

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNITED STEELWORKERS, LOCAL 5890
(ALAN BRODEUR GRIEVANCE)

UNION

AND:

EVRAZ INC. NA CANADA

EMPLOYER

A W A R D

Arbitrator: Kenneth A. Stevenson, Q.C.

Appearing for the Union Sonny Rioux, USW Servicing Staff

Appearing for the Employer Gregory McGinnis, Counsel
Brian Babcock, Senior Human Resources Manager

Hearing: Regina, Saskatchewan
April 8, 2013

Date of Award: May 10, 2013

A W A R D

BACKGROUND

1. The parties agree that I have been properly appointed with jurisdiction to hear and determine matters raised by the April 13, 2012 grievance of Alan Brodeur alleging that his employment was terminated due to extreme and unjust discipline.

EVIDENCE

2. David Crone, Quality Assurance Coordinator, Regina Tubular Division, testified on behalf of the Employer. The Grievor and Lamont Wiley, Senior Physical Tester, testified for the Union. The following is a summary of the material evidence.

3. The Grievor was employed with Evraz in excess of fourteen years. He worked in the Quality Control Department since April 2005; he held the position of Physical Tester for six years. His duties included the preparation and testing of steel products manufactured by the Employer. The testing included conducting a Charpy V-Notch Test ("Charpy Test"). The Grievor had a clear disciplinary record at the time of his termination.

4. The Charpy Test for absorbed energy tests the ability of steel to take/resist impact (brittleness) before it breaks and to test the product to determine its suitability for its proposed application. The Charpy Test is used to measure, in Joules, the energy absorbed to break the test piece and the Shear percentage is determined on visual examination of the broken piece.

5. The Charpy Test is one of a number of product tests to be performed to determine that pipe is manufactured to the appropriate size, grade, quality and specifications of the customer. It is typical that the customer will retain the services of an independent inspector to monitor and audit the production and the testing of the pipe. These inspectors have access to all testing procedures to ensure that the Employer is manufacturing pipe in accordance with the required specifications. The Employer performs product tests to test the tensile (ductile) strength, hardness, Charpy Test and the Drop Weight Tear Test to confirm that the pipe meets basic

American Petroleum Institute (“API”) specifications. Chemical tests are performed when required.

6. A number of tests are performed on each Heat of molten steel (“Heat”) which is made into coils which are then welded into pipe. The sample plates of pipe to be tested with the Charpy Test are cut from the pipe before it goes through the Finishing Line. The lab is responsible for the preparation of sample pieces to be tested during the Charpy Test. These samples include both samples of the body of the pipe and of the weld metal zone. The preparation of samples includes properly notching the samples for breaking in specified locations. At the material time tests were being conducted on pipe produced for an oil pipeline.

Performing the Charpy Test

7. The test pieces include three samples for each test. The samples are identified by a stamp identifying the customer order in respect of the specified change-over. Particulars of the change-over identification of the Heat, the customer, pipe diameter, gauge, and API specifications are included in the Charpy Impact Test Report (“Charpy Report”) which is to be completed by the operator.

8. The Charpy Test is outlined in an Inspection and Test Work Procedure document. This nine-page document provides detailed information related to the scope of the test, the testing/retesting procedure and standards. This document is available in hard copy posted in the lab and in the Employer’s computer documents. Employees are required to acknowledge that they have read and understand the document. The Grievor was trained in the Charpy Test and has performed enumerable such tests during his time as a Physical Tester. According to Dave Crone, the Grievor has never indicated that he did not understand the testing procedure.

9. The Employer presented a video demonstration of the Charpy Test being performed in the prescribed manner, using the same test equipment and facilities which were used by the Grievor to perform the questioned Charpy Tests.

10. The test begins with a set of three sample pieces being cooled to the specified temperature in an alcohol bath. With the energy absorption dial set to 'zero', the tester is required to place the sample on the supports in the Charpy Machine with the V-notch pointing towards the hammer pendulum; he then pushes the activating button to release the pendulum. This is to be completed within 5 seconds or less of removal of the sample from the alcohol bath. The operator then records the energy absorption reading from the dial indicator. When required the operator is to visually evaluate and record the percentage of Shear on the sample and to record the same in the Charpy Report. This visual examination of the fracture appearance on the broken ends of the sample is used to determine the percentage Shear by comparison with the table of industry standards. The operator then resets the dial indicator to zero prior to breaking the next sample.

11. Shear percentage relates to toughness and to show that the sample absorbed the maximum amount of energy. The visual examination is to determine the brittleness of the body or weld. The desirable amount is 100% which means the sample is sound. The Shear value must be determined by a purely physical examination and comparison to industry standard. The visual evaluation of the Shear is done quickly getting a value based on the operator's experience.

12. Once the readings of the absorbed energy and a percentage of Shear have been recorded for the Charpy set, the data averages are calculated and recorded on the Charpy Report. The samples are then discarded in a bucket to be recycled. It is usual that a number of sets are tested at one time. The entries in the Charpy Report are to be made by the operator, who is responsible for the proper and accurate recording of the test results to ensure that the Computer Information Process system (CIP) records match the handwritten form.

13. Following completion of the Charpy Test the operator is to record the data from the handwritten Charpy Report into the CIP database. While such entry is normally done by the operator, there are occasions, such as at the end of a shift, where this will be left for completion by a supervisor or the leader in Quality Assurance. The paper records are retained as part of required document control for a period of seven (7) years.

14. The CIP provides a complete record and history of all of those who were involved with a particular Heat, the coils and through to the time of shipping. This includes a complete record of all testing. No pipe is shipped until all tests are completed and passed. The CIP records for the particular change-over show that between November 2009 and December 2010, the Grievor was responsible for the performance of approximately 1,600 tests on the pipe produced for this change-over. Until March 26, 2012 there had been no complaint about the Grievor's performance of these tests.

The Incident

15. On the morning of March 26 an employee asked Mr. Crone to look inside the Charpy machine. Mr. Crone observed three samples; one was broken and the other two were still attached. From the identification number on the samples, Mr. Crone went through the related paperwork. He was able to confirm that these were the last samples tested by the Grievor on his shift which ended at 6:30 AM on the 26th. The Grievor had entered the data from the Charpy Report to the CIP database. The Charpy Report for these three samples had been completed to show energy absorption readings of 111, 105 and 105 for an average of 107. The Shear value for each of the samples was recorded as 100. The Charpy Report was initialed by the Grievor and the customer's inspector. The CIP record contained these results as entered by the Grievor at 1:06 AM on March 26.

16. Mr. Crone was concerned to find three samples in the Charpy. This indicated that the written procedure requiring the testing and recording the results of one sample at a time had not been followed. Shear values had been recorded and entered in the database for each of these three samples, however, the Shear value could only be determined by a visual examination. This could not have occurred while the samples were in the Charpy. Mr. Crone and another tester each visually rated the Shear values of the three samples and determined that the values were 100% as reported. According to Mr. Crone, a 100% Shear value is observed on the majority of samples, however it is critical to know when it is not 100%. It is a risky bet to say Shear is 100% without examination.

17. After making his findings, Mr. Crone contacted Human Resources to determine where the Grievor was in the discipline process so as to determine the next step. At 5:11 p.m. on Friday, March 30, 2012, Mr. Crone sent an email to Cindy Hinger, the then H.R. Specialist, outlining his findings. He reported that the Grievor falsified qualification documents by recording non-observed values for qualification and violated published work procedures by failing to remove samples from the Charpy. Mr. Crone reports that he had spoken to the Grievor in the presence of Union representation. Mr. Crone says that he informed the Grievor of the seriousness of his actions and the ramifications this could have, both in the eyes of the customer for potential orders and if failing results were stated as passing, the possibility of a major pipeline disaster. He informed the Grievor that there would be discipline. The Grievor does not recall this conversation.

Delay In Suspension/Discipline

18. Subsequent to Mr. Crone's discovery of the samples in the Charpy, the Grievor worked his normal day shifts on March 28 and 29. He worked the night shift on April 2 and an overtime shift of nine hours in this same time period. During these shifts, the Grievor continued in his position with normal duties and responsibility to conduct required tests. There was no special direction or supervision of the Grievor. At 06:00 hours April 3, at the conclusion of his shift, the Grievor was indefinitely suspended with a noted recommendation for termination of his employment.

19. Between March 26 and April 3 Mr. Crone and Ms. Hinger had email exchanges concerning the Grievor's status. On Monday, April 2 they exchanged a number of emails concerning the Grievor's status at work. The Grievor was scheduled to work that night. Ms. Hinger advised Mr. Crone that in light of the seriousness of the infraction, the Grievor needed to be suspended indefinitely pending a meeting. Ms. Hinger advised Mr. Crone to contact the Grievor at home and advise him "*... not to report for work tonight as he is being indefinitely suspended...*".

20. Mr. Crone took the position that the Employer would be in a bad position with trained manpower if the Grievor was suspended prior to his shift. Mr. Crone advised that he couldn't

“swing it” to have the suspension prior to the start of the shift. He had already set up a meeting with the Union representative for 6:00 AM the next morning.

21. Mr. Crone says that it was not his decision to indefinitely suspend an employee; this decision would be for Human Resources. Between March 26 and his March 30 email to Ms. Hinger, Mr. Crone says he was engaged in pre-production meetings with customers.

22. On April 5, 2012 an investigation meeting was held including Mr. Crone, Ms. Hinger, Ian Gretchen, then Local President, and the Grievor in attendance. The Grievor advised that the customer’s inspector wrote the test results in the Charpy Report based on the information the Grievor gave to him. He said that the process was that if he did not say a Shear value, the inspector would automatically record it as 100%. This was his standard practice. He said that he was given approval to do three samples at once, and not to remove each sample after its test. The Grievor said he “*Must have rated them*” (the samples); and that he “*Must have been distracted*”. He reported that he had previously found the same thing but that he did not report it, he just verified the Shear was 100% and discarded the samples. He did not provide any particulars of the change-over or anything more about when these were found.

23. According to Mr. Crone, until this time he was unaware that the Grievor was testing three samples at a time or that anyone in the workplace had said that this was acceptable. He was unaware that customer’s inspectors were entering test results. It is unacceptable to have a customer’s inspector complete the Charpy Report or to record 100% result in the absence of such confirmed result. It is improper to initial the Charpy Report and to enter the results in the CIP database based on this process. The Grievor did not he say that he didn’t understand the process and what he was required to do. The Grievor did acknowledge the importance of recording information into CIP. The Grievor said the customer’s inspector was involved due to the location of the machine and to help the Grievor.

24. On April 9, Cindy Hinger sent the following letter to the Grievor:

Dear Mr. Brodeur:

Re: Termination

Alan, on April 3, 2012 you were involved in an incident whereby you falsified documentation. Alan, you recorded test results on the qualification sheet even though you did not complete the testing requirements as per your job requirement.

Evrax takes pride in their products and is committed to ensuring that product is properly tested prior to releasing to their customer. This negligence is unacceptable and will not be tolerated.

Alan, the Company believes they have sufficient grounds in which to terminate your services and accordingly your services with Evrax have been terminated effective immediately. Please make arrangements to return all Evrax property to Security. All monies owing to you will be paid out accordingly.

Regards,
Cindy L. Hinger
Labour Relations Specialist

The letter refers to an incident on April 3, however, the incident actually occurred on March 26, 2012. According to Mr. Crone, the decision to terminate the Grievor's employment was not his.

25. On April 9 the Employer sent the following document addressed to Evrax, Regina Steel, Tubular Quality Assurance Personnel.

To: Evrax Regina Steel Tubular Quality Assurance Personnel
From: Dave Crone – Quality Assurance Coordinator
Date: 9-April-2012
Re: Testing of Material and Qualification Paperwork

Please sign off on the attached signoff sheet to confirm your understanding of the below information.

1. **Customer Inspectors (3rd Party) writing down results of qualification testing**
Evrax personnel are the only individuals allowed to document results on any testing sheet. The customer inspector is only to sign off on the documented information.
2. **Customer Inspectors (3rd Party) removing samples from DWTT tester**
Due to liability only Evrax personnel are allowed to touch equipment in the lab, this includes removing samples from any equipment; DWTT tester, Charpy tester or others.
3. **Charpy and SWTT Test Shear Rating**
Each sample broken is to have its shear rated by a qualified Physical Tester, leaving samples in the machine is not acceptable.

Failure to comply with the above mentioned items will result in disciplinary action.

Failure to rate shear properly as per the published work procedure states, jeopardizes everyone's job with Evraz, and the company's reputation with our customer. The result of a failure of any test that we perform if it is marked as a pass could result in a major pipeline disaster, so please be aware of the ramification if we cut corners.

Dave Crone
Quality Assurance Coordinator.

On the same day Mr. Crone posted the document. The memo was written as a result of the Grievor's statement that other operators permitted customer inspectors to write down test results.

26. The Grievor says that during training as a Physical Tester, because of his hand, he had trouble retrieving the samples from the Charpy. His trainer, an in-scope employee, said it was okay to do 3 samples prior to retrieval. He has consistently followed this process. He never approached Mr. Crone or other management regarding this procedure. He says going into the Charpy after each sample is *"a pain in the butt with my hand too"*. During the time that he has been a Physical Tester, as a convenience to himself as operator, his practice was to have the customer's inspector complete the Charpy Form based on the Energy and Shear readings provided by him. In the absence of giving a Shear percentage, this percentage was agreed to be 100. The Grievor never considered this to be a "flawed process". He did this because 99% of the testing is 100%. He acknowledges the potential for the recording of a wrong reading and that he must rely on his own memory of the readings when initialing the form.

27. The Grievor does not recall the test performed prior to the three samples being found in the Charpy. He says that he either left them in the Charpy or someone put them in. He always breaks the samples and never records the result unless the sample is inspected. He says he visually examined the 3 samples for Shear. The Grievor knows he did the test properly so the samples must have been placed there by a third party. The Grievor acknowledges that when doing 3 samples at a time, getting a correlation of the Energy and Shear reading to the correct sample is an issue. The only way to ensure this correlation is to do one sample at a time.

28. The Grievor understands the importance of properly conducting the tests and the potential consequences of a steel failure in the field. He acknowledges that some tests are not redundant and all must be properly done. The Grievor agrees that the Employer should be able to rely on the truthfulness and veracity of the test results as verified by him. The Employer needs to place trust in the operator to follow the proper procedures every time. He understands the importance of his job and that the importance of following the proper procedure had been impressed on him. He acknowledges that he had previously had a Last Chance Agreement (LCA) in September 2007 expiring in 2009. The LCA was around testing issues and following procedures in the lab. The Grievor never understood that failure to follow procedures would cost him his job. He thought it could be a 1 or 2-day suspension. The Grievor never re-evaluated his Charpy Test Procedure in light of the LCA.

29. Lamont Wiley says that he has heard reports that customer inspectors were recording test results. He has, many times, mentioned to the testers that this should not be done as it is against company policy. He believes that he said this to the Grievor.

POSITIONS OF THE PARTIES

Employer Position

30. The Employer says that the Grievor's conduct was of such a nature that it clearly deserved discipline; that in all the circumstances, discharge is the appropriate discipline for a number of reasons.

31. First, the Grievor was charged with the performance of very important non-redundant process. There was potentially catastrophic results to the public, the environment and the Company; there is extreme risk if the tests are not performed properly. The Employer manufactures a product which is placed in an environment of high stresses for many years. It is an industry and a product which is controversial. Care needs to be taken to ensure the integrity of manufactured pipe and to appear that the same is safe. Failure to meet this standard would jeopardize both the Employer's business and the employment of all of its employees.

32. Secondly, it was a core duty and precisely the Grievor's job to perform the required tests. The Grievor failed to perform these tests in a systematic way. The procedure the Grievor followed did not ensure accuracy and completeness. The Grievor completed the Charpy form and entered the test results into the CIP. This was a representation that the information was accurate and true; however, the information was false because the tests had not been completed. The Grievor failed to follow the required testing protocol in performing a simple test. It appears that as a result of repeated exposure, the Grievor came to expect a Shear value and recorded Shear values without conducting a visual examination. There is a need to perform this test on every occasion. It appears that the Grievor convinced himself to do less as he believed he could judge the value without observation. This is simply not good enough as the Grievor's process will inevitably lead to error.

33. Thirdly, the Grievor occupied a position of trust. The Grievor's work was essentially performed in unsupervised circumstances where the Employer relied on the Grievor to perform the tests in the proper manner and to record the results accurately. The tests performed and the records made by the Grievor are the only records to prove test results should the same be necessary as a result of a pipe failure. The accuracy of the recorded information is highly important. The Employer does not suggest the Grievor was endeavoring to sabotage its operations. In this position of trust the Grievor had performed hundreds of thousands of tests. The Employer is entitled to rely on its employee to comply with its testing procedures and not perform tests where there are multiple places for human error which can occur as a result of not following the process. Errors could occur without being known to the operator. The Grievor initialed the reporting form with a Shear value that he did not know was true – as he had not looked at the sample pieces. It is entirely unreasonable to believe that the Grievor had read the samples, two of which were not broken apart, and then returned them to the machine.

34. Fourthly, the Grievor has not provided any reasonable explanation for his not following the proper procedure. The procedure is relatively simple and can be performed in a short space of time. There was no reason for the Grievor to make his own procedure without the authorization and approval of the Employer. Not only did the Grievor make his own procedure, but continued to follow it well after he had been placed on an LCA for matters related to

procedures during testing. The Grievor continued to carry on his own process despite its obvious flaws: working with a number of different customer inspectors and the need to rely on these individuals; no way to ensure that the numbers recorded would correspond to the results the Grievor provided; no way to ensure, during multiple breaks, that the same pieces were put together to obtain corresponding readings of energy and Shear.

35. The Employer points out that the Grievor is unrepentant in his position. He does not think that there was anything wrong with the manner in which he performed the Charpy test. This attitude has continued notwithstanding the LCA and issues related to his testing procedures. The Employer says that it is very unlikely that the employment relationship could be repaired having regard to the trust that the Employer must place in the Tester.

36. The Employer submits that termination is the appropriate discipline having regard to the principle of general deterrence. The tests required to be performed by the Grievor are repetitive and perhaps monotonous. This gives rise to a high risk that the employee may adopt an attitude similar to the Grievor's in respect to performing the tests and actually reading the samples for Shear percentage. Employees such as the Tester are largely unsupervised. This presents a tremendous risk to the Employer and to employee jobs. The Tester plays a key role in ensuring the safety of the product; the public depends on the Employer's employees to do their job. Upholding the termination would send a message to the workforce that it is not okay to make mistakes in a systematic way by following unapproved procedures.

37. The Employer recognizes that there was some corporate inertia in not immediately suspending the Grievor. Mr. Crone does not have the power to impose an indefinite suspension. The demands of the workplace delayed the presentation of a summary of the Grievor's conduct to Human Resources until March 30. The Employer acknowledges that it is likely the Grievor should not have been in the workplace or should have been subject to monitoring.

38. The Employer further points to the need to proceed with due process in the disciplinary procedure. Mr. Crone needed to receive some specific advice from Human Resources. While it did not react as quickly as it could have, there was no resultant unfairness to the Grievor; the

Employer neither condoned nor forgave the conduct; it clearly regarded the conduct as serious. While its judgment in not removing the Grievor from the workplace immediately might be questioned, this should not be construed as the Employer considering the conduct less serious.

39. The Employer did not know all of the factual circumstances until the investigation meeting on April 5. It was at that time it began to learn all the facts including that the Grievor has systematically been performing the tests contrary to policy. The Grievor did not recognize any error in his process or any potential errors that could have resulted from following his flawed process.

40. The Employer cites a number of arbitral authorities in which discharge has been found to be the appropriate punishment in like or similar circumstances: *Greater Vancouver Regional District v. Vancouver Municipal and Regional Employees' Union (MacMaster Grievance)*, [1992] B.C.C.A.A.A. No. 309; *Cominco Ltd. v. United Steelworkers of America, Local 480 (Constantin Grievance)*, [1999] B.C.C.A.A.A. No. 562; *Calgary Laboratory Services v. Health Sciences Assn. of Alberta (Maracle Grievance)*, [2010] A.G.A.A. No. 57.

41. In *Greater Vancouver*, supra, the grievor failed to perform required field testing and sampling of water; he falsified time records and particulars of water samples. The arbitrator found a deliberate and persistent failure to perform core duties; the grievor systematically falsified tests and sample times. The Employer says that while he is not sure that the Grievor's conduct was deliberate, in the sense of an intentional desire to deceive, but there was a consistent practice resulting in falsifying that he had verified the Shear values.

42. In *Cominco Ltd.*, supra, an employee was late for work; he did not take normal samples and entered false data and later lied to cover up his earlier fabrication. Dismissal was upheld. Mr. McGinnis says there was a similar offence here. The Grievor failed to follow the prescribed process and then represented that the values had been verified by him when they in fact had not been evaluated. In the face of the Grievor being unrepentant and acknowledging that he did anything wrong, it is unlikely that the employment relationship could be repaired.

43. In *Calgary Laboratory*, supra, the grievor was responsible to conduct cancer tests. She made an error on a test and failed to report the error. In upholding the termination, it was concluded that the grievor's failure to report the error constituted a fundamental breach of her professional responsibilities, disregard for public safety, and undermined the necessary trust and confidence to which the employer and the public were entitled. Mr. McGinnis says that although there were no wrong Shear values entered, there was a misrepresentation that the process followed the proper policy and procedure; there was a failure to ask if the process followed was acceptable. He points to the interest of public safety associated with pipelines.

Union Position

44. The Union puts in issue the seriousness of the Employer's allegation as to the importance of the tests and the significance to it having regard to its product being used in the pipeline industry. Mr. Rioux says that it is problematic; he calls into question the validity of the Employer's position. On the one hand the Employer takes the position that the tests are of vital importance and significance to it and may have a significant impact on it. It refers to the Grievor's actions as being a breach of trust in falsifying records and claims to have lost complete trust in the Grievor. On the other hand, it learned of the events and improper test procedure on March 26. There was no full report made to Human Resources until after 5:00 p.m. on Friday, March 30. Rather than the Grievor being pulled from the workplace, as should have occurred if there was such a serious breach of trust, the Employer allowed the Grievor to continue to work. He worked two day shifts, one night shift, plus a nine-hour overtime shift from the time his misconduct was determined until he was suspended from work. During this time he was never spoken to about the way in which he conducted the tests and his work went unchecked. When Human Resources noted that the Grievor should have been suspended from work Mr. Crone kept him at work because he was short-staffed. The Employer obviously did not regard the Grievor's misconduct to be of the most serious order. *Toronto (City) v. Toronto Civic Employees Union, Local 416 (Brckett Grievance)*, [2006] O.L.A.A. No. 40.

45. Mr. Rioux notes that there had been no customer inspector complaints concerning the procedure followed by the Grievor. Further he notes that the LCA expired two and one-half years prior and was based on conduct four and one-half years previous. This incident relates to

one day when three samples were left in the Charpy Machine. There had been no other complaints about the Grievor's conduct. The Grievor has a clear disciplinary record.

46. Mr. Rioux says that in these circumstances, some discipline is likely warranted. Three Charpy samples remained in the Charpy Machine; it appears that the last visual test was not completed notwithstanding the fact that the Shear values were recorded. He submits that termination is excessive. He acknowledges that it might be an option that the Grievor not be returned to his Tester position. Mr. Rioux cites a number of decisions in respect of excessive punishment in the face of a clear disciplinary record: *International Brotherhood of Electrical workers, Local 348 v. Telus Corp. (Hennig Grievance)*, [1999] C.L.A.D. No. 709; *Newfoundland and Labrador Assn. of Public and Private Employees v. Eastern Regional Integrated Health Authority (Butler Grievance)*, [2012] N.L.L.A.A. No. 9; *North Vancouver (City) v. The District of North Vancouver Firefighters Union, Local 1183 (Lazenby Grievance)*, [2002] B.C.C.A.A.A. No. 106; *Cominco Ltd. v. United Steelworkers of America, Local 651*, [1991] B.C.C.A.A.A. No. 141.

ANALYSIS AND DISCUSSION

47. I am satisfied that the Grievor engaged in conduct worthy of discipline. The evidence establishes that on March 26 the Grievor did falsely record Shear values for three test pieces which he had not examined. He allowed the customer's inspector to record these values in the Charpy Report. He initialed the report and entered it into the CIP. All of these actions were representations by the Grievor that he had completed the test and evaluated the results in accordance with the Employer's policy and procedure. These functions were part of the Grievor's core duties. The Employer relied on the Grievor to properly perform the tests and to record the results as part of its Quality Assurance Program. The determinations that the pipe complied with customer and industry standards is very important. Should the pipe not meet the required standards and such failure not be detected, there could be very significant consequences for the customer, the environment, the Employer and the Grievor's fellow employees.

48. Having determined that the conduct was worthy of discipline, I must decide whether the termination of the Grievor's employment was an excessive disciplinary response. If so, I must decide what, in all of the circumstances, is the appropriate discipline.

49. On April 9, 2013, the Employer terminated the Grievor's employment. The stated reason for the termination was the Grievor's falsification of documentation – the recording of test results without completion of the test requirements as required by his job. The failure to ensure that the product was properly tested was characterized as "negligence". The Employer stated its belief that it had "sufficient grounds" for the termination.

50. In support of its submission that termination is the appropriate discipline, the Employer advances additional or supplemental grounds: the Grievor occupies a position of trust; the Grievor adopted his own test procedure which he systematically followed rather than the prescribed test procedure; the Grievor's unrepentant attitude makes it unlikely that the employment relationship could be repaired.

51. It is generally accepted in arbitral jurisprudence that an employer is not permitted to enlarge the grounds for the imposition of discipline by adding new grounds or to change the characterization of some set of facts. Prior to the decision to terminate the Grievor, the Employer had been told by the Grievor that he was not following company policy while conducting the Charpy Test: testing three samples at a time and having the customer's inspector record the test results. Although the Employer was aware of this consistent practice, it did not advance the same as a reason for the termination. The only conduct reference was to an occurrence on April 3 (sic).

52. The Employer's termination letter does not refer to the Grievor as occupying a position of trust; it does reference its rightful pride in its products and the need to ensure proper testing. However, the conduct is not characterized as a breach of trust, rather, it is characterized as "negligence" which will not be tolerated.

53. In assessing the appropriateness of the termination, I will only consider the grounds advanced by the Employer at the time of termination. It is my conclusion that the termination was an excessive disciplinary response for the misconduct identified and established as occurring on March 26; namely, the falsification of documentation, by recording test results when the tests had not been conducted as required by the Grievor's position and duties. There are a number of reasons why I have determined that the discharge was excessive.

54. First, the discipline was imposed for a single incident of falsification of unperformed test results. Secondly, the Employer characterized the act as negligent rather than as a breach of trust. Thirdly, the Grievor had a clean disciplinary record. While he had previously been subject to an LCA, that agreement had ended over two years previously. While the LCA apparently related to the Grievor's performing of testing, the Employer did not advance this as part of its reason for termination. Fourthly, on the date of the Grievor's termination, the Employer sent a memorandum to the Tubular Quality Assurance personnel in respect of testing of materials and qualification paperwork. The memorandum set out the proper test procedure and policy to be followed. It then noted: *Failure to comply with the above mentioned items will result in disciplinary action.* The memorandum makes no reference that a failure to follow procedure would be considered to be a breach of trust. Nor does it caution that such failure could lead to discipline up to and including dismissal.

55. Lastly, I have considered the Employer's response to the Grievor's misconduct in the workplace. In my opinion the Employer did not react in a manner which would show that it had lost trust or faith in the Grievor's ability to perform the tests or to rely on him to perform his job duties. The Grievor was not immediately suspended and removed from the workplace. Had there been a complete loss of trust or destruction of the employment relationship, I would have anticipated that the Grievor would have been immediately removed from the workplace. I cannot see that the Employer initially treated the incident as displaying extremely serious misconduct.

56. While Mr. Crone may not have had the ability to indefinitely suspend the Grievor, he did not file an immediate report as to the Grievor's conduct or his findings. Mr. Crone confirmed his

findings on the morning of March 26 however he did not provide a full written report to Human Resources until after 5:00 p.m. on Friday, March 30. During that period the Grievor worked two shifts plus a nine-hour overtime shift. I accept Mr. Crone's evidence that in this period he informed the Grievor of the seriousness of his actions and the ramifications this could have on potential orders and for a possible major pipeline disaster. Mr. Crone informed the Grievor that there would be discipline. However, after Ms. Hinger had advised Mr. Crone to immediately suspend the Grievor, he was not suspended. Rather, Mr. Crone took the position that he needed to retain the Grievor at work because he was short-staffed. There was an ongoing indication of trust in the Grievor's ability to perform the tests. No additional supervision was provided nor direction given to the Grievor for these additional shifts prior to his termination.

57. In making my determinations as to the appropriate disciplinary sanction, I have had full regard to the Employer's reasonable need to have the workforce perform duties and responsibilities of their positions. I have had regard to the critical importance of the proper completion and documentation of test results as many of these tests are non-redundant. I have taken into account that the Grievor works in a position where he is largely unsupervised; the Employer needs to rely upon his accurate and full performance of the tests. I have also taken into account the Grievor's failure to acknowledge his failure to perform the subject tests. I have had regard to the Grievor's unwillingness to recognize the need to perform and document each test in accordance with the Employer's policy and procedure and the importance of this notwithstanding that the likely result will be within the required parameters. I have considered all of these matters in relation to the restoration/continuance of the employment relationship. I have also taken into account the need for a general deterrence within the workforce and the need to reinforce to the workforce the need for employees to fully and diligently perform their duties and in particular those duties of a testing and qualification nature.

58. I have also taken into account the LCA which related to testing procedures and the Grievor's failure to recognize and follow policy or to recognize the flaws of his process and potential implications. I do not believe that there is an irreparable breakdown of the employment relationship. In my opinion there exists a level of trust that the Grievor can and will fully

perform his assigned duties in the workplace in the future. This trust is demonstrated by the Grievor continuing to work and perform his duties over a number of shifts after March 26.

CONCLUSION

59. It is my conclusion that a reasonable discipline would be that the Grievor be suspended from work for a period of 30 days following which he be reinstated to employment. Because of the Employer's concern over the Grievor's casual attitude towards testing and his lack of frank recognition of the need to follow established policy and procedure processes, I direct that he not be reinstated to the position of Physical Tester unless and until the Employer agrees to this reinstatement. The Grievor is to be reinstated to a position for which he is qualified and has the necessary seniority.

60. In my opinion this severe disciplinary sanction is appropriate having regard to the Grievor's conduct and his lack of frank admission of wrongdoing; it will also send an appropriate message to the workforce.

61. The Grievor shall be compensated for any loss of wages or benefits and rights under the Agreement subject to his duty to mitigate. At the request of the parties I reserve my jurisdiction to address any aspects of the remedy if the parties are unable to agree.

62. The Grievance is allowed to the extent provided herein.

DATED at Saskatoon, Saskatchewan this 10th day of May, 2013.



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