Union did not show that any "authorized" classification of employees at Electrolux received such training and protective gear, such as, rafter harnesses. Moreover, the record evidence does show that the Grievant had never asked for "fall protection" training and equipment. Ultimately, however, arbitral notice is made of the fact that the Grievant did not follow LOTO procedures before commencing his search for the channel lock tool, notwithstanding the "fall protected" training and equipment argument. The Union's attempt to shift the burden of care from the Grievant to the Employer is not persuasive. It is beyond clear that one does not climb on top of dangerous machinery without first taking the prescribed measures to prevent "bodily harm".

Based on the foregoing, the Arbitrator concludes that the Union's evidence and arguments fall short of acquitting the Grievant of the alleged, now proven, violation of the parties' LOTO rule #10, **Offenses Subject to Immediate Discharge**, Schedule 2. The lead-in paragraph to this section of Schedule 2 states:

Employees who commit any of the following offenses are subject to immediate discharge. Generally, the Company will suspend an Employee believed to have committed such an offense pending investigation before discharging the Employee.

(Joint Exhibit 1) Use of the phrase "subject to immediate discharge" can be interpreted to be equivocal, meaning that discharge may not be automatic and that a lesser level of discipline may be in order. However, when this phrase is considered in context this otherwise apparent ambiguity vanishes. Note that the following sentence beginning with the word "Generally" clarifies the intent of the negotiating parties. This sentence states that the Company will "generally" suspend the employee, pending investigation, and thereafter discharge the

employee provided the investigation discloses violation of a dischargeable rule. The qualifying term, “generally” is interpreted to mean that the facts and circumstances of some cases can result in the employee’s immediate, pre-investigation, dismissal. Of course, this interpretation does not preclude the parties’ from jointly agreeing to vary from the administration of an employee’s immediate discharge. However, no such agreement was reached in the present matter.

The present case record does not refer to other employees who were discharged for this or some other immediately dischargeable offense. Also, the record does not address alleged disparate treatment, caprice and arbitrariness by the Company or discharge-modification considerations, such as, the Grievant’s work record and length of employment with the Company. All of these facts appear to corroborate the Arbitrator’s interpretation of the contract language and to suggest that the present matter is one of first impression, without precedent. Therefore, having found that the Grievant did violate rule #10, **Offenses Subject to Immediate Discharge**, Schedule 2 in the Agreement and given the Arbitrator’s interpretation of the Schedule 2 language in question, the contractually prescribed penalty of discharge is sustained.

**VI. AWARD**

For the reasons discussed above, the grievance is denied.

Issued and Ordered on the 11<sup>st</sup> day of October, 2012 from  
Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator & Professor Emeritus