BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORCARO FORD, INC.

and

TEAMSTERS, LOCAL UNION NO. 43

Case 1
No. 67529
A-6316

Appearances:

Davis & Kuelthau, S.C. by **Mr. Joel S. Aziere, Esq.**, 300 North Corporate Drive, Suite 150, Brookfield, Wisconsin 53045, on behalf of the Company.

Previant Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C. by **Mr. John J. Brennan, Esq**., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, on behalf of the Grievant and Local 43.

ARBITRATION AWARD

Pursuant to Article 4, Section 4, the effective labor agreement[1] parties selected Arbitrator Sharon A. Gallagher from a list of five WERC Staff Arbitrators to hear and resolve a dispute between them regarding the November 2, 2007 discharge of C.R.[2] The hearing in the matter was scheduled and held at Racine, Wisconsin on March 20, 2008. At the hearing, the parties gave opening statements, nine witnesses testified, and four Joint Exhibits, one Company Exhibit and one Union Exhibit were received into the record. The proceedings were transcribed and the transcript was received on March 27, 2008. At the hearing, the parties agreed to submit both initial and reply briefs herein, the former 30 calendar days after their receipt of the transcript and the latter 15 calendar days after their receipt (from the Arbitrator) of initial briefs. The last document was received by the Arbitrator by June 1, 2008, whereupon the record in this case was closed.[3]

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[1] Porcaro Ford, Inc. purchased Towne Ford, Inc. in June, 2007 and also is agreed to assume the 2005-08 labor agreement between Teamsters, Local 43 and Towne Ford, Inc.

[2] The Grievant's initials shall be used herein.

[3] The parties agreed to waive the requirement of Article 4, Section 4, which would have required the Arbitrator to issue her decision 30 days after the close of the hearing herein.

ISSUES

The parties stipulated that the Arbitrators should determine the following issues herein:

1) Did the Company have just cause under Article 5, Section 1, to discharge the Grievant?

2) If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 5. DISCHARGE AND DISCIPLINARY CASES

Section 1. Just cause warranting discharge shall be for reasons such as the following: proven dishonesty; willful or malicious destruction of company property; unprovoked physical violence upon another person upon company premises; drunkenness on the job; refusal to perform work assigned without just cause.

Section 2. In the event of a discharge or other disciplinary action the employee and his steward shall be notified concurrently. Prior to a discharge or disciplinary layoff, the employee, in the presence of his steward shall be informed of the facts relating to the discharge or layoff and shall be given an opportunity to discuss the matter privately on company premises. Either the Union or the employee may file a grievance within five (5) days after which any discharge shall be final. In the event it shall be determined that any disciplinary action, including discharge, was wrongfully taken then the employee affected shall be reinstated to his former status and shall be reimbursed for any loss in wages resulting from such action.

Warnings or disciplinary actions for any offense shall not be considered in the taking of any future disciplinary action for any offense occurring more than nine (9) consecutive months after the giving of such warning or taking of such action.

Section 3. The Employer retains the right to establish, modify or delete reasonable plant rules for its operations.

ARTICLE 14, MISCELLANEOUS PROVISIONS

. . .

Section 3. Privileges. There shall be a rest period in the morning and in the afternoon of each day for a period of ten (10) minutes each. The Employer may designate the time or times for rest periods if he so desires, and if he does designate a time it must be the same time for the entire week, and must be in the middle of the work period in the morning and afternoon.

There shall be a wash-up period of five (5) minutes immediately preceding the end of the work period.

Other work shifts shall be comparable privileges.

Section 4. Maintenance of Privileges. It is agreed that any and all privileges enjoyed by the employees prior to the date of this Agreement will not be denied to them because of the signing of this Agreement. Such privileges shall continue to be enjoyed by the employees during the term of this Agreement.

Section 5. No employee shall engage on any basis in work that is competitive with the business of the Employer unless scheduled to work or compensated for less than the regular work week. Any employee doing so may be disciplined on the first offense by a suspension of up to three (3) days, and a maximum of discharge on the second offense falling within nine (9) months of the date of first offense. This Section should not be construed to mean that an employee may not work on his own automobile.

Section 6. Employees at no time may place or have their own automobiles in the garage of the Employer, nor may they at any time work on their own automobile in said garage unless given permission to do so by the Employer or a representative designated by him for this purpose, whose name shall be posted on the bulletin board.

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BACKGROUND

Porcaro Ford, Inc., herein the Company, is owned by Messieurs Mark and Anthony Porcaro. The Porcaros purchased Towne Ford, Inc., a Ford new car dealership and garage in Racine, Wisconsin owned by Mark Amaters and took over the operation at Towne effective June 1, 2007. As a part of the deal between Towne and the Company, the parties agreed that the Company would continue to employ Towne's employees and the Company also agreed to assume the 2005-08 labor contract (pursuant to Article 16) that Towne had with Teamsters, Local 43. The employees covered by the 2005-08 agreement include Automotive Technical (mechanics), Automotive Body and Paint Technicians and Automotive Machinists, Frame Machine Technicians and Apprentice Automotive Technicians.

It is undisputed that Towne Ford had a practice of allowing its employees to use the Company's facilities (after their normal work hours) to repair/maintain/wash their own vehicles, as well as their own vehicles and those of their family and friends so long as the employee got written permission to have the vehicles (identified by make) in the Company's

garage, on a stated date, signed by the Manager of Parts and Service (or his designee in the Manager's absence).[4] Although Towne Ford undisputedly had a written policy on this practice which was placed in every employees' personnel file, the Company failed to place a copy of same in the record herein (Tr. 33-35). Part of Towne's practice also included the employees' right to buy parts, fluids, filters, etc., at 10% over the Company's costs for use on the vehicles brought in by permission or on any other vehicles of their choosing. Under this part of the practice, employees could pay the Parts Department immediately upon receipt of the items or they could arrange to pay for items later when billed or to pay over time out of their paychecks. It is unclear whether this part of the practice was put in writing by Towne.

No evidence was placed in the record to show that after the Porcaros purchased Towne Ford, that the Company held meetings with unit employees to discuss the past practices they had inherited from Towne or that the Company made any efforts to post or notify employees of the practices which would carry forward. In fact, Parts and Service Director Dresen stated that there were no written policy changes made by the Porcaros after they purchased Towne Ford (Tr. 64). Also, no evidence was proffered to show that any employees had been discharged under Article 5, Section 1 (either by Towne or the Porcaros) prior to C.R.'s discharge (Tr. 88).

The Company's Parts counter is open until 4:30 p.m. each day. Parts counter employees are responsible for inventory control of the parts and supplies they have on hand, for parts ordering distribution and for billing (Tr. 44). Parts counter employees however, have no responsibility or control over the bulk engine oil which is stored in overheard oil tanks in the garage (Tr. 97) and to which all mechanics have access by use of compressor air-fed handguns which are placed in various locations around the shop.

FACTS

The Grievant, C.R., has been a mechanic for over 30 years. He was employed by the Company and by its predecessor as an Automotive Technician from 2000 to his discharge by the Company on November 2, 2007 for "proven dishonesty." No evidence was placed in this record to show that the Grievant had received any discipline from the Company or its predecessor prior to his discharge. And no evidence was proffered to show that C.R. had ever ordered or received parts/supplies from the Company's Parts Department that he did not pay for. In fact, it is undisputed that C.R. has paid the Company (upon receipt) for approximately $3, 000 worth of parts and supplies he requested and that he has paid for some more expensive parts over time out of his paycheck both before and after June 1, 2007.

[4] Parts counter employee, Tom Lefever stated that he keeps copies ofthese slips.

On November 1, 2007 C.R. drove a red Dodge car[5] into work so that he could work on it after the end of his work day. At sometime toward the end of the work day, C.R. requested and received a written permission slip to work on the "Dodge" that evening signed by Mike Yager, a manager authorized to sign such slips in the absence of Parts and Service director Rob Dresen (Jt. Exh. 3). C.R. then put the permission slip on the dash of the car and drove the car from the back lot into the second work bay. At this point, a sales person, Cathy Achelson[6] asked C.R. to take some bolts or strikes off a sports truck so they could be put on a new sports truck before the Company could deliver the truck that night. This work took C.R. about 15 minutes to complete (Tr. 111-112). C.R. then changed the alternator and belt and he had the car lifted up on the rack so he could loosen the last of the bolts. At the end of his work, C.R. checked all the fluids including the oil; he found the car was low at least two quarts of oil because oil did not register on the car's dipstick when he checked it. C.R. immediately lifted it up on the rack to check for an oil leak.

At this time, Mr. Mark Porcaro was meeting with car dealer, Mr. Frank d'Acquisto to show him several cars on the lot which Porcaro was offering to sell at wholesale prices. Mr. d'Acquisto stated that their meeting occurred some time between 6:30 and 7 p.m. (Tr. 26; 158-159).[7] At this time, Messieurs Porcaro and d'Acquisto stated they observed C.R. in the shop with a car raised up on the rack changing the oil.[8] Mr. Porcaro thought this odd so he called Service and Parts Manager Dresen to inquire whether C.R. had a signed permission slip from Dresen to work on this car after hours that night. Dresen came to the shop and spoke to C.R. Dresen testified concerning his conversation with C.R. on November 1st as follows:

(by Mr. Aziere:)

Q What did you do after you received the phone call?
A I told Mr. Porcaro that I did not give C. permission. We discussed it, and he basically said that I should come up here and verify it, and I did.
Q Approximately what time did you arrive at the shop?

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[5] Mr. Mark Porcaro and Rob Dresen stated the car they saw C.R. working on was a red Dodge Stealth sports car. Mr. Frank d'Acquisto (a car dealer who was looking at Porcaro's wholesale cars that night), stated he could not recall the type of car he saw C.R. working on November 1, 2007. C.R. stated that the car he worked on after hours on November 1st was a red, faded Dodge Avenger that belonged to his niece. C.R. also stated that he worked on the car's alternator belt and that he did not drain the oil from the car - - he merely topped off the oil when he found it low at the end of his work on the car. Dresen did not see C.R. draining any oil from the car on November 1st. In my view, the type of vehicle C.R. worked on is not important here as the permission slip and his November 1 and 2 conversations with Dresen did not show that C.R. made any statements to Dresen on these matters that could be interpreted as "dishonest."

[6] Cathy Achelson was not called as a witness herein.

[7] Mr. d'Acquisto stated he met with Porcaro on November 1st between 6:30 and 7 p.m. and that he could not remember the make of the car he saw C.R. working on but he recalled C.R. was changing the oil on the car.

A 7:15.

Q When you arrived, was C. still there?
A Yes.
Q What did you observe?
A C. was sitting in the vehicle. I walked up to the driver's side door, and I asked him basically what he was doing here.
Q Did you see a permission slip that C. had authorizing him to work on the vehicle?
A Yes, I did.
Q I'm handing you Joint Exhibit 3. Are you familiar with that document?
A Absolutely.
Q What is that?
A That is the permission slip used.
Q Is this the permission slip that C. had authorizing him to work on the vehicle on November 1st, 2007?
A This permission slip was sitting on the left front corner of the dash, yes.
Q Who signed Joint Exhibit 3?
A Michael Yager.
Q And as you previously testified, is he authorized to sign these permission forms?
A In my absence, yes. (Tr. 41-42)

. . .

(by Mr. Aziere:)

Q Now going back to your arrival at the shop on the evening of November 1st, 2007, what further conversations, if any, did you have with C.?
A Once he had explained that he was performing the maintenance on the vehicle, I asked him what oil he used. He stated 5W-30. I then proceeded to ask him where he got that oil from, and he pointed at the overhead gun system.
Q Explain the overhead gun system?
A Large bulk storage oil tanks that are compressor air fed that supply oil to the basic handguns in various locations around the shop for ease of filling engine oil.
Q Did you ask him anything about obtaining permission to use the oil?
A No, I did not.
Q Did he state anything about having permission to use the oil?
A No. He did not.
Q Did he state anything about using the oil?
A No. He did not other than that he used it.
Q Did he make any explanation about billing, being billed for the oil?
A He stated that he used the oil, and he would tell Tom Lefever the next morning that he used it, and that Tom would always bill him.

THE ARBITRATOR: Would what?
THE WITNESS: Tom would always bill him for it the next morning. (Tr. 43-44)

. . .

(by Mr. Aziere:)

Q Now in this case, did C. indicate that he had obtained permission prior to using the oil?
A No. He did not.
Q What did he say in regard to how he was going to handle paying for the oil?
A He said that he always did this and that he always had Tom bill him the next morning. (Tr. 45-46)

. . .

Q What did you do after you had this discussion with C.?
A I went up to Dean Sylvester's office, the general sales manager.
Q Why did you go to Dean's office?
A Because I wanted to make a phone call and have a witness.
Q Who did you want to call?
A Tom Lefever.
Q Did you call Tom?
A Yes, I did.
Q Describe your conversation with him?
A Very short and simple. I called Tom on his cell phone. I believe he was driving up north at the time. I asked him if C.R. had ever in the past asked him to bill him for something that he had used the night prior. Basically stating – - I believe the quote was: "Has C.R. ever asked you to bill him for oil that he had used the prior night?" Tom's answer was flat out no. (Tr. 46-47)

. . .

(by Mr. Aziere:)

Q And then what did you do?
A I informed Mr. Porcaro of the situation and everything at hand.
Q After speaking to Mark Porcaro, what did you do?
A I proceeded back down into the shop to find C., and I could not find C..
Q Approximately what time was this?
A That would have been somewhere between 7:30 and 7:45.

Q Was the Dodge vehicle still present?

A It was not in the shop, so then I proceeded to see if I could find it in the lot.
Q Did you find the vehicle in the lot?
A No. I did not.
Q Did you find the vehicle anywhere on the property?
A No. I did not. I walked out the north service man door. I walked across the back lot to look on the east side around – - behind the detail area because sometimes employees will park there as well. I couldn't find him there. I walked back across the back lot. Nothing in the back lot. I walked up the east side - - sorry, did I say east side the first time?
Q Yes.
A I meant the west side the first time. Then I walked up the east side around through these showroom doors and back into Dean's office. I could not find the vehicle or C..
Q What type of vehicle was this?
A A red Dodge Stealth. (Tr. 47-48)

. . .

The above conversation between C.R. and Dresen formed the basis of the Company's position that C.R. had engaged in "proven dishonesty." [9]

On November 2nd at the beginning of the work day, Dresen met with C.R. and Union Steward Sundre. At this meeting, Dresen told C.R. that the Company was considering discharging him, as follows:

(by Mr. Aziere:)

Q The next morning on November 2nd, 2007, did you have any meetings with C.R.?
A Yes, I did.
Q Who was present at that meeting?
A Myself, C.R., and Union Steward Steve Sundre.
Q Did you confront C. with the allegations against him at the meeting?
A Yes.
Q Did you advise him that he was being considered for termination for dishonesty?
A Yes.
Q Did C. respond to these allegations?
A Yes.

[9] No one at the Company did any further investigation of C.R.'s activities on November 1st.

Q What did he say?
A Basically he couldn't believe it. He said I must be kidding. He proceeded to - - the conversation went from I can't believe it to, well, I've never done this before. Then it went to, well, I haven't done this in a long time. Things just really started to get muddy.
Q Were these statements inconsistent with previous statements that C. had made to you regarding the oil?
A Yes.
Q How were they inconsistent?
A To began with, "I always tell Tom", which I knew wasn't right because Tom told me it never happened. Then it went to, you know, "I've never done this before", which was a contradiction to the prior night's statements. Then it went to, "well, I haven't done this in a long time."
Q Did you consider C.'s response during the meeting in determining the appropriate course of action with regard to his employment?
A Oh, absolutely.
Q How did you consider those statements?
A It only solidified in my mind that there was no honesty at that point in time. (Tr. 49-50)

. . .

During this meeting,[10] Dresen gave C.R. the option to resign or be terminated per the following letter:

. . .

> Due to the events of November 1st, 2007, your employment at Porcaro Ford has been terminated. This is in accordance with Article 5, Section 1 (Proven Dishonesty warranting discharge) of the Union Contract. Please make arrangements with me for removal of personal property from the premises.

. . .

C.R. never replied to this proposed option.

Another meeting was held on November 6th by Mr. Anthony Porcaro and Union Representative Jerry Jacobs concerning C.R.'s situation. However, at this meeting, not much was accomplished because Mr. Porcaro believed the Union would provide explanations, evidence and/or justification for C.R.'s actions while Mr. Jacobs thought the meeting was called so that the Company could give the Union justification/evidence to support its decision

[10] At the end of this meeting, Union Steward Sundre allegedly stated, "everybody does it" (takes oil and pays for it later). Sundre was not called as a witness herein.

to discharge C.R. Neither side cleared up these misconceptions.

Thereafter, (on November 8th), the Union filed the instant grievance on C.R.'s behalf and it was moved to arbitration before the Undersigned.

POSITIONS OF THE PARTIES

Company:

The Company urged that on November 1, 2007, C.R. violated Company policy by taking bulk oil without first obtaining permission and making arrangements to pay for the oil, in accord with agreed-upon past practice. The Company noted that virtually every witness, except C.R., confirmed its description of the Company's practice - - Cheever, Lefever, Dresen, the Porcaros. The Company also observed that none of the witnesses who testified herein confirmed C.R.'s assertions that employees took oil without permission and paid for it later. On this point, the Company observed that C.R. could not give the name of another employee who had also taken oil without permission and paid for it later.

The Company contended that on November 1st, when Dresen caught C.R. after he had used the bulk oil on the red Dodge, C.R. engaged in proven dishonesty when C.R. told Dresen he "did it all the time" (took oil without permission or advance payment) and that he would "always tell Tom the next morning" and pay for the oil used (Tr. 122-123 and Tr. 43, 46). The Company urged that C.R.'s dishonesty was proven when Dresen called Lefever later that evening and Lefever specifically denied having any such arrangement with C.R. or anyone else.

In addition, the Company urged the Arbitrator to consider C.R.'s statement to Dresen the next morning (November 2) as further proof of C.R.'s dishonesty: C.R.'s statement that he had never done this before (taking oil without permission/payment) and that he had not done this in a long time (Tr. 50). The Company also noted that C.R.'s failure on November 1st to ask Mark Porcaro for permission to use oil; and C.R.'s failure to seek other alternatives – to drive to a nearby store to buy oil – and C.R.'s failure to produce receipts for the new alternator and belt he allegedly put into the Dodge on November 1st provided further support for the Company's decision to discharge C.R. for dishonesty and for its conclusion that C.R. was not to be trusted.

Furthermore, the Company contended that C.R. failed to call his niece or Steve Sundre as witnesses herein to corroborate his testimony, but that Company President Mark Porcaro's testimony was supported by a disinterested, third party witness, Frank d'Acquisto. Also, the Company questioned why C.R. paid for four quarts of oil on November 2nd, enough to change the oil on the Dodge, not two quarts to "top off" the Dodge as C.R. asserted the car had needed. The fact that C.R. failed to produce a Company receipt showing he paid for two quarts of oil on November 2nd required the conclusion that the Company's receipt for four quarts of oil and the testimony thereon must be credited. Finally, C.R.'s testimony herein regarding his extensive mechanic work on the side during his employment (which the Company also asserted violated Article 14, Section 5 of the labor agreement), showed C.R.'s

lack of character and dishonesty.

In these circumstances the Company argued that this Arbitrator must deny the grievance and let the discharge penalty stand as that penalty was mutually bargained by the parties for "proven dishonesty" pursuant to the clear and unambiguous language of Article 5, Section 1. This is so, despite the fact that the Arbitrator might have imposed a lesser penalty had it been left to her.

Even if the Arbitrator were to determine that the Company lacked just cause to discharge C.R., the Company urged that no back-pay would be due C.R., given his admissions under oath that he had taken virtually no action to seek employment since his discharge. In this regard, the Company noted that C.R. admitted he had made only two applications for employment, one of which was with a company in North Carolina, that he never checked employment opportunities at the "Union hall" or spoke to anyone at the Union about employment, that he made no on-line applications and went to no career centers or employment websites to seek work. The Company asserted that C.R.'s failure to mitigate damages requires a conclusion that no backpay is due him should the Union otherwise prevail herein.

Union:

The Union asserted that the Company failed to perform a fair and complete investigation in support of its decision to discharge C.R. The vast disparity between the factual scenarios submitted by each party, in the Union's view, demonstrated the Company's investigative failure herein. In this case, the Union contended that C.R. never engaged in any proven dishonesty and he therefore could not be fairly discharged under Article 5, Section 1. The Union argued that the record evidence showed C.R. engaged in the following conduct:

. . .

1. R. performed work on a relative's car after work hours and after obtaining permission to do so. The act of working on a vehicle of a relative or friend is specifically allowed by longstanding policy, whether formal and informal – everyone knows it, no one disputes it. Nothing about this act was hidden or secretive. C.R. obtained permission from a member of management, and was openly working on the car in the service bay.

2. C. repaired the car with parts purchased by the owner of the car beforehand. C. repaired the car with his own labor, on his own time and no parts belonging to the employer were used. C. used only the employer's facility with its expressed permission.

3. Upon completion of the repair, C. routinely checked the car's fluids, and determined that the car was low on oil. He added oil directly from the oil gun connected to the bulk oil container. C. had no intention of using oil that night as he did not know the oil was low (Tr. 122, 124). Once it was discovered to be low however, C. did not give it a second thought to use the

oil from the bulk oil container (Tr. 122-123). C. did not attempt to sneak

oil into the car; his use of the oil gun was open for all to see and hear. C.'s use of the oil was not an act he expected to go unnoticed. He simply didn't care because he was not acting outside of ordinary practice that he and other mechanics in the shop had followed (Tr. 122-124).

4. C. was confronted about the oil use before he left. While he was taken aback that he was being questioned about it, he readily admitted using oil; he didn't think that it was a problem. He knew that he would be paying for the oil in the morning and he advised Dresen of that fact. C. had always paid for parts he used in his entire tenure with the company, probably in the thousands of dollars. These parts were not always paid for at the time of use; instead, they were paid for at the time of billing (Tr. 117, Union Exh. 1). There is no reason to believe that C. had any intention of acting outside of this longstanding practice of paying in the morning just as he said he was going to (and did) (Tr. 123). Certainly, a discharge cannot be dependent upon a presumption that he wouldn't. More importantly, using the oil without obtaining permission first, when one has every intention of paying for the oil, does not constitute dishonesty. It may be a violation of the policy, though the union disputes it. In any case, it's not dishonesty.

5. C. paid for the oil in the morning, just as he said he would. This act is the opposite of dishonesty. He acted honestly in paying for oil that he had used (although he may have paid for more oil than he used), and acted honestly in following through with his statement to Dresen the night before that he was going to pay for the oil in the morning.

The Union urged that the above factual summaries "represent the employer's basis for claiming that C. was dishonest. Yet, C. did not do one dishonest thing throughout the entire chronology. There being no dishonesty, there can be no discharge" (U. Br. pp. 7-8).

The Union then contended that C.R. had no deal with Tom Lefever on November 1st because he did not know he would need oil that night; that Lefever must have been surprised by Dresen's call on November 1st and "fearful for his job," "mistaken or hiding the truth," when he told Dresen that he had no arrangement with C.R. for payment for oil after usage. The Union observed that C.R.'s testimony regarding the past practice was credible and supported by Union Steward Sundre's statement (that everybody takes oil) on November 2nd at C.R.'s discharge meeting. Furthermore, the Union urged that the Company's decision to terminate C.R. was based on one conversation between Dresen and C.R. and Dresen's call to Lefever on November 1st; that the Company never asked C.R. for an explanation or for any receipts; that Sundre was never questioned about what he observed in the shop on November 1st; and the Company never investigated Towne Ford's policy on oil usage. Therefore, the Union asserted, the Company lacked just cause to discharge C.R. and it asked that C.R. be reinstated and made whole for all losses.

REPLY BRIEFS

Company:

The Company argued that the Union made a number of assertions in its initial brief which were not supported by the record or added unproven "facts" or misstated the record facts. In this regard, the Company noted that the Union failed to prove many assertions it made in its opening statement herein. For example, the evidence failed to show,

1) that there was a practice whereby employees would take oil and pay later;
2) that other employees have done as C.R. did on November 1st without consequences;
3) that Lefever was surprised by Dresen's November 1st call or that he was playing it safe/fearful for his job;
4) that Sundre was at the sloop on November 1st changing oil on a car.

The Company also argued that the type of car C.R. worked on on November 1st and whether C.R. left the car on the lot on November 1st were really "red herrings" as it is undisputed that C.R. was working on a red Dodge that night. Whether the car was a Dodge Avenger or a Stealth[11], the Company urged, it was C.R.'s responsibility to prove the model of the car. Also, in any event, the Company argued that the record showed that C.R. took oil from the Company which he had irretrievably stolen because C.R. could not return the oil no matter the type of car or where the car was parked on November 1st.

Even assuming, for the sake of argument, that the Company did not perform a thorough investigation of the events of November 1st, the Company noted that C.R. had two opportunities to present his side of the story to the Company, on November 2nd and 6th. On this point, the Company also cited a 1994 arbitration award by Arbitrator Kanner, AT & T, 102 LA 931. There, the company failed to perform an investigation of the grievant's misconduct, preferring to rely upon the criminal investigation of the grievant's misconduct. Arbitrator Kanner held that there was "no contractual or due process duty" for the company to perform a full investigation before disciplining the grievant and because the evidence produced at the arbitration hearing showed there was just cause to discharge the grievant, Arbitrator Kanner let the discharge stand. Accord, HAYES-ALBION CORP, 117 LA 1117, 1181 (ALLEN, 2002).[12]

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[11] The Company attached pictures/descriptions/prices of a Dodge Avenger and a Dodge Stealth and asked the Arbitrator to take arbitral notice thereof. In this Arbitrator's view, post-hearing documentation submitted without joint agreement thereto is inappropriate and should be rejected especially when it is attached to a reply brief to which the other party cannot respond. Therefore, I have not considered the Company's attachments.

[12] The Company cited two cases in its Reply Brief, AT & T, 102 LA 931 (KANNER, 1994) and HAYES-ALBION CORP, 117 LA 1117 (ALLEN, 2002). I find these cases factually distinguishable from this case, as the cited cases involved criminal investigations/charges lodged against the grievants. In any event, the generalized statements

cited by the Company from these cases do not apply here as I have found the Company's investigation was sufficient to prove C.R. had engaged in "proven dishonesty."

Finally, in this case, the Company argued, contrary to the Union, that the Arbitrator must let the discharge of C.R. stand if she finds C.R. engaged in "proven dishonesty" as discharge is required by Article 5, Section 1. To reduce the penalty herein would be contrary to the express language of the labor agreement.

Union:

The Union argued that it is for the Arbitrator to determine credibility issues and that the Company's "acerbic tone" and frequent assertions that C.R. "lied" in this case are, to say the least, out of place, if not misleading. In this regard, the Union urged that all witnesses except Annette Smith and Jerry Jacobs "had a stake in this matter and therefore a reason to lie" (U. Reply, p. 1). On this point, the Union urged that the Porcaros and d'Acquisto had various business reasons "to lie" and others were afraid they would lose their jobs so that their livelihoods were at stake just as C.R.'s was at stake herein. As it is the Company's burden to prove C.R. engaged in dishonesty warranting discharge and it failed to meet that burden, C.R.'s discharge was unwarranted and improper and it should be reversed in this case.

DISCUSSION

This case is most unusual in this Arbitrator's 24 years of experience. It presented numerous head-to-head credibility issues concerning which there was virtually no documentary evidence and few disinterested corroborating witnesses. In addition, Article 5, Section 1, of the applicable contract section, presents, in my view, clear but very unusual language which limits a decision maker's informed discretion regarding the proper penalty to assess for "proven dishonesty."

Regarding the credibility issues, everything from the time of day C.R. worked on the car, to the type of car worked on, to the type of work C.R. performed were contested. Given the fact that the Union did not call Cathy Achelson to corroborate C.R. concerning the time he began working, I have credited disinterested, third party witness Frank d'Acquisto[13] regarding the time of day and the kind of work C.R. did on November 1st – that he saw C.R. changing the oil on a car in the shop on November 1st. Mr. d'Acquisto's testimony, I note, corroborated Mark Porcaro's testimony on this point. As to the type of vehicle C.R. worked on after hours on November 1st, and the kind of work he performed, it was up to C.R. who had control of the car and access to the owner thereof to show that his assertions on these points were correct. Thus, C.R. could have called his niece or his brother-in-law or produced the receipts for the alternator and belt to confirm his (C.R.'s) assertions in this area. C.R. failed to do these things.

[13] The Union presented no evidence to show Mr. d'Acquisto had any stake in the outcome here.

The Union has argued that the Company's investigation was insufficient and denied C.R. due process. I disagree. Certainly, the Company's investigation was one of the briefest in my experience: Dresen had two conversations (one with C.R. and one with Lefever) upon which the Company decided to terminate C.R. The information the Company had as of November 1st was 1) C.R.'s admission to Dresen that he had used 5W40 oil from the overhead bulk tank on the Dodge; and 2) that C.R. had asserted that he would pay Lefever for the oil he had used "in the morning" (Tr. 115).

In my view, I believe that on November 1st, C.R. must have also told Dresen that he (C.R.) always did this and that he (Lefever) would always bill C.R. the next morning (Tr. 46). This is so, because as Dresen stated herein, he immediately called Lefever and questioned him on that very subject, asking Lefever whether C.R. had ever asked Lefever to bill him for oil that C.R. used the prior night. Notably, Lefever confirmed herein his conversation with Dresen on November 1st and its content – that he told Dresen that C.R. had not asked him for a bill for oil recently or in the past (Tr. 95) and Lefever further stated that he never had any arrangements with C.R. "or anyone else for using anything and making payments later" and no employees ever asked Lefever for a bill for oil they had already used (Tr. 97).

It is also significant that on direct examination, C.R. described the practice in a way similar to Dresen's description of what Dresen asserted C.R. told him on November 1st, as follows:

(by Mr. Brennan:)

> Q There's been some discussion today about the policy of the dealership with respect to getting parts and when you pay for them; okay. What is your understanding of the policy?
>
> A Well, if I go in the parts and I get parts, Tom gives me the parts. Then he either comes out a couple days later or asks me if I got the money to pay for it. If it is a good amount of money, he will say do you got the money for this? I will say, no. I will have it tomorrow. He will give me the bill tomorrow.
>
> The day I get the bill I will pay for it that day. Victoria was always - - you have to pay for it the day you got the bill. She didn't want the bill sitting around because Tom could get in trouble. We all paid for it the day we got the bill. (emphasis added)
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> Bulk oil, antifreeze, anything outside the shop if parts is closed or if Tom is not there or if he's not around, you take it. You tell him. You pay for it the next day. It is a mutual agreement between parts and service, you know. (Tr. 117)

Also, later in his direct testimony, C.R. changed his response to some degree on this point which tended to undermine his own prior testimony as follows:

> (by Mr. Brennan:)
>
> Q Well, that is the reason that you didn't simply tell Tom on November 1st that you were going to use oil that night?
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> A I didn't plan on it. I checked oil. It wasn't on the stick, so I definitely don't want to drive it away or start it up. I mean, you hurt a motor, and I will be the guy ending up putting a motor into it. I added oil to it. Nobody's in parts. Parts is closed. Nobody's in the shop except for me and Steve.
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> It wasn't a big deal. We've done it before. What you take you make sure you tell Tom. It is - - it is just like this stuff. You know, the coils, pay me later. We always paid, I mean, the next day or the day after or even a week later.
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> We always paid. It is just a normal procedure, you know. I mean you don't go taking laptops or stuff like that or snowblowers or lawnmowers or cars or computers, you know. In all of these circumstances, I believe the Company's investigation although brief, was sufficient for it to base a decision to discharge C.R, as demonstrated by the above, C.R.'s testimony was not even internally consistent – that Victoria insisted that invoices be paid immediately so Lefever would not get into trouble.
>
> Q Yeah.
> A But a little bit of antifreeze or a little bit of oil, you just tell them and - - (Tr. 122-123).

As demonstrated by the above quotations, C.R.'s assertions were not supported by documentation or the testimony of other witnesses and C.R.'s testimony was not internally consistent. In all of these circumstances, I believe the Company's investigation, albeit brief, was sufficient to base its decision to discharge C.R. for proven dishonesty.

The Union contended that the Company should have questioned Steve Sundre about what he saw in the shop on November 1st and that the Company should have called Sundre as a witness herein. In my view, Sundre (a Union steward) was the Union's witness who should have been asked to corroborate C.R. The fact that Sundre was not called as a witness can properly form the basis for a presumption that, if called, Sundre would not have supported C.R.'s assertions herein.

It is also significant that both Lefever and Parts employee Duaine Cheever failed to support C.R.'s assertions regarding the oil usage past practice and that other employees used oil and paid later. Furthermore, although the Union strongly implied that Lefever lied under oath regarding his "arrangement" with C.R., or that Lefever was under duress when he testified against C.R., the Union submitted absolutely no evidence to support these implications. Rather, the record entirely supported Lefever's testimony and I have credited Lefever in this case and I have decredited C.R. based on this record.

The Company has argued that the inconsistent statements made by C.R. on November 2nd at his discharge meeting should be considered herein in determining whether the Company had just cause to terminate C.R. for his acts/statements on November 1st. I disagree. The discharge letter stated that C.R. was terminated for his acts/statements on November 1st. As the November 2nd meeting occurred after, C.R. had engaged in the dishonest conduct and made the dishonest statements for which he was fired, what C.R. may have said on November 2nd is only relevant in determining his credibility herein and/or deciding whether C.R.'s November 2nd acts/statements supported or detracted from his acts/statements on November 1st. As I have already found C.R. less credible than various other witnesses, the content of this November 2nd meeting is neither relevant nor particularly helpful.

The Company has pointed out that the record herein showed C.R. bought four, not two quarts of oil on November 2nd and that this further demonstrated C.R.'s dishonesty. On this point, I must agree. C.R. stated herein that he paid for two quarts but that he had left the receipt in his dresser on the day of the hearing herein. If C.R. had, in fact, used only two quarts of oil, he should have insisted on paying for that much oil and no more, and he should have produced his receipt therefor. Instead, the invoice produced by the Company, supported by clerical employee Annette Smith's credible testimony, stood uncontradicted and showed that C.R. bought four quarts of oil which, in fact, tended to support the Company's case.

Finally, the Company argued that C.R.'s testimony herein showed that he violated Article 14, Section 5, the contractual no competition clause. I disagree. C.R.'s testimony and the record evidence did not support the Company's claim that C.R. had essentially stolen mechanic work from the Company by his work on the side after his discharge. Also, this Arbitrator need not decide the issue regarding mitigation of damages argued by the Company herein because, based on the above analysis, the grievance must be denied.

AWARD

The Company had just cause under Article 5, Section 1, to discharge C.R. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 6th day of June 2008.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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