

FILE NO. AA92-11-001

EMPLOYER: Westfair Food Ltd.

UNION: United Food & Commercial Workers Union, Local 832

ARBITRATOR: B. Schwartz

APPEARANCES: G. Mitchell, for the Employer  
R. Ziegler, for the Union

GRIEVOR: R. Dalkie

DECISION RENDERED: November 6, 1992

EXPEDITED ARBITRATION: Yes

**ISSUES:** DISCIPLINARY OFFENCES - Work performance - abusive conduct; DISCIPLINARY PENALTIES - Types of penalty - discharge, Arbitral review - substitution of penalty; EVIDENCE - Witnesses - credibility: The Grievor, who worked in the Produce Department, was first suspended and then dismissed as a result of an incident with a customer. The customer, who was pregnant, claimed that the Grievor was rude to her when he told her not to take bananas from the crates which were behind the bananas on display. She also claimed that he told her not to break the bunches apart. She then claimed that the Grievor had shoved one of the crates into her stomach when she tried to get bananas from the other side of the table. The Grievor claimed that when he saw she was pregnant he told her not to go into the boxes because he was afraid she might hurt herself. He claimed that he was civil to her and that she was the one who was impatient. He also denied he pushed the box into her stomach. He also claims that he offered to call the manager, but the customer simply took his name and walked away.

**AWARD:** GRIEVANCE ALLOWED IN PART. The Arbitrator found that during his testimony, the Grievor showed that he could act resentfully and angrily when he believed he was being pressured or criticized which lent plausibility to the customer's recollection of events. He found that the Grievor spoke to the customer in an unpleasant manner and after upsetting her, he made no effort to make amends, he conveyed through his speech and body language that he was not interested in her needs and made her feel she was an annoyance. The Arbitrator also found that the box did hit the customer, as she had no reason to invent the episode. However, he found that while the Grievor was capable of being rude and unhelpful, he was not vicious enough to have intentionally hit a pregnant woman in the abdomen. Yet, he did not express the slightest sympathy over her upset and any physical discomfort that might have resulted. Even after giving the Grievor the benefit of the burden of proof in many respects, the Arbitrator concluded that this encounter warranted discipline. However, he ruled that the dismissal was too harsh a penalty given that the Grievor had not been disciplined previously over customer relations, and that he could still be a worthy employee. Therefore, he ordered the Grievor reinstated and the discharge substituted with a two-week suspension without pay. He recommended, out of concern for the customer's feelings, that the Grievor be transferred to another location.

4422-1-00

6 November 1992

AWARD

WESTFAIR FOODS LTD  
and  
UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 832

re: Mr. Robert Dalkie,  
dismissal.

Cases No. 769/92/LRA and 770/92/LRA

Date and place of hearings: Place Louis Riel, 8 October, 1992;  
Boardroom of Taylor, McCaffrey, 23 October, 1992.

Award Issued: 6 November 1992.

Appearances: For the union, Mr. Robert Ziegler  
For the employer, Mr. Grant Mitchell

Arbitrator: Dr. Bryan Schwartz

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NOV 9 1992

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AWARD

United Food and Commercial Union, Local 832  
and  
Westfair Foods Limited.

Re: dismissal of Mr. Robert Dalkie.  
Cases 769/92/LRA and 770/92/LRA.

Introduction

The grievor worked in the produce department at a large grocery store. On May 14th, he was involved in an incident with Ms. Marlene Desjardins. He was first suspended, then dismissed as a result.

The customer's version of the incident.

Ms. Desjardins testified at the hearing. She had no reason to lie or exaggerate. The manner of her testimony contributed to its credibility in a number of ways. She recalled the event in language that appeared to be her own; she was candid about what she did not notice or remember, and confident and consistent about details she did recall. Her testimony was honest in every respect. The only issues are whether, in good faith, she has made any errors of observation, recollection or interpretation.

Ms. Desjardins' narrative is as follows. In May of 1992, when the incident occurred, she was seven months pregnant. She went to the produce section of the store to buy bananas. She was in a hurry, because she had to pick up her young son at school. She wanted greener ones than were on display. Behind the table were crates of bananas, which she could see inside. The crates did not have lids. Mr. Dalkie was immediately in front of the table, "organizing bananas".

Ms. Desjardins looked for greener bananas in the open crates. Mr. Dalkie told her not to take the bananas out of the crates. She asked why. He said he did not want the bananas broken apart. His tone was "not very nice." He "seemed rude".

Ms. Desjardins was puzzled; no one at the store had ever before indicated that bananas could not be broken apart. Mr. Dalkie continued organizing bananas. Two other customers took their own bananas, but Mr. Dalkie did not say anything. Although Ms. Desjardins was on his left side, Mr. Dalkie placed unpacked bananas to his right side - out of her reach. Ms. Dalkie said "really". She thought Mr. Dalkie should be courteous and start on her side. She

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NOV 9 1992

2

observed Mr. Dalkie to be in "not a good mood". MANITOBA LABOUR BOARD

She moved over to the right hand side of the table. Mr. Dalkie moved a box over to that side, and it came into contact with her. She said "you didn't have to shove the box in my stomach". He replied "I did not". She replied "yes you did". She did not pursue the exchange much further; she did not want to get into an argument. Ms. Desjardins denies that Mr. Dalkie ever offered to call the manager, or gave her his name. She says she discovered it by looking at his tag. Later on, she purchased some bananas and left the store. Some time after she got home, she phoned the store to complain.

The grievor's version of events.

Mr. Dalkie's account departs in many ways from Ms. Desjardins'. In some cases, the differences could be the result of different interpretations of the same facts. On some points, the account of the facts themselves are sharply at odds.

Mr. Dalkie testified that when he arrived at the banana table, Ms. Desjardins was waiting. She was standing with her arms on her waist, looking impatient. She asked him whether he had any greener bananas. He explained that the store had been having a quality problem and the bananas were a little spotted. She tried to reach for bananas that were in closed boxes. (A customer could see bananas inside, through slits, but could not remove them). Seeing that she was pregnant, and fearing that there might be some accident - the boxes are very heavy - Mr. Dalkie, politely addressing her as "ma'am", asked her not to reach for the bananas in the boxes, and that he would be removing the bananas from them. After that, Ms. Desjardins commented that the bananas were too ripe. Mr. Dalkie explained - again politely - that the store had been having quality problems for a week, and that is why the bananas were being sold at a cheap price.

At some point, according to Mr. Dalkie, Ms. Desjardins commented that he was taking too long to fill the display.

Ms. Desjardins (still according to Mr. Dalkie) asked whether there were any greener bananas in the back. Mr. Dalkie admitted that he was getting frustrated at this point, but said - in a firm but civil manner - that there were no greener bananas in the back, the store was having quality problems. Ms. Desjardins then moved to his right-hand side. He moved a case into the lower right hand position. Ms. Desjardins said "you pushed a box into my stomach". He replied that he did not. She repeated the allegation, he the denial. Rather than entering into an argument, Mr. Dalkie recalls, he followed a standard procedure used to defuse confrontations: offer to call the manager. Ms. Desjardins asked instead for his name and then walked away.

NOV 9 1992

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Mr. Dalkie testified that he was trained not to show "favouritism" to a particular customer, but rather to unload all the fruit first, and then deal with a customer's individual needs.

He denies intentionally hitting Ms. Desjardins, and thinks it extremely improbable (though not absolutely impossible) that she was struck at all. Mr. Dalkie says he lined up the new boxes against old boxes. A lower right-hand box would routinely be placed with reference to an upper right-hand box. He also testified that there is a lip around the banana table, which would prevent a box from moving beyond the perimeter. Photographs and sketches presented by the union show that the lip surrounding the table was 3 1/2" high and 3/4" thick.

I would make a few general observations about Mr. Dalkie's testimony.

Mr. Dalkie appears to be experienced at organizing a banana table. He has a standard routine. Ms. Desjardins, by contrast, admitted she was not paying much attention to the actual mechanics of what Mr. Dalkie was doing, and did not indicate that she had any technical knowledge against which to measure it. In some respects, I have been convinced by Mr. Dalkie's account of the procedures he used, routinely on that day, to fill the table.

On the other hand, in response to some aggressive questioning, Mr. Dalkie showed that he can react resentfully and angrily when he believes he is being pressured or criticized. His emotional response to aggressive cross examination was clearly registered in his tone of voice and facial expression. His demeanour lent plausibility to Ms. Desjardins' recollection that she sensed his anger and hostility during the episode. According to Mr. Dalkie's own recollection of events, Ms. Desjardins started off looking impatient, continued to do so, and even commented at one point that he was filling the table too slowly. I rather doubt Mr. Dalkie's recollection that Ms. Desjardins vented her frustration so freely; my overall sense of the incident is that she avoided verbal confrontation. I believe, however, that throughout the episode, Mr. Dalkie did sense Ms. Desjardins' anxiety to complete her purchase, he resented the pressure, and through his body language and tone of voice, he let her know it.

I am also troubled by the fact that Mr. Dalkie, right through to the end of testimony, continued to state that he finds it extremely unlikely that the box hit Ms. Desjardins. It is obvious to any impartial person examining the incident that it did. Mr. Dalkie's refusal to concede the point shows a disturbing reluctance to see things from the customer's point of view. It also indicates that Mr. Dalkie does not always recall or characterize events in an objective manner. On the contrary, it appears that his anxiety to be vindicated can distort the way he recalls or interprets events. Let me immediately make it clear that I do not have an adequate

NOV 9 1992

4

basis on which to conclude that Mr. Dalkie has deliberately lied under oath.

Throughout, I have to be guided by the principle that the burden of proof is on the employer to show that Mr. Dalkie's behaviour was inappropriate.

Let me begin with the most serious matter: shoving the box into Ms. Desjardins.

Was there physical contact with Ms. Desjardins, and was Mr. Dalkie at fault in causing it?

As already stated, I have no doubt whatever that a box moved by Mr. Dalkie came into contact with Ms. Desjardins. She had no reason, then or now, to invent the episode. It is true that there is a lip around the banana table. But Ms. Desjardins was pregnant; her abdomen was protruding to the point where she found it difficult to reach some items on the table. If she was standing close by, part of her abdomen might have been over the edge of the table. Mr. Dalkie's own representative at the hearing forthrightly and properly admitted that it was probable that contact occurred.

The real issue is whether, as Ms. Desjardins believed, Mr. Dalkie shoved the box into her intentionally.

Mr. Dalkie recognized that Ms. Desjardins was pregnant, and only a person almost completely out of control would be so vicious and stupid as to intentionally or recklessly strike a pregnant woman in the abdomen. While I believe Mr. Dalkie is capable of being rude and unhelpful, I find it improbable that he would retaliate against verbal irritation by resorting to outright physical assault. Mr. Dalkie made some convincing points about how his routine procedures for placing boxes would lead him not to expect any contact with a customer standing on the side. As already discussed, Mr. Dalkie would line up the lower right-hand box against an upper right-hand box already in proper place. A lip around the table would usually provide customers with protection against contact. It probably did not even occur to Mr. Dalkie that contact might take place.

When Mr. Dalkie demonstrated how he moved the box, he seemed to be holding on to it throughout. Ms. Desjardins, by contrast, illustrated a more aggressive motion; in her re-enactment, Mr. Dalkie appears to have shoved the box and let go of it. Mr. Dudrak, a manager, testified that he thought the boxes could slide easily. Several of Mr. Dalkie's co-workers, however, testified that it could be difficult for a box to slide very far or fast. The boxes are heavy. If an upper row of boxes is in place already - as appears to be the case in this incident - they would tend to bulge and impede the movement of a box along the lower row. I am not really sure how far or fast the box slid, if at all; the event took

place quickly, and there could easily be honest mistakes in initial observation or recollection. Whatever the exact process, I believe that Mr. Dalkie was simply trying to move the box into the usual position.

To conclude on this point, the employer has not proved that the contact with Ms. Desjardins was intentional or reckless. Indeed, I believe it was not. I am also not convinced that Mr. Dalkie was negligent in moving the box without making sure Ms. Desjardins was out of harm's way. I am not ruling out the possibility of carelessness, but I don't think it has been demonstrated on the balance of probabilities.

By the way, Mr. Dalkie himself speculated on what the appropriate penalty would be if Ms. Desjardins' interpretation of events were correct, and he purposely shoved the box into her. Mr. Dalkie suggested that it was a "50/50" matter whether termination would be warranted. In my books, it would be a near 100% certainty. If a pregnant customer is assaulted by employee, he is going to have to demonstrate truly extraordinary mitigating circumstances to avoid outright dismissal. I cannot see such circumstances in this case.

Telling the customer not to break apart bananas.

Recollections are sharply different here, but I think it quite possible that there was a real misunderstanding concerning the initial interchange between Mr. Dalkie and Ms. Desjardins. Both sides agree that Mr. Dalkie told Ms. Desjardins not to do something. His exact words might have been ambiguous - e.g., "don't do that" - and Ms. Desjardins might have interpreted them differently from the way Mr. Dalkie intended. A statement like "I don't want them broken apart" could refer to a stack of boxes, as well as a bunch of bananas. I cannot see any reason why Mr. Dalkie would suddenly depart from procedures, and become irritated merely because a customer was breaking apart bananas. So I will give him the benefit of the burden of proof on this point, and conclude that his concern was with Ms. Desjardins' handling of large containers.

That said, I would note that Mr. Dalkie did not claim, during his testimony, that he tried to explain his concern over Ms. Desjardins' safety to her. Mr. Dalkie recalls that he indicated to Ms. Desjardins that he would soon be removing the bananas himself. Even if he did, I accept Ms. Desjardins' testimony that his manner of speaking to her was unpleasant.

Failing to offer personal assistance to the customer.

Mr. Dalkie claims that he was told not to show "favouritism" towards a customer by attending to her personal needs, while others were waiting. Mr. Dudrak, an assistant store manager, testified that the first priority is helping a customer, even if that means

NOV 9 1992

MANITOBA LABOUR BOARD

6

unloading must wait. There does not appear to be a manual or instruction sheet issued to employees, or a standard instructional session conducted for new employees. Employees are expected to learn on the job, from others. Perhaps employees can properly differ on what to do if there are many customers waiting to be served, along with one demanding customer. I did not receive any evidence about whether a crowd was waiting impatiently around the banana table at the time of the incident. But common sense suggests that no reasonable customer would be offended by seeing a clerk give priority to a woman who is obviously in the late stages of pregnancy.

It appears to me that Mr. Dalkie's primary concern was to get the table ready, and that he viewed Ms. Desjardins as an irritating presence, rather than someone whose needs were a high priority. Ms. Desjardins' testimony is that she was feeling impatient, but in the interests of avoiding confrontation, remained passive. In her version, Mr. Dalkie never explained anything to her.

Mr. Dalkie, by contrast, portrays her as a "difficult customer". Her gestures indicated impatience, she watched him the whole time, she commented that he was filling the table too slowly. She "frustrated" him by her display of impatience, and by asking about whether there were greener bananas in the back, after he had already said that there was nothing he could do because they had been having quality problems for a week.

Let me suppose for a moment that Mr. Dalkie actually did explain that there had been quality problems and there was "nothing he could do". Such a statement could have a variety of meanings; e.g., "there's nothing I can do about the fact that the bananas I've just unloaded are too ripe". Ms. Desjardins' follow-up question - about whether there were some greener ones in the back - would not have been unreasonable. Even if it were, the customer's worst "sins" would have been to show her anxiety to complete her purchase and to ask a redundant question or two. Nothing she did would have justified treating her in an unpleasant manner. It is clear to me that whatever his exact words, Mr. Dalkie conveyed to Ms. Desjardins, through his tone of voice and facial expressions, that he found her annoying and that he was not genuinely interested in her particular needs.

The evidence is not clear on exactly what Mr. Dalkie should have done affirmatively to help Ms. Desjardins.

Were there greener bananas in the crates he was unloading? Should Mr. Dalkie have immediately stopped loading the table, and opened up some boxes to find them for Ms. Desjardins? Did he have a reasonable chance to find greener bananas in the back of the store? Should he have gone to look for them?

Ms. Desjardins' testimony did not establish what type of



RP-40

NOV 9 1992

MANITOBA LABOUR BOARD

7

bananas she ended up buying. It is not clear exactly how green she wanted her purchases to be, in comparison to what Mr. Dalkie was unloading. The employer introduced records showing that in the days preceding the incident, the store was receiving bananas that were in an early or medium stage of development. I am not willing to arrive at a conclusion based on those records alone; they are, in essence, a report sent by some unidentified person in the store to a record-keeper in another city. Neither the sender or receiver appeared at the hearing. I did not receive any evidence concerning the state of the bananas from any manager who was actually in the store during that period. Also, the records concern the state of bananas that are received on a given day, and not the state of the bananas that actually remain on the tables or in back.

The burden of proof - the civil one - is on the employer. I will avoid making any authoritative finding that Mr. Dalkie has behaved improperly on any point where I am not convinced about the facts or applicable standards of conduct. But this much can be safely said. Mr. Dalkie initially upset the customer by directing her, in an unpleasant manner, to stop doing something with the bananas. He did not take adequate steps to defuse the situation - e.g., by expressing his concern over the customer's having to wait, or by calling a manager. (By his own testimony, he had been counselled on an earlier occasion of the importance of calming down an agitated customer, and told that summoning the manager can be a useful step in doing so). Instead, his words or gestures continued to convey to Ms. Desjardins the sense that he was "not in a good mood".

Reaction to the contact with Ms. Desjardins; failing to apologize.

Both sides agree that Ms. Desjardins accused Mr. Dalkie of shoving the box into her stomach, and that his response was "I did not". The accusation was repeated, and so was the response. Mr. Dalkie testified that his defensive reaction was an instant one to a startling and unfair allegation. He still finds it hard to believe that the box even came in contact with Ms. Desjardins, but at the hearing, he indicated he was prepared to apologize if that was indeed the case.

It is again quite possible that the two parties misunderstood each other. Ms. Desjardins' language - "you didn't have to shove the box into my stomach" - clearly suggests intent on Mr. Dalkie's part, and Mr. Dalkie was probably right to find the suggestion unfair. On the other hand, he was again focusing exclusively on his own point of view, rather than the customer's; even if the allegation of intent was unfair, the customer could have been bumped by accident, and an exemplary employee would have expressed regret that the contact occurred, concern over Mrs. Dalkie's well-being and offers of assistance. The twice-repeated denial of Ms. Desjardins' statements, without more, no doubt aggravated her sense

that Mr. Dalkie was insensitive to her needs, and indeed, downright hostile.

Mr. Dalkie clearly recalls offering to call the manager, Ms. Desjardins' testimony is that he did nothing of the sort. It is easily possible that both testified truthfully; one can imagine Ms. Desjardins being very upset at the time, and not hearing or remembering anything about an offer to call the manager. There are no other witnesses besides the protagonists. As it does not materially affect my overall conclusion, I am prepared to assume that Mr. Dalkie did say something about summoning the manager.

If Mr. Dalkie had acted in a friendly and helpful manner prior to the incident, it is debatable whether the failure to apologize would be a basis for discipline. It would have been better to express concern and offer assistance, but an immediate reaction of denial to a serious allegation might be forgivable.

On the facts, however, Mr. Dalkie was responsible for the hostile relations that developed between him and the customer. Had he not been unpleasant to Ms. Desjardins to begin with, she would not have interpreted his subsequent conduct - placing the bananas on his right side, shoving the box - as malicious. After upsetting the customer in their initial exchange, Mr. Dalkie had a considerable period of time before the bumping to try to make amends, offer assistance, call the manager, do something to de-escalate the situation. Instead, matters reached the point where Ms. Desjardins thought, after an accidental bump, that Mr. Dalkie had deliberately assaulted her. So I am prepared to consider Mr. Dalkie's unsympathetic response to Ms. Desjardins' final complaint as a factor in arriving at my overall assessment of the situation, and in assessing the appropriate measure of discipline.

Mr. Dalkie's past record: episode currently being dealt with in another grievance.

There are three prior episodes involving Mr. Dalkie in which discipline was contemplated or imposed. One of them is currently being grieved. It involves displaying a food item in an improper manner. Generally speaking, I doubt that arbitrators should take into account incidents that are currently being grieved. It would be inconvenient to force parties to litigate the same issue twice; as context in one arbitration, and the central focus in another. In any event, the "food display" episode is not directly related to customer relations and the penalty involved was only a written reprimand; so whatever view is taken of the "food display" dispute would not materially affect my ruling here.

Mr. Dalkie's past record: two matters ending in "without prejudice" settlements.

The other two episodes did involve formal discipline. Both

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NOV 9 1992

9

were grieved and settled.

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Exhibit 5 is the "terms of settlement" from the first incident. It is on a standard form used in grievance mediations under the aegis of the Manitoba Labour Board. Exhibit 5 says that says that Mr. Dalkie's five-day suspension without pay has been reduced to three days, subject to the following conditions: "without prejudice and without precedent."

Exhibit 6A is a similar Manitoba Labour form. The incident involved Mr. Dalkie's allegedly not culling out some decayed product from a display. The employer reduced a written discipline to a verbal warning "as per attached employee discipline form", exhibit 6B.

The union argued that the two prior grievances cannot be considered by a board of arbitration, because they are marked "without prejudice and without precedent". The employer argues that the meaning to be given to a phrase like "without prejudice" depends on the wording of the particular document and the surrounding circumstances. I agree.

Sometimes a document labelled "without prejudice" may contain terms of settlement that are not only noted by an arbitrator, but actively enforced; see Westfair Foods and United Food and Commercial Workers Union, Local 832 (Case No. 1180/91 LRA, arbitrator Steel, unreported). Indeed, at the bottom of the Manitoba Labour form, it is expressly provided that either party can grieve a failure to implement the terms of the settlement.

Now suppose labour and management agree, as part of the terms of a "without prejudice" settlement, that a measure of discipline be imposed. In some circumstances, they might intend that it not form part of the record. In other cases, the parties may use "without prejudice" in a narrower sense. The phrase would not mean that the slate is unaltered; it would mean that the slate is altered, but only to the exact extent provided in the settlement. Neither party could be later accused of having conceded anything beyond what is contained in the settlement. Such a "without prejudice" settlement might also preclude any renewed dispute over the incident. For example, if an employee accepts a short suspension for carelessness with respect to equipment, the employer might not be able to go aback and claim that deliberate sabotage was involved. The employee might not have accepted even a short penalty if it could later be used as a jumping-off point for a more serious allegation.

Exhibit 5 is silent on whether the discipline accepted forms part of the employee's record. The "terms of settlement" in exhibit 6A say that Mr. Dalkie's written reprimand is reduced to a "verbal warning, as per attached employee discipline form", exhibit 6B. While it is not absolutely clear, the parties probably did intend

NOV 9 1992

MANITOSA LABOUR BOARD

10

that exhibit 6B would form part of Mr. Dalkie's disciplinary record.

I would strongly suggest that in settling future grievances, the parties expressly specify whether a particular disposition is supposed to form part of the employee's disciplinary record.

In this case, I see no point in pursuing the admissibility of exhibits 5 and 6 any further. Even if they are both a legitimate part of Mr. Dalkie's record, they would not materially affect my view of his credibility or the measure of discipline to be imposed on the facts of this particular case. Exhibit 5 concerns an episode that occurred several years ago, and is not directly related to customer relations. The measure of discipline involved with exhibit 6A is minor, and also did not involve customer relations. My point about the impact of past discipline on unrelated matters is confined to the facts of this case; I am not invoking or suggesting any general rule.

The Penalty to be imposed.

After giving Mr. Dalkie the benefit of the burden of proof in many respects, I must still conclude that his encounter with Ms. Desjardins involved conduct that warrants discipline. He directed her away from banana containers in an unpleasant manner. After upsetting her, he did engage in any significant effort to make amends; instead, through his manner of speech and body language, he conveyed to Ms. Desjardins that he was not interested in her particular needs. On the contrary, he made her feel that she was an annoyance. At the end of the episode, he accidentally brought a box into contact with her abdomen. His earlier conduct had upset the customer the point where she actually thought the contact was a deliberate assault. He did not express the slightest sympathy over her upset and any physical discomfort that might have resulted.

Counsel for the employer argued that even if the contact was accidental, dismissal is warranted. At the very least, he submitted, Mr. Dalkie deserves to be suspended up until the time of the arbitral hearing.

The union representative suggested that if the contact with the box was an accident, but Mr. Dalkie was rude to the customer, a "one or two week suspension" might be appropriate.

On the side of imposing a substantial penalty are the following factors. The evidence is that Mr. Dalkie works in an area where positive customer relations are extremely important to its commercial success. It follows that management can reasonably take the view that it must send a strong message when an employee treats a customer in an inappropriate manner. The particular employee may have to be disciplined to prevent recurrences; to show other employees where the boundaries are; and to re-assure customers that

NOV 9 1992

MANITOBA LABOUR BOARD

11

their complaints are taken very seriously. Mr. Dalkie is an experienced employee who should have "known better". He was given specific non-disciplinary counselling, after an earlier encounter with a customer, about the need to avoid confrontations.

Mr. Dalkie could have mitigated the penalty to a considerable extent by expressing some genuine measure to express his concern over the customer, and his regret over the incident - when it occurred, in the period leading up to the hearing, or in testifying at the arbitration itself. As already noted, Mr. Dalkie has shown little inclination to try to see things from the customer's point of view. He still finds it improbable that she was even struck. He still refers to her as a "difficult customer"; he indicated no understanding that she might have been a customer with real difficulties.

On the other hand, Mr. Dalkie has not been disciplined previously over customer relations. (Nor has it been shown that he deserved to have been). I do not believe he is incorrigible. He can still be a worthy employee. The result of this arbitration should be a lesson and a warning. The suspension imposed here will form a part of his record, Mr. Dalkie will likely not forget the five months leading up to this decision either. He has been facing termination, been ineligible for unemployment insurance for an extensive period, and looked in vain for other jobs.

I did hear evidence from Mr. Dudrak, an assistant supervisor, about Mr. Dalkie's other possible drawbacks as an employee. Mr. Dudrak criticized Mr. Dalkie on a variety of fronts, such as chatting too much with other employees or being "loud and abusive" (apparently, in conversations with other staff or managers, as opposed to customers). One of Mr. Dalkie's co-employees testified that Mr. Dalkie's relationships with other staff appeared to be average, rather than particularly problematic. An arbitrator should be wary of taking into account past episodes which did not result in discipline. An employee should have fair warning that an incident will be held against him, and a chance to challenge that prospect by bringing a grievance. In this case, I am not prepared to make anything of the supervisor's testimony about issues such as Mr. Dalkie's alleged talkativeness. I was not told in sufficient detail about specific episodes to draw conclusions about them, none of them were apparently serious enough to warrant formal discipline, and the conduct involved was not a matter of customer relations.

The union brought to my attention an unreported 1987 arbitral award by a distinguished Manitoba arbitrator, Mr. Waldron Fox-Decent. It arose out of a strike between the same union and employer. A number of employers were dismissed for their conduct, some of it involving mistreatment of customers. Mr. Fox-Decent reinstated the employees, and imposed suspensions of varying lengths, ranging up to twenty weeks. I cannot derive much guidance from the

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NOV 9 1992

MANITOBA LABOUR BOARD

12

case. I have only an oral transcript of Mr. Fox-Decent's award, and it does not set out the facts in much detail. Furthermore, Mr. Fox-Decent took into account the "unusual dynamics and attitudes" connected with a strike situation.

The arbitral case law is clear that:

a high standard is expected of employees in their dealing with customers. The underlying rationale of the cases is that "the customer is always right"; Re Canada Packers and Canadian and Allied Workers, 6 L.A.C. (2d) 163, at 164.

Mr. Dalkie's actions fell short of the standard expected. As already explained, his tone of voice, facial expression and words left a customer feeling that he was uninterested in - indeed, downright irritated by - her individual shopping needs, and that he was insensitive to her entirely understandable upset at being bumped. On the other hand, the physical contact was an accident, and it has not been shown that he ever yelled at the customer, hurled insults or ridicule, or used profanity.

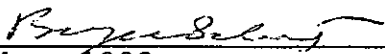
Without pretending to any scientific precision, I believe that the facts proved originally warranted, and still warrant, suspending Mr. Dalkie without pay for two weeks.

Ms. Desjardins mentioned she would not want to shop at the store if Mr. Dalkie were still there. While I do not interpret events in quite the way she does, I would still recommend, out of deference to her feelings, that Mr. Dalkie be transferred to another store. To be clear, I am presenting the employer with a suggestion, not a binding order. (I would also caution that the aim here is to accommodate Ms. Desjardins, not to further punish Mr. Dalkie. For example, it would not be proper to select a new place of work for him on the basis that it is the farthest from his residence).

As the parties have requested, I leave it to them to determine the exact financial implications of replacing Mr. Dalkie's suspension with a two-week suspension.

I would note for the record that the employer agreed to postpone the initial hearing in this case in response to a request by the union, but reserved the right to raise the postponement as a factor in working out the financial implications of any reinstatement.

I would expressly retain jurisdiction in this case with respect to matters arising out of the interpretation and implementation of this award.

Dr. Bryan Schwartz,   
6 November 1992