

*The Saskatchewan Employment Act*

IN THE MATTER OF AN ARBITRATION OF THE DISCIPLINARY GRIEVANCE OF Shane Bork  
PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

Between:

EVRAZ INC. NA CANADA

- and -

UNITED STEELWORKERS, Local 5890

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**AWARD**

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Arbitrator: Francine Chad Smith, Q.C.

Appearances: For the Employer: David T. McDonald, Counsel  
For the Union: Sonny Rioux, Union Representative

Date of Hearing: April 8<sup>th</sup>, 2015 REGINA, Saskatchewan

Date of Decision: May 12<sup>th</sup>, 2015

# INTRODUCTION:

[1] This case involves a four week suspension for repeated acts of insubordination arising in the context of a brief verbal and physical altercation. The material facts in the case include a complaint by employees that was unaddressed, the failure of some employees to perform one of their tasks, an upset employee, a series of questionable reactions from a manager, and issues of credibility.

[2] The factual sequence demonstrated a negative chain reaction that might have been halted or turned around at a number of points. Sadly, it brought to mind the proverb *For Want of a Nail*:

*For want of a nail the shoe was lost,  
for want of a shoe the horse was lost,  
for want of a horse the knight was lost,  
for want of a knight the battle was lost,  
for want of a battle the kingdom was lost.  
So a kingdom was lost—all for want of a nail.*

Naturally, it is in hindsight that this proverbial truism becomes obvious. The message in the proverb is seemingly small actions, or inaction, have significant impact.

[3] Here failure to address a standing complaint by the brick crew regarding repeated failures of the furnace workers to clean the EBT platform, resulted in the Grievor embarking upon a course of action that led to a forceful exchange between him and his Manager. The Manager's failure to remain in control, or otherwise deal effectively with the Grievor, prolonged and escalated the exchange to a level where some physical contact occurred. The Grievor was suspended for four weeks as a result and precluded from working on the brick crew.

[4] There may or may not have been a ready solution to the ongoing complaint of the brick crew. However, it appears the issue was not addressed. No changes were made; nor was the brick crew told whether any change was possible or not. The value of communication in the workplace, be it positive or negative, should never be underestimated.

## FACTS:

- [5] The Grievor is an eleven year employee, currently working as a heavy plate processor, with the Employer, Evraz Inc. NA Canada, a large diverse steel mill in Regina. At the material time he was working as a member of the brick crew in the Refractory at the mill. The Refractory manufactures products to line vessels for carrying molten steel.
- [6] On April 17, 2014 around 6:30 or 7:00 am, the brick crew was preparing to do a sleeve change on a furnace. This procedure is done once a week or so. The brick crew conducts the sleeve change from the eccentric bottom tapping platform (the "EBT") that lies under and surrounds each furnace. As they were getting organized to attend to the sleeve change they saw the platform had not been cleaned by the furnace crew. The brick team were not going to begin the work because the dirty platform presented a safety issue and cleaning it was not part of their job duties.
- [7] Although it had not been uncommon for the brick crew to clean the platform, it was the responsibility of the furnace workers to do so. The EBT should be cleaned at least once a day, if not more often. The failure of the furnace workers to clean the platform had been raised with management "time and time again". Finally, on this occasion the brick crew, apparently frustrated with the situation, decided they were not going to clean the platform and the Grievor decided to speak to management about it.
- [8] The Grievor went to the Melt office on the third floor of the building. Their immediate supervisor was on sick leave. Mr. Frank Elek, a member of the bargaining unit, was the acting supervisor, and that is with whom the Grievor first raised the issue. Mr. Elek referred the Grievor to Mr. Jim Burns, the Manager of the Yard and Refractories, and the Grievor went to his office.
- [9] The evidence of what occurred at Mr. Burns' office and after was not consistent, although there was agreement with respect to the generalities. That is, the evidence demonstrated the Grievor was upset when he arrived at the office and spoke in a raised voice when explaining the problem. Mr. Burns replied with a

raised voice. He told the Grievor to grab a banjo (shovel) and clean the platform. The Grievor responded, "Fuck you. I am not going to do it". Mr. Burns replied, "Fuck you, you are going to do what you are told".

[10] As the Grievor left the office and was heading to the hallway, Mr. Burns followed him out and told the Grievor to get a shop steward before he goes home. Loud exchange between the men continued as they were in the hallway. At a point some 20 to 30 feet from the Manager's office door, the Grievor stopped and turned, and some physical contact occurred. Other managerial personnel, having heard the noise and entered the hall way, quickly intervened and separated the two men.

*Mr. Burns' Evidence:*

[11] Mr. Burns testified he heard commotion before the Grievor arrived at his office. He heard the Grievor yelling and saying, "This is bull shit – stuff left on platform again". Then when the Grievor came into his office, and spoke to him in a raised voice, he responded similarly. By the time the men were in the hallway, Mr. Burns concluded the Grievor was insubordinate and a shop steward should be called. The two men continued shouting at each other down the hall for about 20 to 30 feet. The Grievor then turned and took a step toward him. Mr. Burns thought the Grievor "was coming over the top" and the Grievor's finger was about two inches from his face. So Mr. Burns moved his finger aside. The Grievor moved sideways out of his way. The Grievor then pushed him placing his hands on his shoulders. Mr. Burns lost his balance, stumbled and his glasses slid off the right side of his face.

[12] In cross-examination Mr. Burns was asked if he recalled the Grievor commenting about what would happen if he came close to him. Mr. Burns responded the Grievor said he was going to drill or hit him. He also stated he only told the Grievor once to clean the platform. He acknowledged he told the Grievor three to four times to get a shop steward, but he did not recall what response the Grievor made.

[13] Mr. Burns acknowledged the complaint about the platform not being cleaned was not new; it was the subject of continuing complaints.

*The Grievor's Evidence:*

[14] After first speaking with Mr. Elek, the Grievor went and stood in the doorway to Mr. Burns' office. Mr. Burns was standing and looking at his computer. The Grievor waited until Mr. Burns acknowledged him and then said, "Jim that fucking platform is a disgrace again". Mr. Burns responded, "Don't you fucking yell at me". The Grievor answered, "Jim, I am not yelling at you. I am upset this fucking platform is unsafe to work on again". Mr. Burns had still been standing looking at the computer and the Grievor had remained in the

doorway. Mr. Burns then walked up to the Grievor and “was in his face”, and said, “Get a banjo and clean it up.” It took the Grievor a second to figure out what a banjo was. Then he responded, “No that is not my job. It should have been cleaned up before I went down there.” Mr. Burns then yelled at the Grievor saying, “You will do what I tell you to”. The two men were face to face. The Grievor responded, “Fuck you”, and started to walk away. He testified he did not want to be in that situation so he was leaving to return to his work area. He wanted to get away from Mr. Burns.

[15] As the Grievor was walking toward the water cooler, Mr. Burns stood in his doorway. Then he started yelling at the Grievor, “You are fired; you are done; you are out of here.” That is when Mr. Burns said, “Get a shop steward and get in my office”. The Grievor stopped dead in his tracks. He was close to the water cooler at that time. He turned, looked at Mr. Burns and said, “Fuck you, I am going home”. Mr. Burns then walked from his doorway straight up to where the Grievor was. He came within two inches of his face, and said, in a moderate voice, “You are done here. You are so fucking done here”. The Grievor told him, “If you put your hands on me I am going to knock you down” or something to that effect. The Grievor testified he was not comfortable with Mr. Burns being in his face when he had tried to walk away. Mr. Burns responded, “Go for it”. The Grievor spun around and proceeded to walk down the hallway. He made it to the doorway of the co-ordinator’s office. The whole time the Grievor was walking down the hallway, Mr. Burns “was behind him, yelling things like get back here – you are not going anywhere”. The Grievor started worrying because Mr. Burn’s voice was coming up quickly. He stopped at the co-ordinator’s doorway and spun around. Mr. Burns was ‘already at [his] grill again’. The Grievor warned him again saying, “If you put your hands on me I am going to knock you down” or something to that effect. Then the person from the co-ordinator’s office became visible in his doorway. At that point Mr. Burns reached out and grabbed the Grievor’s coverall pocket, just below the collar. As soon as he did that the Grievor pushed him hard. His right hand was on Mr. Burns’ pectorals and his left palm rode up from the pectorals, hitting Mr. Burns’ face, knocking the right side of his glasses askew.

[16] Immediately after the Grievor pushed Mr. Burns away, the Grievor heard someone saying ‘whoa, whoa’, and the co-ordinator reached in and grabbed both of the Grievor’s arms. The Grievor said he then underhooked the co-ordinator, grabbed him by the collar and put him up against the door jam. The Grievor then said to the co-ordinator, “What in the fuck are you doing touching me? You saw him grab me”. The co-ordinator responded, “No I didn’t”. The Grievor then called him a fucking liar and just let him go. The Grievor then backed away. Someone else was calming the situation down. By that time the Grievor said he was really worked up.

*Evidence of Mike Preston, the Co-ordinator:*

[17] Mr. Preston was a member of the bargaining unit at the time the incident occurred. He was the acting co-ordinator at the time. He has since been hired into the position and is no longer a member of the Union. At all material times he reported to Mr. Burns.

[18] He testified he heard a lot of yelling when he was in his office. He could not make it out because it was around a corner; however, it was loud, and got louder and louder. There was profanity and more yelling between Mr. Burns and the Grievor. He recalled Mr. Burns saying, "Clean it up", and the Grievor responding, "It is not my job". He heard the Grievor say, "Fuck off" and Mr. Burns say something about going home. The Grievor responded, "No I'm not, fuck you", and he started coming down the hallway. Mr. Burns came after him and said, "Get into the board room and get a shop steward", or it might have been, "You are going to need a shop steward". At that point the Grievor was just past Mr. Preston's office and he stood up to see what was going on. Mr. Burns said, "You are not going onto the floor - you are going home". Then the Grievor turned around and walked toward Jim and said something like, "Don't touch me or I'm going to smack you". Then they went back and forth. The Grievor took a couple of steps back. That's when Mr. Burns said, "Get back here, you are going home, you are not going to the floor". The Grievor took off his glasses and hard hat. He said, "Don't touch me or I will smack you" – a couple of times. Just before the shove he took his glasses and hard hat off. At one point the Grievor went back toward Mr. Burns. Mr. Burns was saying, "Come back here". Mr. Burns put his hands up, as in response to someone saying 'stick 'em up'. That is when the Grievor shoved him. Mr. Preston then grabbed the Grievor's hands. The Grievor then grabbed him by the collar. Mr. Preston told him to calm down, that we would get a shop steward and things would be looked after.

[19] Mr. Preston testified the shove was forceful enough to knock Mr. Burns backwards. He testified in examination-in-chief that he did not see Mr. Burns lay hands on the Grievor. In cross-examination he acknowledged it could have happened, and acknowledged that his view was fairly limited. He stated he was not saying Mr. Burns did not hit the Grievor, that he was just saying he did not see Mr. Burns touch him.

[20] In cross-examination Mr. Preston also acknowledged the Grievor kept saying to him, "You saw him hit me, you saw, it is not right". He said he could not recall whether the word used was hit or touch. He also stated in cross, 'think he called me a liar after I said I did not see anything'.

*Other evidence regarding credibility:*

[21] The Union tendered evidence through Mr. Doug Page, Mr. Cory Prior, and the Grievor regarding Mr. Burns' conduct in the workplace. It was about incidents some time ago. In any event the thrust of that evidence was that Mr. Burns could be overbearing and antagonistic when dealing with employees. In this regard Mr. Burns candidly admitted he has a temper and when people yell at him he responds in that way himself.

*Evidence of Mr. Troy La Londe, the Senior Human Resource Manager:*

[22] Mr. La Londe testified about the investigation and the review of the incident by management. Initially the Employer considered dismissal. However, having concluded the incident could have been better addressed by Mr. Burns, they concluded a four week suspension was more appropriate.

[23] Management did take into account its zero tolerance policy for violence in the workplace and its philosophy that safety is to be the first consideration at all times in the workplace. He reviewed how these positions have been conveyed to all employees. Management's concerns included the repeated times the Grievor was insubordinate throughout the incident - including the Grievor's refusal to clean the platform, the language used, his refusal to go into the boardroom where the incident could have been neutralized, and the physical element of the incident. Management concluded the physical element of the incident was the most egregious. It had concluded the incident occurred over a time span of thirty seconds to two minutes.

[24] Regarding the conduct of Mr. Burns, Mr. La Londe acknowledged his conduct was not excusable. He agreed Mr. Burns could have better neutralized the emotional level; however, he was not prepared to say Mr. Burns provoked the Grievor. He also testified that Management had not received any complaints regarding Mr. Burns.

[25] From Management's perspective, Mr. La Londe observed the Grievor arrived upset, loud and in an aggressive state of mind at Mr. Burn's office; he refused to attend to the work when told to do so; he refused to get a steward when told to do so, and he continued to warn Mr. Burns saying, "Don't get near me or I will hit you". Then the Grievor removed his hard hat and glasses before striking Mr. Burns.

[26] Mr. La Londe acknowledged a sleeve change while the platform was dirty would have been a safety issue; however, he did not understand the Grievor was raising the furnace workers' failure to clean the platform as a safety concern. Mr. La Londe also noted the issue was not one that a manager would normally address, and that the Grievor had other options available to him, which included going to the co-ordinator or to the shop steward.

[27] Lastly, Mr. La Londe testified the Grievor's period of indefinite suspension pending Management's disciplinary decision was included in the penalty of the four week suspension.

## ARGUMENT:

### The Position of the Employer:

[28] Counsel for the Employer submitted the foundation for the discipline was insubordination and the aggressive conduct of the Grievor which escalated the exchange with his manager into a physical altercation. He also submitted the Grievor's removal from the brick crew was not an issue before the arbitrator. Counsel argued it was clear the Grievor was insubordinate on Apr 17: he refused to follow the direction of his manager. It was also clear the Grievor was the one who escalated the incident into the physical altercation. Therefore discipline was warranted; and the four week suspension was warranted.

[29] This is not a review of Mr. Burns' management style. It is not the arbitrator's job to determine if Mr. Burns should have been disciplined or suffered consequences. Even if the Union wants to make this a case about Mr. Burns' management style, he admitted he yells and swears. The evidence led by the Union to suggest he is a bully and harboured animosity toward the Grievor, was profoundly weak, the incidents having occurred a considerable time ago. There had been no complaints about Mr. Burns. Even if the Union's allegations about Mr. Burns were true, the Grievor had other options available to him. He could have contacted the shop steward.

[30] Counsel argued the Grievor had painted a picture of events that he thinks justified his behaviour. However, both Mr. Preston, who did not even know the Grievor, and Mr. Burns, testified it was the Grievor who first physically contacted Mr. Burns and that Burns had not initially touched or struck the Grievor. Where their evidence conflicts with the Grievor's, their evidence should be preferred. The Grievor's allegation that they lied is very serious.

[31] Mr. Burns' failure to better control or to de-escalate the situation does not excuse the action of the Grievor. Nevertheless, the Grievor does not understand his behaviour was unacceptable; he feels he has done nothing wrong. That is a sufficient reason why a four week penalty is appropriate.



[32] When assessing the credibility of witnesses, an arbitrator must have reference to the test enunciated in *Faryna and Chorny* to arrive at conclusions based upon the preponderance of probabilities. When one reviews the contemporaneous investigative statements, the evidence is consistent with those statements. Accordingly, the arbitrator must make the same findings the Employer did.

[33] *Faryna and Chorny* requires the arbitrator to consider all the evidence to see how “it hangs together”. That includes hearsay evidence: what Mr. La Londe was told and the statements provided to the Employer. Arbitrators can and do accept hearsay as corroborating evidence. Counsel relied upon the written statement of Frank Elek, which states the Grievor took off his glasses and hard hat before he shoved Mr. Burns, to demonstrate the Grievor’s intent to strike Mr. Burns.

[34] A workplace cannot function if the employees refuse to follow the directions of management, or if the employees threaten management. There was no evidence that Mr. Burns had a history of touching or otherwise assaulting employees. The Grievor’s statements “If you touch me, I will deck you” were not warnings; they were unwarranted remarks and they were threatening.

[35] Counsel submitted Mr. Preston’s evidence was credible. He was then a member of the bargaining unit who intervened to save Mr. Burns. He also submitted Mr. Burns was a credible witness: he acknowledged his temper, and that he swears and yells. When contradictory evidence of the Grievor was raised with him, his reply was simply, “Well I don’t control what the Grievor’s evidence is, or what he says”. Counsel submitted that response by Mr. Burns indicates his evidence had a ring of truth.

[36] Lastly, the brick crew was capable of cleaning the platform and have done it in the past. The evidence was it would have taken two men approximately five minutes to clean it. So it was clear the Grievor had created the circumstances that led to his suspension, and he was fortunate that he was not dismissed.

[37] In addition to *Faryna and Chorny*, Counsel for the Employer relied upon the following authority: *Cannet Freight Cartage Ltd. v. Teamsters Union, Local 419*, 35 L.A.C. (4th) 314; *MacDonalds’ Consolidated Ltd. v. R.W.D.S.U, Local 580*, 14 L.A.C. (4th) 379; *Canamera Foods and UFCW, Local 248-P3, Re*, 60 C.L.A.S. 80; *Rocanville Potash Employees Assn. v. PCS Potash Rocanville*, 98 C.L.A.S. 345; and *UFCW, Local 318W and Molson Breweries (Lloyd), Re*, 58 C.L.A.S. 334.

## The Position of the Union and the Grievor:

[38] The Union Representative submitted the Grievor's Manager, Mr. Burns, is a very antagonistic individual. He relied upon the evidence of Mr. Page, Mr. Prior and the Grievor to support this position. He submitted Mr. Burns' management style demonstrates a lack of respect for the employees. When the Grievor said to him he was not yelling at him, he was yelling because he was upset, Mr. Burns' reaction was to start yelling at him instead of trying to understand what the problem was.

[39] Turning to the issue of credibility regarding what prompted the Grievor to push Mr. Burns, The Union Representative first commented upon the Employer's failure to call Mr. Frank Elek, one of two witnesses to the incident. He relied upon the inference Mr. Elek's evidence would not be favourable to the Employer. Secondly, he submitted it was not Mr. Burns' personality or style to hold up his hands indicating surrender as the response to 'stick 'em up' would indicate. This evidence by Mr. Burns was not credible. However, on the other hand, if someone was reaching out to you it is understandable that you would push him away. It is not reasonable that the Grievor would have pushed Mr. Burns away if his hands had been up in the air and not in a threatening position. Whether or not Mr. Burns grabbed the Grievor, Mr. Preston was clear in cross-examination that he did not see Mr. Burns grab the Grievor because his view was blocked – not because it did not happen.

[40] That Mr. Burns either touched the Grievor or moved into his personal space, is consistent with the lunch room incident. The evidence regarding that incident was that Mr. Burns had disturbed the employees during their lunch break, calling them "lazy dogs", telling them to get up and generally berating them. When the Grievor answered his phone and was disregarding Mr. Burns, Mr. Burns then singled him out for abuse. Then the Grievor left the lunch room to get away from Mr. Burns, sat down outside and began smoking. Mr. Burns followed him out and stood over him inside his personal space thus continuing to annoy him. At that time, when the Grievor stood up, the two men were uncomfortably close, face to face. Mr. Burns was telling him to get a steward; however, the Grievor did not and the matter was not taken any further.

[41] The Union Representative submitted notwithstanding the objection by Counsel for the Employer to the colourization of Mr. Burns as a bully, he is in fact a bully. He uses his position to yell and swear at employees, and to call them names. Such conduct is bound to have a negative impact on employees. The Union Representative also took exception to the evidence of Mr. La Londe regarding two matters: that the Employer determined that Mr. Burns did not inflame the situation; and that the Employer described Mr. Burns' responsibility as simply failing to neutralize the situation. He argued there was no question Mr. Burns

inflamed the situation. Furthermore, he submitted Mr. Burns was so out of control he lost his authority as a manager to direct the Grievor as was discussed in the *Newmont Mines* case.

[42] The Union Representative argued there was provocation operating in this matter. The Grievor and his colleagues had a sense of injustice regarding what was going on in the workplace. They had asked the Employer repeatedly to address the issue of the furnace workers failing to attend to their job duty of cleaning the platforms, but nothing was done. Then there was also the sense of injustice stemming from Mr. Burns' role in the incident that gave rise to the discipline.

[43] Lastly, the Union Representative submitted under the circumstances the Grievor was entitled to remove himself from the situation as opposed to being subjected to further interaction with Mr. Burns in the conference room. In *Re Howe Sound Forest Products* the question was whether the employee's action of pushing the supervisor to enable him to exit the trailer was disproportionate to the provoking conduct of his supervisor. If it was not disproportionate, the employee could have a complete defence to insubordination.

[44] The authority relied upon by the Union included: *Faryna and Chorny; Newmont Mines Ltd. and Canadian Association of Industrial, Mechanical and Allied Workers, Local 22*, [1982] B.C.C.A.A. No. 103, 3 L.A.C. (3<sup>rd</sup>) 396 and the *Re Howe Sound Forest Products* case discussed therein; *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) v. Aeroguard Eastern Ltd. (Luckman Grievance)*, [2008] C.L.A.D. No. 306; *Calgary (City) v. Calgary Civic Employees, Local 37 of the Canadian Union of Public Employees (McGillis Grievance)* [2014] A.G.A.A. No. 40; *Granville Island Hotel and Marina Ltd. and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW- Canada), Local 3000* [1995] B.C.L.R.B.D. No. 169; *Re Freeman Decoration Ltd. and L.I.U.N.A, Local 506* [1965] O.L.A.A. No. 439, 43 C.L.A.S. 296; and *Bell Canada v. Communications, Energy and Paperworkers Union of Canada (Browne Grievance)* [2002] C.L.A.D. No. 635.

## ISSUES:

[45] The issues raised by the evidence and argument are:

1. Was discipline warranted;
  - i) Assessment of credibility to determine the facts;

- ii) Whether a manager can lose authority to direct an employee; and if so, did the Manager do so here;
2. Was the penalty of a four week suspension within the appropriate range given the conduct; and
3. Is it just and reasonable to substitute a lesser penalty under all the circumstances;

## DECISION:

[46] Overall I find the evidence of the Grievor to be preferred where it conflicts with either that of Mr. Burns or Mr. Preston. Under the circumstances the insubordination of the Grievor is limited to his refusal to clean the platform. Given the harassing and threatening conduct of the Manager, his further instructions to the Grievor were without managerial authority and therefore the Grievor's failure to comply with them did not amount to insubordination. Furthermore, the Grievor's action of shoving the Manager was a proportionate response to the Manager's conduct and for that reason does not constitute a ground for discipline.

[47] There was provocation operating in relation to the refusal to clean the platform. However, the balancing of the mitigating circumstances, which include the serious nature of insubordination coupled with objectives of civility and avoidance of violence in the workplace, persuaded me that it is just and reasonable to substitute a two week suspension for the four week suspension imposed by the Employer.

## REASONS FOR DECISION:

Was Discipline Warranted:

*Assessing credibility to determine the facts:*

[48] There are three matters of fact where the conflicting evidence is material. The first pertains to the Grievor's state of mind and demeanour in arriving at Mr. Burns' office and the initial exchange between him and the Grievor. The second is whether the Grievor removed his glasses and hard hat before pushing Mr. Burns.

Related to that, is the third, whether the Grievor pushed Mr. Burns without cause, or whether the Grievor responded to protect his personal space or to protect himself.

[49] The leading authority in matters of credibility is *Faryna and Chorny*, [1951] B.C.J. No. 152; [1952] 2 D.L.R. 354, p 357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistence with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story or a witness in such cases must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth.

[50] Mr. Burns testified prior to the Grievor arriving at his office he had heard some yelling to the effect, "This is bull shit – stuff left on platform again". Then Mr. Burns went on to testify the Grievor proceeded to yell at him for ten to fifteen seconds. Whereupon he responded by yelling back telling the Grievor to grab a banjo and clean up the platform. And then, of course, the argument was in full swing.

[51] However, the Grievor's evidence was different. He stated he arrived at Mr. Burns' office and remained in the doorway until Mr. Burns noticed he was there. He then began, in a raised voice telling Mr. Burns about the problem with the dirty platform. According to the Grievor, Mr. Burns told him to stop yelling at him. The Grievor responded, "Jim, I am not yelling at you. I am yelling because I am mad about the situation". Mr. Burns denied that was said.

[52] No one other than Mr. Burns testified about the Grievor yelling, or any yelling prior to the engagement between Mr. Burns and the Grievor. Mr. Elek, with whom the Grievor had first spoken, was not called to testify. Mr. Preston did not testify about any yelling prior to the engagement of Mr. Burns and the Grievor. His office was located adjacent to Mr. Elek's office and it is likely that both men would have heard had the Grievor been raising a ruckus prior to arriving at Mr. Burns' office.

[53] Mr. Preston testified he first heard the Grievor and Mr. Burns yelling back and forth in the hallway. He heard the Grievor say several times, "Don't touch me or I will smack you". He said the Grievor removed his hand

hat and glasses and then shoved Mr. Burns. He immediately intervened by reaching over and grabbing the Grievor's hands. The Grievor broke his hold.

[54] In cross-examination the Grievor denied that he removed his glasses and hard hat. He stated that he shoved Mr. Burns on the chest with both hands and his left hand slid up Mr. Burns' chest to his face resulting in the right side of Mr. Burns' glasses being knocked askew. The next thing he knew someone had reached over and grabbed his hands. He said he broke the hold by rotating his hands and arms out and then grabbed that person, who turned out to be Mr. Preston, by the collar and held him against the wall.

[55] I do not accept the contents of any written statements the Employer collected as evidence of the truth of the facts. It is not reliable because it has not been subjected to the rigours of cross-examination. I do accept the Union's position that failure by the Employer to call Mr. Elek, who witnessed some of the incident, carries with it the inference that his evidence would have been prejudicial to the Employer in keeping with *Murray and The City of Saskatoon*. Not only was Mr. Elek the first management person the Grievor spoke with about the state of the platform, but his office was located in the proximity of the offices of both Mr. Burns and Mr. Preston, and he apparently did hear and or observe some of the interaction between Mr. Burns and the Grievor.

[56] Where the evidence of Mr. Burns and the Grievor conflicts, I find the evidence of the Grievor to be more credible. He openly acknowledged what he did and made no attempt to slide over any fact that was not in his favour. Furthermore, some of his evidence, such as the number of times he warned Mr. Burns not to touch him, was verified by Mr. Preston. Then the issue of whether or not Mr. Burns grabbed him before the Grievor pushed him away is consistent with the Grievor's evidence about repeated warnings, and that Mr. Burns was quickly moving into his space in the hallway. It is quite unlikely that someone who was anxious to leave, would turn around and shove someone who had his hands in the air in a position of surrender. There was the immediate reaction where upon being redirected by Mr. Preston, the Grievor said, "You saw him grab me".

[57] Lastly, I am concerned about Mr. Preston's evidence that the Grievor removed his hard hat and safety glasses immediately before shoving Mr. Burns. No one else testified to this and the Grievor denied it happened. I am inclined to prefer the Grievor's evidence on this point over that of Mr. Preston's. If the Grievor had removed his hard hat and safety glasses, what happened to them? How could he have shoved Mr. Burns effectively with two hands while holding his hard hat and safety glasses? The Grievor testified that his left hand slid up to Mr. Burn's face and knocked the right side of his glasses askew. If the safety

glasses and hard hat were thrown or dropped on the floor in the hallway, would that not have been significant? Would those items not get kicked or stepped on when the men were separated?

[58] Overall this was a significant incident for the Grievor. Even at the hearing it was clear that he felt strongly about it. He appeared to have a firm recollection of the events, and it is reasonable that he did so for two reasons: first, he was upset over the fact the platform was dirty and the brick crew felt strongly that something should be done to ensure the furnace workers did their job of cleaning the platform; and two, because of the way he was treated by his Manager. In addition, as I have stated, the Grievor was candid to volunteer all aspects of his conduct that did not put him in a favourable light.

*Can a manager lose authority to direct an employee; and if so, did the Manager do so here:*

[59] The Union Representative submitted there are circumstances under which a manager can lose authority to direct an employee. I agree. An obvious example of such a situation is where an employee is directed to do something that is illegal, as noted in the *Newmont* case. Another example would be where an employee is directed to perform work that is unsafe. However, the *Newmont Mines* case, *infra*, goes further and observes the conduct of a manager may negate the authority to direct an employee.

[60] In the *Newmont Mines* case, Arbitrator Brown observed at para 18, "Provocative acts may, however, alter the nature of the conduct which would otherwise be insubordinate." In that paragraph, Arbitrator Brown states the essence of insubordination not only denies the authority of management, but it impedes operations. He then goes on to say:

For example, a foreman who directs an employee to perform an illegal act can hardly complain that non-compliance is insubordinate, because the order has no industrial purpose. The legitimacy of a supervisor's authority depends not only upon the goal sought, but also upon the method by which it is pursued. An order that is backed by a clenched fist to an employee's chin need not be obeyed, because threats of violence are foreign to the industrial enterprise. Similarly, a supervisor whose words severely provoke an employee - perhaps by sexual or racist harassment - is deprived of legitimate authority by this conduct, so that an insolent response is not insubordinate. In this way, severe verbal provocation totally excuses abusive language by an employee. The line is drawn at severe provocation because milder antagonism may weaken the legitimacy of a supervisor's authority, but does not completely obscure it.

[61] In that case the supervisor's behaviour was not found to be sufficiently extreme and as a result the Arbitrator concluded the employee warranted discipline. The egregious conduct of the supervisor consisted of

perching near the employee's work station to ensure he continued to work; speaking angrily to him; and swearing at him. Nevertheless, the arbitrator, relying upon *Re Douglas Aircraft* for support, concluded the employee's behaviour merits a lesser penalty, not because the supervisor was also at fault pursuant to the logic in the *Douglas* case, but because the supervisor's authority was weakened and therefore mitigated the action of the employee. In the case, the arbitrator concluded that while the supervisor was being abrasive, the employee was being more abrasive.

[62] In the case at hand, the Employer's position was there were three incidents of insubordination: the Grievor's refusal to grab a shovel and clean the platform, his swearing, and his repeated refusal to get a shop steward and attend in either Mr. Burns' office or the conference room.

[63] I agree the Grievor's refusal – in no uncertain terms, to clean the platform constituted insubordination. However, in my view, there was absolutely nothing to be gained by continuing the interaction given the high emotion of both Mr. Burns and the Grievor. Mr. Burns had a clear refusal to follow a direct order – even if that order was made in an uncivil manner. It is clear Mr. Burns was quickly losing control – not only of the situation, but of himself and of his ability to act rationally. It is hardly appropriate to have a manager chasing after an employee swearing and yelling threats of dismissal, and at the same time ordering him to get a shop steward to return and engage in a reasonable or productive discussion. Such discussion in the presence of a shop steward could have occurred sometime later in the day or on the following day. It appears to me to be grossly unreasonable to expect an employee to respond positively to such harassment. Accordingly, I do not blame the Grievor for walking away from Mr. Burns or for continuing his exodus under those circumstances. I cannot in all consciousness conclude the Grievor was insubordinate in trying to get away from this verbal harassment, which progressed into what the Grievor reasonably regarded as physically threatening behaviour.

[64] I have considered arbitral principles such as work now, grieve later; that a direction from an employer need not be delivered with a measured degree of politeness; and of course, that it is not for the employee to question whether or not the direction complies with the collective agreement. I have also considered that provocation by the employer can be, and is usually regarded as, a mitigating circumstance affecting the penalty.

[65] I have also had reference to *Collective Agreement Arbitration in Canada*, Palmer & Snyder, 5<sup>th</sup> ed., para. 11.74, where it is noted:



11.74 It has long been established that provocation provides one of the strongest defences to a charge of insubordination, and that it will be taken into account as a mitigating factor, *and possible as a complete defence to insubordinate conduct*. . . . Arbitrators will assess whether the response of the disciplined employee was proportionate to the provocation.

[Emphasis added]

[66] Not every incident of provocation by an employer should be regarded as a complete defence to a charge of insubordination. However, the Manager's conduct, following the Grievor's initial insubordinate refusal to perform the work, was in my view so egregious that it cannot be regarded as a proper exercise of managerial authority. The arbitral law regarding insubordination arising from failure to comply with a direction is clear: there must be a clear order understood by the employee; the order must be given by a person in authority; and the order must be disobeyed. It is inherent in those requirements that the order must be in furtherance of a legitimate business objective. In my view that was not the case here. The direction, given the circumstances in which it was given, was abusive and threatening. It was harassing conduct precluded by the *Saskatchewan Employment Act*, and may well have amounted to criminal threatening and assault. It served no useful purpose except to intimidate the Grievor and undermine his personal integrity. There was no reason the Manager was compelled to address the earlier insubordinate refusal to work at that point.

[67] Palmer & Snyder have made the following observation in their introduction to the chapter on insubordination at para. 11.1:

11.1 . . . It is viewed that the right to order employees to carry out orders without extended debate and without a loss of respect is central to the role of management. This right, however, is tempered with the appreciation that Canadian society does not accept that blind automatic obedience to order is consistent with its basic assumptions of acceptable behaviour. *Authority is not supreme; it must be based on reason*. . . .

[Emphasis added]

[68] In discussing the third requirement of insubordination – that the order must be disobeyed, the authors discuss the philosophy of the impact of disobeying orders in paras. 11.8 to 11.10. In para. 11.8 they note:

11.8 . . . What is important is whether the attitude of the employee is indicative of an unwillingness to accept the authority of the employer. The element arbitrators are trying to capture is evident in the following comment [from *British Columbia Hydro and Power Authority*, [2002] B.C.C.A.A.A. No. 415. 113 L.A.C. (4<sup>th</sup>) 337, pp. 360-61 (McPhillips)]:

. . . Mr. Crerar's activities have combined to create disruption for the clerical staff, embarrassment for Mr. Sharp in dealing with the President's office, frustration for Mr. Crerar's superiors in attempting to assign work and have meetings with their employees, and have posed symbolic and real threats to their ability to supervise and manage the workplace.

[69] The authors then go on to note at para. 11.9:

11.9 Although arbitrators do not condone employee conduct that flouts legitimate authority, they will not necessarily sympathize with managers who assert their authority in an arbitrary way.

It is consistent with arbitral principles generally that management rights arise and exist in the legitimate pursuit of its business objectives when it directs the workforce. That is, management's directions must be fair and reasonable, and must not be arbitrary or unrelated to business objectives. That is the requirement placed upon employers in hiring and promotional matters. Surely it is also appropriate to expect employers to adhere to this requirement in matters of discipline.

[70] With respect to the actions the Manager pursued following the Grievor's refusal to perform the work, I find they were not in furtherance of legitimate business interests, and accordingly, cannot be regarded as an order(s) given by a person in authority. Therefore the Grievor's refusal to comply with those orders or directions cannot form the basis of discipline.

[71] However, that is not the end of the matter. It remains necessary for me to consider other aspects of the Grievor's conduct which I shall do under the next heading.

Was Discipline Warranted:

[72] The conduct the Employer is left to rely upon includes the fact the Grievor appeared at Mr. Burns' office swearing at him and speaking in an abusive manner; refusing to clean the platform; threatening him; swearing at him; and shoving him.

[73] As discussed under the heading of credibility, I accept the Grievor's evidence that he arrived at Mr. Burns' office door and waited for Mr. Burns to acknowledge him. When Mr. Burns did so, the Grievor began to explain his problem in a loud voice and using the adjective "fucking" at least once, and possibly more often, in his opening remarks. While it was understandable that Mr. Burns yelled back, it was really not conduct one would like to see a manager engage in. Then the Grievor tried to explain he was not yelling at Mr. Burns; he was yelling because he was angry at the situation. While the Grievor was impolite in raising his voice, and certainly failed to address the issue in a respectful manner in the first instance, I cannot say that in and of itself constituted insubordination. Especially not given his explanation to Mr. Burns that he was not yelling at him; he was yelling because he was angry at the situation. This explanation was in my view approaching an apology.

[74] Once again Mr. Burns did not respond as one would hope a manager would by trying to calm the irate employee and have a discussion. Nevertheless, Mr. Burns did give the Grievor an order to clean the platform. Mr. Burns was provocative in the manner in which he did so. He got up close to the Grievor, ignored the fact the Grievor, and of course the whole brick crew, may have had a legitimate complaint, and told him to clean the platform. While this may not have been what the Grievor wanted to hear, it should have been obvious to him and the rest of the brick crew that they could not proceed with their work until this was done. I have assumed no furnace workers were at work then.

[75] The Grievor was wrong in refusing to do what obviously had to be done. The evidence indicated it would take two men approximately five minutes, or a little more, to clean the platform. The refusal based upon the reason it was not the brick crew's job, is a clear example of the requirement for employees to work now and grieve later. Such a refusal to attend to the cleaning may have impacted negatively on the operational plans for the Refractory and on other mill operations. Accordingly, there is no question the Employer had grounds for discipline arising from the Grievor's refusal to clean the platform.

[76] After the refusal in descriptive language, both men engaged in swearing and yelling back and forth. While there was provocation, the Grievor acted in an uncivil manner in continuing to engage in some swearing and yelling with his manager. However, after the refusal to perform the work, it was clear the manager was out of control. The Grievor was trying to get away, which was a sound response. Unfortunately Mr. Burns would not desist. He continued to chase and provoke the Grievor.

[77] I accept the Grievor's evidence that he stopped and turned near Mr. Preston's office because he concluded Mr. Burns was getting uncomfortably close to him. He had previously been warning Mr. Burns not to touch

him, or he would smack or drill him. While the last warning appears to have been reasonable, I wonder about the previous ones when Mr. Burns was following him – apparently at a distance, and giving him orders. I am prepared to conclude the preceding warnings, while in response to Mr. Burns' actions, may have been unnecessary and added some fuel to the flames. As a result, I conclude the Grievor's misconduct consisted of the refusal to perform work and in unnecessary warnings that he would drill or strike Mr. Burns if he touched him, thereby continuing to participate in the verbal altercation even while he was leaving. The latter matter not being overly significant because things had certainly fallen apart and reason was by then a scarce commodity.

[78] I find Mr. Burns did grab the Grievor and therefore the Grievor was entitled to shove him back. The Grievor's refusal to clean the platform may have ignited the incendiary incident; however, Mr. Burns, as a manager must bear most of the fault for its continuation and certainly for the fact the Grievor ended up shoving him.

#### Was a Four Week Suspension within the Appropriate Range Given the Conduct:

[79] I find a four week penalty was excessive for the refusal to perform the cleanup of the platform. In my view a two week, or possibly even a three week suspension would be at the high end of the penalty range for such conduct.

#### Is it Just and Reasonable to Substitute a Lesser Penalty under all the Circumstances:

[80] I have considered the mitigating circumstances in favour of the Grievor. There was provocation arising from the employer's failure to address the furnace crew's repeated failures to clean the platform pursuant to their job description; and the Employer failed to exercise a reasonable protocol in addressing the Grievor's complaint. As it happened, there were acting appointees in the more direct lines of authority: Mr. Preston was the acting co-ordinator and Mr. Elek was the acting supervisor. This may have been a contributing factor in the Employer's failure to address the long standing complaint regarding the furnace workers not cleaning the platform. There was also provocation arising from Mr. Burns' response to the Grievor's complaint, which included his forceful manner of giving the Grievor the direction to clean the platform and his failure to neutralize the high emotional state the Grievor was in.

[81] Those mitigating factors which favour the Employer's position include the fact that insubordination is a serious matter because of the potential interference with operations. Here the Grievor was in an emotional state in presenting the issue to Mr. Burns. He was frustrated, he raised his voice and swore. He was not unaware of Mr. Burns' volatile or bullying attitude. Naturally, the preferred course of action would have been to approach Mr. Burns with a steward in an attempt to address the situation or file a grievance. I have also considered that the appropriate conduct of all employees, including management, when in the offices apart from the industrial floor warrants a higher degree of civility.

[82] Deterrence is another factor that is significant. In this industrial setting, especially given the nature of the work and the workplace, I expect some rough language, and even raised voices, may be part of the culture. I recall a number of years ago – perhaps twenty or so, I noted in a decision arising in an industrial setting that the cultural norms were hardly on the same level as the governing norms at a tea party. However, as frequently noted and accepted universally by arbitrators, values and even legislation have changed considerably since then. Now we have legislation expressly prohibiting verbal and physical harassment in the workplace, which also place legal responsibilities on Employers to protect all employees, including management from such abuse. This Employer is focussed on safety in the workplace, and is also concerned with the related issue of violence. There can be no doubt, as this case demonstrates, that yelling, swearing and demonstrations of lack of respect may quickly lead to incidents of physical interaction. An Employer is entitled to take such considerations into effect when determining an appropriate penalty.

[83] I have found facts that were different from those relied upon by the Employer. The result being the Grievor's conduct was less egregious than the facts the Employer considered when it determined what penalty to impose. In particular I have found the Grievor's insubordination was limited to his refusal to clean the platform. While there were mitigating circumstances in his favour, those circumstances may be more or less balanced with most of the mitigating circumstances in favour of the Employer. If that were the case, I would have regarded a penalty of one week as being fair and reasonable for the one incident of insubordination. However, the deterrence from insubordination is vital to this operation, and the Grievor's emotional and loud approach to his Manager away from the work floor and in the office wing, was instrumental in what followed. Accordingly, I find it is just and reasonable under all the circumstances to substitute a lesser penalty of a two week suspension *in lieu* of the four week suspension imposed by the Employer.

[84] In conclusion, I should simply like to emphasize the high standards arbitrators expect from those persons in managerial positions having direct supervisory functions over the members of the bargaining unit. It is vital that they have the necessary patience and skills to address workplace complaints and difficult, volatile or

potentially volatile situations. Consider how the initial frustration of the failure to clean the platform might have been addressed in a timely manner. Would a decision, positive or negative, have prevented the Grievor's anger? What might have happened had the Manager expressed appreciation of the problem and calmly explained how under the circumstances the planned work could not be done if the brick crew did not clean the platform; perhaps otherwise stroked or sympathized with the brick crew; or scheduled a meeting to discuss the problem with the brick crew. What would have happened had he simply noted the Grievor's initial insubordination and let him walk away, and then subsequently disciplined him?

[85] . . . all for the want of a nail - one that might have been inserted at a number of opportunities to have prevented this physical incident.

[86] I also want to emphasize the current norm of a higher degree of civility that arbitrators expect of all employees with respect to their coworkers and management, even in industrial settings. It may be prudent for the Employer and the Union to remind everyone in the workplace of these expectations and provide them with some tools to assist them when frustrations, whatever the cause, arise in the workplace.

DATED at Saskatoon, this 12<sup>th</sup> day of May, 2015.

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