6-22-1981

Re York Farms Ltd, Sardis and Canadian Food and Allied Workers, Local P430

Innis Christie

J Wells

A Hamilton

RE YORK FARMS LTD., SARDIS AND CANADIAN FOOD AND ALLIED WORKERS, LOCAL P430

I. Christie, J. Wells, A. Hamilton. (British Columbia) June 22, 1981.

EMPLOYEE GRIEVANCE alleging unjust suspension.

M. Blaxland and *R. Bremner*, for the union.
M. Hunter and others, for the employer.

AWARD

Counsel agreed at the outset of the hearing that the board was properly constituted and seised of this matter. It was also agreed by counsel that management would not introduce evidence of the grievor's work record on the understanding that if the board concluded that there was just cause for *any* discipline there would be no reduction in the three-day suspension.

The facts of this case present an issue of principle with almost unreal starkness. At a regular labour-management committee meeting on November 6, 1980, the union initiated discussion of the colour of bump hats worn by employees in the plant. Bump hats are a sort of junior version of hard hats. Management, supervisors and maintenance people are supposed to wear, respectively, white, green and blue hats, and the union was concerned that their failure to do so was making it difficult for new employees to identify them. It was agreed that a certain laxness had developed with respect to the colour of bump hats, including the fact that some employees had spray painted their hats according to their preference.

As a matter of general practice male employees in the plant wore yellow hats and female employees wore orange hats. For some seven or eight years men working in the Sardis plant have worn bump hats provided by the company, but it was only two or

three years ago that, in accordance with industry practice, the company directed that women should also wear bump hats. Traditionally in the canning industry women wore bandanas and, later, hairnets. Apparently by coincidence, and certainly without any thought being given to the matter by the company or the union, the hats that were ordered for the women, who make up two-thirds of the work-force at the Sardis plant, were orange. Since then the practice has been to dispense orange hats to women and yellow hats to men.

The evidence called by the union indicated that they were not at all concerned at the meeting of November 6th with men wearing orange hats or women wearing yellow hats. Their concern was entirely with the special colours of hats for supervisory and maintenance personnel. The evidence on behalf of management was that they thought the union concern extended to the colour of hats worn by men and women. In my view that difference of understanding is irrelevant. Nothing was agreed or needed to be. The fact is that following the meeting the plant superintendent, Mr. Poole, directed that each employee was to wear the proper coloured hat, and by that he meant not only what the union wanted but also that women should wear orange hats and men yellow hats. That is the direction that he gave to the woman in charge of dispensing hats and that is the direction that he gave to the foremen. Our concern, therefore, is with a management rule. It cannot, in my view, find any legitimacy that it might otherwise lack in the union concern expressed in the labour-management committee meeting of November 6th.

As a result of Mr. Poole's direction everyone wearing the wrong coloured hat was asked to change and all complied, except the grievor.

The grievor is a labeller in the jam and juice department of the company's Sardis plant, where he has been employed for seven years. He is, without question, a man of principle, a believer in causes who devotes a good deal of his time to both politics and political activity. Some nine months before the issue in this matter arose he had lost or damaged his bump hat and when he sought to replace it found that there was no yellow hat available. He was given an orange hat which, I suppose, many employees would have considered a "women's hat" but that was not the sort of distinction that concerned the grievor.

On the morning of November 21st, acting on Mr. Poole's direction, Ms. Taskie, whose job it was to dispense bump hats, approached the grievor and asked him to trade his orange hat for

a yellow one. The grievor responded, politely, in effect, "Why? I like my hat." At that point his production line started to clog up and he simply moved away from Ms. Taskie to clear the line. There was no argument of any kind. She went to another male employee who was wearing an orange hat and traded his hat for a yellow one. Some time later, at a break, that employee mentioned to the grievor that Ms. Taskie was annoyed because he had refused to exchange hats. Then, about five minutes after the lunch-break, the grievor's foreman, Gerald Wood, approached him with a yellow hat and asked him to change. The grievor responded much as he had to Ms. Taskie. He was then told that there was a direction that all men in the plant should be wearing yellow hats. At that point he said, calmly, even politely according to Mr. Wood's evidence, that he would change hats "over my dead body". Wood then directed the grievor to come to his office. The grievor did so and again questioned why he should have to change hats. Wood told him at that point that the reason he had to wear a yellow hat was because Wood had been directed to enforce the rule that men wore yellow hats and women wore orange ones. When the grievor asked the reason for the rule Wood responded that he did not make the rules, it was simply his job to enforce them. The grievor then likened the unthinking enforcement of rules to what had happened in Nazi Germany but, again according to Wood's testimony, this was all said quite calmly, although the grievor reiterated that he would change hats over his dead body. At this point, the grievor testified, he perceived that there was an issue of breach of the provincial human rights legislation. When the grievor maintained his refusal to wear a yellow hat Wood made it clear that some discipline might result and the meeting ended.

Wood went to discuss the matter with the union president who had already had a word with the grievor. It being apparent that no resolution of the developing confrontation was available on that front, after consultation with higher management, Wood called the grievor back into his office. There is no dispute that he then clearly reiterated his order to the grievor to wear the yellow hat, explaining that he was acting on the direction of the plant superintendent, and advised the grievor that if he did not comply discipline would result. The grievor said that he understood that. Wood pointed out to him, explicitly, that if he objected to being required to wear a yellow hat he should file a grievance, which was his right under the collective agreement. The grievor acknowledged that be the case but refused to exchange hats. Wood then suspended him indefinitely and sent him home.

Subsequently, the whole matter was reported to management. The upshot was a three-day suspension as evidenced by the following letter:

> Mr. Crawshaw:
>
> On Friday, November 21, 1980, when you were approached by a member of supervision you responded in a most insubordinate manner, and failed to follow instructions. Furthermore, even when the consequences of your actions were pointed out to you, you still failed to follow instructions.
>
> Insubordination and failure to follow instructions is conduct which cannot be tolerated and will not be condoned.
>
> This letter will confirm your disciplinary suspension from the time you were spoken to on Friday, November 21, 1980, until the commencement of your regular shift on Thursday, November 24, 1980. You are further advised that future conduct, similar in nature, will result in more severe disciplinary action, including dismissal.
>
> YORK FARMS
>
> G. Wood
> Foreman

At the end of his suspension on Thursday, November 27th, the grievor reported to work, wearing his orange bump hat. He was directed by Wood to meet with him once again in his office. At that meeting, which was attended by the union president and Michael Gilbert, the company's employee relations manager, the grievor was informed that henceforth men and women working in the plant could wear either orange or yellow bump hats, but that his suspension would stand because he had refused to comply with his foreman's order.

While the grievor was under suspension Mr. Gilbert had contacted the British Columbia Human Rights Commission. He explained the situation to the officer with whom he was put in contact and she advised him that the company should reconsider its policy unless there was a functional reason for the difference in the colour of men's and women's bump hats. As a result, the company changed its policy, effective November 27th, the date the grievor returned to work.

The issues

The broad issue is whether the company had "just cause" as required by art. 6 of the collective agreement for the discipline imposed upon the grievor. By virtue of s. 98(*d*) of the *Labour Code*, R.S.B.C. 1979, c. 212, this board of arbitration has authority to:

> (*d*) determine that . . . discipline is excessive in all circumstances of the case and substitute other measures that appear just and equitable.

As the labour board stated in *Wm. Scott & Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. 1 at p. 5, [1976] 2 W.L.A.C. 586, in relation to discharge, but in terms no less applicable to discipline:

> . . . arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

In this case, however, as stated at the outset, counsel have agreed that the only question is the first one. If we find that the grievor gave just cause for any discipline the three-day suspension imposed here is not in issue.

More specifically, the issue is whether in deliberately refusing to comply with his foreman's direct and well understood order to wear a yellow bump hat instead of an orange one the grievor was insubordinate. Does the general arbitral principle "work now, grieve later" apply, or does this case fall within any of the exceptions to that principle? Most narrowly, the issue appears to be whether, faced with an order based on a rule that is invalid because it is contrary to the collective agreement, contrary to a provincial statute and unreasonable, an employee is nevertheless subject to discipline if he does not comply and pursue his objections through the grievance procedure.

Decision

In addition to the standard "just cause" provision in art. 6 of their collective agreement the parties identified as relevant part of art. 2 which provides:

> The purpose of this Agreement is . . . to provide an amicable method of settling differences or grievances which may from time to time arise . . .

that part of art. 7-1 which provides:

> Both the Company and the Union emphasize the desirability of a satisfactory grievance procedure, the purpose of which will be to settle as many grievances as possible promptly and on the spot . . .

and that part of art. 19 which provides:

> It is, therefore, of paramount importance to all concerned that the spirit of this Agreement be followed as faithfully as the written terms.
>
> With this in mind, the parties hereto pledge their best endeavour to carry out the provisions of this Agreement in a spirit of goodwill, tolerance and understanding.

More directly to the point, art. 7-12 addresses itself to the "work now, grieve later" issue:

> 12. If an employee feels he is suffering a grievance, he should report the complaint at once in the manner described in Section 3. Pending its investigation and settlement, he should meanwhile try faithfully to perform the duties assigned to him by management.

In my view this provision makes explicit the "work now, grieve later" rule applied generally by Canadian arbitrators, stated by Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 7:3610, p. 343, as follows:

> As a general proposition, employees who dispute the propriety of an employer's orders should, subject to considerations which follow, carry out those orders and only subsequently, through the grievance procedure, challenge their propriety. The rationale for, and the premise upon which this principle is founded, are said to lie in the employer's need to be able and his inherent right to direct and control the productive process of his operations, to ensure that they continue uninterrupted and unimpeded even when controversy may arise, and in his concomitant authority to maintain such discipline as may be required to ensure the efficient operation of the plant.

The authors state in the supporting footnote that: "The awards which assert that the employer's rights to maintain production and to maintain its authority are the two premises on which the general rule is founded are simply legion." See also "Work Now, Grieve Later" by J.M. MacIntyre from *Grievance Arbitration: A Review of Current Issues* (1977 — Continuing Legal Education Society of B.C.). As Professor MacIntyre states, the classic statement of this doctrine in labour law is the American award of Professor Shulman in *Ford Motor Co.* (1944), 3 L.A. 779 at pp. 780-1:

> The employee himself must also normally obey the order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey. To be sure, one can conceive of orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may refuse to obey an improper order which involves an unusual health hazard or other serious sacrifice but in the absence of such justifying factors he may not refuse to obey merely because the order violates some right of his under the contract . . . [the grievance] procedure is prescribed for all grievances, not merely for doubtful ones . . . an industrial plant is not a debating society. Its object is production.

Professor MacIntyre points out that "there is practically no subsequent development in the principles which is not flagged" in this quotation. The "health and safety" exception has engendered a significant body of arbitral jurisprudence and there are a number of cases dealing with the "illegality" exception, which is the nub of the matter here. There is also a developed body of

arbitral jurisprudence creating an exception in what are referred to as "personal appearance", or, perhaps more appropriately, "hair" cases. It was argued on behalf of the grievor that there is also an exception for "unreasonable" orders and even for orders contrary to the collective agreement. On a different plane, Canadian arbitrators, as well as American, have addressed the balancing of the employer's interest in productivity and the maintenance of his authority against the potential injury to the employee who obeys an improper order and grieves later, a balance which must take account of the viability of the grievance procedure and arbitration as mechanisms for remedying an injury to the employee.

How does the grievor here fare under each of these exceptions to or elaborations upon, the "work now, grieve later" rule? Two things at least are obvious. The "health and safety" exception is irrelevant and the "illegality" exception is very relevant, so I turn first to that issue.

(1) The British Columbia *Human Rights Code*, R.S.B.C. 1979, c. 186, s. 8(1), provides, in part, that:

> 8(1) . . .
>
> (*a*) no employer shall . . . discriminate against [a] person in respect of employment or a condition of employment . . .
>
> . . . . .
>
> unless reasonable cause exists for the . . . discrimination.

and s-s. (2)(*c*) provides that, for these purposes:

> (*c*) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency.

By s. 98(*g*) of the B.C. *Labour Code* this board of arbitration has authority to "interpret and apply" the *Human Rights Code*, because it is an "Act intended to regulate the employment relationship of the persons bound by" the collective agreement before us. However, it is not necessary for us to do so, because even assuming, as I will for the purposes of this award, that the employer's rule with respect to orange and yellow hats offends the *Human Riqhts Code*, I have concluded that the grievor was obligated to "work now, and grieve later". This is so because in my opinion the "legality" exception applies only where what the employee is ordered to do would put *him* in breach of the law, not where the order or its execution constitutes a breach of the law by the employer and not by the employee. Section 8 of the B.C. *Human Rights Code* is clearly directed to the employer, so if the grievor had donned the yellow hat there is no way in which he could be said to have acted illegally.

Brown and Beatty (cited above) state, at para. 7:3622, p. 350, that:

> . . . arbitrators have differed as to whether this exception should prevail where compliance with the employer's instructions would involve only the employer and not the employee in any illegality.

With respect, my reading of the cases cited by the learned authors such as *Re National Starch & Chemical Co. (Canada) Ltd. and Canadian Union of Distillery Workers* (1976), 11 L.A.C. (2d) 288 (Rayner); *Re Int'l Nickel Co. of Canada Ltd. and U.S.W.* (1974), 6 L.A.C. (2d) 172 (Shime), and *Re Kimberly-Clark of Canada Ltd. and United Papermakers & Paperworkers, Local 256* (1973), 3 L.A.C. (2d) 278 (Brown), all of which involved breaches of the Ontario *Employment Standards Act*, suggests to me that the arbitrators in those cases were dealing with a statute, the breach of which involved an offence by both the employer and the employee, a fact of which the arbitrators took note. In *National Starch* the arbitrator concludes, at p. 291:

> Presumably the rationale allowing an employee to refuse an illegal order is based on some concept that the employee should not be required to lay himself open to criminal law or regulatory charges.

See *Int'l Nickel Co. of Canada Ltd.*, at p. 176. In the later case of *Re FBM Distillery Co. Ltd. and United Brewery Workers, Local 304* (1978), 20 L.A.C. (2d) 161 (Arthurs), the arbitrator refused to apply the "illegality" exception because [p. 165]: "If anyone was engaging in illegality [as to which he made no finding] it was the company".

In the *Kimberly-Clark* award, on the other hand, the board of arbitration, chaired by H.D. Brown, did appear to base its decision on the reasoning that [p. 286]: "If the order could not legally be given, the failure to perform that order could not be proper cause for disciplinary action" and this was a major thrust of the argument by counsel for the union on behalf of the grievor here. He stressed that it is well established that where an employer exercises its unilateral management power to make rules, those rules must, among other things, "not be inconsistent with the collective agreement" and "not be unreasonable": see *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson), and the other cases noted by Brown and Beatty (cited above) at para. 4:1500, pp. 149-52.

The *KVP* requirements do not specifically state that unilaterally imposed rules must not be unlawful, but it goes without saying that any unlawful rule would be "unreasonable". Thus, assuming that the company's "yellow hat — orange hat" rule is contrary to

the B.C. *Human Rights Code*, it follows not only that it would have been declared invalid had it been grieved against, but also that any discipline based on a breach of the rule would have been set aside. I must, however, disagree with the statement quoted from the *Kimberly-Clark* award because it does not follow from the fact that no discipline is justified for breach of an invalid rule that no discipline is justified for breach of a direct order to comply with such a rule.

If a rule is unlawful or otherwise unreasonable, and if the employer is considered to have gone outside his authority under the collective agreement, an arbitrator examining the matter *ex post facto* must do what he can to afford a remedy to an employee affected by the rule. But where an employee breaches a direct order, even an order based on an invalid rule, any discipline that ensues is based, presumably, at least in part on his defiance of his employer's authority as well as on his failure to comply with the rule in question. When an arbitrator examines that discipline *ex post facto* the very essence of the "work now, grieve later" principle is that, as far as it relates to the defiance of authority and not to the breach of the rule, the discipline is justified. Where the arbitrator finds that the direct order that was breached was an order to comply with an invalid rule there should, perhaps, be some reduction in the discipline handed out by the employer (see, for example, *FBM Distillery Co. Ltd.*, cited above) but that is not to say that there is no just cause for any discipline.

In this case, it will be recalled, it was agreed that this board of arbitration would only address the question of whether there was just cause for any discipline. There is, therefore, no warrant for me to pursue the issue of the degree to which the grievor's suspension related to defiance of the employer's authority and the degree to which it related to breach of the employer's arguably illegal rule.

In summary on this point, the "illegality" exception to the "work now, grieve later" rule does not apply because the grievor was not ordered to do anything that would have been illegal on his part. Any breach of the law that we may assume to have resulted would have been by the company alone. If the rule that the grievor was ordered to comply with was unlawful only in that sense, his refusal was defiance of the employer's authority which justified *some* discipline.

(2) Counsel for the union also submitted, on the authority of *Re Spruce Falls Power & Paper Co. Ltd. and Int'l Brotherhood of Pulp, Sulphite & Paper Mill Workers, Local 89* (1972), 2 L.A.C.

(2d) 91 (Abbott), that, quite apart from illegality, because the company's order was unreasonable the grievor was not obliged to comply with it. My reasoning and conclusion with respect to the issue of "illegality" applies to this argument as well.

The board of arbitration in the *Spruce Falls* case does ask whether the order given in that case was "a reasonable order", but it cites no authority for the proposition that if it was not a reasonable order no discipline would be justified. In fact, the award goes on to deal with the "work now, grieve later" cases and the accepted arbitral jurisprudence with respect to the "health and safety" and "illegality" exceptions.

Clearly, to create a general "unreasonableness" exception to the "work now, grieve later" rule would be to swallow up the rule itself, as I think has happened in the American cases cited by counsel for the union. The rule is not, and in my view for the reasons in the *Ford Motor* case should not be, that wherever the grievor can satisfy an arbitrator, *ex post facto*, that an order was unreasonable he will be held to have been justified in disobeying.

(3) The grievor himself maintained in the course of his evidence that had he complied with the company's rule that men wear yellow bump hats and women orange ones he would have been in breach of the collective agreement, pointing particularly to art. 17, which provides:

> It is mutually agreed that no demand shall be made by either party to this Agreement upon the other party, which in any way contravenes laws, orders or regulations issued by, or under the authority of the Government of Canada, or that of the Province of British Columbia, or such agency as may be assigned by either of such Governments from time to time in regard to wages, bonuses, hours, conditions of labour or other related matters . . .

Maintaining the assumption that the company's rule was in fact in breach of the *Human Rights Code*, the grievor would appear to be correct in suggesting that the order was in breach of this provision of the collective agreement. However, to suggest that an *ex post facto* determination by this board of arbitration that the foreman's order was in fact in contravention of the collective agreement excuses the grievor from having had to comply is, once again, to create an exception to the "work now, grieve later" rule which swallows up the rule. Given this provision in the collective agreement some extraordinary remedy to the grievor or the union might have been justified, but none was requested. In this context, counsel for the union quoted from a decision of the Ontario Divisional Court in *Lake Ontario Steel Co. Ltd. v. U.S.W., Local 6571 et al.* (1979), 26 L.A.C. (2d) 144*n*, 79

C.L.L.C. para. 14,229, where, at p. 15,360, Chief Justice Evans stated:

> It was further submitted by Mr. Morphy on behalf of the applicant that there was an error in law in failing to apply the rule that an employee is required to obey a company directive and then lodge a grievance if he disputes its validity. My brother Steele and I are not prepared to accept that submission in its entirety. In our view, such a rule only applies where the conduct complained of is obviously contrary to the Collective Agreement, and in this particular situation the Board found no prohibition to the conduct complained of. The Board further held as a fact on the evidence that the prohibition by management was not necessitated by a maintenance of order in the plant or the protection of productivity. This finding of fact is within the exclusive jurisdiction of the arbitration board and is not reviewable by this court.

The suggestion in this oral decision by the Divisional Court that the "work now, grieve later" rule "only applies where the conduct complained of is obviously contrary to the Collective Agreement" is so directly contrary to the whole body of arbitral jurisprudence that it must be seriously discounted, certainly outside Ontario. Even in Ontario the ruling of the Court has been confined to its facts by at least one experienced arbitrator. In *Re Silverwood Dairies, Division of Silverwood Industries Ltd., and Canadian Union of Operating Engineers & General Workers, Local 101* (1980), 25 L.A.C. (2d) 338, a board chaired by Professor Schiff referred to the *Lake Ontario Steel* case and went on to state, at pp. 242-3:

> . . . the Ontario Divisional Court recently appeared to limit drastically the scope of the work now-grieve later rule. Taken out of its context, what the Court said on the matter was that "such a rule only applies where the conduct complained of is obviously contrary to the Collective Agreement" (at p. 15,360). The reality, however, is much less significant than the appearance. The award under review, reported in 20 L.A.C. (2d) 432 (Abbott), dealt solely with discipline imposed for a grievor's refusal to obey the employer's order not to engage in what the board and the Court characterized as union activity outside the grievor's scheduled working hours and perhaps partly on the employer's premises. That is a situation where, as far as reported awards reveal, the rule has not previously been raised, let alone applied . . . where the issue is the propriety of a penalty for refusal to obey an employer's plant regulation or order governing conduct outside of working time, arbitrators have seen that the employee's freedom to pursue personal and union interests as the paramount value — a value to be compromised only to the extent necessary to protect the employer's interests in plant safety, productivity and general discipline: *e.g. Re U.E.W. and Canadian General Electric Co.* [(1951), 3 L.A.C. 909 (Laskin)], and *Re Air Canada and Int'l Assoc. of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews) (quoting previous awards). The limitation the Court imposed on the work now-grieve later rule is consistent with this long-standing emphasis on freedom of individual conduct. But, where the issue is, as it is before us, the propriety of a penalty

for refusal to obey an order given by a superior during regular working hours in the course of operating the employer's business, the important value to which individual freedom must ordinarily give way is continuing production without work stoppage. Both labour relations statutes and wise policy dictate that. In this situation, the limitation the Court imposed in *Lake Ontario Steel* would make no sense and, we are sure, has no application.

(4) In "Work Now, Grieve Later" (cited above), Professor MacIntyre identifies the "Personal Appearance" exception to the rule; and counsel for the union submitted that this case falls within that exception. I am not prepared to accept his submission because, in my view, the arbitral jurisprudence does not, and should not, establish an exception sufficiently wide to include this case. Nearly all of the cases cited by counsel, and by Professor MacIntyre, relate to hair length and beards. In those "hair" cases arbitrators have quite uniformly held, in the absence of health and safety considerations or good business reasons related the employer's "image", that an employer cannot, either by rule or direct order, require employees to cut their hair or shave their beards. Indeed, the general position has been that to establish the importance of "image" the employer has to prove actual complaints from his customers.

The "hair" cases do appear to be a true exception to the "work now, grieve later" rule but any attempt to extend that exception to other aspects of appearance runs into difficulties. In my view the rationale for the "hair" cases is the same as that stated by Professor Schiff in his *Silverwood Dairies* award, quoted above. By regulating an employee's hair while he is at work the employer necessarily infringes upon his freedom of individual conduct in his off-work hours. The same is true only to a much lesser degree when the employer's concern is with clothing, which can be changed when the employee leaves the job, and there is virtually no infringement of individual freedom off the job when what is in issue is a "uniform" item provided by the employer.

In other words, what underlies the "personal appearance" cases, including the "hair" cases, is a balance between the interests of the employer and the interests of the employee. When the concern is simply with the colour of a bump hat provided by the employer (leaving aside, for the moment, the matter of infringement of the employee's principles — see (6) below) the employee has no significant interest at stake. Admittedly, where the employer's colour rule is not only unreasonable but probably unlawful he may appear to have no real interest at stake either, but in the context of the "work now, grieve later" principle he does have at stake his interest in maintaining authority in the plant.

Without elaborating further on the "personal appearance" or, more correctly in my view, the "hair" exception, I refer to my own award in *Re Pacific Western Airlines Ltd. and Canadian Airline Employees' Assoc.* (1981) (unreported [since reported 29 L.A.C. (2d) 1]), and the award of O.B. Shime, Q.C., in *Re Dominion Stores Ltd. and U.S.W.* (1976), 11 L.A.C. (2d) 401 at pp. 403-4.

(5) Counsel for the union cited *Re Hamilton St. R. Co. and Amalgamated Transit Union, Division 107* (1977), 16 L.A.C. (2d) 402 (Burkett), in which the board of arbitration set aside a one-day suspension imposed on a bus driver for failing to comply with an order to wear his uniform cap while off duty, in accordance with his employer's rule. The board there concluded that the rule was unreasonable. The company did not require bus drivers to wear their caps while *on* duty and the board was not satisfied that the rule was justified by the employer's interest in its corporate image. Without making any judgment on the correctness of the board's conclusion with respect to disobedience of the order I would simply distinguish that case as one relating to off-duty hours and, once again like Professor Schiff in the *Silverwood Dairies* award, emphasize the reluctance of arbitrators to allow an employer to infringe upon his employees' individual freedom on their own time.

(6) Through all of these exceptions and suggested exceptions to the "work now, grieve later" rule runs the theme articulated by Professor MacIntyre as arbitrator in *Re British Columbia Telephone Co. Ltd. and Federation of Telephone Workers of British Columbia* (1976), 13 L.A.C. (2d) 312 at p. 322:

> We must balance the realistic prospects of satisfaction through the grievance procedure and the potential harm to the company (both material and by loss of symbolic authority) with the potential loss or disadvantage suffered by the employees and the union if the order is obeyed.

Professor MacIntyre saw this as an exception to the rule — the "disproportionate harm" exception. Like Professor Arthurs in the *FBM Distillery* award (cited above), I concur with the statement in *Re British Columbia Telephone Co. and Telecommunications Workers Union* (1977), 15 L.A.C. (2d) 426 (Larson), that this is not "a new exception to the rule but rather falls within the generic rationale for exceptions". Nevertheless, applying that rationale, it might well be appropriate for an arbitrator to conclude that the balance was such that even though the case before him did not fit the pigeon-hole of one of the recognized exceptions, "health and safety", "illegality" or "hair — impact on non-working hours", to apply the "work now, grieve later" rule would make no sense. The

categories of exception are no more closed now than they were in 1970 when Professor Weiler ruled in *Re Int'l Woodworkers of America, Local 2-500, and Stancor Central Ltd. (Peppler Division)* (1970), 22 L.A.C. 184, that a union official was entitled to disobey an order so that he could attend a union meeting, which it was his right under the collective agreement to attend, to deal with union business that simply could not wait. That award has been followed frequently since and "Union officials" is now characterized by Brown and Beatty (cited above) as a separate exception, at para. 7:3623, p. 350.

The evidence here was that there was no interference with production. On each occasion when the grievor spoke to his foreman he either continued to tend his production line or had a lead hand stand in for him. There was no blatant display of insubordination, but at least three other employees, Ms. Taskie, the employee to whom she turned after the grievor refused to exchange hats and the union president, were aware of the grievor's defiance of his foreman's orders, and there was no evidence with respect to how much more widely known the incident was. The potential harm to the company, therefore, was to its "symbolic authority". The grievor's potential loss was a matter of his principles. Arguably, because of its ephemeral nature, the damage he would have suffered had he complied with his foreman's order could not have been rectified through the grievance procedure and arbitration. By the same token, however, its ephemeral nature makes any harm to him very difficult to weigh in the balance.

We, as a board of arbitration, must hesitate to substitute our personal values for those of the grievor, but it must not be forgotten that what he was being asked to sacrifice here was not his support of the principle of non-discrimination between the sexes, which I take to be genuine, but only the difference between supporting that principle by refusing to obey his foreman's order and supporting it by complying and immediately filing a grievance. There is no reason to think that had he chosen the latter course it would have been ineffective. We know that once the consciousness of both the union and of the industrial relations manager, Mr. Gilbert, was raised to the point where he consulted the Human Rights Commission the rule to which the grievor objected was immediately abandoned. Without downgrading the importance of the grievor's principles we can say that the course he adopted to vindicate them was unnecessary to achieve the result he desired. Nor, presuming him to be a rational and reasonable person, was it

necessary for the protection of his spiritual or psychological well-being. I put it in those terms because I can envisage a case where even temporary compliance to an order which an employee found offensive on religious or other grounds of principle might be sufficiently damaging to him to overbear the employer's "symbolic authority" interest. This, however, is not that case.

Conclusion

On balance, I have concluded that the "work now, grieve later" rule required that the grievor comply with his foreman's order in this case. That is a rule of general application which these parties have reiterated in art. 7-12 of their collective agreement. On the company's side nothing more than its interest in the maintenance of symbolic authority was at stake here but on the grievor's side the interest at stake was even less significant. Had it not been for the agreement of counsel, all the factors which made the balance close, particularly the fact that the foreman's order was based on a rule that was unreasonable, and probably unlawful and contrary to the collective agreement, would have dictated the substitution of lesser discipline, *on the evidence before the board.* I stress the words "on the evidence before the board" because had it not been for the agreement of counsel we might well have heard evidence relating to the grievor's disciplinary record which would have led us to conclude that since some discipline was merited the three-day suspension imposed by the company was appropriate, considering the record.

In the result, the grievance is denied.

[J. Wells dissented.]