

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

A W A R D

Appearances:

For the Union Sonny Rioux
For the Employer Meghan McCreary

Sole Arbitrator Kenneth A. Stevenson, Q.C.

Hearing Date: March 18, 2011

Award Date: April 26, 2011

A W A R D

INTRODUCTION

1. By agreement of the parties, I have jurisdiction as sole arbitrator in respect of a grievance filed on October 8, 2010 claiming that Jason Nugent (the "Grievor")'s employment was unjustly terminated. The grievance alleges a violation of Article 5.03; it requests the Grievor's reinstatement to his position and to be made whole.

2. The parties agree that in the event the grievance is successful, any ruling with respect to remedy be reserved.

THE EVIDENCE

3. The Grievor has been employed by Evraz since August 1997. He has held a number of positions including Final Inspector and Sonic Operator in the 2 Inch ERW Mill ("Mill"). This is the position he held at the time of his termination in October, 2010. Ms. "KR" has been employed with Evraz since the summer of 2007; in May, 2010 KR moved to the position of Final Inspector in the Mill. From Friday, September 24 to Sunday, September 26, 2010 the Grievor and KR worked the night shift.

4. During the course of production in the Mill, the finished pipe is visually inspected by the Final Inspector for defects and customer compliance. Following final inspection, the pipe is transferred to the Sonic Operator who is responsible for conducting both a visual and an ultrasonic inspection to identify any defects in the pipe. The Sonic Operator and the Final Inspector work in relatively close proximity; their work stations have them working from 6 to 20 feet from each other. During each shift there is a need for communication between the Final Inspector and the Sonic Operator concerning their observations of the pipe.

5. The Grievor and KR worked together since May 2010. Subsequent to KR's initial training as an inspector, she received advice and assistance from the Grievor and other sonic

operators in relation to her duties. KR appreciated the Grievor's assistance in helping her do a better job. KR also worked with sonic operators on other crews.

6. KR says she adopted a work procedure that changed the timing as to when pipe was moved from her work station to the Grievor's work area. According to KR, the Grievor did not approve of this change. Starting at the end of June, 2010, the Grievor showed his dissatisfaction in the following ways: pounding on her desk; clapping his hands in her face; standing very close to her in her space and saying nothing; and repeatedly "flapping the kickers". KR says that the Grievor's pounding on her desk, clapping his hands and standing in her space have each occurred a couple of times or "a few times". KR's response was generally to ignore these gestures. She understood these actions and the grievor's hand signals to indicate his dissatisfaction with the timing of the movement of pipe to him.

7. According to KR, the grievor's regular way to get her attention and show his dissatisfaction with the movement of pipe was to flap the kickers in his work station repeatedly. The hydraulic kicker is used to lift the pipe from the skid in the final inspection area onto the terminal for the sonic station. When there is no pipe in the kicker, the result is a very loud banging of metal on metal. This banging can be heard throughout the Mill. KR says she told the Grievor a couple of times to stop standing in her face and flapping the kicks. She told him she would decide when and how to move pipe. Her preference was to ignore the Grievor and not respond when he engaged in this conduct.

8. Events that occurred during the evening shift on Saturday, September 25, 2010 are significant. According to KR, the Grievor repeatedly flapped the kicker on a near non-stop basis. She says this was to get her attention and to intimidate her. Notwithstanding that the Grievor had pipe in his work area when she was at her station, he kept hitting the flap, signaling that he wanted her to send pipe. During some of this time, the Mill was down; KR had her ear protection removed and the repeated banging of metal on metal was very loud. She says workers from the beveller came inquiring as to whether there was a mechanical problem. In frustration, KR yelled and swore at the Grievor and repeatedly told him that she would decide when to move the pipe. When the flapping ended the Grievor said he was going to find the shift leader.

9. Around lunch time the next evening (Sunday, September 26), the Grievor advised the company EMT that he had developed a headache as a result of KR's perfume scent and had to go home. KR says that she has an allergy and does not wear perfume.

10. As a result of the Grievor's actions, KR became frustrated with the Grievor making it out that she was not doing the job she should; she felt he was demeaning her character and worth ethic. KR says that the Grievor made his actions personal when he was observed going to other employees and engaging in an animated conversation while pointing at her. KR did hear her name but not what was said. None of these individuals testified nor was the Grievor asked about these conversations.

11. At the end of her shift on Monday, September 27, KR spoke to her supervisor, Neal Makellky ("Neal") about what had occurred on Saturday night. She explained how she felt intimidated, uncomfortable coming to work, and unable to stay at her work station or do her job. She dreaded when the Grievor would pound her desk, be in her space or hit the flaps. She wanted the conduct to stop. At Neal's request KR wrote a statement as to events and matters related to the Grievor's conduct and delivered it to Neal on September 29.

12. On September 27 KR also spoke to Sonja Dirnberger ("Sonja"), Manager of the Mill, to advise her of the weekend events and the ongoing activities, and to advise that she had "had enough". KR reported that the Grievor's conduct adversely affected her morale and her desire to come to work. While KR was not worried in any physical way, she was uncomfortable and wanted to find ways to prevent the Grievor from stopping her doing her work. She didn't report the conduct earlier as she had not wanted to be "that girl" on shift causing issues. She simply wanted to be able to do her job; she has worked in many other parts of the plant without any issues. The tipping point was the allegation that her perfume was making the Grievor ill. As she does not wear perfume, she considered the allegation to be a malicious personal attack, made to impugn her character.

13. KR says she was unaware of the harassment processes in the Collective Agreement or of the Union until after this matter occurred. She did not want the issue to be about her. She has not spoken to the Grievor since and he has not apologized to her for his conduct. KR says that she spoke to Lowell Holliday ("Lowell"), an in-scope crew leader, about the Grievor's actions. On one occasion Lowell did "speak to her" in a manner to indicate to the Grievor that he was telling KR about keeping the pipe moving. Lowell did not suggest that she change her operating procedure. She says that while working with the three other Sonic Operators, she has not had any issues raised about the way she does her job. KR acknowledges that in the past other employees have hit the kickers and some did so as a joke after the grievor's discharge. However, no one has hit the kickers repeatedly and deliberately as the Grievor did to get her attention and to intimidate her.

14. Neal says he became involved in the early morning of September 27 when Lowell reported that there was an issue between the Grievor and KR on the weekend. KR felt she was being bullied by the Grievor and wanted something done. Neal and Sonja received KR's written statement, which was also addressed to Ian Gretchen ("Ian"), Vice-President of the Local. As a result of discussions with Sonja, Neal asked for statements from other employees. He received information from shift leaders, Lowell and Sean, as well as another employee, JS. Neal says the Grievor came to him on September 29 advising there had been an issue between him and KR on Sunday night. The Grievor did not think he could work with KR anymore as she wore perfume that bothered him.

15. On September 29, Neal and Sonja met with the grievor, Ian and a shop steward. Sonja advised it was the Employer's decision to suspend the Grievor indefinitely for actions reported from the weekend. According to Neal the Grievor was very quiet and said little.

16. Lowell has been employed with the Employer for six years and has served as an in-scope shift leader since July 2010. He observed the strained relations between the Grievor and KR. The Grievor wanted KR to do things "his way"; he did not treat KR with a lot of respect. He would hit the kicker to get KR to move pipe. On at least two occasions in August, the Grievor asked Lowell to get KR to move pipe on his schedule and to provide him with sufficient pipe.

Lowell spoke to KR in a manner to make it appear to the Grievor that Lowell was “scolding her”. Lowell did not think this conversation was necessary but he asked KR to move pipe. Lowell observed the Grievor flap his kicker several times per shift. At KR’s request, Lowell asked the Grievor to stop this action. After this Lowell did not see the Grievor flap his kick. Lowell did not take this issue to management until September when Neal asked for his written report as to what had occurred. Lowell had no issue with the manner in which KR was doing her work. In his opinion, the grievor’s actions were done to intimidate KR and they negatively affected her desire to work and the speed of her work. It was Lowell’s opinion that the Grievor was harassing KR.

17. Sonja first became aware of matters on September 27 based on the report from Neal. On September 29, she received KR’s statement and met with her. KR expressed the belief that she could no longer manage the situation; she was concerned as the workplace was poisoned. She did not want to file a formal harassment complaint. After reviewing the allegations, Sonja reported them to Human Resources, along with her decision to suspend the Grievor indefinitely without pay. This decision was made having regard to the Grievor’s disciplinary record and to provide the Grievor with an opportunity to present his side of the story.

18. After lunch on September 29 a meeting was held with the Grievor and Union representatives to discuss the allegations. Sonja advised the Grievor of the allegations of unacceptable behavior. The issues discussed included: the Grievor being deliberately abusive to co-workers; trying to control action and pipe flow; leaving his work station to talk to other employees; slandering co-worker to others on shift; causing the kicks to smash loudly to the point of potentially causing equipment damage; the need for a doctor’s note. The Grievor was offered an opportunity to discuss the matter but did not offer anything. The Grievor was issued an indefinite suspension for “work rule infraction/insubordination” on September 26, 2010. Future action noted in the disciplinary form was: *Mr. Nugent will call the HR Department to set up a meeting to discuss his behaviour & will come to the meeting with a doctor’s note confirming his illness Sunday night (9/26/10).*

19. Sonja considers “insubordination” to be a global term that covers being disrespectful to KR and to others by taking time from work to slander KR to others. Respect is a Core Value of the Employer in the workplace; aspects of this culture are reflected in the workplace rules.

20. At a meeting held October 7 involving HR to discuss the matters, Ms. Cindy Hinger represented HR and related the alleged behaviors of the Grievor and the conflict in the workplace. According to Sonja, the grievor’s only response when asked to reassess his behaviour from KR’s perspective was that he had “made an error”. He offered no explanation for his conduct or what he would do in the future. Ian spoke on his behalf. Sonja could not recall that the Union had proposed any solution other than its offer to supply training. She could not recall the Grievor advising that he was aware of the harassment programs of either the Union or in the Collective Agreement, nor that he wanted, needed or was willing to participate in such a program. Following a meeting between Ms. Hinger and Ian, the Grievor was advised that his employment was terminated.

21. On October 12 Ms. Hinger wrote the following letter to the grievor:

Re: Termination of Services

Jayson, on September 29, 2010 you were indefinitely suspended for a work rule infraction and insubordination. This indefinite suspension was progressive on the three (3) day suspension you received for insubordination on April 6, 2010 and the one (1) day suspension you received on June 16, 2010 for insubordination. We met on October 7, 2010 to discuss the indefinite suspension. At this meeting, you did not provide a substantial explanation for your behavior.

Jayson, the Company believes that they have sufficient grounds for termination. The Company has made the decision to terminate your services effective immediately.

Please return all EVRAZ Inc. NA property to Security. All monies owing to you will be paid out accordingly.

Sonja says that the factors considered by the Employer in reaching its decision to terminate include: the grievor’s egregious behaviour which showed a complete lack of respect for his co-workers; the grievor’s decision to poison the workplace for KR; his lack of concern and care for the workplace and use of equipment in a manner that could cause down time; his determination to manipulate and coerce KR to move pipe forward without inspection and with risk that pipe was unacceptable; the Grievor left his workplace and hovered over KR – clapped his hands and

pounded the desk, the matter was becoming physical; the Grievor did not speak on his behalf or offer any reason why he could continue to work; he only acknowledged that he had “f _ _ _’d up”; there was no indication that he could change his behaviour and how, nor did he say that he would not repeat the behavior. The Employer considered the grievor’s past disciplinary record including a three-day suspension on April 11, 2010 for insubordination/job action (walk-off) and a one-day suspension on June 16, 2009 for insubordination and failure to follow a supervisor’s instructions.

22. Sonja acknowledges that respect for the Collective Agreement is also a Core Value. The Company’s decision was to follow progressive discipline rather than the harassment policy. KR did not wish to file an harassment complaint. It is Sonja’s opinion that the conduct alleged by KR was systematic and abusive, and could be considered to be “bullying”. The Employer hopes that its employees will work together in harmony and respect each other; it is not an expectation that employees need like each other.

23. Ian’s evidence is that he has worked for the Employer for fifteen years. Prior to the September 29 meeting, he was informed by Neal of the allegations that the Grievor had not treated a co-worker with respect and dignity. He understood the allegations to be of harassment and bullying. Prior to the suspension meeting, Sonja declined Ian’s offer to let the Union handle the situation. During the October 7 meeting, he requested that rather than the Grievor being terminated, the Grievor receive diversity, sensitivity and other training. He says the Grievor “seemed in agreement”. The Grievor never said he would take the offered training, rather, he nodded his head, which Ian interpreted as meaning he wanted the training. The Grievor never said how he was going to change in the future, nor did he offer an explanation for his behaviour. The Union has a policy against unwanted conduct, spoken or acted, towards others.

24. Prior to the termination meeting Ian had received a copy of KR’s statement and spoken to her. She was offered the option to speak to the Union’s anti-harassment officer. She did not want to go through the Union’s harassment process. She didn’t want the Grievor terminated or disciplined, she just wanted the behaviour to stop.

25. The Grievor is aged 38 years; he has been employed by the Employer since August 1997. He has held numerous positions including the 2 Inch Inspector and Sonic Operator. He says the duties of the Sonic Operator include inspecting visually and by ultrasound the integrity of welded areas of pipe. Should defects be detected, the pipe needs to be cut, modified or repaired. The Grievor says that an advantage to the steady and continuous flow of pipe is that it provides the Sonic Operator the opportunity to advise the Mill of flaws in a timely manner, thus enabling the Mill to address any ongoing problem.

26. The Grievor acknowledges that "once or twice" he entered KR's work station to get her attention. While standing in her space he would wave his hands and clap in her face (two times), and pound on her work station (at least two times) to express his demand for pipe. He "didn't realize he was doing it". He acknowledges that he has used his kickers and his work station to get KR's attention. He did this "a few times a shift probably". He operated the kicks when he had no pipe in his area. According to the grievor, other sonic operators have done this. He complained incessantly to KR about the lack of pipe movement and the skid getting backed up. In the last week of September 2010 the shift leader, Sean's, response was to "watch it". The Grievor took this to mean that nothing was to be done about the pipe movement. He does not remember flapping the kick after he was asked to stop. He doesn't recall KR's words to him when she spoke to him a couple of times when he was in her space and flapping the kicks except on one occasion she told him to f _ _ _ off.

27. The Grievor acknowledges that his actions toward KR did not accomplish anything. He now sees that standing in her space, clapping his hands and using the kicks was wrong. He did not previously understand this. He says that he was unaware of the purpose of the September 29 meeting. He thought it would be about leaving early Sunday night because of a migraine and facial numbness due to a fragrance that he assumed came from a female working in a close area. He acknowledges having an opportunity to respond to the allegations of the September 29 meeting, but he was not prepared for this issue. He was aware of the conflict and KR's concern with his conduct, but did not think it had gone this far. He was surprised and could not respond. He acknowledges that at the termination meeting he was provided with an opportunity to tell his side but that he did not. He had not seen the written papers. He was aware of allegations of

abusive conduct and that his flapping the kickers was an issue including the issue, of equipment operation.

28. The Grievor is aware of the work rule to treat everyone and equipment with respect. He is aware that it is not acceptable to bully or intimidate another employee. His repeated use of the kicks was to get KR's attention when he had work-related concerns over the flow of pipe. He complained to co-workers. His actions were intended to get KR to change the way she worked; he acknowledges that it did not work, but he kept doing it. He was advised by Lowell to stop using the kicks to get her attention but he still did this. He did not realize his actions bothered KR. He acknowledges that he had no excuse to treat KR as he did. Looking back, he realizes his conduct was inappropriate and might be considered to be bullying/harassment.

29. After the Grievor became aware of the effect of his conduct, he never apologized to KR as he never saw her and he took no efforts to see her. The Grievor never took his concerns to Neal or other management. He says that he was waiting for the new schedule to see if there was to be any change. If not, he was going to ask to be moved.

RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

Article 1 – No Discrimination or Harassment

1.01 The Company and the Union recognize that all employees have the right to work in an environment free from discrimination and harassment. The parties wish to create a workplace in which employees do not engage in or become subject to discriminatory and harassing behavior as defined by law. Accordingly, the Company has established clear policies prohibiting discrimination and harassment within the workplace. In the furtherance of these policies the Company and the Union agree that there will be no discrimination against any employee on the basis of any prohibited grounds as set forth in applicable Provincial Human Rights Legislation or on the basis of Union membership or Union activity and that harassment will not be tolerated within the workplace. The parties agree that they shall not exercise their rights under this collective bargaining agreement in a discriminatory or harassing manner.

Employees are encouraged to immediately bring complaints to the attention of the Company. All complaints must be filed in writing. All complaints received will be fully investigated in accordance with Appendix "G", The Discrimination and Harassment Complaint Procedure, and appropriate remedial action will be taken.

Article 3 - Management

3.01

The Union recognizes that it is the function of management to manage the affairs of the business and to direct the working forces of the Company, subject to the terms of this Agreement.

3.02

Such management functions shall be:

3.02 (c) To discharge, suspend or discipline employees for just and reasonable cause, and also hire, transfer, promote, demote and to assign employees to shifts with due regard to seniority in Article 12 of this agreement.

Article 5 – Discharge & Disciplinary Procedure

5.01 Disciplinary Action

Management shall not take disciplinary action without first discussing this issue with the employee, unless the circumstances justify immediate suspension or discharge. In the event of a claim that an employee has been discharged or indefinitely suspended unjustly or unreasonably, the grievance shall be filed at Step Three of the Grievance Procedure and a meeting held at Third Stage within five (5) working days. Claims that an employee has been unjustly or unreasonably suspended for a set period of time shall be filed at Step Two of the Grievance Procedure and a meeting held within seven (7) working days.

5.03 Reasonable Discipline

The Company and the Union agree that disciplinary penalties shall not be imposed unreasonably or unjustly. Any warning and/or penalty (excluding dismissals) shall be cleared from the employee's record after a period of twelve months.

In the event of a reinstatement, the employee's record will be cleared after 12 months from the date of return to work.

5.04 Employee Reinstatement

If it is determined or agreed at any steps in the grievance procedure or decided by an arbitrator that an employee has been discharged unjustly, management shall reinstate the employee without loss of seniority or regular wages or make other arrangements as to compensation which is just and equitable in the opinion of the parties.

Article 6 – Grievances

6.01 The purpose of this Article is to establish procedures for discussion, processing and settlement of grievances as defined in 6.02 of this Article.

Appendix "G"

Discrimination and Harassment Complaint and Investigation Procedure

*Appendix G is attached to this Award.

POSITIONS OF THE PARTIES

Union Position

30. Mr. Rioux says that the Employer violated the terms of the Collective Agreement. The parties agree (Article 1.01) that all employees have the right to work in an environment free from discrimination and harassment; harassment will not be tolerated in the workplace. Employees are encouraged to bring complaints immediately to the attention of the Company. He says that the parties have agreed that complaints of harassment will be investigated and dealt with in accordance with The Discrimination and Harassment Complaint Procedure – Appendix “G” (“Complaint Procedure”).

31. Mr. Rioux submits that the Employer was aware of the grievor’s conduct in relation to KR as a result of the shift leaders being aware of acts which could constitute harassment prior to the September weekend in question. It was clear to the Employer that KR was complaining of conduct of the Grievor that alleged harassment in the workplace. Mr. Rioux acknowledges that the grievor’s conduct constitutes harassment of KR.

32. The Employer requested that KR provide, and she did provide, a written statement concerning the grievor’s conduct. This statement constitutes a complaint in writing under the Complaint Procedure. Following KR’s report of the grievor’s conduct, the Employer sought further background from the shift leaders. Notwithstanding taking these steps, the Employer failed to comply with the Collective Agreement when it failed to follow the Complaint Procedure agreed to by the parties. The Employer chose to avoid the word “harassment” notwithstanding that all of the Employer’s representatives considered the conduct to be harassment. The Grievor was denied his contractual rights to have the conduct investigated and dealt with in accordance with the Complaint Procedure.

33. Mr. Rioux says that the Employer’s breaches of the Collective Agreement include the failure to have the complaint investigated by the joint investigation team, and the failure to interview the Grievor as the alleged offender and, significantly, the failure to obtain full disclosure of the facts. The Employer failed to follow the process in place to determine what occurred with the result that the process for the submission of a report by a joint investigation

team and any decision or orders which are to be made by the Director of Human Resources, Canadian Steel Operations, were not made. There was a complete failure to invoke and/or comply with the agreed procedures to be followed in relation to allegations of harassment in the workplace.

34. He further submits that in addition to the Employer's failure to comply with the Complaint Procedure, the Employer failed to investigate properly the allegation or to inform the Grievor of the allegations such as to permit him to have an opportunity to put forth fully his position in relation to the allegations prior to his suspension.

35. In support of his position, Mr. Rioux cites:

Plasti-Fab, Division of PFB Corporation and United Steelworkers (Hardy Grievance), Unreported Decision of Arbitrator Christopher Sullivan dated October 8, 2010 ("Plasti-Fab")

Minolta Business Equipment (Canada) Ltd. v. Office and Professional Employees' International Union, Local 378 (Claveau Grievance), [2000] B.C.C.A.A.A. No. 180 ("Minolta")

Goodyear Canada Inc. v. United Steelworkers of America, Local 189 (Tompkins Grievance) (2001), 107 L.A.C. (4th) 289 ("Goodyear")

36. Mr. Rioux submits that the Grievor now understands his actions were inappropriate and the consequences of his actions. Having regard to the grievor's long term employment and his abilities as a valued employee, the discipline of discharge was excessive in the circumstances. The Grievor ought to have been subjected to a lesser punishment and can reasonably return to work in the workplace.

Employer Position

37. Ms. McCreary points out that the grievance alleges unjust termination but does not raise the Union's allegation that the Employer breached the Collective Agreement by failing to follow the Complaint Procedure. She says there was no need for the Employer to follow the Complaint Procedure because there was no written complaint of harassment. The evidence is that KR did not want to make an harassment complaint. She points out that there is no provision under the Complaint Procedure for either the Employer or the Union to make an harassment complaint.

This case is to be distinguished from Union authorities where the complainant wanted to file a formal complaint.

38. Ms. McCreary says that Article 1.01 does not apply in the circumstances as there is no allegation of discrimination based on harassment under Provincial Human Rights Legislation. As such, she submits there is no need to follow the Complaint Procedure.

39. Ms. McCreary submits that the incorporation of an harassment provision or the Complaint Procedure into the Collective Agreement does not supplant the Employer's right to discipline an employee up to and including termination should it be found suitable. She relies on the decision of Arbitrator Dirk Silversides in *Temple Garden Mineral Spa and Saskatchewan Joint Board, Retail, Wholesale and Departmental Store Union* (Unreported), July 31, 2003 ("Temple Garden").

40. Ms. McCreary says the Employer retains the right to proceed with a disciplinary investigation and subsequent discipline and is not required to exhaust the processes under the Complaint Procedure. The Complaint Procedure does not say the Company cannot discipline for harassment without compliance with the process. In these circumstances, there is no prejudice to the grievor. Had the matter proceeded under the harassment complaint with investigation, the outcome would have been the same in any event.

41. The Employer's position is that until the complaint was made by KR on September 27, it had no knowledge of the grievor's conduct in relation to KR. Sonja and Neal did not know until this matter was brought forward by Lowell. There was no condonation of the grievor's conduct. On being informed the Employer commenced an immediate investigation. Ms. McCreary says that the Employer acted appropriately when it suspended the Grievor on September 29. The circumstances and the alleged conduct were sufficiently serious to support immediate suspension. At the meeting prior to suspension the Grievor gave no new information to the Employer that would affect its decision. The Grievor was given an opportunity to meet with the Employer and to present his side as to what occurred. Prior to this meeting a copy of KR's statement had been given to Ian and the Grievor was well aware of the complaint.

42. Ms. McCreary says there was no question that as a result of the grievor's egregious conduct the Employer had cause to discipline him. Having regard to all of the circumstances, including the grievor's past disciplinary record, discharge was the appropriate penalty. The Employer says that the grievor's misconduct was serious and it should be viewed in light of the Grievor being upset with a coworker and choosing not to speak to her, but to communicate by his actions which were intended to intimidate her.

43. The Grievor did not appreciate the effect of his actions, which exacerbates the situation. There was no reason for the Grievor's conduct. The Grievor still does not understand why he behaved as he did. He still represents that the issue of the pipe movement was the reason for his conduct.

44. Having regard to the aspects of progressive discipline the conduct in question was a culminating incident and gave rise to the Employer's right to terminate the Grievor's employment. The Employer is not required to continue with an employee who has not learned from previous discipline. Ms. McCreary says that no mitigating factors have been presented to persuade the Board that the punishment of discharge was excessive.

45. Ms. McCreary says that it is well accepted that employees have an inherent right to a respectful workplace free from abuse:

Re Parmalat Canada Inc. and C.A.W. Canada, Local 462 (2005), 141 L.A.C. (4th) 377.

Re Canada Post Corp. and C.U.P.W. (1987), 27 L.A.C. (3d) 27

Ms. McCreary cites the following cases where it was concluded that discharge was an appropriate penalty:

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

Extendicare (Canada) Inc. – St. Paul and CUPE, Local 2677 (2006), 151 L.A.C. (4th) 84 (Smith)

In respect of progressive discipline and culminating incident, Ms. McCreary relies on:

Brown and Beatty, *Canadian Labour Arbitration*, 4th Edition, paragraph 7:4310

Labatt Breweries of Newfoundland and Newfoundland Association of Public Employees, Local 7004 (1991), 22 C.L.A.S. 472 (Alcock)

Maritime Paper Products Limited and C.P.U., Loc. 1520 (1991), 19 L.A.C. (4th) 1

IPSCO Inc. and United Steelworkers of America, Local 5890, September 12, 1985 (Larson)

SaskEnergy Inc. and Communications, Energy and Paperworkers Union of Canada, Local 649 (Grant Johnson Grievance), July 15, 1997 (F. Chad Smith)

DISCUSSION AND ANALYSIS

Did the Company breach the Collective Agreement?

46. Article 1.01 provides in part: “*All complaints received will be fully investigated in accordance with Appendix “G”, The Discrimination and Harassment Complaint Procedure, and appropriate remedial action will be taken.*” Mr. Rioux says that in the face of KR’s allegations, there is no question there was an allegation of employee conduct that could constitute harassment. He says that in such circumstances the Employer is obligated to follow the process or put differently, the employee is entitled to have the matter addressed under the Complaint Procedure.

47. KR made a verbal complaint to management that the Grievor had harassed/bullied her in the workplace. KR advised that she had had enough; the conduct was affecting her in the workplace and she wanted the conduct to stop. The Employer requested KR to provide a written statement summarizing the conduct or incidents. KR provided this. The Employer sought further information from crew leaders as to allegations of the grievor’s misconduct.

48. The Employer was well aware that KR’s verbal and written complaint about the grievor’s conduct included allegations of harassment/bullying. Management considered the conduct to be just that. In fact, its reaction to KR’s report of the conduct was to suspend the Grievor from

work indefinitely on September 29, as the circumstances justified immediate suspension (Article 5.01). Sonja advised Ms. Hinger of her intent to suspend the Grievor indefinitely. Sonja's report and summary of the grievor's conduct primarily addresses the grievor's conduct in relation to KR and the allegations of systematic, protracted attacks on her to manipulate himself into a position of power and control. Sonja writes: "*This appears to be classic, bullying displaying a complete range of textbook characteristics including: verbal, emotional and physical harassment...*" Sonja notes that the grievor's progressive discipline level is a 3-day suspension. She also makes reference to the repeated actuating of the skid kick to make a slamming noise.

49. These parties have recognized the right of the employees to work in an environment "*free of discrimination and harassment*" (Article 1.01); they agree that harassment will not be tolerated in the workplace. The Employer covenants that it has established clear policies prohibiting harassment. The Collective Agreement encourages employees to bring complaints to the attention of the Employer immediately. Article 1.01 provides in part:

All complaints must be filed in writing. All complaints received will be fully investigated in accordance with Appendix "G", The Discrimination and Harassment Complaint Procedure, and appropriate remedial action will be taken.

Appendix "G" provides a comprehensive complaint procedure. This procedure requires that an employee who wishes to pursue a concern arising from an allegation of harassment "*must submit a complaint in writing...*"

50. KR initially made a verbal complaint to management. It is the responsibility of supervisors to respond to any complaint or inquiry regarding allegations of harassment. Management asked KR to provide a written statement as to particulars of matters in respect of which she was complaining.

51. At management's request, KR put her verbal complaints of the grievor's alleged harassing conduct in writing. In a four-page typed document she summarized details and events between the Grievor and herself since bidding into the 2 Inch Inspector position in May, 2010. The summary includes particulars of the events which occurred on the weekend of September 24-26. The incidents reported contained allegations of harassment. KR says she did not want to make a formal complaint, or to have the Grievor terminated. However, she is and was equally

clear that she wanted the conduct to stop and the situation to be rectified. She concluded her written statement: *"I hope for a speedy reconciliation, and am willing to do my part to make it so."*

52. In these circumstances, is the Employer contractually bound to utilize the Complaint Procedure prior to there being any disciplinary action taken against the grievor? If so, does the breach void the discipline or otherwise impact the discipline?

53. I am satisfied that these parties intended that in circumstances like these, an harassment complaint would be processed through the Complaint Procedure wherein a decision on remedy and discipline would be made in accordance with its provisions.

54. A similar issue was considered by Arbitrator Silversides in *Temple Garden* (supra). There the harassment provision under consideration provided only for the investigation of the complaint. It did not provide for disciplinary proceedings that might be followed after a finding of harassment. In those circumstances, Arbitrator Silversides wrote at page 14:

In conclusion the incorporation of the harassment provisions into the collective agreement in this case does not mean that the harassment policy supplanted the Employer's right to terminate a probationary employee that it found unsuitable.

However, these parties have contractually agreed to a comprehensive Complaint Procedure for the investigation of harassment complaints. I am required to give effect to the agreement reached by these parties as expressed in clear language in the Collective Agreement.

55. Appendix "G" provides a comprehensive Complaint Procedure for the investigation of employee concerns arising from an allegation of harassment or discrimination submitted in writing within thirty (30) days of the alleged occurrence. All complaints are to be immediately investigated by a joint investigation team consisting of a Local Union Anti-Harassment Coordinator, Member of the Local Management Team and a Director of Human Resources. The Complaint Procedure provides a detailed process for the investigation, reporting and making orders as necessary to resolve the issue including final discipline.

56. The process provides for the Director of Human Resources, Canadian Steel Operations, upon receipt of the joint investigation committee report, to make such orders as may be necessary to resolve the issue. Where the Company and the Union are satisfied with the Director's decision, the proceeding shall be at an end and not subject to further proceedings or the grievance procedure. If either party is not satisfied with the decision, the matter is to be referred to a mutually agreeable Adjudicator who shall have the authority to dismiss the complaint, review and determine the facts in issue, review the appropriate level of discipline to be applied to the offender, and where excessive make an order to apply a lesser penalty and further recommendations as necessary to provide a final and conclusive settlement to the complaint. An employee determined to have violated the harassment policies is not entitled to grieve the disciplinary action taken by the company that is consistent with the decision of the Adjudicator.

57. The Employer's right to discharge, suspend or discipline an employee for just and reasonable cause is "*subject to the terms of this Agreement*" [Article 3.02(c)]. These parties have specifically agreed that when an employee makes a complaint in writing of discrimination or harassment, all such complaints will be fully investigated in accordance with Appendix "G" – Complaint Procedure and appropriate remedial action will be taken. KR's complaint is not of discrimination which would require it to be on the basis of a prohibited ground; rather, she made a complaint in writing alleging harassment. An harassment complaint is subject to Article 1.01.

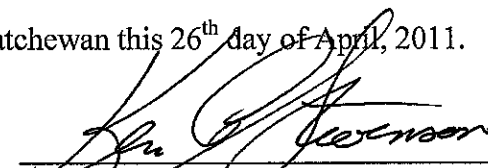
58. I conclude that the Employer's failure to follow the Complaint Procedure was a breach of the Collective Agreement. The Grievor is contractually entitled to have these complaints/allegations investigated and determined in accordance with this process. Due to this breach, the Grievor's dismissal was unjust and a violation of the Collective Agreement

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.

60. Accordingly, it is my decision that the grievance is allowed. I direct that the Grievor be reinstated to his employment effective May 4, 2010 with full benefits and without loss of seniority from October 8, 2010 to the date of his reinstatement. At the request of the parties I reserve my jurisdiction to address any issues of remedy, in the event the parties cannot successfully resolve this issue.

61. Nothing in this award shall be construed so as to prevent the parties from addressing KR's harassment complaint through the Complaint Procedure provided in Appendix "G" and for a determination of any necessary orders to resolve the issue including the appropriate level of discipline, if any.

DATED at Saskatoon, Saskatchewan this 26th day of April, 2011.



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