

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Purolator Courier Ltd.

- and -

Teamsters Local 938,

Regarding the Grievances of Decordova Foster and Marvin Abrams

BEFORE: Brian McLean, Arbitrator

APPEARANCES:

For the Union: Adam Beatty, Counsel

For the Employer: Hugh Dyer, Counsel

Heard in Toronto, Ontario, on June 19 and October 7, 2014 and January 15, and
March 11, 2015

Date of decision: June 5, 2015 .

AWARD

These are two grievances regarding the discharge for theft of the two grievors Marvin Abrams and Decordova Foster. The parties agreed that the grievances would be heard together by me as sole arbitrator. This award determines the grievances.

It is useful to set out generally the employer's case against the two former employees before describing and assessing the evidence in detail and the union's challenges to that evidence.

Purolator is a multinational courier company. It has a large collection and distribution centre in Toronto- the Metro Toronto hub. Customers' packages are delivered to the hub by trucks, sorted and then shipped to the person for whom the package is intended. The hub deals with thousands of packages each day and the goods delivered can be almost anything, but include commercial shipments of various consumer goods. The two grievors worked at the hub. Mr. Abrams worked at the relevant time with another employee, Omar Heslop, unloading trailers at bay 35 at the hub. Mr. Foster worked in an area behind and some distance from the bay where Mr. Abrams and Mr. Heslop unloaded trailers. However, for a few years prior to the events which give rise to these grievances Mr. Foster and Mr. Abrams had worked side by side at the same bay. The grievors were represented in their employment relations with the company by the union.

The company has a loss prevention department. In or around June 2011 it came to the attention of the loss prevention department that there were higher than average losses of packages going in and out of the hub. Mr. Grant Merrick of the loss prevention department conducted an investigation to see if he could determine how the freight was being lost. Soon after, in July and August 2011, there were a number of customer complaints regarding failures to deliver packages containing Bulova watches and cell phones. In August one customer reported that there were empty boxes in its delivery that seemed to be associated with other customers' packages. The empty boxes formerly contained watches.

Eventually, based on scanning data, the company determined that a number of the lost packages had been processed at the hub, and in particular, at bay 35 at the hub on the night shift.

The company identified that two employees generally worked unloading trucks at bay 35 on the night shift (Midnight to 6:30 AM), Mr. Heslop and Mr. Abrams. Mr. Merrick and another loss prevention employee, Iain Campbell, attended at the hub at 5am and spoke to Mr. Heslop and Mr. Abrams separately on September 30, 2011, each of them in the presence of their union steward, Mr. Foster who, as noted, is the other grievor. At the meetings Mr. Heslop and Mr. Abrams each denied any knowledge of any loss of goods. At his meeting Mr. Heslop was wearing a Bulova watch. Mr. Merrick asked Mr. Heslop to show him the watch and he recorded what he believed was the serial number on the back of the watch. That number, as it turned out, was the model number and not the serial number.

Mr. Heslop told Mr. Merrick that he had received the watch from a friend. Mr. Heslop later acknowledged that this statement was false and that he had actually stolen the watch from a Purolater package.

Following the meetings Mr. Merrick compared Mr. Heslop's watch model number to the model number of the watches that had gone missing. They were the same. Accordingly, on October 4, 2011 Mr. Merrick again interviewed Mr. Heslop at the hub. Again the union steward representing Mr. Heslop in the investigation meeting was Mr. Foster. Mr. Merrick first asked Mr. Heslop where he got the watch. Mr. Heslop answered that he had got it from a friend. Mr. Merrick then confronted Mr. Heslop about the fact that the model number of his watch was the same as the model number of one of the watches that had gone missing. In response to this assertion, Mr. Heslop asked Mr. Foster to leave the room. Once Mr. Foster left, Mr. Heslop confirmed that the watch he was wearing had been in fact stolen from a Bulova shipment and had been given to him by Mr. Abrams. He told Mr. Merrick that he had one other watch at home but he had taken others which he gave away and could get back. He told Mr. Merrick and Mr. Campbell that the security guards were not doing their jobs. He also admitted to participating in the theft of cell phones. He said that Mr. Abrams asked him about cell phones and Mr. Heslop answered that they could be unlocked (making them a valuable target for theft). He also said that Mr. Foster was in on the thefts.

Mr. Merrick asked Mr. Heslop to prepare and sign a written statement of what had occurred. Mr. Heslop prepared the following document which has been modified, for ease of reading, to correct a number of spelling errors:

Statement of Omar Heslop October 4 2011

This statement is given of my own free will without promise or threat.

Upon the beginning of this interview I asked Foster to leave.

I started working at Purolater in May and at first everything was normal. The first incident happened with woman's underwear to my knowledge when Marvin was working with Foster they would take these items often. I didn't take any at first but because I didn't want to rock the boat or have any problems especially knowing what was happening. I took.

As for the phones I wanted no part in that. To be honest knowledge about the phones was an accident. The tape of a box was pulled off and I saw the phones inside. Marvin asked me what kind of phones they were and I told him "i-phones". I can't remember if it was two or one but he took them. From then on after it went on for a long while. He would also ask me to check out the boxes to see what was inside. At times I would empty the container and he would pocket the items. I was given \$60 (\$30 on two different occasions). To my knowledge the phones were sent out of the country.

The Bulova watches were my fault. In part because I noticed the label marked jewelry and mentioned it out loud. Marvin then opened the box and found the watches. I'm not sure when Foster was made aware of them but I witnessed them being handed to him and I was also made to hand over to him as well. I was given a few of which I've kept and gave the others away but I will be able to get them back.

I didn't want any of this. All I wanted was a job that I can work and help support my family. The work means a lot to me and I want to work here.

I give this full account knowing full well the repercussions that I may endure.

Mr. Heslop was immediately relieved of duties and eventually his employment was terminated. The company called the police. On October 7, 2011 Mr. Heslop returned the watches he had stolen and which he still possessed (31 in total, "give or take", according to Mr. Merrick). The company did not record the serial numbers of the returned watches. Mr. Heslop was arrested on nine counts of theft

under \$5000. Mr. Heslop eventually pleaded guilty and was given community service and after that an absolute discharge.

In initial cross examination Mr. Merrick acknowledged that the list of stolen items provided to the union and made an exhibit before me only had 22 watches on it. Mr. Merrick explained that the company was dependent on the customer to report losses and obviously not all of the stolen watches had been reported as lost. In later cross examination Mr. Merrick advised that there was a further list which had more stolen watches identified.

On October 14 Mr. Abrams and Mr. Foster were also arrested. Mr. Foster was charged with stealing 17 watches. Mr. Abrams was charged with stealing 35 cell phones. The company's final list shows 41 cell phones as reported lost by customers. No cell phones were ever recovered. The police did not search the grievors' homes.

Mr. Foster's employment was terminated October 27, 2011 by letter which stated in relevant part:

On Friday October 14, 2011 you were arrested by Toronto Police Services in connection with thefts that had occurred at our Metro West Hub facility.

Subsequent to your arrest, our human resources manager, Diana Brown, contacted you on October 24th, 2011 to try and arrange a meeting with you to discuss the events in question. You indicated to Ms. Brown that you would be consulting with your criminal lawyer and then contacting her to advise if you would attend a meeting. To date, you have not contacted Ms. Brown and Ms. Brown has been unable to reach you despite calling you several times. We can only conclude that you have chosen not to meet with us.

Foster, based on the information available to us, we have no alternative but to terminate your employment with Purolater Inc. effective immediately for theft of customers' property.

Mr. Abrams's employment was terminated October 27, 2011 by similar letter, which stated in relevant part, as follows:

On Friday October 14, 2011 you were arrested by Toronto Police Services in connection with thefts that had occurred at our Metro West Hub facility.

Subsequent to your arrest, our human resources manager, Diana Brown, contacted you to arrange a meeting to discuss the events in question. However, Ms. Brown was contacted by your criminal lawyer who advised that you will not be meeting us.

Marvin, based on the information available to us, we have no alternative but to terminate your employment with Purolater Inc. effective immediately for theft of customers' property.

On October 11, 2012 the criminal trial against Mr. Foster and Mr. Abrams commenced. Mr. Heslop was called as a witness and gave evidence in chief and was cross examined. The transcript of the trial was put into evidence before me. While the evidence he gave was similar to the evidence he gave before me, there were some differences between that evidence and the statement he gave to the company. The charges against the grievors were dismissed in the middle of the trial when it became clear that the Crown could not prove that anything had been stolen because the ultimate owners of the property did not testify or provide affidavits regarding their losses.

As the termination letters indicate, long prior to the trial, the company asked Mr. Abrams (at least) to meet with Purolater's human resources manager, Diana

Brown, to give his side of the story but he refused on the advice of criminal counsel. There is a dispute about whether the company also asked Mr. Foster to give a statement. Mr. Foster denies that he ever spoke to Ms. Brown or received a message from her to call to work. Ms. Brown testified that she called Mr. Foster as well as Mr. Abrams and told them the company wanted to meet offsite. She told them they should consult with criminal counsel first before agreeing to meet. Mr. Abram's criminal counsel called her back and advised her that he would not meet. Mr. Foster did not call her back and so she attempted to reach him again but was unsuccessful. Because the company was unable to speak with the two grievors it decided to make a decision about Mr. Foster's and Mr. Abrams' employment based on the information it had, that being the loss prevention report and Mr. Heslop's confession, as reflected in his statement.

The Evidence in Detail

Mr. Heslop worked over two periods for the company in the classification of sorter in the unload section of the hub. He was initially hired for the busy Christmas season in 2010. His employment at that time ended on or about December 21, 2010. He was re-hired by the company in May 2011 and his employment was terminated on or about October 4, 2011.

In his initial period of employment he was assigned to work alongside Mr. Abrams. They worked in trailers at bay 35. A mobile conveyer belt was placed in the trailer which was connected to the warehouse's main conveyer system. Mr. Heslop and Mr. Abrams would unload the truck by removing freight (packages,

boxes and goods) from the trailer and place them on the conveyer belt. They worked on either side of the belt which essentially divided the trailer in half, length wise. It is company policy that trailer doors always be in the fully open position and the partial closing of doors is “discouraged”. However, even when the trailer door is open, security cameras cannot see into the trailer but only cover the bay doors.

Mr. Heslop testified that he became aware that Mr. Abrams was stealing goods soon after he started working in the Fall of 2010. At that time, according to Mr. Heslop, Mr. Abrams was stealing women’s underwear. He would know what boxes to open because they were identified as being from retail stores like La Senza or La vie en Rose. He would open the boxes in the trailer out of view from anyone who might be in the hub walking by the back of the trailer. Mr. Abrams stuck the underwear into his knee high socks under his pant legs. Mr. Heslop testified that he initially resisted accepting stolen underwear when offered. However, Mr. Abrams explained that it was easy to steal the underwear and eventually he relented and took the underwear as well. Mr. Abrams would either just repackage the empty box and include it with the larger package to be delivered or he would break the box down and put it into another customer’s box. These thefts occurred periodically depending on how often underwear packages were in their trailer. The company did not before me attempt to identify specific underwear packages that had gone missing around this time.

Mr. Heslop testified that he was going through some personal issues at the time and Mr. Abrams gave him advice. In Mr. Heslop's words Mr. Abrams became a "father figure" to him. He trusted him.

When Mr. Heslop returned to work for the company in May 2011 he was initially assigned to work with a different co-worker. However, after a week he was back working with Mr. Abrams. He testified that soon after they stopped stealing women's underwear and moved on to cell phones and watches. Mr. Heslop testified that they started stealing cell phones after he noticed a box partially opened and mentioned it to Mr. Abrams. Mr. Abrams asked what was in the box and Mr. Heslop told him it was I-phones. Mr. Heslop put the box aside for Mr. Abrams who took the I-phones out of the box. Mr. Abrams took a phone and put it into his work gloves and left the building at the end of his shift. Mr. Heslop was with Mr. Abrams as they left the facility and saw that security did not scan the work gloves with the metal detector. Mr. Heslop testified that he did not see what happened to the box the phone was in.

Following that they stole phones on a number of occasions. Either Mr. Heslop or Mr. Abrams would identify a box containing cell phones and open it. Either Mr. Heslop or Mr. Abrams would take it out of the hub. Mr. Heslop claims that he only took the phones out on one occasion when Mr. Abrams had too many phones to take out by himself. On that occasion Mr. Abrams gave Mr. Heslop 30 dollars after he gave the phone to him in Mr. Abrams' car. Phones were identified because the packages came from cell phone carriers like Telus, Rogers and Koodo. Mr. Abrams always removed the cell phones in his work gloves or socks.

Mr. Heslop acknowledges that it was his fault that they began to steal watches. On one occasion he noticed a box marked "jewelry" and he told Mr. Abrams. Mr. Abrams opened the box and discovered it contained watches. Mr. Abrams took a number of watches out of the box, handed one to Mr. Heslop and kept the rest for himself. He then closed up the box and placed it on the belt. Mr. Heslop was asked how often watches were taken and he replied on several occasions, but it depended how often watches were in the trailer they were unloading.

According to Mr. Heslop, Mr. Foster was also aware that they were taking watches. He knew Mr. Foster was aware because on a number of occasions he saw Mr. Abrams hand Mr. Foster watches. Mr. Foster's involvement started a couple of weeks after Mr. Heslop started working with Mr. Abrams again, when Mr. Heslop gave a watch to Mr. Foster. Sometimes Mr. Heslop overheard Mr. Abrams would tell Mr. Foster that he had something for him. He and Mr. Foster got along well.

Mr. Heslop's evidence was that they often worked with the door to the trailer half closed so that it was difficult for anyone outside to see inside where they were working and engaging in improper activity. It was against the rules for the two to work with the trailer door half down but they had only been called on it by a manager on one occasion.

Mr. Heslop testified that he talked to Mr. Abrams on two occasions after the initial investigation meeting with the company. Mr. Abrams asked what had happened. Mr. Heslop told him that he told the company that he had nothing to do with what was going on. He also told him about the watch he was wearing. Mr. Abrams replied: "I told you not to wear that watch". They spoke again just prior to Mr. Heslop returning the watches after he had been caught,

Under cross examination Mr. Heslop readily acknowledged that he had repeatedly lied to the company but claimed that he was now telling the truth. He also acknowledges that his written statement to the company contains no reference to thefts in his first stint with the company. He also agrees that there is no reference in the statement or in his testimony at trial that he was asked by Mr. Abrams to remove phones from the facility and that the first time he had ever mentioned that fact was at the arbitration hearing.

Counsel also asked Mr. Heslop about what he had done with the watches he took. At the second meeting with loss prevention he told the company he had given them to friends but could get them back. However, at the trial he testified that he had kept the watches because he "felt weird" about having them. In front of me he initially denied that he had testified in court that he kept the watches. However, when confronted with his testimony he denied lying at court but had "said the wrong thing". In the end it was unclear whether he had given away 32 watches or had kept them, as he testified to at trial. However, given how quickly they were returned, it seems most likely that he kept the watches and did not give them, or at least all of them, to people.

Other inconsistencies between the evidence he had given at trial and the evidence he gave in chief before me were raised. One was the fact that the trailer door was half closed. At trial he seemed to testify that it was acceptable for the trailer door to be half closed and he believed that it was only when the company “got wind” that something was up that they became concerned about the positioning of the trailer door. Before me, that was not his evidence.

Mr. Foster was employed for 16 years with the company and had no discipline on file. He worked in various positions and also was, as noted, a union steward. Mr. Foster worked as a sorter in an area within the hub up (half way between the floor and the ceiling) behind the bay where Mr. Abrams and Mr. Heslop worked. He put a number on the boxes to direct them to the right truck for final destination. He would sort approximately 300 packages per hour. He denies ever stealing property from the company and was unaware of Mr. Heslop’s improper activities.

He described the circumstances of his arrest which is only relevant because the employer relies on his account as evidence of his dishonesty in giving his testimony. He said that he was eating in the cafeteria at work when Mr. Campbell brought him into a meeting with four other persons who he identified as police officers. Soon Mr. Abrams was also brought into the room and at that time Mr. Campbell told Mr. Abrams that he was under arrest for theft. He was put in handcuffs and taken in a squad car to the police station for booking. He strongly disagreed that Ms. Brown ever spoke to him, or left a message for him, to try to arrange a meeting following his arrest.

Mr. Foster was asked in examination in chief why he thought that Mr. Heslop would want to implicate him. Mr. Foster testified that the two of them had run ins. Mr. Foster explained that there had been an occasion when he was having a conversation/argument with another employee and Mr. Heslop “just budded in”. According to Mr. Foster he told Mr. Heslop to, in effect, “bud out”.

Under cross examination Mr. Foster acknowledged that he had known Mr. Abrams since at least 2006 when they met at work. They worked together in the same trailer for a total of about two years from June 2009 to June 2011 and they got along pretty well. He denied taking lunches and breaks with Mr. Abrams. He also denied that they met socially at all.

Mr. Foster was also asked questions about how he performed his role of steward, which he had been for many years. He usually spoke to the employee before or after a meeting to find out what happened. However, after the first investigation meetings Mr. Foster claimed that he did not speak to Mr. Abrams to find out why the company was asking about missing cell phones. Later he testified that he told Mr. Heslop: “you have to let us know what is going on if want us to help you” but that Mr. Heslop did not wish to speak with him.

Mr. Foster was unaware of any relationship between Mr. Abrams and Mr. Heslop and never saw them together except perhaps walking side by side after shift was over. He was aware that from time to time Mr. Heslop asked Mr. Abrams for bus

fare and Mr. Abrams might have found this annoying and Mr. Heslop might have perceived this annoyance. But he was not aware if this created a problem between the two and was unaware of any problems between them. He denied that Mr. Abrams ever expressed any concern about Mr. Heslop. He had no relationship with Mr. Heslop.

Also in cross, Mr. Foster reiterated his evidence that he had never spoken to Ms. Brown after his arrest. He says it “never happened”. He got no messages from her. He did speak to Mr. Abrams who told him that Ms. Brown had spoken to him to try and arrange a meeting but that his criminal counsel told him not to attend. Mr. Abrams had called Mr. Foster at home. Had Ms. Brown reached him he would not have agreed to meet her. He had been a police officer for 16 years in the country where he previously lived and he knew better.

Mr. Abrams was employed with the company for 12 years always as a sorter and also had no discipline on file. He denied stealing items or giving stolen items to anyone.

He testified that he did not own a cell phone and that when he was asked about this by Mr. Merrick he said they were “trouble”, that a cell phone had cost his brother his marriage. He was asked what conversation he had with Mr. Foster as his union steward at the time he was initially brought in for questioning. He replied that he had no conversation with him.

He said that his trailer door was always open. There were as many as 2000 pieces in a trailer depending on how full it was. They had to work quickly in order to unload the trailer at the required pace. They carried no tape that could have been used to reseal boxes but did carry a knife which was used to remove plastic wrap from around pallets. In his view the x-ray and metal detector wandling would have caught anything brought through security as they were wanded from head to toe.

He testified that it was about a ten minute walk from bay 35, where he worked, to the washroom and the whole process would take eight to ten minutes. Sometimes he would tell the team leader that he was going to the washroom and sometimes he would just go when he needed to. He went to the washroom frequently as he drank a lot of water while working. He confirmed Mr. Foster's testimony that Mr. Campbell, and not the police, told him he was under arrest.

Under cross examination Mr. Abrams was challenged about how long it would have taken him to walk to the closest washroom. Counsel suggested it was about a minute's walk. Mr. Abrams agreed with this estimate despite his earlier testimony. He also agreed that the goal was to unload the trailers as fast as possible and that they would unload three to six trailers each five and one-half hour shift. There was a five to six minute break while the trailer was removed from bay 35 and a fresh one brought in to be unloaded. He disagreed that was the best time to go to the washroom and that he simply went to the washroom whenever he needed to.

He agreed that he and Mr. Heslop worked in close proximity to each other and could see what the other was doing. He agreed he could see if his partner was opening a box, handling an open box, or if he was carrying tape. He carried a knife for use in removing shrink wrap from palletized products. He did not know if Mr. Heslop was stealing even though there were particular days when Mr. Heslop was stealing numerous items.

Mr. Abrams denied having a personal relationship with Mr. Heslop of any magnitude. He did not take breaks with him- he took his breaks alone. However, they got along and had no disagreements.

He worked with Mr. Foster for one to two years and they got along as “co-workers”. Mr. Abrams classified himself as a “very anti- social person”. He chatted with Mr. Foster on an irregular basis. They did not call each other. Mr. Abrams could not recall him speaking to Mr. Foster about cricket as Mr. Foster testified. He acknowledged that he had Mr. Foster’s telephone number but claimed that he did not call him on a regular basis. Sometimes Mr. Foster would call him and ask him for a drive to work. They still talked occasionally after they stopped working together in the trailer. However, they never talked about the theft issue. He never asked him in his capacity of union steward what was going on. He acknowledged that he also called Mr. Foster and told him that Ms. Brown had contacted him but that on advice of counsel he had decided not to meet with her. He and Mr. Foster talked about the case on three occasions. In re-examination he was asked why he had Mr. Foster’s phone number and he answered that he had it as a friend.

Decision

Many of the alleged facts are disputed in this matter, so it is useful to start with what is not disputed. The most important fact that is not in dispute is that at a minimum, Mr. Heslop was stealing goods from packages at bay 35 and that he worked with Mr. Abrams at bay 35. Much flows from these two undisputed facts. Included among what flows is the nullifying of the union's numerous challenges to the company's investigation. There was significant evidence led about how Mr. Merrick arrived at the conclusion that the missing packages were disappearing from bay 35. It is not necessary for me to describe this evidence in any detail. The fact that it is possible that some of the missing goods may not have been at bay 35 at a time when Abrams and Foster were working does not change the essential fact that Mr. Merrick was right: someone was stealing goods out of bay 35. Also, the union's position as to the company's security system are essentially rendered meaningless because the fact is that Mr. Heslop was able to get at least 31 watches out of the facility. However strong the security system was, it was clearly not infallible. Similarly, the fact that Mr. Foster may have been absent at the time a few of the items went missing does not affect the company's case in a meaningful way. I have no doubt that Abrams and Foster were at work on most, if not all, of the days, when goods were taken and could have participated in the thefts of those products as alleged. The real question is: did they?

In answering that question it is critical to consider the evidence against the two grievors separately. The evidence against them, while similar in some respects, is

very different in many other respects. I need be careful, too, not to use deficiencies in the evidence given by one griever against the other griever.

Mr. Abrams

The case against Mr. Abrams is really in two parts. The first part is the circumstantial case. This is comprised largely of the fact that it is clear that goods were being stolen out of bay 35 at a time when Mr. Heslop and Mr. Abrams were working there together. This circumstantial fact, by itself, amounts to considerable evidence against Mr. Abrams that he either stole goods himself or, at a minimum, turned a blind eye to Mr. Heslop's theft. I have some doubt about Mr. Heslop's evidence which I detail below, but it is not necessary for me to resolve Mr. Heslop's credibility here because, even without Mr. Heslop's testimony, I am satisfied that as a minimum Mr. Abrams must have known that Mr. Heslop was stealing goods and he did not act appropriately to stop it.

I come to that conclusion because the two men worked side by side in close quarters in the trailer and the trailer is realistically the only place where boxes could be opened, the contents tampered with, and the boxes resealed. Importantly, it is also the only place where packages targeted for theft could be set aside to be opened later. Mr. Abrams must have seen this activity.

Mr. Abrams' only explanation for how he could not have seen Mr. Heslop's improper activity is that Mr. Heslop engaged in it while Mr. Abrams was away at

the washroom. In my view this explanation does not stand up to close scrutiny. In his testimony Mr. Abrams obviously exaggerated the amount of time it would take him to go to the washroom as well as the fact that as a routine matter he went to the washroom when he felt the need and not coincident with the time he had off when he was waiting for a new trailer to be parked in the unloading bay. Moreover, given the number of items taken over a relatively short period of time, even if Mr. Heslop had, as suggested, waited until Mr. Abrams went to the washroom, I find it very unlikely that he never noticed anything amiss on his return or that he never noticed Mr. Heslop setting aside boxes, as he must have done. In coming to this conclusion I am mindful of the significant number of items that were stolen.

In addition to the concern I have about Mr. Abrams' testimony regarding his washroom breaks, I must say that in other respects the evidence he gave was not, on my assessment, particularly credible. It was clear that he deliberately underplayed the nature of his relationship with Mr. Foster and Mr. Heslop. At one point in his testimony he referred to Mr. Foster as just a co-worker while in later testimony it became clear that he was more than that. They worked together for as long as two years, they had each other's telephone numbers because they were friends, and Mr. Foster would occasionally ask him to drive him to work. This evidence varies in a somewhat minor way from the truth. However, the variances suggest a witness who was trying to shade the evidence in his favour for an obvious purpose.

In fact, in the circumstances, I also think it more likely than not that Mr. Abrams was an active participant in the thefts. Even leaving aside Mr. Heslop's evidence,

it is difficult to believe that Mr. Heslop, a relatively new employee, would start working with a stranger and then almost immediately begin stealing things in the hopes that his co- worker would not say anything. He would likely need knowledge of how things worked at the facility, including how the security system worked, how often management came around to check in the trailers and what would happen if a customer found an empty box in its delivery. The possibility of a brand new employee engaging in this behaviour on his own, strikes me as remote. The obvious conclusion is that Mr. Abrams was a party to it.

I accept that the penalty for theft, or not reporting theft, is usually, but not automatically, discharge. The individual circumstances of each case must be assessed. That being said, it is obvious that the company depends heavily on the honesty of its employees. They frequently work with packages in circumstances where it would not be difficult to steal. That is the reason the company has a quite elaborate security system in place, including video surveillance cameras and an airport like metal detection system. I agree with the cases provided to me that the penalty for theft in this industry is, absent extenuating circumstances, which are not present here, generally discharge.

Mr. Abrams has fairly lengthy unblemished service with the company. However, he has not acknowledged wrongdoing of any kind. Given the seriousness of the offence and the failure to acknowledge wrongdoing this is not an appropriate case to exercise my discretion to reduce the penalty imposed. Even if I am wrong that Mr. Abrams engaged in theft, I am fully satisfied that he was aware of Mr.

Heslop's activities and did not take the appropriate action and I see no reason to reduce the penalty in that circumstance either.

Accordingly the grievance respecting Mr. Abrams is dismissed.

Mr. Foster

The employer's case against Mr. Foster is considerably different than its case against Mr. Abrams. It is not alleged that he took anything out of packages. It is only alleged that he accepted watches from Mr. Abrams and Mr. Heslop, which he must have known were stolen, and then participated in removing them from the facility. He was not found in possession of stolen property. During the relevant time Mr. Foster did not work directly with Mr. Abrams or Mr. Heslop and in fact worked some distance away from them. Moreover, the company is unable to tie any piece of stolen property to Mr. Foster. In fact, when one takes into account the number of watches stolen by Mr. Heslop and likely taken by Mr. Abrams, it is not even certain that there are any additional watches that are unaccounted for, that the company could identify as watches that Mr. Foster might have taken out of the facility.

The company's entire case therefore rests on Mr. Heslop's evidence, plus the alleged deficiencies in Mr. Foster's evidence, particularly as given on cross examination. This not a case where the employer relies on circumstantial evidence. Mr. Heslop's evidence is direct evidence of Mr. Foster's wrongdoing. It

is internally plausible. There is no serious argument that Mr. Foster could not have accepted the stolen goods as alleged. He was in the workplace at appropriate times. He had some contact with Mr. Abrams at least; it is not as if Mr. Foster and Mr. Abrams were strangers to each other. They worked side by side for a couple years and they occasionally drove to and from work together. They had each other's telephone numbers. Eyewitness testimony of this sort plays an important role in the justice system generally and the arbitration system specifically.

In comparing their evidence, I must say that both men came across as believable witnesses. They both testified in what appeared to be a forthright manner. That makes this case very difficult. I must choose which of two witnesses to believe when on the surface both are believable. Of course, as the cases make clear, I must not make a finding of credibility based solely on which witness I think makes the better appearance in the witness box. Instead, or in addition, I must look at the witness's evidence in the context of the "whole story". The real test of the truth of a witnesses story is its harmony with the preponderance of probabilities which are recognizable as reasonable in that place and in those circumstances (see, for example, *Faryna v. Chorny* (1951) [1952] 2 D.L.R. 354 (B.C.C.A.))

I take little from the mere fact that Mr. Heslop initially lied to the company and now has changed his story. Unfortunately, employees frequently lie to the employer when confronted with damning accusations. Such lies are, at a certain level, understandable and do not automatically lead to the conclusion that the employee is not telling the truth at a later time, particularly when the previous

dishonest story is recanted and the employee admits wrongdoing, even if this only occurs in the face of overwhelming evidence.

That being said, I found aspects of Mr. Heslop's testimony troubling. In particular, while he tried to blame Mr. Abrams and Mr. Foster for the thefts, it is clear that he downplayed his part in the scheme. On his own evidence he was the one that identified watches and cell phones as potential targets. Those thefts were a step up from the underwear that he says were being taken before. This concern is enhanced by the fact that the company did not prove that any goods were stolen from bay 35 prior to Mr. Heslop's initial period of employment or his return to the company's employ. The rash of thefts that drew the company's investigatory interest only started after he recommenced work in May or June 2011. Further, his statement "as for the phones I wanted no part of that" seems totally disingenuous. It was him that pointed out that there were phones in a package and it was him that explained to Mr. Abrams that the phones could be made useful by being "unlocked". His statements that: he was "made" to hand over watches to Foster; he wanted "no part" of the cell phones; and he wanted "no part of this" are indicative of an individual who has not actually taken full responsibility for his own misconduct.

While I discount entirely the idea that Mr. Heslop held a grudge against the other two employees and so was motivated to point a finger at them (the incidents suggested as possible motivation were so minor as to be not worth mentioning), that does not mean he had no interest in dragging down others with him. This part of his written statement is suggestive of his possible motive: "All I wanted was a

job that I can work and help support my family. The work means a lot to me and I want to work here.” It would appear that at the time of his confession he still held out the hope that the company might keep him employed and that was more likely if he gave them bigger fish to fry. In this regard, I note that he had a period of time between when he was caught wearing the stolen watch and the company’s next investigatory meeting. He had no way of knowing that the company did not have the serial number of the watch- he must have known he was likely to be caught. In that time, he could have come to the conclusion that pointing a finger at Mr. Abrams might not be sufficient and the only other person that could possibly be part of Mr. Abrams’ circle was Mr. Foster.

There were also some troubling aspects of the story he gave, in particular his vacillation about what he did with the watches he stole. At the time he gave the written statement to the company he told the investigators that he had given away the watches but could get them back. However, at trial he testified that he had kept the watches. Before me he had difficulty acknowledging the discrepancy in his versions of events but ultimately suggested he was not lying but was simply wrong. I draw two conclusions from this aspect of the case. The first is that to the extent Mr. Heslop was “coming clean” he actually did not do so in a totally honest way. Second, it again is indicative of his underlying motivations in that by suggesting he did not have the watches but could get them back, he was placing himself in the position of doing a favour for the company which they might reward by letting him keep his job or not pressing charges against him.

As noted, Mr. Foster gave a straightforward denial of being a participant in the thefts. The company's attack on his credibility rests in large measure on two points: First was his statement that Mr. Campbell told him that he was under arrest which the company argues is absurd given that there were police officers present and Mr. Campbell has no power to arrest anyone. The second is that, contrary to Ms. Brown's evidence he denies that Ms. Brown called him to try to arrange a meeting. While I think it is more likely than not that Mr. Foster is wrong on both accounts, I do not take much from his mistakes. That is because he had absolutely nothing to gain by lying about those events. What does it matter if it was Mr. Campbell or a police officer who told him that he was under arrest? What does it matter whether Ms. Brown called him or not?

The company also asserts that the testimony that he gave regarding his communication with Mr. Heslop and Mr. Abrams make no sense given his role as union steward and ought not to be believed. I share similar concerns as discussed below.

There is no doubt that the company's case against Mr. Foster is somewhat thin. However, it is not a circumstantial case as the company has direct evidence in Mr. Heslop's testimony of Mr. Foster's wrongdoing. There is also no doubt that Mr. Heslop was not a perfect witness and, moreover, did not come completely clean when he decided to confess.

That being said, what causes me to, in the end, believe Mr. Heslop is the fact that there is no motivation for him to lie. This lack of motivation can be assessed in more than one circumstance. I start with his initial decision to confess to the company when confronted in the second investigation meeting. I accept that at time there was motivation to implicate Mr. Abrams. Mr. Heslop might have anticipated that the only way to perhaps keep his job and/or escape prosecution was to implicate his partner particularly when it was clear that the company was also investigating Mr. Abrams. He would have anticipated that the company would not accept his confession as a full confession if he did not at the same time explain Mr. Abrams' role.

However, I can think of no reason why Mr. Heslop would perceive a need to falsely accuse Mr. Foster. To his knowledge, the company had no interest in Mr. Foster at that time. Had it any interest, management would surely have insisted that Mr. Heslop seek the assistance of another union steward or would have interviewed Mr. Foster on his own. But the company did neither of these things; Mr. Heslop had no reason to think the company was suspicious of Mr. Foster. Moreover, it is difficult to see what benefit Mr. Heslop might believe he would get out of falsely implicating Mr. Foster. His argument to remain an employee or to not be charged is hardly strengthened if he brought two co-workers down as opposed to just one.

The conclusion that Mr. Heslop was truthful with respect to Mr. Foster is strengthened by the fact that he asked him to leave the second investigation meeting. I accept that this was a spur of the moment decision. Mr. Heslop gave up

his union representation because he did not want Mr. Foster to know that he was talking to the company about Mr. Foster's role in the theft scheme. This action is more consistent with an employee genuinely wanting to come clean than an employee making up his story as he went along.

Furthermore, Mr. Heslop did testify at trial against Mr. Foster. I am not obviously naïve enough to suggest that witnesses do not lie in criminal proceedings.

However, by that time he had nothing to gain by testifying. He had already pled guilty and there is no direct evidence before me that Mr. Heslop received a lesser sentence for his agreement to testify against the other two. In this regard, I note that Mr. Heslop denied such an arrangement and no evidence was called to the contrary. Mr. Heslop's testimony at criminal trial is a step up in seriousness above his decision to simply tell the company about Mr. Foster's role. Similarly, he had absolutely nothing to gain by testifying against the two men in front of me. By the time he did so, his own criminal wrongdoing was behind him and he knew that he would not get his job back. He was a student at university. Had he been lying the whole time it would have been easy for him to simply tell the court (and me) the truth, had that been the truth.

Finally, and while I accept that there is no obligation on Mr. Foster to develop a theory as to why Mr. Heslop would have falsely accused him, the absence of any such motivation also suggests that Mr. Heslop is likely telling the truth. I do not accept that any of the incidents which Mr. Foster (or Mr. Abrams for that matter) testified about would have motivated Mr. Heslop to bear a grudge against the two

men. In fact, to their credit, neither the union nor Mr. Foster really suggested that Mr. Heslop was “out to get” him for these reasons.

In the end, what I am left with is a witness, Mr. Heslop, who gave evidence against Mr. Foster which implicates Mr. Foster even though the company cannot identify an item that Mr. Foster stole. I can think of no reason for Mr. Heslop to have falsely and repeatedly implicated Mr. Foster. In these circumstances it is more likely than not that the reason Mr. Heslop told the company about Mr. Foster’s involvement in the theft scheme was that it was true. I also am, on the other side, troubled by Mr. Foster’s evidence with respect to the communication he had with Mr. Heslop and Mr. Abrams as their union steward. He testified that it was his normal practice to speak with grievors when they were called into meet with management. That is hardly surprising. What is surprising is that he initially said he did not do so with respect to Mr. Abrams, either before or after the meeting, when he was questioned about stolen goods. That suggests it was either unnecessary to do so because he already knew what was happening or that he was concerned about speaking when he was already involved. Given the fact they were on quite friendly terms (whether or not they were “friends”) that evidence is difficult to understand or believe. His evidence, given in later cross examination, that he tried to arrange a meeting with Mr. Heslop, and had a brief conversation with him after the September 30 meeting, is odd considering his earlier testimony in cross that he had no conversation with Mr. Foster. Why did he treat the men differently? It makes little sense. This evidence cuts into Mr. Foster’s credibility and, with the comments I have made with respect to Mr. Heslop’s evidence, on balance causes me to prefer the evidence of Mr. Heslop over that of Mr. Foster.

On the balance of probabilities I am therefore satisfied, on all of the evidence before me, that Mr. Foster participated in theft of property as the company alleges.

In my view, the analysis regarding the appropriate penalty for Mr. Foster is essentially identical to that for Mr. Abrams and I rely on it. For the reasons set out there, I see no reason to vary the penalty imposed on Mr. Foster.

Accordingly, for the above reasons, the grievance respecting Mr. Foster is also dismissed.

Brian McLean

Mediator and Arbitrator

Toronto, Ontario