THE TRADE UNION ACT
PROVINCE OF SASKATCHEWAN

IN THE MATTER OF AN ARBITRATION PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT RE: JAYSON NUGENT

BETWEEN:

UNITED STEELWORKERS, LOCAL 5890
JAYSON NUGENT

UNION/GRIEVOR

AND:

EVRAZ INC. NA CANADA

EMPLOYER

SUPPLEMENTARY AWARD

Submissions	
On Behalf of the Union	Ian Gretchen, Vice President, USW, Local 5890
On Behalf of the Employer	Meghan McCreary, Counsel
Sole Arbitrator	Kenneth A. Stevenson, Q.C.
Supplementary Award Date:	December 21, 2011.

SUPPLEMENTARY AWARD

BACKGROUND

1. On April 26, 2011 I issued an Award in this matter. My Award upheld the grievance of Jason Nugent and directed that he *"... be reinstated to his employment effective May 4, 2011 with full benefits and without loss of seniority from October 8, 2010 to the date of his reinstatement."* I reserved my jurisdiction to address any issues of remedy that the parties were unable to resolve.

2. In my Award I concluded that the Employer's failure to follow the Complaint Procedure was a breach of the Collective Agreement ("Agreement"). The Grievor was found to be contractually entitled to have the complaint/allegations of harassment investigated and determined in accordance with the this process. In my Award I wrote at paragraph 59:

> 59. I acknowledge the Employer's right to discipline employees for conduct such as that of the Grievor in the alleged abuse/misuse of equipment. However, it is my conclusion that in these circumstances this alleged misconduct is so inextricably linked to the complaints of harassment that it is most appropriate that the conduct be considered part of the harassment complaint to be investigated and determined pursuant to the Complaint Procedure.

3. The parties agree that the matters of harassment have been determined during the arbitration hearing. As such nothing further would come from an investigation. They agree to refer the matter of appropriate discipline to myself for determination. The parties agree that harassment did occur and that the Grievor's conduct is deserving of discipline.

4. The Grievor was reinstated to his employment on May 2, 2011 without loss of seniority or loss of benefits. The parties have been unable to agree as to whether or not the Grievor is entitled to lost wages for the period, or any portion of it, prior to his reinstatement.

EMPLOYER POSITION

5. It is the Employer's position that the Award does not entitle the Grievor to lost wages, rather, only reinstatement without loss of seniority or without loss of benefits. The Employer

accepts that due to its breach of the procedural requirements of the Agreement, the appropriate result would be that the Grievor should be reinstated. It submits that the procedural breach of the Agreement acts as a mitigating factor on penalty; it does not negate the wrongdoing of the Grievor and does not necessarily entitle the Grievor to be made whole. The Employer says that there should be no compensation payable to the Grievor for lost wages as a result of his absence from work for nearly seven months.

6. Counsel has referred me to a decision of the Saskatchewan Court of Appeal in *Canada Safeway Ltd. v. R.W.D.S.U., Local 454* (2000), (SKCA) 119, as well as the decision of Arbitrator Ish in *DHL Express (Canada) Ltd. and CAW Canada, Local 4215 and Jay Rae*, [2010] C.L.A.D. 428. Counsel also cites *CUPE, Local 726 v. Estevan (City) (Baird Grievance),* [2011] S.L.A.A. No. 7, and *Royal Ottawa Health Care Group v. Ontario Nurses Association (Tanguay Grievance),* [2001] O.L.A.A. No. 628.

7. The Employer submits that except for its breach of the Agreement in its failure to follow the Complaints Procedure, termination would be the appropriate penalty. Having regard to the mitigation factors, the Employer submits that the approximate seven (7) months' suspension is appropriate. The Employer cites in support of this submission *Re Parmalat Canada Inc. and C.A.W. Canada, Local 462* (2005), 141 L.A.C. (4th) 377; *Intercontinental Packers Ltd. and U.F.C.W., Loc. 472* (1990), 16 L.A.C. (4th) 328 (Chertkow); *ITT Cannon Canada and C.A.W., Loc. 1090* (1990), 15 L.A.C. (4th) 369 (H.D. Brown); *Foyer Valade Inc. and Manitoba Government Employees Association* (1991), 24 L.A.C. (4th) 32 (Chapman); *Sobeys Inc. and C.A.W., Loc. 1090* (2004), 126 L.A.C. (4th) 334 and *Saskatchewan Power Corporation and IBEW, Local 2067*, November 8, 2010 (Stevenson).

UNION POSITION

8. Mr. Gretchen says that the Grievor admits his improper conduct, laments his actions and disrespect towards co-workers, management personnel and Company property. He says that at the hearing Mr. Nugent admitted that standing in his co-worker's space and clapping his hands was wrong, even though he did not previously understand this.

9. The Union says that the penalty of suspension without compensation as requested by the Employer is too severe in all of the circumstances. The Union asks that I take into account that the Grievor understands his actions towards KR were wrong and that he has successfully returned to the workplace without incident since his reinstatement. He says that Mr. Nugent recognizes that his actions were both wrong and hurtful.

10. Mr. Gretchen requests that I substitute the appropriate penalty in all of the circumstances. In this regard he submits the decision in *DHL Express (Canada) Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 4215* (supra). In *DHL Express* the grievor sent a series of emails to management personnel, copied to many other people, in which he used profanity and highly volatile language. By the end of the hearing the grievor had not apologized for his statements or even acknowledged that they were not proper. Arbitrator Ish upheld a 30-day suspension notwithstanding the employer did not conduct a "disciplinary interview" at the time the penalty was imposed as required by the collective agreement.

DISCUSSION AND ANALYSIS

11. This matter is before me based on the agreement of the parties that I should determine the appropriate discipline in all of the circumstances. In making this determination I consider that the parties effectively agree to put me in the position to determine the appropriate level of discipline as the same would have been determined by an Adjudicator in accordance with the Complaints Procedure.

12. The Union acknowledges that the Grievor's conduct is deserving of punishment. Such a conclusion is properly based on the evidence.

13. I accept the evidence of KR as to the nature and extent of the Grievor's conduct and the effects of the conduct on her. This evidence is summarized in paragraphs 6 through 13 of my April 26, 2011 Award.

14. The Grievor's actions were clear and substantive violations of the Company's harassment policy. The harassment started at the end of June 2010 and culminated with events on the September 25, 2010 weekend shifts. The allegations of the misuse of equipment are supported by the conclusions to be drawn from the evidence. This misuse was integral with the harassment.

15. Employees have a right to a respectful workplace free from harassment and/or abuse. I am satisfied that the Grievor's actions in relation to KR were intentional. They were done to provoke, annoy, upset, and to intimidate KR. This conduct and the Grievor's attitude served to cause KR considerable distress. It interfered with KR's right to have a respectful workplace. Further, the conduct interfered with the normal operations of the workplace. This conduct was not isolated, rather, it occurred over a number of months. The most serious conduct escalated on the weekend of September 25, 2010.

16. I have fully considered the various authorities to which the parties have referred me. I have taken these into account in reaching my conclusions.

17. The appropriate level of discipline must have regard to the Grievor's prior disciplinary record. This record consists of a three-day suspension imposed on the Grievor in April 2010 for walking off the job; this discipline was built on a one-day suspension in June 2009 for insubordination.

18. The Employer submits that its procedural breach of the agreement is a mitigating factor to be considered in deciding the appropriate level of discipline. It says that the Grievor's reinstatement is a result of this procedural breach.

19. The Union submits that in view of the Grievor's acknowledgment of the wrongful nature of his conduct, the Employer's procedural breach of the Agreement and the Grievor's successful return to work, the penalty of suspension between August 8, 2010 and May 2, 2011 is excessive.

20. I am satisfied that in all the circumstances, the appropriate discipline to be imposed on the Grievor is a suspension without pay for a period of 3 months from October 8, 2010 to January 7, 2011 inclusive.

21. The Grievor was reinstated as at May 2, 2011. Accordingly, the Grievor is entitled to be accorded all the rights and benefits including wages that he would have been entitled to, but for his suspension from January 8, 2011 to the time of his reinstatement on May 2, 2011. The amount of back pay the Grievor is entitled to shall be reduced by the amount of any wages or self-employment income earned by the Grievor in the period from January 8 to May 3, 2011. The Grievor is directed to provide acceptable verification and substantiation of all such earnings on or before January 16, 2012.

21. I will retain jurisdiction for a period of one hundred twenty (120) days to deal with any issues of remedy.

DATED at Saskatoon, Saskatchewan this 21st day of December, 2011.

Kenneth A. Stevenson, Q.C.
Sole Arbitrator.