The Saskatchewan Employment Act

IN THE MATTER OF AN ARBITRATION OF THE DISCIPLINARY GRIEVANCES OF Marko Gustin
PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

Between:

EVRAZ INC. NA CANADA

- and –

UNITED STEELWORKERS, Local 5890

AWARD

Arbitrator: Francine Chad Smith, Q.C.

Appearances: For the Employer: David T. McDonald, Counsel
For the Union: Leslie McNabb, Union Representative

Date of Hearing: March 30th and 31st, 2015 REGINA, Saskatchewan

Date of Decision: May 3rd, 2015

INTRODUCTION:

[1] The Grievor, Mr. Marko Gustin, has grieved two separate, but related, disciplinary penalties by the Employer, Evraz Inc. NA Canada. The first penalty was a two day suspension arising from a crane accident. A second employee working with the Grievor had his discipline reduced after grieving it. The second penalty was dismissal following an altercation between the Grievor and the above-mentioned second employee. The facts the Employer relied upon for the dismissal were more egregious than the evidence of the Grievor. Neither the other employee involved in the altercation, nor the eye witness, testified.

[2] Matters raised during the hearing included fairness arising from different treatment of employees involved in the same incident; the acceptability and weight to be given to hearsay evidence; the evidentiary impact of a disciplinary sunset clause in a collective agreement; and of course, whether the discipline imposed should stand or be reduced.

[3] While not an issue in the hearing, it occurred to me that the altercation between the two employees may not have happened had the investigatory procedure relating to the accident been more thorough and the results of it, together with the reduction in the second employee's penalty, been more transparent. In this regard I am not suggesting there was any wrongdoing *per se* or any *mala fides* on the part of the Employer. However, as the evidence unfolded it appeared to me neither the investigation of the accident or the subsequent altercation were as thorough as they might have been. More importantly, the investigations did not permit the Grievor a sufficient opportunity to address the conclusions arrived at by management prior to any decision regarding discipline being made.

[4] Of course these comments must be taken in the context of the Employer's operations. It is a large diverse steel mill running twenty-four hours a day, seven days a week. I assume all employees, including the managerial staff, are continuously busy attending to their respective work. I also appreciate that while there is a lead hand nearby during some shifts, including those shifts when the incidents in question occurred, the managerial staff charged in the first instance with direct supervision were not at the workplace when the incidents occurred. It seems that during some shifts, such as the night shifts, managerial staff is limited, and may be located some distance from some work stations or operations. That situation, together with the rotating shifts of the employees involved, and perhaps other factors – such as the Easter holiday in this case, often create challenges in supervision, investigation processes, and discipline. Bearing in mind the issues and possible shortcomings identified, including demands placed upon the management, I now delve into these grievances.

THE FACTS:

[1] It is common ground that the workplace is a safety sensitive one. The Employer's position is that safety is to be the number one concern at all times, and this philosophy is incorporated into its training and policies.

[2] The Grievor, Marko Gustin, was a certified and experienced crane operator who had been employed with Evraz for twenty-one (21) years. On November 5th, 2014 he and Josh Gaebel were working the night shift on the slitter line in the Rolling and Finishing Mill. The work on the slitter line involves work with rolls or coils of flat steel which may be from 44 to 77 inches wide, with a diameter of 55 to 60 inches, and weighing 56,000 to 57,000 lbs. As the crane operator, the Grievor would lift these coils, one at a time, from bunks where they had been stored and transfer them to a coil car. Mr. Gaebel, the ID Bander, would then feed the coil car up to the slitter line, where the slitter operator unwinds the coil and slits it, and then winds it up again. The slit coil is then transferred to the auto bander where it is labelled and set in place for the crane operator to remove it from the line. The Grievor was operating the overhead crane from its cab that was raised well above the work floor.

[3] It was Mr. Gaebel's job, as an ID Bander, to ensure the coil car was in the down position each time the crane operator was preparing to place a coil on it. The car would not secure the coil in place if it was not in the down position.

[4] Around 3:00 am, after the shift meal break and eight hours into the shift, the Grievor was placing a coil of steel on the coil car when he noticed it was not in the down position. Athough he tried to abort the placement at the last minute, the coil rolled off the car and lodged between the car and the pulpit, knocking the car control box off its mooring and damaging its electronics. Mr. Gaebel was in the pulpit at the time. The coil car is located adjacent to the pulpit and its control box lies between the pulpit and the coil car. The crane arm was still in place through the central aperture of the coil when it came to rest in that position. The Grievor reported the accident immediately.

[5] Mr. Tyler Fuessel, the Manager of Finishing and Shipping, was notified at home by telephone and went to the mill to oversee the investigation. The Grievor and Mr. Gaebel were asked to provide written statements, which they did. They passed the alcohol and drug screening. Mr. Fuessel then met with them individually to review what had happened.

[6] Mr. Fuessel testified that Mr. Gaebel acknowledged he made a mistake by assuming the coil car was in the down position; whereas the Grievor did not accept responsibility, blaming the incident on Mr. Gaebel. In his statement, and in his interview, the Grievor told Mr. Fuessel that Mr. Gaebel had been reminded earlier during the shift to lower the car. However, Mr. Fuessel felt the Grievor, as the crane operator should never place any load down without first ascertaining it was safe to do so. He advised the Grievor of that procedural requirement.

[7] As a result of his investigation Mr. Fuessel concluded there had been a breach in the operation protocol regarding the level of the coil car, the crane operator should not have been placing the coil given the car was in the raised position, and the actions of both men compromised safety. In consultation with Human Resources, it was determined both men were equally at fault and should receive a two day suspension.

[8] Following the accident the Grievor was scheduled on a series of days off, and accordingly, was not disciplined until November 17th, his first day back. However, Mr. Gaebel was at work in the interim. He received his two day suspension, filed a grievance, and had his suspension reduced to one day before the Employer met with the Grievor to advise of his two day suspension.

[9] The accident caused the operations on the slitter line to stop for ten (10) hours to allow for the completion of the investigation at the site and the repair of the control box and its electronics. The steel mill operates on a tight schedule for all departments to meet production targets and delivery obligations. Accordingly, any interruption to operations is always a concern.

[10] The second incident also involved the Grievor and Mr. Gaebel. It occurred on November 19th at the shift changeover around 7:00 pm. It was as a result of this incident, the November 5th crane accident, and a written warning in March 2014 for tardiness, that the Grievor was dismissed. According to Mr. Fuessel, the misconduct on November 19th that resulted in the decision of dismissal was the Grievor had punched Mr. Gaebel in the face without warning or provocation.

[11] The incident was brought to Mr. Fuessel's attention on November 21st by an employee who had heard about it. Mr. Fuessel interviewed Mr. Gaebel and an employee named Jonathon, who had witnessed the incident. He also viewed a video that captured the incident. The following day Mr. Fuessel arranged to meet with the Grievor, a Union Steward and the Human Resource Manager. Mr. Fuessel testified the Grievor acknowledged pushing Mr. Gaebel in the neck saying that Gaebel had been chirping at him. The Grievor was told he was suspended pending investigation. Following further discussions, it was determined the

Grievor would be dismissed. A letter to that effect dated November 22nd was delivered to the Grievor. The reasons for dismissal contained in the letter were the Grievor had struck Mr. Gaebel during a verbal exchange, without warning or provocation; that such conduct constituted violence in the workplace violating policy and placing the health and safety of others in jeopardy; and because of his file [which the evidence demonstrated contained the two above-referenced items of previous discipline].

[12] In addition to the reasons contained in the letter of dismissal, Mr. Fuessel testified another reason for the dismissal was the Grievor failed to take responsibility for the incident, that the Employer has a zero tolerance for violence, and that the Employer was concerned for the safety of employees. Material to the last point was Mr. Fuessel's testimony that Mr. Gaebel told him he had not reported the incident because he was concerned about his safety.

[13] No written statements were taken in relation to the November 19th incident, nor did Mr. Fuessel make any notes of his discussions with Mr. Gaebel, the witness Jonathon, or the Grievor. Neither Mr. Gaebel nor Jonathon were called to testify regarding the November 19th incident.

[14] The Employer's case for both incidents in November was based primarily upon the hearsay evidence of Mr. Fuessel. Regarding the November 5th incident, the Employer also filed the statements Mr. Gaebel and the Grievor submitted, and of course the Grievor did testify. With respect to the November 19th incident, the Employer relied upon the hearsay evidence of Mr. Fuessel, including his evidence regarding the Grievor's acknowledgment that he pushed Mr. Gaebel in the neck, and a video record of the incident. The Grievor also testified about the November 19th incident.

[15] I now turn to the evidence of the Grievor regarding the incidents.

[16] The Grievor testified he did not think he should have been disciplined for the November 5th incident. He testified that during the course of the shift Mr. Gaebel was not attending to his responsibility of ensuring the coil scale car was in the lower position each time the Grievor was bringing over a new coil to be placed on it. He stated he had to repeatedly honk the crane horn to get Mr. Gaebel to attend to raising the car. Apparently Mr. Gaebel spent most of the shift inside the pulpit, and was inside it when the accident occurred. By the time they took their meal break, the Grievor felt Mr. Gaebel was attending to the proper positioning of the coil car. However, on the last occasion the Grievor did not notice the car was up until he was just about to place the coil on it. He tried to abort the placement but lost control of the crane arm and the coil rolled off the car. The crane arm was still inside the coil when the investigation began, although the

pictures were taken after the arm had been moved out. The Grievor also testified that a bar dividing the crane window screen interfered with his vision. He would have been able to get an accurate view if he had bent over to look, but doing so hurt his back, which had been injured in a workplace accident.

[17] In cross-examination the Grievor was asked about using the public address system during the shift to remind Mr. Gaebel to adjust the height of the coil car. The Grievor said he did not use it as it would have carried throughout the mill, and he had not wanted to embarrass or "rat on" Mr. Gaebel for not doing his job. While acknowledging it was the crane operator's responsibility to ensure safe placement of each load, in this case because Mr. Gaebel had not been attending to his job earlier, and at the time in question, the Grievor thought Mr. Gaebel was responsible for the accident.

[18] Turning to the Grievor's evidence regarding the November 19th altercation, the Grievor denied punching Mr. Gaebel in the face. He testified that when he walked out of the lunch room to start his shift, Mr. Gaebel was standing there. As he walked by, Mr. Gaeble asked him what suspension he got for the crane accident. Even though the Grievor had been given a two day suspension, he said he did not get one. Gaebel then asked why not. There followed a discussion about who was to blame for the accident. The Grievor stated it was Gaebel's fault because he was not putting the car down and that is what caused the coil to roll. Gaebel responded it was the Grievor's fault because he was the crane operator. The Grievor said Mr. Gaebel was not taking any responsibility for the accident, saying, "No fucking way" was he responsible. At that point the Grievor said, "I'm done with you" and started walking away. Mr. Gaebel said, "I'm not done with you". The Grievor responded, "Say what?" and began walking back toward Mr. Gaebel. Mr. Gaebel looked jittery and was upset; he appeared about to say something and took a step toward the Grievor. The Grievor said, "stay away from me" and put his hands out on Gaebel's chest and pushed him away. The Grievor then walked away.

[19] The Grievor walked some distance to the washroom, and as he was on the stairs Mr. Gaebel came up behind him and gave him a dirty look. The Grievor said, "What?". Gaebel replied, "Hey I just wanted to talk about the suspension." The Grievor responded, "I am done with this", and walked away. He then went to the crane and began work. He quit around 5 am, two hours before the shift ended because he had a head ache and his neck was sore.

[20] The video of the incident was shown at the hearing and a flash drive recording of it was filed. The video is limited to the altercation outside the lunch room. It shows the two men and their interaction from afar. At the point of physical contact the Grievor is standing in front of Mr. Gaebel and his back is to the camera.

The tape does not show a punch; nor does it clearly show a shove, but it is consistent with a shove being administered to Mr. Gaebel. The video was consistent with the evidence of the Grievor, and demonstrated a great force was not applied against Mr. Gaebel.

[21] There was some evidence of other instances of violence in the workplace. Mr. Tony St. Louis, a former employee, testified that in late 2013 he was suspended for three weeks when he put his hands on another employee and pushed him down into a chair at the number one desk. The suspension was later reduced to two weeks because he had been provoked. Mr. Fuessel testified there had been some chest butting in that case and Mr. St. Louis failed to control his temper. He noted Mr. St. Louis did acknowledge he erred and took responsibility for his actions. Mr. Fuessel acknowledged other employees have been disciplined for violence in the workplace and not all of them were fired.

ARGUMENT:

The Position of the Employer:

[22] Counsel for the Employer submitted the discipline imposed for each incident was not excessive and accordingly, the grievances should be dismissed. To support the discipline imposed, Counsel submitted there was no basis for a reduction of the penalties because there is arbitral support for them, the Grievor does not understand the gravity of his misconduct, nor does he take responsibility for his actions. In this type of workplace he argued employees must understand violence is unacceptable, they must take responsibility for their own actions, and they must understand when matters necessitate communication with management.

[23] Counsel submitted the Grievor demonstrated his lack of comprehension of the foregoing employment requirements through his own evidence throughout the course of his evidence. First, he denied Mr. Fuessel made some of statements he testified to when interviewing him regarding the November 5th incident. In particular was Mr. Fuessel's testimony that he told the Grievor as the crane operator he has the ultimate responsibility for the safe placement of the load. The Grievor did not say Mr. Fuessel was mistaken, he said he was lying probably to make his case look better. It was submitted this demonstrates he has no respect for management.

[24] Second, in discussing Mr. Gaebel's failure to attend to the proper placement of the coil car throughout the November 5th shift, the Grievor stated he did not use the public address system or speak to management about it because he did not want to embarrass, "rat out" or "squeal on" Mr. Gaebel. Counsel also noted the Grievor was also concerned about how reporting his co-worker would go over in the steel mill. Counsel submitted these are unacceptable attitudes in the workplace. The matter was a safety issue, and the Grievor's behaviour was antithetical to what the Employer is trying to address when it places safety as the number one priority. Counsel submitted the Mafia's *omerta* (code of silence) is not appropriate in this safety sensitive workplace. This *Omerta* was also apparent in the November 19th altercation; it is pervasive in the work place and must stop.

[25] Third, the Grievor began to place the steel coil on the coil car without first ascertaining it was safe to do so. If a crane operator cannot determine a placement is safe, he should not proceed.

[26] Fourth, the Grievor has minimized his responsibility in both incidents. He testified he should not receive discipline in relation to the November 5th accident because it was Mr. Gaebel's fault. He also placed the blame for the November 19th altercation on Mr. Gaebel. Counsel submitted the Grievor's version of the events should not be accepted.

[27] Fifth, Mr. Gaebel's version as reported to Mr. Fuessel, and as supported by the eye witness Jonathon and the video, should be accepted. According to the reports of Mr. Gaebel and Jonathon, there was no evidence of provocation. The Grievor failed to appreciate he provoked Mr. Gaebel when he lied to him about not having received a suspension. Then after he walked away from Mr. Gaebel, he returned and punched him surprising and shocking Mr. Gaebel. Both the Greivor and Mr. St. Louis testified Mr. Gaebel looked shocked following the altercation.

[28] Sixth, the Grievor testified that were he returned to work he would have to sort out the differences with Mr. Gaebel. Counsel submitted the Grievor's position demonstrated his attitude that if Mr. Gaebel cannot satisfy him they will not be able to work together. He argued this undermines management's authority to manage the work force. It also demonstrates the Grievor has no remorse for his actions, and that he was upset simply because he was caught. A successful return to work would require an acknowledgement of wrongdoing, which the Grievor does not appear to be capable of.

[29] Seventh, Counsel submitted failing to report incidents and not involving management leads to an unsafe workplace. This is particularly so where, as was the case here, management was not available at that time to resolve the matters.

[30] Lastly, with respect to mitigating circumstances, Counsel argued as a result of the disciplinary sunset clause in the collective agreement, the Grievor is precluded from relying upon his length of service. (*Marriott, infra.*) A significant factor to be considered is the Employer's policy of zero tolerance of violence in the workplace. Counsel also submitted there was no evidence demonstrating the Employer treated other employees differently for violence in the workplace. In Mr. St. Louis's three week suspension for violence that was reduced to two weeks, there was no evidence that he had a prior disciplinary record, and his penalty had been reduced because there was provocation.

[31] The Employer's position was the grievance regarding the crane accident should be dismissed – the penalty being consistent with case authority. The Employer further submitted the second grievance should also be dismissed. The evidence demonstrated he has not learned anything. The Grievor is completely unrepentant. He does not accept workplace rules and should therefore not be operating a crane that requires a high degree of care and compliance with rules. Counsel submitted there were no mitigating circumstances to justify the substitution of a lesser penalty. There was cause for discipline and the penalty of dismissal was not excessive under the circumstances, especially when considered in light of his disciplinary record.

[32] Counsel for the Employer relied upon the following authority: *Marriott Corporation of Canada Ltd. v. C.U.P.E., Local 229 (1998),* 75 L.A.C. (4th) 1 (ON – Brandt); *Westinghouse Canada Inc. and UE., Local 504,* [1993] O.L.A.A. No. 1164; *National Steel Car Ltd.* v. *U.S.W.A., Local* 7135 (2005), 144 L.A.C. (4th) 175; *Potash Corporation of Saskatchewan* v. *United Steelworkers of America, Local 7689,* 1993 CanLII 8151 (SK LA); *Saskatchewan Association of Health Organizations and Canadian Union of Public Employees, Local* 3967, 2011 CanLII 20279; *XL Foods* v. *U.F.C.W, Local 404,* [2011] A.W.L.D. 4320; *TNT Logistics North America Inc.* v. *U.S.W.A., Local 9042,* [2003] O.L.A.A. No. 798; and *Coast Mountain Busline Co. and Independent Canadian Transit Union, Local 2 (Croteau Grievance),* [1999] B.C.C.A.A.A. No. 318;

The Position of the Union and the Grievor:

[33] The Union Representative, in responding to the Employer's argument, submitted the Grievor does understand the value of safety in the workplace: he testified he is very vigilant as a result of the serious injury he sustained at work some time ago. On the November 5th shift he had repeatedly used the crane horn to remind Mr. Gaebel to pay attention to the level of the coil car and eventually Mr. Gaebel did begin to pay attention. It seemed Mr. Gaebel was the one not paying attention and not adequately concerned about safety. The Grievor's method of keeping Mr. Gaebel on track was successful until the accident occurred around 3:00 am - some eight hours into the twelve hour shift. If employees stopped work to report to a manager every time someone wasn't attentive to their job duties, the level of production would be compromised. The Grievor had engaged in a reasonable method to engage Mr. Gaebel's attention that night. There is no basis for suggesting he should bear responsibility for any code of silence that exists in the workplace.

[34] Regarding the November 19th altercation, the Employer's case was founded on hearsay and the video. No statements were secured, nor were notes made of discussions Mr. Fuessel had with the employees to assist in his recollections.

[35] Mr. Gaebel clearly had not accepted responsibility for the accident on November 5th. There was no acknowledgement of responsibility in his statement. He had been blaming the Grievor for it in discussions with other employees and word of this got back to the Grievor. Even in the altercation Mr. Gaebel denied responsibility for the accident.

[36] There was provocation by Mr. Gaebel in the altercation. He blamed the Grievor for the accident. That action, together with repeating the allegation to other employees would provoke any employee, especially one who takes pride in his work as the Grievor did. It would be natural for an employee in that position to want the repeated assertions of blame to stop.

[37] The fact the Grievor said he would want to work things out with Mr. Gaebel before returning to work is a responsible and reasonable approach for any employee to take. Mr. Gaebel demonstrated responsibility in relation to both incidents. He reported the accident promptly and provided a statement. He also acknowledged shoving Mr. Gaebel when questioned about the altercation.

[38] With respect to the accident, is appears inherently unfair that having assessed equal responsibility to the two employees, Mr. Gaebel's suspension was reduced to one day before the Grievor was given a two day suspension. The procedure manual makes it clear it was Mr. Gaebel's responsibility, as the ID Bander, to adjust the coil car height. The Grievor's evidence was Mr. Gaebel repeatedly failed to do this throughout the shift. Contrary to Mr. Fuessel's evidence was the evidence of the Grievor and Mr. St. Louis that Gaebel continuously denied responsibility, and placed the blame on the Grievor. Mr. St. Louis said this was done repeatedly in discussions with other employees.

[39] The Grievor's evidence was that Mr. Gaebel began the November altercation, and even after the Grievor walked away, Gaebel told the Grievor he was not finished with him. The hearsay evidence that Mr. Gaebel was concerned about his safety following the incident is contrary to the subsequent re-engagement of the Grievor by Mr. Gaebel outside the washrooms.

[40] The Grievor is a twenty-one year employee. It is not fair or reasonable that a thirty (30) second incident that was not reported by the alleged victim, where no one was injured and no damages occurred, results in dismissal. That penalty was excessive. Notwithstanding the zero tolerance for violence in the workplace, The Union Representative relied upon other incidents of physicality resulting in penalties other than dismissal. The Grievor testified he should have continued walking away. He has not seen Mr. Gaebel since the incident and accordingly, has not had an opportunity to apologize.

[41] The Union's position regarding the November 5th crane accident was the two day suspension should be reduced to a written warning. The accident occurred because Mr. Gaebel was not attending to his clear responsibility as the ID Bander to ensure the coil car was in the proper position. This was notwithstanding having received numerous promptings from the Grievor during the shift. Although the Grievor did try to abort the placement of the coil at the last minute, he was unsuccessful and the crane arm failed to counter-balance the weight of the coil.

[42] With respect to the November 19th altercation with Mr. Gaebel, the Union submitted the penalty of dismissal should be reduced to a suspension. Such reduction would be consistent with other penalties for altercations – including that of Mr. St. Louis. In support of this position the Union also relied upon the *William Scott* case and the following mitigating circumstances: the Grievor's 21 years of service; the brevity of the incident – 30 seconds; the incident was a momentary flare-up; Mr. Gaebel initiated the exchange and continued to pursue the matter after the Grievor had initially walked away; there was provocation; there was no damage to property or injury; Mr. Gaebel did not report the incident; it is unlikely the Grievor will be involved in another

such incident; he acknowledged that he should have just kept walking away; he is willing to work out his differences with Mr. Gaebel; he can be reintegrated back into the workplace; there are always economic consequences when a dismissal occurs; the Grievor co-operated with the Employer's investigation and acknowledged shoving Mr. Gaebel; the Employer does not consistently enforce its zero tolerance of violence in the workplace as demonstrated in cases involving Mr. St. Louis and those acknowledged by Mr. Fuessel; the policy of zero tolerance is not clear that all instances of physical contact will result in automatic dismissal; and a suspension will serve as a deterrent.

[43] In addition to the *William Scott* case, the Union relied upon the following authority to support its position: *International Woodworkers of America – Canada, Local 1-184 v. SRI Homes Inc. (Estevan Manufacturing Division) (Poage Grievance),* [1996] S.L.A.A. No. 3, 58 L.A.C. (4th) 385 (SK - Hood); and *Grimm*'s *Fine Foods v. United Food and Commercial Workers Union, Local 247 (Costas Grievance)*, [2010] B.C.C.A.A.A. No. 146 (BC – Brown).

THE ISSUES:

[44] The issues arising from the evidence and arguments are:

1. The November 5th crane incident:
    i) Was the discipline imposed just and reasonable under the circumstances;
    ii) If not, what discipline is.

2. The November 19th altercation:
    i) Can reliance be placed upon years of service in light of the disciplinary sunset clause in the collective agreement;
    ii) Was the discipline imposed just and reasonable under the circumstances;
    iii) If not, what discipline is.

DECISION:

[45] The discipline for the November 5th incident is troubling from my perspective. I wonder if the Employer was not a little too quick to address the issue, particularly the role Mr. Gaebel played by failing to attend to his responsibility to set the coil car at the proper level, some four to five times, prior to the accident. This oversight was reinforced when Mr. Gaebel's suspension was reduced to one day, some five days or so before the two day suspension was meted out to the Grievor, because Gaebel accepted responsibility for the accident. The issue was then further exacerbated by the post incident evidence that Mr. Gaebel did not accept responsibility for the accident and repeatedly told other employees the accident was the Grievor's fault. Ultimately, all of these facts do create an impression of unfairness.

[46] However, because the Grievor, as the crane operator, had the last opportunity to avert the accident, and because of the inherent dangers associated with crane operations in the steel mill, I am not able to conclude the two day suspension imposed was not just or that it was unreasonable pursuant to section 6-49(4) of *The Saskatchewan Employment Act.*

[47] On the other hand, I have no difficulty in concluding dismissal for the November 19th altercation was excessive generally. I am of the opinion it is just and reasonable to substitute a lesser penalty of a one week suspension for the dismissal pursuant to *The Saskatchewan Employment Act*. The foundation of this conclusion is that I have found the facts as testified to by the Grievor, and as supported by the video, were more compelling than the hearsay evidence relied upon by the Employer. That conclusion, and other reasons, are discussed under Reasons for Decision. As requested by the parties, I reserve my jurisdiction to address the matter of compensation to the Grievor arising from his dismissal.

[48] I also note the hearing raised a number other issues that were not necessary to comment upon to arrive at the decision. Some of these issues have already been mentioned and may be expanded upon in Reasons for Decision. Other issues shall be commented upon under the subsequent heading of *Obiter Dicta* – that is, comments that are not biding upon the parties.

REASONS FOR DECISION:

The November 5th Accident:

[49] I have considered the role Mr. Gaebel played in this accident. In this regard I have considered his repeated failure as the ID Bander to attend to the proper positioning of the height of the coil car, and his training that included time in the overhead crane to be made aware of the potential blind spots of the crane operators. I have also considered that notwithstanding the attribution of equal fault by the Employer, that his suspension was reduced to one day because he apparently acknowledged to the Employer he bore a responsibility for the accident. I was concerned that thereafter he repeatedly denied responsibility and placed all the blame upon the Grievor in discussions with other employees.

[50] I was also concerned about the Employer's possible hurried investigative process. While it was not clear from the evidence, and the matter was not pursued in cross-examination, I wondered whether the Employer advised the Grievor of its initial conclusions regarding blame and the roles each employee played, and thereafter gave the Grievor a specific opportunity to address those conclusions and provide more complete information – such as the number of times Mr. Gaebel failed to attend to his responsibility regarding the position of the coil car. While this omission in not fatal to discipline imposed (see *Mosiac Potash and USW*, infra), it can often result in either the discipline itself being found to be without basis, or the penalty being reduced where the Employer has failed to secure all the relevant facts.

[51] In this case, I specifically considered the question of unfairness raised by the Union raised given the fact Mr. Gaebel's penalty was reduced from a two day suspension to one day. It opened a tempting avenue, particularly given Mr. Gaebel's subsequent conduct. However, ultimately in balancing the competing interests pursuant to principles of mitigation, I concluded there was a sufficient balance in the Employer's interest to uphold the two day suspension.

[52] The factors weighing in favour of the Grievor were the lesser penalty imposed upon Mr. Gaebel, notwithstanding the Employer's equal attribution of fault, and Mr. Gaebel's clear, but subsequent, renunciation of responsibility for the accident. Ultimately the latter consideration was discounted because it was after the fact, and could not be attributed against the Employer. I was not unaware of the fact the Grievor testified he had been working a lot of overtime and had a sore back which impeded his ability or willingness to bend over for a clearer view. However, I did not regard these as mitigating factors in the Grievor's favour because employees must not be at work or attending to tasks – especially inherently dangerous ones - when their ability is compromised. I shall have more comments about this subsequently under the heading *Obiter Dicta.*

[53] The factors in favour of the Employer's penalty included the specific training and qualifications for crane operators; the fact the operator is responsible for the safe placement of the load; the Grievor knew the ID Bander had failed to adjust the coil car position on a number of occasions earlier in the shift (although the fact he had more recently been adjusting it properly may cut the other way); the crane operation of moving steel coils is inherently dangerous; and the Grievor had been able to spot improper positioning earlier, but failed to do so in sufficient time on the last occasion.

[54] While I may have not have reduced Mr. Gaebel's suspension under all the circumstances, given the heavy responsibility a crane operator bears in the workplace, I was unable to conclude the reduction of Mr. Gaebel's penalty was sufficient to conclude the two day suspension to the Grievor was excessive generally, or not just and reasonable pursuant to section 6-49(4) of *The Saskatchewan Employment Act* to warrant the substitution of a lesser penalty. One potential error does not necessarily amount to a second one.

The November 19th Altercation:

[55] The Employer's case was based upon hearsay evidence tendered by Mr. Fuessel, the Manager of the Rolling and Finishing Mill, together with a video. Hearsay evidence may or may not be accepted by an Arbitrator. Section 6-49(3) of *The Saskatchewan Employment Act* provides:

> 6-49
> . . .
> (3) An arbitrator or an arbitration board may:
> . . .
> (c) receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the arbitrator or arbitration board considers appropriate, whether admissible in a court of law or not; . . .

Even where hearsay evidence is accepted, it is trite law that the matter of weight to be given to it lies with the Arbitrator to determine.

[56] When termination of employment is involved, it is doubtful many arbitrators would rely upon hearsay evidence to support the discipline and/or penalty. Hearsay evidence does not usually provide a sound evidentiary basis, particularly when there is testimony of material inconsistent facts. In this case the Employer also relied upon a video tape of the incident. However, the tape did not support its case. It recorded the thirty (30) second incident from afar and did not have any sound. The critical portion of the

tape depicted the Grievor, with his back to the camera, standing directly in front of Mr. Gaebel. It did not show the Grievor punching Mr. Gaebel. It was more consistent with the Grievor's overall version of the events, including the fact that he shoved Mr. Gaebel.

[57] The result is that it then became a case of weighting the Grievor's *viva voce* evidence against the Employer's hearsay evidence, and the other evidence. I have no difficulty in accepting the Grievor's testimony rather than the untested second hand evidence presented on behalf of the Employer. There was no meritorious basis for impugning the evidence of the Grievor regarding the altercation. (See generally *Faryna and Chorny,* [1952] 2 D.L.R. 354, at p. 357 (B.C.C.A.)). Furthermore, the Grievor's testimony was consistent with what appeared on the video, and portions of his evidence were against his interest.

[58] I am satisfied Mr. Graebel began "chirping" at, or nattering at, the Grievor as the Grievor walked by him outside the lunch room. A heated verbal exchange occurred and the Grievor walked away. According to the Grievor, Mr. Gaebel said, "I am not done with you yet". Upon hearing that the Grievor turned and walked back. That was when Mr. Gaebel moved in his direction and the Grievor responded by placing his hands on his chest and shoved him back. The shove did not appear overly aggressive and was consistent with a person standing his ground and protecting his personal space.

[59] Contrary to the hearsay evidence submitted by the Employer, I do not find Mr. Gaebel was concerned about his safety as a result of the incident. When he and the Grievor crossed paths again moments later near the washroom, Mr. Gaebel tried to again engage the Grievor in conversation. That is not consistent with fearing for one's safety. The Grievor responded by ignoring Mr. Gaebel and proceeding on to his work station.

[60] A further comment regarding the hearsay evidence that Mr. Gaebel feared for his safety is in order. Such an allegation adds a more serious tone to altercations, be they verbal or physical. In my opinion, it requires a person so alleging to testify at a hearing so his allegation may be tested. This is particularly so where, as in this case, an individual's job is on the line.

[61] I do not accept the Employer's position that the Grievor provoked the altercation by telling Mr. Gaebel he had not received a suspension. While he may have intended to tease Mr. Gaebel, this may have been in response to Mr. Gaebel having been telling all who would listen that the crane accident was the Grievor's fault. Surely spreading that version of events around the workplace amounted to a serious level of provocation. Then it was Mr. Gaebel who initiated the interaction in the first place. Additional provocation

occurred when Mr. Gaebel engaged in the pattern of "chirping", or nattering, at the Grievor; and then invited him to come back after the Grievor had initially walked away by stating, "I am not done with you."

[62] The Grievor was candid in acknowledging at that point he should have continued walking away. However, the facts indicate Mr. Gaebel was intent upon a show down – verbally or possibly otherwise.

[63] One more point should be commented upon. The Grievor did say in examination-in-chief that after he shoved Mr. Gaebel he appeared "kind of shocked – weird". In cross-examination Mr. St. Louis testified Mr. Gaebel looked surprised after the shove. When he was then asked in cross-examination if he looked shocked, he responded affirmatively. Emotions were high prior to the shove, and it is not surprising that the recipient of a shove would look surprised or kind of shocked. The tables had been turned on Mr. Gaebel.

[64] In summary then, the Grievor failed to exercise good judgment in engaging in the heated verbal exchange, and then in not continuing to walk away from Mr. Gaebel. Both men were at least annoyed, if not upset during the exchange. Then the Grievor returned to listen to what else Mr. Gaebel had to say. He concluded Mr. Gaebel was about to get in his face or strike at him, and responded by shoving Mr. Gaebel away. I have concluded there was a reasonable cause for his shove, and the shove was not excessive under the circumstances. Do those facts create a basis for discipline? At best, the Grievor failed to ignore Mr. Gaebel in the first instance, and then in the second instance he failed to continue walking away when Mr. Gaebel was taunting him to return. Do these facts warrant dismissal – even in light of the discipline record of a two day suspension earlier in the month for the crane accident and a written warning for tardiness eight months ago?

[65] These questions brought me back again to the Employer's failure to call Mr. Gaebel and Jonathon. When interviewed about the matter, the Grievor had denied punching Mr. Gaebel and acknowledged that he shoved him. In any event, given the evidence, it is not necessary for me to draw any adverse interests against the Employer as a result of this failure as might have been done pursuant to *Murray and The City of Saskatoon*.

[66] I wonder if this second incident would have occurred had the first investigation and disciplinary process been more complete and transparent – not only for Mr. Gaebel and the Grievor, but for all other employees as well. But as I discussed in the introductory remarks, there are many calls upon the time and attention of everyone in the workplace.

[67] In cross-examination the Grievor acknowledged he erred in shoving Mr. Gaebel and that conduct was against the rules. He also acknowledged he should have kept on walking and not returned after Gaebel stated he was not done with the Grievor. It was also clear from the Grievor's testimony that the initial discussion was heated.

[68] The Employer's policy, as reflected in the January 19, 2012 letter mailed to all employees, is that employees are "[n]ever [to] engage in acts of violence". The zero tolerance for such conduct as also explained in the letter follows:

> . . . where we determine any person has violated one or more of the above rules, we will take disciplinary action consistent with Company policy and local agreements. Such disciplinary action will be determined based upon the individual circumstances and may include suspension and /or termination of employment. In all cases, contributing factors will be considered prior to a decision being made.

[69] I do not condone the actions of either employee in the emotionally charged debate. That interaction can indeed be an act of violence in itself. And it follows, as night follows day, angry discussions can quickly escalate into physical violence, as it did in this case. The Grievor may have been somewhat justified in pushing Mr. Gaebel out of his personal space and/or taking defensive action under the circumstances; nevertheless, I agree with his acknowledgement that he broke the rules.

[70] The essence of his breach of the policy against violence was that he continued to engage in the heated discussion with Mr. Gaebel, and even after walking away he went back when Mr. Gaebel taunted him by stating, "I'm not finished with you". In engaging in the heated discussion and then returning to continue the discussion it should have been apparent to him that the situation may escalate.

[71] Given the nature of the altercation, including the contained level of physical contact, dismissal does seem excessive to me. In any event I conclude it is just and reasonable under all the circumstances to substitute a lesser penalty. The Grievor did not initiate the incident. He was provoked by Mr. Gaebel. And Mr. Gaebel, although an active participant and the instigator, was not disciplined.

[72] Other factors that are relevant to the assessment of penalty include many of the factors outlined by the Union Representative in her argument. They include the Grievor's twenty-one years of service; the brevity of the incident – 30 seconds; the incident was a momentary flare-up; Mr. Gaebel initiated the exchange and

continued to pursue the matter after the Grievor had initially walked away; there was provocation; that there was no damages or injury; Mr. Gaebel did not report the incident; the Grievor acknowledged the rules were broken; he acknowledged that he should have just kept walking away; he did walk away when Mr. Gaebel attempted to engage him moments later outside the washroom; it is unlikely the Grievor will be involved in another such incident; the Grievor is willing to work out his differences with Mr. Gaebel; the Grievor co-operated with the Employer's investigation and acknowledged shoving Mr. Gaebel; the Grievor can be reintegrated back into the workplace; the Employer does not appear to follow a consistent approach to penalties for incidents of violence in the workplace; the policy of zero tolerance is not clear that all instances of physical contact will result in automatic dismissal; and more serious cases have not received a similarly harsh penalty; and a suspension will serve as a deterrent.

[73] Against all of those facts, I have weighed the Employer's concern about violence in the workplace. This concern is justifiable in light of the increased focus on such matters, including harassment and bullying in the workplace and the legislated responsibilities of employers, unions and employees regarding safety. I have also taken into account the Grievor's disciplinary record in 2014, the existence of the disciplinary sunset clause in article 5.03, and the inferences arising therefrom as discussed in the *Marriott* case and in a recent decision of mine involving this Union and Mosaic Potash, as discussed below.

[74] The sunset disciplinary clause follows:

> Article 5.03 Reasonable Discipline
>
> The Company and the Union agree that disciplinary penalties shall not be issued unreasonably or unjustly. Any warning and/or penalty (excluding dismissals) shall be cleared from the employee's record after a period of twelve months. In the event of a reinstatement, the employee's record will be cleared after 12 months from the date of return to work. . . .

[75] The *Marriott* case discusses the impact of a sunset clause with respect to mitigating factors in disciplinary cases. (See paras. 53 to 70, and paras. 81 to 82.) The salient points to be drawn from the case are:

i) the case law does not provide clear guidance on the matter;
ii) a union is entitled to refer to the length of service of an employee; however, no inference can be drawn "one way or the other as to whether that service was or was not unblemished";
iii) the door for reviewing the actual historical disciplinary record will be open should the union or grievor seek to characterise the entire period of service as free or relatively free of discipline; and

iv) where the door to the past disciplinary record has been opened, that evidence is limited to the issue of mitigation.

[76] In *Mosaic Potash Colonsay ULC and United Steelworkers, Local 7656*, dated March 29, 2014, I addressed the same issue, without reference to the *Marriott* case, and arrived at a similar conclusion. At paragraph [98] I observed:

> [98] While I can appreciate there may be some instances where that [a sunset disciplinary clause renders inadmissible the long service] may be a reasonable approach and therefore why some arbitrators have taken that position, I cannot endorse it as a principle of general application. There may be circumstances where long term employees who have provided good service over the years have, for one reason or another, engaged in conduct that when considered on its own would justify dismissal. In my view taking an isolated incident out of the context of long and dutiful service can result in unfairness. My preferred approach would be to consider the length of service with all the positive and negative consequences that may flow from it, together with the existence of a disciplinary sunset clause and all of its ramifications. While the existence of a sunset clause does preclude consideration of previous disciplinary action when weighing the appropriateness of a disciplinary penalty, it does not, in my view, preclude consideration of the general work attributes of the employee in question (with the exception of the specific incidents which have involved discipline precluded by the sunset clause) when such have been raised by the employer or the union. . . .

In the *Mosaic* case, the evidence unfolded in the manner I noted in para. [99]:

> [99] In the case at hand, the general work attributes of the Grievor were raised by both the Employer and the Union. The Employer presented general statements to the effect the Grievor required continual monitoring and this took up a lot of time. In his evidence the Grievor raised the issue of his past compliance with instructions when he testified he always followed directions from the Employer. . . .

It was the grievor's testimony that he always followed directions from the employer, which opened the door on his previous disciplinary record demonstrating that was not so.

[77] Lastly, I have considered the cases relied upon by Counsel for the Employer regarding penalties for violence in the workplace.

[78] Other cases involving violence in the workplace can indeed be useful in assessing the range of acceptable penalties, and in determining whether or not there is a basis for substituting a lesser penalty. However, ultimately each case turns upon its unique facts, all the related circumstances, including the actual workplace itself, and the culture of that workplace.

[79] The penalty cases relied upon by Counsel for the Employer contained factual situations that were more serious than the one at hand, and can be distinguished on that basis.

[80] The *National Steel Car* case involved an employee who responded physically to a verbal attack. The altercation was brief. The physical response was found to be unnecessary, inappropriate and very dangerous because there was a heavy basket of parts suspended five feet off the floor, the floor was littered with blocks of wood, there was machinery and equipment nearby, and the other employee was wearing a crane operator's harness. There was a risk the crane operator's harness controls would be activated, serious damage and injury could then have resulted from unexpected movement of the crane load, or the other employee might have been pushed into the suspended load during the altercation. The grievor was a sixteen month employee and did have an unrelated incident of discipline on his record. His termination was upheld. This case presented a great potential for injury and property damage.

[81] The *Potash Corporation* case involving physical violence was not a momentary flare-up. The physical violence had been preceded by a car driving incident a week earlier as the two fighters, Davis and Nycolychuk, and a third were driving home from the mine on the highway. A jockeying game went on restricting the third employee from passing one of the subsequent fighters. In the course of this "game" a stone was thrown up by the Davis vehicle into the Nycolychuk windshield causing a substantial crack. Nycolychuk was going to have to replace his windshield at considerable cost. Davis and Nycolychuk did not work the same shift until a week elapsed. There was an angry exchange around 8:30 am between Nycolychuk and the third employee. As a result of this conversation Nycolychuk concluded the stone that cracked his windshield was thrown up by the Davis vehicle. Then around coffee time at 9:55 am, Nycolychuk and Davis engaged in an angry discussion that led to a physical altercation. The physical altercation involved pushing, shoving, punching, and wrestling on the floor. Both men suffered minor cuts. The fight was seen by a number of employees, who testified it had a significant emotional impact upon them. Both employees had seventeen years of seniority. Nycolychuk had one had one incident of discipline ten years before, while Davis had twelve disciplinary incidents over the preceding twelve years involving aggressive and undignified behaviour toward other employees. The economic conditions were poor at the time and would have made finding alternative comparable employment unlikely. Nycolychuk was 37 years

old. Davis was 62 years old and planned to retire at age 65. The fight was the talk of the mine and continued to be so as of the date of the arbitration hearing five months later. Nycolychuk received a three month suspension and his reinstatement was subject to a six month conditional period. Davis, having the significant disciplinary record, received a five month suspension and his reinstatement was subject to a 10 month conditional period. This case was considerably more serious involving a prolonged physical fight.

[82] The *XL Foods* case involved violence in an industrial food processing plant. The grievor, having been hit by a backsplash of water, leapt from a work table, approached the employee who had caused the backsplash, grabbed a hose and proceeded to spray that employee with scalding water. Some pushing and shoving occurred during the subsequent tussle for the hose. The incident was brief and determined to be a momentary flair-up. The grievor had been provoked. There was a no violence policy in the workplace, although dismissal was not an automatic penalty. The grievor was a union steward, whom the arbitrator concluded had intended to spray his co-worker, knowing the water was scalding and would likely cause scalding, which it did. The arbitrator upheld the dismissal. Here the grievor sprayed his co-worker with scalding water – a very dangerous thing to do, and did in fact scald the man.

[83] The *TNT Logistics* case involved the Unit Chairperson of the bargaining unit in an industrial workplace. He was dismissed for physically assaulting and threatening a co-worker. The two employees had first engaged in a heated debate during which the grievor moved close to his co-worker's face and poked his finger in his chest on two occasions. The grievor was the physical aggressor. The situation calmed down; however, five minutes later after the co-worker had quit and was heading to the door, the grievor set upon him. The co-worker had muttered something about union members being ass holes and the grievor then moved toward him and threw a punch. The co-worker dodged the punch. The grievor then took a few steps backward and charged into his co-worker, then punched him in the side of the head. The total incident occurred over fifteen minutes. The grievor had been warned by a supervisor to stop the confrontation. The arbitrator observed that although the grievor had demonstrated remorse in his examination-in-chief, his responses during cross-examination and re-direct detracted from the remorse and did not instill the arbitrator with any confidence that there is little likelihood of a similar incident occurring again. The arbitrator upheld the grievor's dismissal. Once again this was a more serious incident. It involved two phases, separated by fifteen minutes. The grievor had been warned by a supervisor to stop, but disregarded that warning. The arbitrator concluded the grievor was not remorseful and there was a risk of him acting violently in the future.

[84] The *Saskatchewan Association of Health Organizations case* can be distinguished on the very different nature of the workplace. Thus the violence is even more serious in that setting. It involved an assault and

aggressive conduct, in the course of horseplay that went awry, by a special care aide on a co-worker in a care home, as opposed to a violent incident in an industrial workplace. The grievor apologized and demonstrated remorse. The employment relationship remained viable. The dismissal was reduced to a three month suspension.

[85] I am mindful that notwithstanding the more serious misconduct in the foregoing cases, the periods of suspension were markedly longer than the one I have imposed in this case. Nevertheless, I have concluded the facts of this case, particularly all of those factors noted in the Grievor's favour, with the fact Mr. Gaebel, having been the instigator and provocateur, as well as a participant, was not been disciplined, justifies a short period of suspension.

[86] Given all the circumstances, I consider it is just and reasonable to substitute a one week suspension for the penalty of dismissal. Were it not for the seriousness of violence in the workplace and the Grievor's discipline record, I may have substituted a shorter suspension because the incident was relatively minor, and more importantly, Mr. Gaebel, the instigator and provocateur, was not disciplined.

[87] The grievance is allowed and the penalty of dismissal is to be reduced to a one week suspension.

Obiter Dicta:

[88] I have already drawn attention to the merits of a complete investigation which allows employees to specifically comment upon preliminary conclusions made by the Employer. While the requirement is not fatal, it may prejudice the Employer's case should the matter proceed to arbitration and new or different facts arise. However, ultimately this is a business decision for the Employer to make in light of its overall operations.

[89] More importantly are the matters of accommodation and safety which arose in my mind as the evidence was presented. The hearing may also have been the first time the possibility of these matters was brought to the Employer's attention.

[90] The Grievor was noticeably suffering from a sore back during the course of his testimony. He also testified that around November he had been working a considerable amount of overtime. Then of course he testified

there were blind spots in the overhead crane cab; and while the blind spots could be addressed by the operator bending over from the waist to look down below the crane windshield bar, doing so hurt his back. There was also a suggestion made in the argument of the Union Representative, arising from the contents of Mr. Gaebel's training records, that ID Banders went up into the crane cab to become aware of blind spots or difficulties the operators may have in viewing specific areas.

[91] The parties may wish to consider whether a physical examination of the Grievor and an assessment of his operational capabilities be undertaken in conjunction with his return to work. Should this be done, the topics in the inquiries should include the Grievor's ability to work overtime and whether or not any further modifications to the crane cab would be reasonable.

[92] As I mentioned in the introductory remarks, the comments in this section are not binding upon the parties. I have raised then simply because they arose in the context of the evidence and my analysis of the grievances.

Conclusion:

[93] The grievance regarding the crane accident is dismissed.

[94] The grievance regarding the altercation is allowed and the penalty of a one week suspension is to be substituted for the penalty of dismissal.

[95] I reserve my jurisdiction, as agreed by the parties, to address any remedial issues arising from this decision that the parties are unable to resolve.

DATED at Saskatoon, this 3rd day of May, 2015.

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