IN THE MATTER OF: **A grievance dated June 26, 2012 on behalf of Shawn Fletcher alleging termination of employment without just cause, contrary to the collective agreement.**

BETWEEN:

TURTLE RIVER SCHOOL DIVISION,

Employer,

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1897,

Union.

AWARD

Appearances

- David Simpson, Legal Counsel; Bev Szymesko, Superintendent of Schools; Gwen McLean and Dan Delaurier, Trustees; Morgan Whiteway, Manitoba School Boards Association; for the Employer.

- Lee McLeod and Doug McLaughlin, National Representatives; Diane Cabak, Local President; Denise Harder, National Representative (Observer); for the Union.

Nature of the proceedings

The grievor Shawn Fletcher was terminated from his employment as a Mechanic's Helper in the McCreary, Manitoba school bus garage operated by the Turtle River School Division ("the Division" or "the Employer"). It was alleged that during working hours on June 12,

2012, just outside the garage in the bus parking area, he made unprovoked threats of violence against a fellow employee, Bus Driver Gordon Allan ("Allan" or "Gordie"). The ostensible reason for the conflict was that the grievor was hit by over spray from the pressure hose Allan was using to wash his bus after the daily run. There was no physical altercation but the language was intimidating, belittling and laced with profanity. The incident was over in a few moments. However, Allan was upset and complained to management the next day.

The Division states it has a zero tolerance policy with respect to workplace violence. An investigation was conducted and the grievor acknowledged making threats. He expressed no remorse and made no apology during the investigation. He explained that he didn't like Gordie. The grievor had five and a half years of service and a personnel record with two related prior incidents in 2010 - a warning and a reprimand, both for inappropriate interactions with Bus Drivers at work. The characterization of the reprimand for disciplinary purposes was a contested issue during the present arbitration hearing.

On June 21, 2012, the Division terminated the grievor. He apologized orally at the discharge meeting. But a few days later, he also made remarks about Allan to an independent witness which the Division construed as further threats. Subsequently the grievor sent a letter of apology via the Union, to be delivered to Allan at work.

The Division submitted that there was cause for discipline and justification for discharge, the only live issue being mitigation of penalty. In the Division's view, the misconduct was not impulsive or provoked, there was little or no remorse, there was no long service and the grievor has taken no steps to deal with his anger problem. None of the co-workers wanted to see the grievor return to work. Therefore the decision to terminate should be upheld.

For its part, the Union would not concede cause for discipline although it acknowledged that

the grievor's behaviour on June 12, 2012 was inappropriate. He was intemperate but not aggressive. The Union emphasized the grievor's apology, even if made somewhat belatedly. The Union said that the incident should be viewed as a momentary loss of temper and self control, which the grievor promised to avoid in future. Moreover there was a failure by the Employer to utilize progressive discipline in this case. The Division should have opted for a corrective punishment and allowed the grievor an opportunity to improve his behaviour in the workplace before taking the ultimate step. The Union requested reinstatement with a substituted penalty, at most a warning or a reprimand.

The Union filed its grievance on June 26, 2012 (Ex. 2) and I was appointed as sole arbitrator under the collective agreement on August 7, 2012. The hearing was held in Brandon, Manitoba on October 25, 2012. At the outset, the parties affirmed my appointment and jurisdiction. No preliminary issues were raised.

The evidence

The witnesses

Shawn Fletcher ("the grievor" or "Shawn") has been employed with the Division since November 2006 and testified on his own behalf. Aside from his duties as a Mechanic's Helper, he has been assessed and approved to work as a spare bus driver (Ex. 10, 11). The grievor is responsible for light mechanical repairs to buses as well as other Division property. He also does light carpentry jobs. He books spare drivers, moves buses around, takes phone calls and drives spare a few times each month. No other witnesses were called by the Union.

For the Employer, Gordie Allan, Dean Bluhm ("Bluhm") and Tyler McFadyen ("McFadyen") gave evidence.

Gordie Allan, the complainant in this matter, is 52 years of age and been employed by the Division as a bus driver for three years. He also works seasonally as a public works employee for the Village of McCreary. He testified under subpoena from the Employer.

Bluhm is the Transportation and Maintenance Supervisor for the Division, a position he has held for five years. He joined the Division 12 years ago as a Mechanic's Helper and progressed to Head Mechanic. For 18 months, as Head Mechanic, he worked with the grievor on a daily basis in the McCreary shop. The hours of work for each position were nearly the same. Now Bluhm is based in the Division office a few blocks from the garage but he usually starts his day at the garage.

McFadyen is a member of the bargaining unit and has worked as a Bus Driver for two years. He is also employed by the Village of McCreary. He appeared under subpoena. McFadyen knows both Allan and the grievor from work.

In his evidence, Bluhm described the bus garage operation. There are three service bays, a parts room and the office. The parking area is about 150 yards square and has ample parking for a number of buses. Drivers fuel their buses at the garage, wash them, take care of repairs, have coffee and wait around for their next run. Phone calls are frequently fielded from parents. According to Bluhm, there is continuous interaction between the Mechanic's Helper and the drivers when they are at the garage.

The June 12 incident

Allan and the grievor both testified as to the interaction which occurred on June 12, 2012. There were differences in the respective accounts but during the course of the arbitration

hearing, the Union stipulated that it was not disputing Allan's version for purposes of the present case. On this basis, Allan's version must stand in terms of any necessary factual findings. However, I have also taken note of the grievor's evidence as set forth below which can be considered his recollection and interpretation of the brief incident on June 12. I accept the Union's point that I am still required to analyse the facts in terms of the applicable arbitral principles. Was there cause for discipline? Was discharge excessive? If so, what penalty should be substituted?

In his testimony, Allan described the incident in question as follows. On June 12, he had an extra trip to Ste. Rose and returned to the garage around 2 pm. He refueled and then backed his bus up to the third bay door where the wash hose and wand are located. The back of his bus was 5-10 feet from the garage. He was parked on the cement pad. He started washing the bus and was standing 5-6 feet away from the vehicle because of the spray. About five minutes into the task, he heard Shawn say, "Watch out." Looking up, he saw Shawn standing nearby and wanting to pass by. Gordie stopped washing. Shawn walked between Gordie and the bus toward the front of the vehicle. Gordie asked, "What's up?" There was no reason Shawn had to walk between Gordie and the bus. There was lots of open space on the parking pad behind Gordie. Shawn made no reply.

Shawn walked to the door of Gordie's bus and entered. Again Gordie asked, "What's up?", and again there was no reply. Gordie went back to washing the same side of the bus. Then he heard Shawn say, "Move". He let Shawn pass. Again there was no reason Shawn could not have walked behind him. Gordie continued washing. He realized Shawn had turned off the bus engine. Gordie had left it running in case he needed to move the bus during the washing process. He conceded the exhaust may have been venting into the garage and possibly this led Shawn to turn off the motor.

Then Gordie heard Shawn hollering something. He stopped and asked, "What's the matter?" Shawn said, "Did you do that deliberately?" It was noisy because the compressor for the pressure sprayer was running but Shawn was loud and Gordie could hear him. "Do what?" Gordie asked. Shawn said, "You sprayed me, you fucker." Gordie replied, "No I didn't", which was true. Gordie couldn't tell if Shawn was wet but it's a pressure washer and possibly he did hit Shawn accidentally with the over spray. Gordie was certain he did not spray Shawn directly.

Shawn then said the following: "You fat little fucker. I'm going to punch the fuck out of you." Shawn was standing 10-15 feet away. Gordie made no eye contact and tried to avoid a confrontation. He responded, "I don't know what the hell you're doing." Gordie was unable to comment on Shawn's demeanour during the exchange. "I can't say, I didn't look at him, usually I don't in a confrontation." Under cross examination, he confirmed that the grievor never touched him and did not come towards him during the encounter.

Next Shawn said, "I'll meet you back here at 5 pm, we'll settle this once and for all." Gordie felt things were escalating. He didn't know what Shawn meant by "settle this". But he took the comment to mean that Shawn wanted a fight at 5 pm. At the time, he did not believe Shawn would actually "punch the fuck" out of him. When he thought about it later, he concluded that maybe it was more serious. He was upset. He felt they had been "kinda friends" for years. There had been no prior incidents like this between them. They often spoke at work when Gordie was in the garage getting supplies or fuel, maybe once or twice a week.

Gordie finished the washing job, left the area and did not come back. He felt the need to leave the area of conflict quickly. Later he drove the bus to the school and completed his scheduled run. The next morning he reported the incident to Bluhm and filed a complaint.

He felt he needed to do so. Bluhm recommended that Gordie consider applying to court for a Protection Order. Gordie never did apply for an Order or contact the police.

After the incident, Gordie saw Shawn around town but they had no conversation. In early September, Gordie received a letter of apology hand written by Shawn. It had been prepared some time during the summer and was provided to Bluhm by the Union for forwarding to Gordie when the school term resumed. It read as follows (Ex. 3):

> Gordie Allan:
>
> I would like to apologize for what I said on June 11th (*sic*) at the bus garage. My behaviour was inappropriate, immature and disrespectful.
>
> I let my temper at the time get the better of me. I have had time to think of my actions and I feel embarrassed by them and I will do my best to not ever let this happen again.
>
> Again, I am sorry for my actions and I hope we can put this matter behind us.
>
> Sincerely,
>
> [signed]
> Shawn Fletcher

Asked how he felt about working again with the grievor if reinstatement should be ordered following the arbitration, Allan said he did not know. He was uncomfortable about it. He still had concerns. "I don't know if it's over." He was not sure he would continue driving bus for the Division. "It's a tough question, it depends on what transpires."

The grievor gave the following account of the incident during his testimony. As noted above, where this account differs from Gordie Allan's testimony, I will accept Allan's version.

Shawn was working in the middle bay changing tires and Gordie was washing his bus outside. Shawn could smell exhaust so he went out, yelled "Stop" to Gordie, put his hand up and walked past, went onto the bus and shut off the engine. As Shawn returned to the garage, he felt spray past his shoulder. "I lost it. I said to him, if you do that, you'll be on the fucking ground." Gordie said, "What?" Shawn answered, "You know what, don't ever do that again." Shawn kept walking and Gordie said something about him screaming. Then Shawn said, "If you want to keep hollering, be back at 5 pm and we'll finish it." That was it.

The grievor was asked in direct examination if he had any intention to harm Gordie at the time of the incident. He responded, "Maybe at the time, I may have thought of it, but I never followed through. It was over and done. I had no animosity to Gordie, Dean or anyone else." He felt sure he could work with Gordie again.

Under cross examination, the grievor admitted that there was nothing wrong at the time of the incident except for the exhaust. He did not approach Gordie about moving the bus or turning it off. When he went outside, he could have walked behind Gordie. But he denied seeking a confrontation. Gordie would have to turn off the spray regardless so he could get on the bus. The grievor denied saying "Watch it" or "Move". However he admitted telling Gordie, "Do it again and you'll be lying on the fucking ground." The grievor conceded that this was a threat. By his words, he was saying he would physically put Gordie on the ground. He had no intention at that moment to grab Gordie but he said it. "The marble stopped twirling. I lost my temper." As for the reference to 5 pm, the grievor testified he meant they would finish their conversation at 5 pm.

Why did he threaten Gordie? The grievor said he felt spray go past his shoulder and thought, "What's he doing?" The water never hit him but he felt the mist of water. The grievor

readily acknowledged he was not entitled in this situation to threaten Gordie. But he did threaten Gordie, yes. He over-reacted.

The grievor confirmed Allan's evidence that the two men had no contact after the incident although they noticed each other around town quite often. He deliberately stayed away from Allan as he wasn't sure how it would go if they spoke about the incident. It would just be better to have no contact, he felt. The grievor added that he saw Allan's wife at the gas station about two months earlier and they exchanged hellos.

The letter of apology was his own initiative, said the grievor. He was not sure precisely when he wrote it. It was after he had met with the Lee McLeod from the Union. He asked Lee if an apology letter would help his case, would it be appropriate? Then he wrote the letter and the Union arranged to have it sent to Allan.

For the record, I note the following observations which may be germane in a case involving alleged threats of bodily harm. Gordie Allan, as he appeared while testifying in October 2012 at the arbitration hearing, was short and overweight. He presented as reticent and insecure. The grievor was not a great deal taller than Allan but appeared lean and considerably more muscular. He presented as relatively self assured. I also appreciate that both individuals were somewhat uncomfortable appearing in a formal arbitration hearing process.

Investigation and decision by management

Bluhm testified that Allan came to see him around 9 am on June 13 and wanted to make a report about an incident with Shawn Fletcher. Allan was quite emotional. His eyes were red. He seemed excited and under a great deal of stress. Bluhm thought that Allan might tear up

as he recounted the incident with the grievor. It was apparent to Bluhm that Allan did not know how to deal with it. Allan was wondering how he could return to working at the garage after what happened.

Bluhm filled out an Incident Report Form (Ex. 4) in accordance with the Division's Violence Prevention Policy (Ex. 5). He gave consideration to the Division's Policy Statement on Staff Discipline (Ex. 6). The Union stipulated that it was not raising any *KVP* issue with respect to these Employer policies. Bluhm then commenced an investigation. He contacted two employees who were at the garage the previous afternoon and might have been witnesses but they were unaware of the incident. He arranged a meeting with the grievor for 1:30 pm the same day. Local President Diane Cabak ("Cabak") attended to assist and represent the grievor. Superintendent Bev Szymesko also attended.

At the June 13 meeting, after being told of Allan's complaint in general terms, the grievor responded as follows. He was hit by over spray when Gordie was washing his bus. He told Gordie he would put him on the ground. He asked Gordie to come back at 5 pm for a fight. He used profanity, he used F-words. He could not recall the exact conversation but never gave a version of the incident contrary to the complaint. Bluhm asked the grievor whether he felt justified in what he did. The grievor answered, "I did what I did because I don't like the guy."

Bluhm testified that he hesitated to inquire any further at that point. He detected no remorse or sense of responsibility on the grievor's part. Bluhm was concerned for Gordie's safety. Once the grievor confirmed the incident and the threat, Bluhm knew the grievor would be placed on leave. Bluhm did not want the grievor to develop a "nothing to lose" attitude where he might just go find Gordie and "finish it".

Bluhm testified that the grievor seemed arrogant in response to the investigation process, as if to say, "Like why are we here, I didn't *hit him*." There was no apology offered during the meeting. Bluhm felt that eventually the grievor would physically assault Gordie so he placed him on leave of absence. The grievor reacted by casually tossing his keys to Bluhm as he left, stating, "I'll have to make a phone call, I guess." In his evidence, the grievor explained that this was a reference to calling his National Union Representative. He confirmed that he did not apologize during the meeting on June 13 or make any comment acknowledging he was wrong in what he did.

In his testimony, the grievor essentially confirmed Bluhm`s account of the meeting. Yes, he answered Bluhm's question about justification by saying, "I don't know what you mean but I don't like the guy." Pressed further in cross examination, he agreed that he told Bluhm he felt justified in threatening Allan because he disliked him. They haven't had any prior disagreements but the grievor explained in his testimony, "He's ignorant, he's dirty, he spits everywhere. He spreads stories about everyone in town, including my friends. That's why I said it was justified." The grievor added that was unaware at the time that this was a breach of the Violence Policy but agreed it was wrong. "It's just common sense." He agreed the Employer is obligated to provide a safe work environment.

The grievor was asked at the end of cross examination if he still dislikes Gordie today. "We are not tight, we don't see eye to eye. OK, I still don't like him."

Bluhm was fearful for Allan's safety and went to see him in order to inform him about what had happened. Bluhm did not believe it was over. He suggested that Allan stay away from the grievor and Allan said OK.

Another meeting was scheduled for June 18, 2012. Bluhm testified that he sent numerous

messages to the grievor but received no response. He postponed the meeting to June 21 but the grievor did in fact appear as requested on June 18. When he arrived, the grievor gave no explanation for his failure to reply. No substantive meeting occurred on that date but the grievor conceded in his testimony that he offered no words of apology at the time despite having had five days to reflect on the incident.

By June 21, management had determined that the grievor would be terminated. A meeting was convened with Bluhm, Superintendent Szymesko, Cabak, National Union Representative Doug McLachlin and the grievor. At the opening, McLachlin said the grievor wished to speak. The grievor offered an apology: "I'm sorry for my actions, my temper got the better of me." In Bluhm's opinion, it was not a sincere apology. The tone suggested that the grievor knew he was in trouble and that was the reason for the apology. Under cross examination, Bluhm said he was positive the grievor had been advised to apologize in order to help his case. By June 21, the grievor must have known termination was coming. In his own testimony, the grievor confirmed that by this point, he knew there would be discipline but added he was not expecting to lose his job over the incident. He admitted that his apology at the start of the June 21 meeting was his first expression of regret to the Employer.

After listening to the apology, Bluhm presented the grievor and the Union with a termination letter (Ex. 7) dated the same day and signed by the Interim Division Secretary Treasurer. Bluhm had drafted the letter. The allegations as reported by Allan were listed and it was stated that the grievor had confirmed all allegations against him. The grievor's actions were characterized as a contravention of the Division's Violence Prevention Policy and Manitoba Workplace Safety and Health legislation. Two prior workplace offences were cited from 2010. The grievor's lack of remorse at the June 13 meeting was recalled and identified as cause for concern that he might repeat the misconduct. The letter concluded as follows:

> I fear that your behaviour will not change and only escalade (*sic*) to a point of further violence. Turtle River School Division cannot tolerate the chance of a situation like this happening again between yourself and any employee(s). Considering this situation and your employment record as a whole, your employment is hereby terminated effective June 14, 2012.

Upon reviewing the letter, McLachlin responded that the Employer was "jumping the gun". The grievor denied some of the attributed threatening statements. The Union wanted to discuss the prior discipline. Bluhm replied that the time to talk was at the June 13 meeting but offered to arrange another session upon request. The whole exchange took about five minutes. Nothing was tabled by the Union to explain the grievor's conduct.

Bluhm testified that he saw no remorse on the grievor's part. "He was still quite cool. My impression was he was there because he had to be." No follow up meeting was requested or held. Bluhm conceded that by this stage, the Division had committed itself to termination. In his testimony, the grievor said he did dispute some reported facts during the meeting. He did not recall an invitation to attend another meeting but he never sought another session to deal with the version as stated in the termination letter. He just spoke with the Union.

The grievor was not barred from Division property. He was allowed to return to remove some surplus doors which had previously been promised to him.

The two prior offences referred to in the termination letter occurred on January 21, 2010 and February 19, 2010. Bluhm testified that the first incident involved a verbal warning due to a series of driver complaints about the grievor's language and attitude toward them. He would "fly off the handle" in dealing with them. If he thought a question was stupid, he would tell them so directly. The grievor's response at the time was that the drivers bothered him while he was working. The termination letter stated that in January 2010 the grievor had

been warned to watch his language and keep his temper in check especially when dealing with Bus Drivers. In his evidence, the grievor confirmed that he was told he must change his behaviour.

On February 19, 2010, Bluhm issued a letter (Ex. 9) outlining how the grievor was to conduct himself with the Drivers. A Driver had filed another complaint about the manner in which the grievor spoke to him. In the February letter, Bluhm recalled the January discussion about dealing with Drivers and noted that the Mechanic's Helper duties include professional and courteous communication with Drivers and anyone else on the job. The letter was entitled "Letter of Reprimand" but it concluded as follows:

> No disciplinary action will be taken at this time but be advised that you are being put on notice if I receive any additional complaints disciplinary action may be taken at that time.

Under cross examination, Bluhm was challenged about the disciplinary status of this letter. It specifically states no disciplinary action is being taken. How can the Division now rely on it as a prior offence? Bluhm responded that he meant to say no *further* discipline would be imposed at that time beyond the reprimand itself. But this was a disciplinary action in his view.

It was not disputed by the Union that the January warning was a disciplinary offence. Thus, by any measure, the grievor did not have a clear record.

In his testimony, the grievor recalled the February letter but said that at the time, he felt he had done nothing wrong. But no grievance was filed. He maintained that his attitude is different now. He is prepared to change.

Bluhm acknowledged under questioning that the Division's Staff Discipline Policy (Ex. 6) provides for options before resort to termination. Four progressive discipline steps are listed (p. 1): verbal warning, written warning, suspension without pay and dismissal. "Serious Violations" are defined as including a threat to the safety and well-being of another employee. Inappropriate language is also included. The Policy states that the first time a serious violation is committed, the supervisor should issue a written warning or contact administration for further action. "Major Violations", by contrast, are described as actions which cannot be tolerated. Threatening or striking a supervisor, theft, sexual assault and harassment, racial acts, physical abuse and falsification of records are all listed under the major category. The list does not include threatening a fellow worker. Discharge is the usual consequence for major violations regardless of the employee's prior record, according to the Policy.

In the present case, said Bluhm, the management group did discuss alternatives short of dismissal but they were always unanimous in opting for termination.

Bluhm testified that staff morale was much higher once it was announced that the grievor had been dismissed. "Everyone was grateful." However, Bluhm admitted he did not conduct a full canvass of all employees. The other Bus Drivers in particular did not want to see the grievor back at work because of the way he talks to them. A lot of them felt threatened. Based on his personal interactions with the grievor, Bluhm described him as an angry person who becomes involved in constant confrontations in the community. "He brings it to work, he holds that temperament for a long time. When you ask him to do something, he won't answer."

Bluhm expressed concern that if reinstated, the grievor would be in contact again with Allan and other drivers, unsupervised, which Bluhm considered a safety risk. He said the grievor

has never taken personal responsibility or shown true remorse for the incident with Allan. Asked under cross examination if an Anger Management course would help alleviate the Employer's concerns, Bluhm answered that it would depend on the circumstances and who evaluated the course. In redirect, he clarified that this would not address the safety risk in his mind.

The grievor testified that profanity is used in the bus garage routinely "but not when the girls are around". Bluhm agreed but he distinguished ordinary swearing from a verbal attack against another person.

The Division takes a zero tolerance view of workplace violence and opposed any order of reinstatement. For his part, the grievor testified that he will improve his behaviour if he is given another chance. "I would do what I need to do, anything." He conceded he has not yet taken any specific steps such as counselling or Anger Management.

The grievor is now working at Timberfab in Dauphin, Manitoba, a prefabricated truss manufacturing operation. Due to the extra commuting distance, he is away from home more and that has been "somewhat hard" on the family. He has three teenage children and one is disabled. It has been "a little bit hard financially". Right after the discharge, he got work at the McCreary slaughter plant but it was part-time. Then he was hired at two other jobs before his current employment.

The exchange on June 25

Tyler McFadyen, also a Division Bus Driver, testified that on June 25, 2012, he was working outdoors for the Village when the grievor drove by and stopped to talk. He told McFadyen he was let go by the Division. It was the first McFadyen had heard of it. The grievor was

agitated and said it was Gordie's fault. He said it was not over and he was going to get Gordie. "It was that fat little fuck's fault." McFadyen testified that his impression at the time was that the grievor meant to take physical action against Gordie. He told the grievor that wouldn't help anyone and then he moved on. It was a brief five minute exchange.

McFadyen pushed off the encounter at first but as he thought more about it, he felt a responsibility to Gordie. He reported the conversation to Bluhm the next day and also to his own supervisor at the Village. He decided not to tell Gordie as it would only add further stress for Gordie.

Pressed in cross examination, McFadyen insisted there *was* an implication by the grievor that it could get physical. He conceded that no threat was stated as such. He himself has never had any problem with the grievor at work.

When Bluhm received McFadyen's report, he contacted the RCMP in Ste. Rose and received information about how Allan could obtain a restraining order. Then he went to see Allan and recommended he make an application. Allan said he would consider it and would go the court if it happened again. Bluhm testified that Allan seemed quite hurt about the news and said, "I can't believe this is happening, I thought we were friends." Allan did not file for a restraining order.

Having listened to McFadyen's evidence in the hearing, initially the grievor did not deny it. He acknowledged there was a conversation. He wasn't sure but said in direct examination he might have made the comments attributed to him about blaming Gordie. He had no intention to hurt Gordie. In cross examination, the grievor was equivocal. "I never threatened - I mean, I don't recall that. I don't know if I blamed Gordie for being fired." He agreed he had no reason to dispute McFadyen's version of the exchange but he did not recall

using the words "that fat little fuck". Then he insisted he never said that about Gordie *at any time*. By this point in the arbitration hearing, the Union had already stipulated to Allan's account of the June 12 incident between the grievor and Allan including the "fat little fucker" insult.

Next the grievor testified that McFadyen may have fabricated the version he gave at the hearing. Then he said it was partly fabricated. However, the grievor could think of no reason why McFadyen would do such a thing. The grievor finished by saying he did not dispute that he may have threatened Gordie on June 25 as McFadyen reported. This was four days after he apologized during the termination meeting with the Division. The grievor was challenged about the sincerity of that apology in light of the threat made a few days later. He was adamant that his apology had been genuine. He did not recall issuing a threat while talking to McFadyen but at the same time he did not dispute it.

Employer final argument

For the Employer, Mr. Simpson submitted that there was a significant threat of violence in this case and that termination was justified. Aggressive behaviour in the workplace is now completely unacceptable. It is inconsistent with the employer's interest in creating a positive and productive working environment. It undermines the health and safety of employees. When the misconduct is not disputed, the only real issue is the appropriate sanction. Brown and Beatty, *Canadian Labour Arbitration, Fourth Edition*, 7:3430.

Gordie Allan's version of the June 12 incident was not challenged by the Union and most of the facts were admitted by the grievor. Where the grievor did dispute elements of the altercation, the evidence supports Allan's account. The phrasing "fat little fucker" was not conceded by the grievor but McFadyen reported essentially the same language on the

grievor's part a few days later. The consistency provides corroboration for Allan's version. McFadyen was an independent witness with no reason to fabricate a story. Allan himself had no incentive to embellish and as the victim, would be most likely to remember the experience in vivid detail. Only the grievor would be inclined to manipulate the facts in order to minimize the consequences to himself. The Employer therefore asked for a finding that the incident took place just as Allan described in his testimony.

Even though there was no physical assault, the grievor's conduct was serious because the threat was so overt and direct. In many cases the threat is veiled or made to third parties in the absence of the victim. Here the grievor was standing near Allan, threatened him and invited him to return after work for a fight. The grievor said he lost his temper and was out of control. In that light, the grievor's suggestion that he was merely offering to continue a discussion at 5 pm made no sense and should be rejected.

The Employer noted that the grievor approached Allan with hostility from the outset of the incident. He could easily have walked behind Allan. There was ample space in the parking area. Instead he deliberately walked between the bus and the sprayer and forced Allan to interrupt his task. No explanation was given by the grievor for this choice. It can only be interpreted as confrontational. Perhaps the grievor was motivated by his pre-existing dislike for Allan but that was no justification for threats. While the grievor attributed his loss of self control to being hit by water, the aggressive conduct began prior to any suggestion of errant spray. In fact the grievor precipitated a confrontation.

Once this conclusion has been reached, the specific words spoken by the grievor are not determinative. Taking either Allan's version or the grievor's somewhat less offensive recollection, it was a serious threat. Allan said he was looking down throughout the incident and trying to avoid confrontation. But the grievor kept pushing it. He asked Allan to come

back after work at 5 pm to finish it "once and for all". This suggested an ongoing hostility. The Employer was right to treat the grievor's outburst as a serious safety risk in the workplace.

In the Employer's submission, the key consideration in this case was the grievor's lack of remorse once the incident was over. He never took personal responsibility for what he did. When Bluhm began the investigation, the grievor's initial justification was not the annoyance of spray or exhaust, it was dislike for Gordie Allan. This in itself was troubling. No apology was offered on the first two occasions, the June 13 interview and the brief June 18 meeting which was postponed. When the grievor finally did apologize on June 21, Bluhm found it lacking in sincerity. This perception was supported by the evidence.

The grievor admitted in his testimony that by this time he knew he would be disciplined. It is reasonable to conclude that the June 21 apology had little or nothing to do with the victim and was intended to minimize consequences to the grievor. Subsequently the grievor discussed his case with Union staff and asked if a written apology would help his case. The written apology followed. This was long after the fact and should be discounted given the circumstances.

Tyler McFadyen's evidence cast further doubt on the sincerity of any apology provided by the grievor. There was continuing aggression on June 25. The grievor made another round of threats against Allan. While the grievor said he could not recall what he said, McFadyen was a disinterested witness and his version should be believed. He took it seriously enough that he went to see Bluhm the next day out of concern for Allan's safety and well being. The fact that the grievor was now blaming Allan for getting him fired was also significant. This too shows a failure to take responsibility. By June 25, nearly two weeks had elapsed since the original incident. It was long past the stage of an emotional outburst in the heat of the

moment. While the grievor testified that he would not act on his threats, the Employer was obligated to take them seriously. All the circumstances supported termination.

The Employer asked, where is the assurance that the grievor will not repeat this misconduct or worse? As of the date of arbitration, four months following his discharge, the grievor had done nothing about his anger issues. He had never spoken to Allan. Understandably, Allan remains uncertain whether the dispute is over or not. As the victim, he is uncomfortable with the prospect of working again with the grievor. The grievor had two prior incidents of inappropriate language and behaviour with drivers and admitted that back in 2010, he did not believe he was doing anything wrong. Considering the latest incident and the grievor's reaction afterward, there is no reason to believe he has actually changed even now.

The Employer cited the following arbitral authority: *Re Esco Ltd. and USW, Local 7175-03* (2008), 171 L.A.C. (4th) 182 (Craven); *Re Maple Leaf Pork and UFCW, Local 1832* (2006), 153 L.A.C. (4th) 27, [2006] M.G.A.D. No. 24 (Graham); *Re City of North Bay and CUPE, Local 122* (2006), 151 L.A.C. (4th) 236 (Slotnick); *Re Doman Forest Products Ltd. and IWA-Canada, Local 2171*, [1999] B.C.C.A.A.A. No. 330 (Kelleher); *Re Windsor Regional Hospital and CAW* (2010), 195 L.A.C. (4th) 279 (Kaplan); *Re Prince George Citizen and CEP, Local 2000* (2011), 108 C.L.A.S. 124 (Brown).

In *Esco*, *supra*, the grievor grabbed a fellow employee by the collar and pressed him up against the wall, angered by the victim's use of his last name. The attack was held to be unprovoked. The grievor apologized to the company the following day but never took steps to make amends with the victim. There were few mitigating factors aside from 11 years of service. The arbitrator denied reinstatement on the following basis, which the Employer submitted was applicable as well in the present case (para. 14-16, 22):

> Workplace violence is taken seriously at arbitration today, and while there may be a range of views among arbitrators about the extent to which the employer's (and indeed the mutual) interest in maintaining a violence-free workplace can be offset by various mitigating factors, in my opinion there is a universal consensus that an employee who has committed an act of serious interpersonal violence at work will not be reinstated when the arbitrator is not persuaded that the likelihood of recurrence is very small.
>
> In considering the likelihood of recurrence, arbitrators will consider, among other factors, whether the employee fully acknowledges what happened and accepts responsibility for it; whether the employee has shown remorse or apologized appropriately for his actions; and whether the employee has taken appropriate steps to deal with any underlying individual or interpersonal issues that contributed to the violent behaviour.
>
> In the case before me, having heard the grievor's testimony and observed his demeanor, I am not satisfied that he fully acknowledges what happened and accepts responsibility for it. ...
>
> ...
>
> I have found that the grievor's conduct on January 16 amounted to *prima facie* cause for discharge. The evidence does not persuade me that reinstatement would be attended with minimal risk of recurrence in the circumstances. In good conscience, I am unable to return the grievor to work in a safety-sensitive environment when I consider the risk of another, possibly more serious, episode of violence to be more than minimal.

In *Maple Leaf Pork, supra*, serious veiled threats suggesting a stabbing were made by the grievor to a third party concerning a supervisor. The grievor denied the allegation but it was upheld based on credibility findings. Dismissal was sustained as follows (para. 300):

> In that regard, I would make an additional observation. The Union and the Grievor chose to present this case on the basis that the Grievor did not threaten Sulymka. I have found otherwise. However, consistent with the Grievor and the Union's approach, no evidence

> was introduced to establish that the Grievor recognized any wrongdoing on his part, or that he would significantly alter his behaviour in the future. The Grievor was clear in his evidence that he felt he had done nothing for which he should apologize. Apart from Dr. Somers' [psychologist] report, the Union and Grievor advanced little evidence to assure either the Company, or me, that the Grievor would be able to conduct himself in the future so as to avoid threats or other inappropriately aggressive behaviour in the workplace. Although there were factors in this case which generate sympathy and understanding towards the Grievor, given the factual findings that have been made, something more tangible by way of evidence of rehabilitative potential was required to support a reinstatement of the Grievor's employment; ...

The grievor in *City of North Bay, supra*, had 19 years of service and a prior incident (one week suspension) when he threw a large block of wood at a co-worker. He apologized 45 minutes later to the victim, the apology was accepted and both employees felt the matter was closed. When management learned about the incident, there was an investigation and the grievor gave a misleading statement. There was no provocation. Again the arbitrator emphasized the importance of having some assurance that violence will not reoccur, a key factor in the present case as well (para. 30-31):

> It is not necessary to review the case law here. Each case has its own particular facts, but it is clear that arbitrators have become increasingly conscious of the risks of reinstating employees who have shown aggressive tendencies unless they have some assurance, medical or otherwise, that the conduct will not be repeated. (See for example *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113*, [2005] O.L.A.A. No. 743, 145 L.A.C. (4th) 139 (Springate)).
>
> If Mr. LeClair were to be reinstated, the burden will be borne, in my view, by his fellow union members. I have little confidence that he can work without another outburst, given his two largely unprovoked eruptions over a short period of time, his poisonous relationship with Mr. Decou, and his continuing efforts at minimizing serious misconduct. Mr. LeClair and Mr. Joyes are lucky the block of wood missed its apparent target on September 20; the main risk of

> reinstatement is that the results of the next incident could be far more serious. There were hints in the evidence I heard that many of his co-workers, even those who testified on his behalf such as Mr. Gerbasi, were intimidated by his behaviour and felt it best to stay silent in the face of conduct that ought to be reported. This atmosphere of fear is not one that I want to encourage. While Mr. LeClair has long seniority and other points in his favour, any mitigating factors are outweighed in my view by a strong possibility that there will be further instances of aggressive and even violent behaviour if he is reinstated.

In *Doman Forest Products, supra*, it was held that the grievor made a veiled threat against the life of his supervisor. The grievor denied the allegation and was disbelieved. There was no apology. Despite lengthy seniority, termination was upheld (para. 43-46). The arbitrator noted that "An employer is under a duty to protect other employees including members of management from harm" (para. 44). Suspension was not an adequate response in the circumstances. Similarly in *Windsor Regional Hospital, supra*, the grievor was holding scissors when he verbalized a threat to slit the throat of a co-worker, and the grievor was discharged notwithstanding a clear 25 year record. Again the duty to protect employees in the workplace was cited (para. 17). The Employer in the present case argued that a threat to "punch the fuck out of you" is also a threat of grave bodily harm and triggers the duty to protect against violence.

Considering the factors normally applied by arbitrators to review penalty (*Prince George Citizen, supra*, para. 52), the Employer submitted there was no basis to substitute a suspension or warning on the current facts.

- The grievor's record was not a good one, whether the February 2010 letter is characterized as disciplinary or counselling. At a minimum, the grievor was on notice about his unacceptable behaviour.

- There was no lengthy seniority.

- The incident was not an isolated one.

- Provocation was absent.

- The grievor's approach to Allan was deliberate and premeditated, even accepting that he lost his temper once he was sprayed. He himself initiated a confrontation.

- There was nothing to negate intent.

- There was no evidence of special hardship.

- The Employer's policies permit dismissal for serious incidents. At least by analogy, this was a Major Violation.

- The misconduct was aggravated by another threat expressed to McFadyen a few days later.

In summary, said the Employer, reinstatement cannot be contemplated without an acknowledgement of wrongdoing on the grievor's part and a genuine expression of remorse. This would have to be accompanied by a convincing commitment on the grievor's part to changing his behaviour in future. None of these requirements were met. The arbitrator must uphold termination.

Union final argument

For the Union, Mr. McLeod submitted that the facts were largely undisputed and it was apparent that the grievor spoke inappropriately to Gordie Allan. The incident was threatening in nature. While the grievor may deserve a consequence, the arbitrator should also examine the Employer's attitude and response to the situation. The Union urged careful consideration of whether any formal discipline at all should have been imposed. At most a letter of warning or reprimand was warranted.

The Union's primary argument was that the grievor had no real intent to harm Allan. This was an outburst in the heat of the moment. Angry words were spoken and they seemed threatening to Allan but the grievor was not going to take it beyond words. In the grievor's mind, he had been intentionally sprayed by Allan and he admitted to getting mad. As a result he vented his frustration. The Union conceded that the grievor invited Allan to a physical confrontation. But the grievor never acted on these sentiments and did not appreciate, at the time, the gravity of his actions. Neither did he realize how greatly Allan would be affected by the outburst. These were unintended consequences. As it turned out, Allan never did contact the court for a restraining order, something he was advised about but declined. He testified he did not actually expect an assault at the time. The Union agreed the matter was serious but argued that it must be kept in proper perspective.

Beyond the impact on Allan as the victim, the grievor failed to appreciate the consequences for himself. Even as he entered the June 21 meeting, believing there would be some kind of penalty to face, the grievor did not foresee termination of the employment relationship. Shop floor language at the garage was shown to be quite foul at times and the grievor, again in his mind, did not see his outburst as much different than day to day swearing. The Union agreed, however, that intemperate language with a threatening tone is no longer tolerated in the

workplace. On June 13, when he met with Bluhm to review Allan's complaint, the grievor was not attuned to any of these considerations.

The Union submitted that as a result of this whole affair, the grievor has a much better understanding of his actions and his responsibilities. On June 21, he apologized to the Division and stated that his behaviour was wrong. The letter he drafted later in the summer took the same tone and was consistent with his initial apology. Most of the delay in forwarding the letter was due to the Union holding it until it was sent to the Employer on August 31. The Union characterized the letter as poignant and sincere. It refuted the Employer's contention that no remorse was ever expressed by the grievor.

The most important question, said the Union, was whether or not the grievor had good rehabilitative potential. Can he return to work with no likely repeat of the misconduct? The Union argued that the grievor is redeemable and has learned from the experience. He now appreciates the severity of what he did. If there was any recurrence, it would be extremely difficult to contest further discipline, and the grievor knows it. The Employer said that no remedial help had yet been taken by the grievor. This was true but more importantly, the grievor is clearly willing and open to such steps, whereas in the past, he lacked the necessary insight. Attitude is the crucial factor. The arbitrator should order reinstatement.

Turning to McFadyen's account of the June 25 exchange, the Union suggested that it was inadmissible as post-discharge evidence and should not be given weight. In any event, it was the termination itself which created the conditions for the June 25 incident. The grievor had just been fired and was experiencing understandable stress. He did not do or say anything to suggest he was trying to send a message to Allan. The evidence showed he had numerous opportunities to make contact with Allan around town but, in an effort to be careful and avoid further distress, he held back. There was a friendly exchange with Allan's wife.

Considering all the foregoing, said the Union, the June 25 exchange with McFadyen was just a momentary verbal outburst with no impact whatsoever on Gordie Allan. The Union denied that the incident deserved any greater significance.

The Union noted that the collective agreement contains no mandatory penalties. While the Employer argued that termination was the only viable option, the arbitrator retains full discretion to consider all the facts. The Division's policies do not dictate zero tolerance for these facts. Threatening a co-worker does not fall within the definition of a Major Violation. Even if it did, or was analogous, the arbitrator's discretion remains open. The duty of fairness also applies. Termination would be an excessive penalty.

The Union cited arbitral authorities that in its view involved circumstances similar to the present case: *Re Kretschmar Inc. and UFCW, Local 1000A* (2005), 144 L.A.C. (4th) 42 (Albertyn); *Re Cadbury Adams Canada Inc. and UFCW, Local 175 (Brayall Grievance)* (2007), 162 L.A.C. (4th) 1 (Slotnick); *Re Intelicom Services and UFCW, Local 832 (Archambault Grievance)*, [1998] M.G.A.D. No. 24 (Peltz); *Re Toronto School Board and CUPE, Local 4400 (Van Word Grievance)* (2009), 181 L.A.C. (4th) 49 (Luborsky); *Re Worthington Cylinders and USWA, Local 9143 (Brown Grievance)* (2006), 149 L.A.C. (4th) 417 (Roberts).

In *Kretschmar*, *supra*, the grievor encountered a stranger rummaging through his paperwork in the plant and confronted him, issuing a veiled threat to cut off his fingers. In fact the stranger was a federal meat inspector who had introduced himself to staff while the grievor was elsewhere and was invited to check certain documentation. Initially the grievor stood his ground and refused to apologize or admit any error so the company terminated him. The grievor's action was a serious offence and jeopardized the company's relationship with regulators. However, about four weeks later the grievor sent a letter of apology which the

arbitrator accepted as genuine. He explained he had been under pressure due to health problems and overtime hours. At the hearing, he reiterated the apology and added that his comment to the inspector had been facetious, not serious and intentional. Again the arbitrator accepted these points and held there had been no real risk of harm. Moreover the arbitrator found that a recurrence was unlikely.

A three month suspension was substituted for discharge and the arbitrator concluded as follows (para. 26):

> As I have said, the Grievor was genuinely contrite at the hearing. He understood that comments such as he made on April 22 are quite unacceptable and he has made clear that he will not speak like that again. I am satisfied the Grievor has learnt from the experience of being terminated; he has gasped how inappropriate is a threat to physical safety, and how wrong was the comment he made; he has realized how important his job is to him. As in *Public General Hospital Society of Chatham*, above, the Grievor had no real intention to inflict harm. The Grievor would like to see out his last year of work as an employee of the Company before his retirement. He is a very long serving employee who, while not being exemplary in his performance, has not threatened violence previously, nor shown a tendency to violence. He is in very poor health. He will be able to function effectively in the plant again for his remaining year of service before his retirement. ...

The Union in the present case argued that a number of these considerations apply here. In particular, there was a delay but then a genuine apology, and there was remorse displayed at the hearing. There was no real intent to inflict harm. The grievor has learned a lesson.

In *Intelicom, supra*, it was found that the grievor consistently engaged in intimidating and confrontational behaviour toward other employees, aggravated by the fact that this was a security company and the grievor was in possession of a firearm. Discipline was warranted but termination was set aside on the basis that the employer had failed to use any progressive

discipline over an extended course of events. As arbitrator, I held as follows (para. 129-130):

> The whole object of progressive discipline is to put the employee on notice that the conduct in question is not going to be tolerated, and will be subject to increasingly serious discipline if such conduct persists. This prevents an employee from being lulled into a false sense of security, as may have happened here. Bullying behaviour, disrespectfulness and noncompliance with procedures on the grievor's part led to weak responses by management. Without for a moment excusing these actions by the grievor, I must observe that he was never told bluntly that disciplinary consequences were going to result. Without progressive discipline, a defaulting employee is able to respond to his dismissal with a plea that the employer has acted unjustly and harshly, precisely what the grievor says here. On the other hand, by acting firmly to impose reasonable discipline as problems arise, an employer hopes to correct an employee's misguided ways, and restore productive effort in the workplace. Failing a positive response on the employee's part, at least the employer has laid the foundation to justify more serious discipline, including discharge if necessary.
>
> Considering all the evidence in light of these principles, I find that the penalty of dismissal, as a first disciplinary measure against the griever for the infractions cited by the Company, is excessive.

The Union in the present case submitted that similar circumstances apply here and justify reinstating the current grievor. Progressive discipline should be employed before the ultimate sanction is imposed on the grievor. The same point was made in *Toronto District School Board*, at para. 73, dealing with off site misconduct.

In *Cadbury Adams, supra*, where the grievor shoved a supervisor and was verbally abusive, termination was overturned in favour of a suspension, applying the factors listed in *Re Dominion Glass Co. and United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84 (Linden). Discretion was exercised in the grievor's favour even though she denied the allegations as the arbitration hearing opened but changed her story on the second day and

made a limited admission that still minimized her culpability. The *Cadbury* grievor received a suspension without pay and the arbitrator noted she might have been eligible for some back pay had she confessed sooner.

In the present case, reviewing the *Dominion Glass* factors in light of the facts here, the Union argued for reinstatement. No one was physically touched or harmed. It was a momentary flare up on the grievor's part. There was some provocation insofar as the grievor allowed annoying bus fumes to vent into the garage and he sprayed the grievor, albeit unintentionally. The prior record does not include threats of this nature. There is a fair degree of seniority. Apologies have been made. There is some measure of family and economic hardship. Taken together, the circumstances justify mitigation of penalty.

Finally, the Union relied upon the principles discussed in *Worthington Cylinders, supra*, a case where two employees were terminated for a fight on the plant floor. The critical factors in considering reinstatement include whether the violence was premeditated, whether the act was impulsive and whether there was genuine remorse (p. 426). Again the Union argued that the present grievor is entitled to the benefit of another chance based on these principles.

The Union reviewed and distinguished the Employer's authorities. Those cases involved actual physical altercations, threats of death or extreme violence, and attacks on supervisors. By contrast, there was aggressive language but no contact in the present case. There was no Employer authority figure involved.

In closing, the Union reiterated that the grievor's conduct was inappropriate and will be better in future if he is reinstated.

Analysis, findings and conclusions

Admissibility of the McFadyen testimony

The Union objected to McFadyen's evidence about the June 25 exchange with the grievor but the point was not raised until the Union's final argument. No objection was made when McFadyen was on the witness stand. In its reply argument, the Employer noted the omission and also submitted that post-discharge evidence of this kind is clearly admissible when penalty is in issue, as it is in the present case. McFadyen's account of his conversation with the grievor goes to the credibility and sincerity of the grievor's June 21 apology, which was relied upon by the Union in mitigation. I agree with this submission.

Moreover, the alleged absence of remorse was a factor cited by the Division in the termination letter itself (Ex. 7). To the extent that McFadyen's evidence sheds light on the reasonableness of the decision to terminate, it could be admissible even aside from the issue of mitigated penalty and the statutory jurisdiction of an arbitrator in Manitoba. In *Cie miniere Quebec Cartier v. United Steelworkers of America, Local 6869*, [1995] 2 S.C.R. 1095, the leading authority on post-discharge evidence, the court held as follows (para. 12-13):

> As a general rule, an arbitrator reviewing a decision by the Company to dismiss an employee should uphold the dismissal where he is satisfied that the Company had just and sufficient cause for dismissing the employee at the time that it did so. On the other hand, the arbitrator should annul the dismissal where he finds that the Company did not have just and sufficient cause for dismissing the employee at the time that it did so. ...
>
> This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee.

> In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented.

The June 21 discharge decision was premised on the Division's belief that the grievor would not change his behaviour and that there was a risk of escalating violence. The grievor's attitude was key to this assessment. McFadyen gave evidence that four days later, after purportedly apologizing, the grievor was still expressing hostility and blame toward the victim. This helps to shed light on the reasonableness of the Employer's decision as it was rendered on June 21. It remained open for argument as to what conclusions, if any, should be drawn from McFadyen's testimony, and both sides did have full opportunity to address this point during the hearing.

Threats of violence in the workplace

In general terms, both the Division and the Union said they recognized the seriousness of workplace violence and threats of violence. Arbitrators too have spoken on this subject in recent years. It is too simplistic to speak of "zero tolerance" in this context, except as a means of denouncing socially reprehensible behaviour. In respect of employment consequences for the offender, the approach must be a balanced and nuanced one. Facts matter and each case is unique. Nevertheless, reasonably clear principles have emerged in the case law to guide the exercise of arbitral discretion.

The authorities cited by both parties were consistent at this level. "As a general principle, where arbitrators are satisfied that there is little likelihood of a recurrence because, for example, the employee has apologized and/or shown real remorse, they typically favour a suspension without pay for some period of time rather than a conclusion that the grievor must

lose his job. The converse of this principle is that, in the absence of extenuating circumstances, arbitrators usually do not reinstate employees who continue to deny they did anything wrong, or refuse to take responsibility for the harm they caused" (Brown and Beatty, *supra*, at 7:3430). As a practical matter, given that the stakes are high in these cases, arbitrators look for reassurance that offending employees have achieved insight into their misconduct and have taken steps to prevent a reoccurrence.

I endorse the following analysis by Arbitrator Roberts in *Worthington Cylinders, supra*, a case cited by the Union (para. 26):

> (1) In cases of violence in the workplace or threats of violence in the workplace, employees are being held to higher standards of conduct than in the past. This development has resulted from highly publicized real life tragedies that have occurred in workplaces in recent times and the consequent magnification of the degree of importance of the employer's statutory duty to take every reasonable precaution for the protection of the health and safety of its workers. ...
>
> (2) In such cases, the most critical issues for an arbitrator to examine are (a) whether the violence or threat of violence may be characterized as malicious, deliberate or premeditated; (b) whether the misconduct may instead be characterized as an impulsive act or momentary flare-up in response to provocation; and, © whether the griever has expressed genuine remorse for his or her misconduct. These are the factors that are most relevant to predicting the effect of reinstating the grievor. ...
>
> ...
>
> (6) The unilateral adoption by an employer of policy of zero tolerance does not mean that a claim for the substitution of lesser discipline will be dismissed at arbitration. A guarantee that employees who engage in specific types of misconduct will always have their terminations upheld can only be acquired by negotiating a specific

> penalty provision into the collective agreement. Specific penalty provisions require employees to be automatically terminated for the misconduct in question. They foreclose arbitral review of the severity of the discipline.

In the present case, the parties were divided mainly by their differing interpretations of the facts.

Findings of fact

The Union conceded that Gordie Allan's version of the June 12 incident should be accepted notwithstanding the grievor's somewhat different recollection. The main difference lies in the degree of profanity and insult which accompanied the grievor's threatening statements. The grievor admitted saying he would put Allan "on the fucking ground". I find as a fact that he actually said, "You sprayed me, you fucker. ... You fat little fucker. I'm going to punch the fuck out of you." The Division was correct in its termination letter (Ex. 7) when it alleged that the grievor intimidated, swore at, belittled and threatened another employee. The evidence indicates that Allan was essentially cowering during this tirade, keeping his eyes down and trying to avoid an escalation. Had Allan been more assertive in defence of his own dignity, there might well have been a physical altercation.

I further find that the whole episode was deliberate, premeditated and malicious. I reject the grievor's claim that he was just passing by to shut off the bus when he was sprayed and lost his temper. This was not an impulsive or momentary flare-up in response to some perceived provocation. Whether or not the grievor was annoyed by the exhaust from Allan's bus, there was simply no reason to walk between the spray hose and the bus, forcing Allan to interrupt his work. There was no reason to have any close contact at all. If the real issue was the

exhaust, the grievor could have called to Allan and asked him to shut off the engine, explaining it was fouling the air inside the garage. He made no such effort.

Rather the grievor embarked on a deliberate confrontation. He was a man looking for a reason for a fight. When he was touched by a mist of water, he had his excuse. In testimony, the grievor made plain his dislike for the grievor. In his mind, as he later told Bluhm, this was sufficient justification for threatening Allan. The grievor is fully entitled to his opinions about other people in the workplace but it is unacceptable to threaten violence based on a personal dislike.

The grievor told Allan he would meet him back at the garage at 5 pm and “”we’ll settle this once and for all.” I reject the grievor’s evidence that he meant only to continue their conversation. There *was no* conversation taking place between the two men, only a series of threats by the grievor intended to provoke Allan into responding so that the grievor could assault him, or alternatively humiliate him through dominance. Given the context, the grievor’s explanation makes no sense. For all the foregoing reasons, I am unable to accept the Union’s more benign characterization of the June 12 encounter and prefer the Employer’s interpretation of the events.

The absence of any apology or other indication of remorse on June 13 during the meeting with Bluhm was significant. The grievor should have been calm by the time of the meeting and should have been able to express some sense of regret for his actions. He had the benefit of overnight reflection. Then he had a few hours advance notice and a Union representative for assistance. There was no suggestion he was taken by surprise. During the meeting, he admitted making threats. He agreed with Bluhm that it was common sense for the Employer to prohibit such violence in the workplace. The one thing the grievor could not bring himself

to do was to say he was sorry.

As outlined in the cited authorities, this is a crucial factor in an arbitrator's assessment of likely recurrence. Here the grievor failed to show either insight or remorse. Subsequent apologies still deserve weight but they are subject to the criticism that they have been crafted to save the offender's job. Thus, I have taken into account both the June 21 verbal apology and the later written apology forwarded via the Union, but I have given greater weight to the absence of an early apology.

In any event, the exchange with McFadyen on June 25 undermines the grievor's claim to genuine remorse. I accept McFadyen's version of the conversation. The grievor basically did not dispute it. McFadyen had no apparent reason to fabricate or embellish the encounter. The following facts are all troubling. Four days after being dismissed and nearly two weeks after the incident, the grievor was still agitated, still blaming Allan, still belittling the victim and still verbalizing threats. The use again of the words "fat little fuck" suggest a dehumanizing mind set from which violence can easily erupt. I find it significant that McFadyen, after trying to just brush it off, became worried the next day for Allan's safety and decided to report the exchange. To this extent, his reaction as an independent witness corroborates Bluhm's impression that the grievor was a potential danger to Gordie Allan. I find that the Employer had a well founded apprehension of risk to the victim's future health and safety.

With regret, I observe that nothing about the grievor's testimony provided any sense of comfort on the key question. If reinstated, will the grievor refrain from further threats of violence, or worse? Aggressive behaviour in the workplace and in the community has been called "deviant": Brown and Beatty, *supra*, at 7:3430. Yet this kind of unacceptable conduct

is common enough in our society. Individuals who have committed threats of violence need to take personal responsibility and must also take action to start healing themselves. In this case, the grievor admitted he has done nothing concrete. The Union advanced its best plea on behalf of the grievor, arguing that his attitude has now changed and urging another chance. Unfortunately, considering the evidence, I was not persuaded.

Progressive discipline

The Union's submission based on progressive discipline was an important point. In *Intelicom, supra*, I overturned a termination based on the employer's failure to use any available tools of progressive discipline. The present case is factually distinguishable insofar as the grievor here received, at a minimum, one disciplinary warning and was put on notice about inappropriate behaviour toward the drivers. The February 2010 letter was styled as a reprimand and ought to have conveyed exactly such a message when he grievor received it. Even if it was not strictly speaking disciplinary in character, I find it was an attempt by the Employer to correct and educate the grievor concerning his unacceptable behaviour. Ultimately that is the purpose of progressive discipline.

I would add that *Intelicom* was a 1998 decision and all the other authorities cited in the present case post-date it. The contemporary arbitral approach appears to focus more on the likelihood of violence repeating itself. Nevertheless I would not diminish the continuing role of progressive discipline principles in labour relations and I note that the Division's Staff Discipline Policy (Ex. 6) specifically incorporated progressive discipline steps. Arbitrators however do not require an employer to exhaust all steps in a violence case if, taking into account the relevant considerations, it is just and reasonable to terminate the offender.

Mitigating factors

There were few mitigating factors to offset the weight of the foregoing conclusions. I recognize that there was no physical contact or harm, only threats, a point stressed by the Union. Apologies were made but for the reasons discussed earlier, they are subject to discounted weight. The grievor's seniority was modest. His record was not unblemished. There was no legitimate provocation. There was nothing to negative intent. The grievor found new employment. There was no special hardship established although I acknowledge that the termination did have some adverse impact on the grievor's family, within the normal range. It is a sad reality that in cases where an employee misconducts himself, his loved ones may pay the price.

Balancing all these considerations in light of the governing arbitral principles, termination was just and reasonable. I am unable to find a basis for mitigation of the penalty.

Award and order

The grievance is denied.

DATED March 26, 2013.

"A. Peltz"

ARNE PELTZ, Arbitrator