

The Trade Union Act

IN THE MATTER OF AN ARBITRATION HEARING REGARDING THE MURRAY PROZNICK GRIEVANCE
PURUSANT TO A COLLECTIVE AGREEMENT

BETWEEN:

EVRAZ INC. NA

- and -

UNITED STEELWORKERS, Local 5890

AWARD

Arbitrator: Francine Chad Smith, Q.C.

For the Employer: Jennifer Koschinsky, Counsel
For the Union: Sonny Rioux, Union Representative

Date of Hearing: October 16, 2013
Date of Decision: November 14, 2013

Regina, Saskatchewan

INTRODUCTION:

[1] The grievance places in issue a three day suspension for poor work performance. The Employer, Evraz Inc. NA, is a steel fabricator that operates three pipe mills at its Regina facility. At the relevant time the Grievor's position was a bevel operator in the twenty-four inch mill. His job was to operate a machine that bevelled one end of pipes according to specifications located in a computer data base. The specifications for the bevelling work were generally unique to each pipe fabrication contract the mill was working on.

[2] The primary question of fact was what bevel specifications the operators were to apply to the contract in question. The difference in the parties' respective positions placed the foundation of the discipline in issue. Accordingly, I shall first summarize each of the respective parties' position regarding the bevel operator specifications, and then proceed to consider related evidentiary details which I relied upon in arriving at my conclusions regarding the foundation of the discipline and the question of poor work performance.

SUMMARY OF UNDERLYING FACTS OF THE RESPECTIVE CASES:

[3] The Employer's case contained six elements relating to the nature of the conduct in issue and the penalty imposed. The first element was accessing the bevel specifications. The bevel machine operators were to access the contract bevel specifications on the grade specification screen in the computer (see Exhibit A6), and if the specifications on that screen contain a reference to the existence of a note regarding the bevel root face the operator must then access the screen with the grade notes (see Exhibit A7) and apply the more particularized specifications from that screen to the work in question. Alternatively, the bevel operators could access the Inspection and Test Checklist (ITC) screen in the computer. Both of those procedures show the grade specifications were to be 2/64 inches to 6/64 inches for 5% of the circumference (weld area) and 4/64 inches to 6/64 inches for 95% of the circumference. Second, Sonia Dirnberger, the Mill Manager, had walked by the bevel machine the Grievor was operating during the morning and had instructed the Grievor to "check his bevels". Third, sometime later the Grievor produced six pipes in a row

that failed to meet the contract specifications. Fourth, when the failure to meet the specifications was drawn to the Grievor's attention he did not accept responsibility for the error and tried to blame the inspectors at the finishing bench for any alleged error. Fifth, the Grievor had received a written warning for poor work performance relating to a contract with identical specifications nine months before the incident in question. And sixth, the Grievor should have known how to access the specifications required because he had previously worked as an inspector at the finishing bench, had been operating a bevel machine in the twenty-four inch mill for some time, and was a long time employee with considerable experience as a bevel operator in the spiral mill.

[4] The case for the Union was that the Grievor, a twelve year employee, understood the specifications for the contract were contained in the initial grade specification computer screen (Exhibit A6), and that the reference on that screen to the note was only for the use of the finishing inspectors. Accordingly, his testimony was the bevel specifications required were 2/64 inches to 6/64 inches, and the six pipes in question met with those specifications. Secondly, two other bevel operators and a leader had the same understanding regarding accessing the specifications for contracts. That is, they understood the bevel operators need only comply with the specifications on the initial grade specifications screen (Exhibit A6) and need not make any further reference to any related notes on a subsequent screen. Third, the Grievor acknowledged being previously disciplined for poor work performance; however, he could not recall the details of the matter. Fourth, the bevels on the opposite end of the six pipes in question did not meet the specifications the Employer asserted to be the correct ones; however, the bevel operator responsible for those was not disciplined.

[5] The evidence of the leader Jeff Pennington was particularly significant. He is a sixteen year employee who has worked all the positions in the twenty-four inch mill except sonics. He knows how to run the bevel machines. His current position of leader in the twenty-four inch mill involves general trouble shooting, training, and filling in positions when there is an employee shortage. He testified he trains new bevel operators to rely on the grade specifications screen (Exhibit A6) only. He understood the grade note screen (Exhibit A7) was for the use of the final bench inspectors. He stated that the grade specification screen was "the bible" for the bevel operators. While he was aware of the Inspection and Test Checklist computer screen (Exhibit E12) he stated he showed a paper copy of it to the bevel operators during training, but the screen was not easily located or accessed on the computer. The latter fact was confirmed by the evidence of bevel operator Mike Goetz.

ARGUMENT:

The Position of the Employer:

[6] Counsel for the Employer submitted the case was clear cut. Six pipes in a row bevelled by the Grievor failed to meet the required specifications. This was so notwithstanding the earlier warning by the Mill Manager to check his bevels. Then when confronted with the unacceptable work the Grievor failed to accept responsibility for it and tried to deflect any blame to an error by the inspectors on the finishing bench. Failure to comply with specifications is not acceptable because of the significant implications such failure has in terms of correcting the deficiencies, or in the event deficient product is shipped.

[7] Of further concern was the Grievor's apparent careless attitude regarding work standards given the well-known efforts of the management team to improve production standards.

[8] Lastly the Employer was concerned the Grievor had demonstrated a careless attitude in general regarding appropriate and efficient operations, and complying with operational rules. This attitude was reflected in his previous discipline for work performance, discipline for leaving the finishing bench unattended thereby shutting down operations, and his failure to accept responsibility for the current matter.

[9] The Employer's case did not respond directly to the apparent problem of two other bevel operators and the leader who all followed the same approach as the Grievor did to ascertain the specifications. Those witnesses were questioned about the reference to the Inspection and Test Checklist document contained in the written training document; however, their evidence was they did not use that document; it was not readily accessible in the computer; and they were trained to rely upon the grade specification screen reflected in Exhibit A6. Nevertheless, Counsel for the Employer submitted the Grievor knew better or should have known better because of the length of his employment, his experience as an inspector on the final bench, his bevelling experience in the spiral mill, and the discipline related to poor bevelling where the specifications were identical to the ones in issue. Further in this regard, Counsel for the Employer submitted the evidence of the Grievor that bevel operators were only required to meet the specifications contained on the grade specification screen "strained credibility". She submitted he knew what the specifications were, and how to access them, from his experience in his other positions and put blinders on. Counsel stated the result of such action was a clear repetition of the poor work performance nine months prior to the incident in question.

[10] Authorities relied upon by counsel for the Employer were *Oceanview Development-Cemetery Division of Sci (Canada) Ltd. and Construction and Specialized Workers Union , Local 1611 (Vye Grievance)*, [2013] B.C.C.A.A. No. 59 (Emily Burke); *William Scott & Co (Re)*, [1976] B.C.L.R.B.D. No 98; [1977] 1CanLRBR 1 (BCLRB - Weiler, Alcott and MacDonald); *Communications, Energy & Paperworkers Union of Canada, Local 132 v. Korex Don Valley (Sobolewski Grievance)* [2007] O.L.A.A. No. 320; 90 C.L.A.S. 28 (Arb- Jesin); *United Steelworkers of America, Local 3257 v. Steel Equipment Com. (Unjustified Discharge Grievance)* [1964] O.L.A.A. No. 15, 14 L.A.C. 356 (ON Arb. – Reville, Park and White); and *Communications, Energy and Paperworkers Union of Canada, Local 341 v. Interprovincial Cooperative Ltd (Grant Grievance)* [2013] M.G. A.D. No. 1, 229 L.A.C. (4th) 404 (Man. Arb. – Graham, Q.C.).

The Position of the Union:

[11] The Union Representative raised the issue of the Employer discriminating against the Grievor. He relied upon the fact that Mr. Kumar, who was the bevel operator for the opposite ends of the six pipes in question also failed to meet the specifications contained in the grade notes or the Inspection and Test Checklist but was not subject to any disciplinary process.

[12] The second issue raised by the Union Representative was the differing views of management and employees regarding the applicable specifications and the reference source for the specifications. He argued these differences indicated a serious breakdown in training and procedures.

[13] The authorities relied upon by the Union were *AGT Ltd. and I.B.E.W., Loc. 348* [1995] C.L.A.D. No. 1223, 52 L.A.C. (4th) 415 (Can Arb. – Sims, Q.C., Rogers, Armstrong); *Canada Post Corp and Canadian Union of Postal Workers (Berdan Grievance, CUPW 566-95-00457* [1999] C.L.A.D. No. 42, [1999] D.A.T.C. no. 42 (Can. Arb. – Brunner); *Canada Post Corp and Canadian Union of Postal Workers (Nicholson Grievance, CUPW 626-95-3-12712G)* [2000] C.L.A.D. No. 58 (Can Arb.- P.C. Picher).

THE LAW:

[14] When it comes to matters of discipline, there are usually two basic issues: did the grievor engage in the alleged misconduct; and was the penalty imposed reasonable. Were it not for the nature of the case advanced by the Union, the witnesses for the Employer would have satisfied me the Grievor did engage in the misconduct; and it would have further satisfied me the three day suspension was reasonable.

[15] However, the case presented on behalf of the Union raises two very fundamental preliminary principles regarding the appropriateness of discipline in the first place. The most significant requirement before discipline can be imposed is that a clear rule known to the employees has been breached. The second fundamental requirement is that the rule be enforced consistently; or in other words, that all employees be treated fairly and that there is no discrimination in the treatment of employees. These two principles arise from *KVP Co. Ltd. and Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73; (1965), O.L.A.A. No. 2 (Robinson).

[16] The *KVP* case enunciates the fundamental requirements for discipline pursuant to Employer rules. Those well-accepted criteria regarding the enforceability of rules and policy made by employers are:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

[17] Surely the same principles enunciated in that case, where applicable, must be brought to bear upon employer rules and expectations regarding very particular work performance standards such as those involved in this case. The primary issue arising from the *KVP* principles in this case is whether the specifications and or the method of accessing them was clear and unequivocal, and that information was brought to the attention of the employee, thus allowing the Employer to discipline for failure to meet the specifications or for poor work performance.

[18] The principle that the rule in question should have been consistently enforced by the company from the time it was introduced is also relevant. The evidence was the Employer failed to impose any discipline upon Mr. Kumar who had also failed to meet the bevel specifications.

[19] These two fundamental principles and why they are relevant to the case at hand shall now be discussed.

1. The question of a clear rule and the Grievor's knowledge of it:

[20] At the outset I differentiate this situation from a case where the conduct in issue is wrong, and employees should know it to be wrong without the need to refer to a specific rule. Obvious examples of such conduct include intoxication while at work, dishonesty, serious breaches of trust, fraud, theft and assault. (See generally Palmer & Snyder *Collective Agreement Arbitration in Canada*, para. 10.97)

[21] I also understand enforcing compliance with work standards was not the underlying reason for the development of the *KVP* principles. Nevertheless, the underlying reason for the development of the *KVP* principles was based upon the premise of fairness. That is, before employees are subjected to discipline, it is only fair that they know the rules they are expected to comply with, that the rules in question be reasonable, that serious consequences of the breach of any rule be made clear, and that all employees be treated similarly – the latter being another measurement of fairness.

[22] It follows naturally that when employees are working in an environment where precise work standards – such as the precise bevelling specifications in this case - are to be met or complied with, it must be clear to employees what those standards are and how to locate or ascertain them. In other words, there must be a clear rule, or method of locating them or ascertaining them. This may be accomplished through any number of means – such as an employer protocol that provides specific instructions to employees at relevant times, training, written or verbal directions, and may even include a protocol that where uncertainty exists an employee should seek clarification through a group leader, foreman or other knowledgeable and responsible person.

[23] However, the facts in the case at hand have demonstrated that three bevel operators (including the Grievor), and a designated and respected leader who trains bevel operators and was a former bevel operator, all did not know how to properly access the correct specifications or misunderstood what the correct specifications were. Without evidence to the contrary, the only conclusion to be drawn is that there was no clear rule or protocol for ascertaining the correct specifications known to the employees, including the Grievor. But even more glaring, based upon the evidence of those four individuals and without evidence to the contrary, is the conclusion that the applicable specifications were to be found on the grade specification screen of the computer, as reflected by Exhibit A6, and there was no need to make any further reference to the grade notes that were indicated to exist or to the Inspection and Test Checklist.

[24] I appreciate the Employer has questioned the credibility of the Grievor's testimony in this regard, and that it has also submitted the training documentation and challenged the witnesses regarding that material. I shall address these matters below. However, in light of the totality of the evidence, I have concluded there was not a clear and unequivocal rule or protocol regarding the precise work standard or specifications that had been brought to the attention of employees, including the Grievor, to provide a basis for discipline.

Employer's evidence to the contrary:

[25] The evidence to the contrary relied upon by the Employer included a written training document; the evidence of Sonia Dirnberger and Jeffrey Cran regarding accessing the specifications, the Grievor's work history, and the earlier written warning to the Grievor for poor work performance where the specifications were the same as those at hand, and the rebuttal evidence of Mr. Cran regarding the previous disciplinary incident.

[26] The training document (entitled "24 Inch Mill – Bevellers", Ex. E11) stated: "3.1 Responsible for producing quality bevels, lands and end squareness, per the Inspection and Test Checklist (ITCL)." The applicable Inspection and Test Checklist for the relevant contract (Ex. E12) did contain the bevel root face specifications of 1/16 inch +/- 1/32 inch for 5% of circumference; and 1/16 inch +1/32 - 1/32 for 95% of circumference consistent with the evidence tendered by the witnesses for the Employer. The training document also contained the following information at number 6 entitled "Documentation":

- 6.1 Specifications/grade notes
- 6.2 ITCL [Inspection Test and Checklist]
- 6.3 Beveller Operators Tolerance Report CIP

[27] Notwithstanding the reference to the Inspection and Test Checklist in the training documents which would have recorded the specifications relied upon by the Employer, I have discounted its relevance to the issue of the bevel operators knowledge of that document as a resource. Firstly, while the evidence demonstrated it was in the computer, the evidence of bevel operators and Mr. Pennington was that its location was not readily available and that they were not trained how to access it. During their actual training they were simply shown a paper copy of the screen document. Furthermore, the evidence of the Grievor, the two other bevel operators and leader Jeff Pennington was that during training they were shown how to access the computer screen titled Grade Specification – TW 169 (Ex. A6), which contained the specifications relied upon by the Grievor, the other two bevellers, and the leader/trainer, being:

Root face: - land (64ths inch) 2.000 to 6.000/64

Although that document does contain a reference to grade notes, the evidence of the Grievor, the other two bevel operators and the leader was that they relied only upon the specifications in Exhibit A6 and were not required to go further or refer to the notes. The Grievor and Mr. Pennington also stated they understood the notes were only for the use of the inspectors. Lastly, there was the fact that immediately following the incident in question, steps were taken by the Employer to give instructions to the bevel operators on the correct process to access the applicable specifications, with particular reference to the grade notes. One inference from that fact is there was a concern that it was not just the Grievor who suffered from a misapprehension of the rule or process. However, very little weight has been placed on this fact because it is also consistent with prudent managerial action to ensure accurate and correct operations.

[28] I do not find the evidence to the contrary sufficient to outweigh the evidence of the Grievor, the two other bevel operators and the leader-trainer that according to their actual training they were told and understood they need only refer to the Grade Specifications Screen (Exhibit A6), that they need not take into account any other information including any reference to notes, and that any reference to notes was there for use by the finishing inspectors only.

[29] The aforementioned evidence by the witnesses for the Union also negates the bevel operators were aware of the rule and process for ascertaining the specifications as testified to by the witnesses for the Employer.

Special knowledge of the Grievor:

[30] To fully consider the Employer's position, I now consider whether even though the other bevel operators and the leader did not know or understand the rule or process for ascertaining the correct specifications, the Grievor should have because of the length of his employment, his bevelling experience in the spiral mill, his work as a finishing inspector in the twenty-four inch mill, and his previous discipline for poor work performance involving a contract with identical specifications.

[31] The evidence does not persuade me on the balance of probabilities that the Grievor did know or understand the rule or process for ascertaining the correct specifications. There was no evidence tendered to suggest simple employment longevity would make that the case. The leader Mr. Pennington has been

employed for sixteen years at the Employer's operations and he did not know the correct rule or process. The Grievor had been employed there for twelve years.

[32] While the Grievor had been a bevel operator in the spiral mill for a number of years and the evidence was that the bevel process was the same, no evidence regarding the rule or process to access specifications for that bevelling was tendered. I have considered this in light of the different nature of the pipes (one being a corrugated pipe, the other being smooth; and the corrugated pipe having a weld spiralling along the length of the pipe, the other having a weld in the same position throughout the length of the pipe) and the unchallenged evidence of the Grievor regarding the four test points on the circumference of the twenty-four inch pipe being unrelated to the location of the weld. His evidence was the test measurements were taken at 0, 90, 180 and 270 degrees, which points are used regardless of how the pipe may have been rotated prior to the time of measuring.

[33] Lastly there was the evidence of the previous disciplinary action for poor work performance arising in relation to a contract with the same specifications. The Grievor acknowledge he had been disciplined but he could not recall the details of that matter. The other evidence regarding the discipline was contained in Exhibit A3, which stated there had been poor work performance because "Bevels did not meet spec when sent to the inspection bench. This resulted in pipe having to be sent back for re-bevel." That evidence was supplemented by rebuttal evidence from Mr. Cran, the General Foreman. Mr. Cran had very little specific recollection of the discipline itself. He did not have notes to refresh his memory. Mr. Cran stated that prior to testifying he went back to check the specifications for the contract then being worked on and he found them to be the same as in the contract at hand. Nevertheless, he was unable to recall what the nature of the defect of the Grievor's bevel in question was at the time. He testified about his usual approach to disciplinary matters and stated that he showed the Grievor the specifications on the "CIP screen". However, there was no evidence as to what the CIP screen was, whether it was part of the actual training of the bevel operators, or what information it contained. The only other evidentiary related reference to the "CIP screen" appears in the training document (Exhibit E11) under number 6, which simply states:

6. Documentation

- 6.1 Specifications/grade notes
- 6.2 ITCL [Inspection Test and Checklist]
- 6.3 Beveller Operators Tolerance Report CIP

Prior to Mr. Cran's rebuttal evidence, in keeping with the rule in *Dunn and Brown*, Counsel for the Employer told the Grievor in cross-examination that Mr. Cran would testify that he showed him the correct specifications to him on the computer to allow the Grievor to comment on that matter. The Grievor responded if that had been done, he would have been using the correct specifications since that time and on the date in question.

[34] While the matter of the knowledge the Grievor should have had as a result of the earlier discipline for poor work performance cannot be answered categorically, taking into account his evidence and that of the other Union witnesses measured against the evidence presented on behalf of the Employer, and the fact the Employer has the onus of proof in disciplinary cases, I have concluded the Employer has not established on the balance of probabilities that the Grievor knew, or should have known, the correct specifications to be used by the bevel operators and how to locate them.

[35] Accordingly, based upon the requirement of a clear and unequivocal rule regarding work standards that is known by the employee, the Employer has not established there was a basis for discipline. The grievance is upheld. The discipline is to be removed from the Grievor's record, and he is to be reimbursed for his loss of income and benefits relating to the three day suspension.

2. Consistent enforcement of the rule for the work standard:

[36] While it is unnecessary to address this matter in light of the above conclusion, I believe it will assist the parties to receive comments regarding the matter of consistent enforcement of rules. This issue may arise as a fundamental requirement of discipline, and it may also arise under the heading of mitigation of penalty. I shall restrict my discussion to how it pertains to one of the fundamental element of discipline, as that is how it was raised by the Union Representative.

[37] The fundamental principle that the rule be consistently enforced is predicated on the notion of fairness. That is, an employer is not permitted to be selective about whom it will discipline for a breach of a rule. The employer must either discipline everyone – and in this case that would include Mr. Kumar, the bevel operator at the other end whose bevels also did not meet the specifications, or no one. The explanation offered in the Employer's evidence for not disciplining Mr. Kumar was twofold: he did not have as much experience as the Grievor in operating the bevel machine, and he was a good employee. Those are not acceptable grounds for declining to discipline an employee who has also violated the rule or

performance standard. However, those certainly are reasons for imposing a different level of discipline than the discipline that might be imposed upon a long term employee who already had a discipline record. Another justifiable reason for not imposing discipline upon another employee would be if that person was still undergoing training relating to the specific work performance in question.

[38] Once again the notion that all employees involved in the same incident, rule violation or poor work performance matter receive discipline arises out of the tenet of fairness in the workplace. Employers must act at all time in a manner that is reasonable and fair, and that is therefore not arbitrary or discriminatory. It is not acceptable to discipline one person because he is not regarded as a good employee and fail to discipline another employee who is regarded as a good employee when both have engaged in the same misconduct. While the precise discipline need not be the same, it needs to reflect the employer's general disciplinary policy and or the measure of seriousness of the conduct.

[39] Had the Employer had a clear rule or protocol regarding the grade specifications for the bevels in question that the Grievor knew or should have known, then the grievance would have succeeded on this second ground – that the Employer failed to consistently enforce the rule or work standard.

DATED at Saskatoon, Saskatchewan this 14th day of November, 2013.

 F. Chad Smith
Francine Chad Smith, Q.C.
Arbitrator