IN THE MATTER OF AN ARBITRATION

Between

CARIBOO PULP & PAPER COMPANY
(The Employer)

And

UNIFOR, LOCAL 1115
(The Union)

Grievance: Mr. Ed Sankey Suspension

Arbitrator:	Ronald S. Keras
Counsel for the Employer:	Mr. Donald J. Jordan, Q.C.
Counsel for the Union:	Mr. Craig Bavis
Hearing Date: Location:	June 22, 23 & 24, 2015 Quesnel, BC
Published:	July 24, 2015

I

The parties agreed that this Arbitration Board was properly constituted, pursuant to the terms of the Collective Agreement with the jurisdiction to hear and decide the matter in dispute.

Mr. Sankey grieved his eight (8) shift suspension. The suspension letter of August 7, 2014 read as follows:

> August 7, 2014
>
> Ed Sankey
> 3826 Quesnel Hydraulic Rd.
> Quesnel, B.C.
> V2J6G3
>
> Ed,
>
> Re: Bullying and Harassment
>
> As a result of activities that occurred on the night shift of July 2, 2014, allegations of bullying and harassment were brought against you. The Company engaged a third party to investigate and based on our review of the Investigator's report we have concluded that not only were these allegations true on that shift, but were part of a long-standing pattern of such behaviour.
>
> The behavior in question included making threats against employees behind their backs, boasting about a past jail record in a manner calculated to intimidate, demeaning people in front of others, and ignoring work assignment protocol in a deliberate effort to cause a fellow worker discomfort. In addition, on the overtime night in question, you took a prolonged lunch break, delaying and disrupting work operations. You have also been heard to make disparaging comments about management.
>
> The Company and the Union, on behalf of its members, have signed a

collective agreement that states their mutual recognition of their "respective obligations and responsibilities to provide a work environment free from sexual and personal harassment". Your conduct is in breach of that *collective* agreement requirement. In addition, recent amendments to the *Workers' Compensation Act* create statutory obligations for "employees", "supervisors" and "employers" regarding bullying and harassment. Your conduct violates your obligations as an employee under that legislation. Further, your conduct created a risk of a statutory violation on behalf of the employer and your supervisors. Your obligations about bullying and harassment were brought to your attention when you reviewed the definitions of bullying and harassment and completed the Bullying and Harassment Training Module required at Cariboo Pulp.

The Company views its obligations under the *collective* agreement and under legislation very seriously and will not tolerate bullying or harass ng behaviour. Every employee of Cariboo Pulp is entitled to attend at work without being subject to bullying and harassment and is entitled, at a minimum, to expect workplace cooperation from their fellow employees. Your conduct in purporting to unilaterally determine what functions you would perform on July 2, 2014 and your conduct in taking an extended lunch break have also been taken into account in our decision. As a result of your actions, you are being suspended for eight (8) working days commencing on August 8, 2014. You will return to work on August 24, 2014. During the period of your suspension, you will remain off the worksite.

If you continue to engage in behavior worthy of discipline or if you take retaliatory action against anyone as a result of this investigation, you will be subject to progressive discipline, up to and including termination of employment.

Sincerely,

Tony Christy
Production Manager

Cc/ Unifor Local 1115

The Employer hired an independent investigator, Ms. Stephanie Vellins, to make an assessment about the various allegations. Ms. Vellins' conclusion concerning Ed Sankey and Ron Durocher read as follows:

> The above findings indicate that the respondents and each of them have engaged in bullying and harassment in breach of the West Fraser Policy and contrary to WorkSafe BC's Occupational Health and Safety policies.

WorkSafe BC's definition reads as follows:

> **Definition**
>
> "*bullying and harassment*"
>
> (a) includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but
>
> (b) excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.

Ron Durocher received the following August 7, 2014 disciplinary suspension which read as follows:

> Ron Durocher
> 1858 Cypress Ave.
> Quesnel, B.C.
> V2J 482
>
> Ron,
>
> As a result of activities that occurred on the night shift of July 2, 2014, allegations of bullying and harassment were brought against you. The Company engaged a third party to investigate and based on our review

of the Investigator's report, we have concluded that not only were these allegations true on that shift, but were part of a long-standing pattern of such behavior.

The behavior in question included making threats against other employees such as "I'll punch him out", threatening to throw an employee off a roof or "meet him in the parking lot", and "I'd like to kill Bob". You commonly make demeaning and degrading comments about other employees and purposely isolate or exclude certain individuals from regular work activities. In addition, on the overtime night in question, you took a prolonged lunch break, delaying and disrupting work operations.

The Company and the Union, on behalf of its members, have signed a collective agreement that states their mutual recognition of their "respective obligations and responsibilities to provide a work environment free from sexual and personal harassment". Your conduct is in breach of that collective agreement requirement.

In addition, recent amendments to the *Workers' Compensation Act* create statutory obligations for "employees", "supervisors" and "employers" regarding bullying and harassment. Your conduct violates your obligations as an employee under that legislation. Further, your conduct created a risk of a statutory violation on behalf of the employer and your supervisors. Your obligations about bullying and harassment were brought to your attention when you reviewed the definitions of bullying and harassment and completed the Bullying and Harassment Training Module required at Cariboo Pulp.

The Company views their obligation under the collective agreement and under legislation very seriously, and will not tolerate bullying and harassing behavior. Every employee of Cariboo Pulp is entitled to attend at work without being subject to bullying and harassment and is entitled, at a minimum, to expect workplace cooperation from their fellow employees. Your conduct in taking an extended lunch break has also been taken into account in our decision. As a result of your actions, you are being suspended for four (4) working days including August 8th, 9th 24th and 25th, 2014. During the dates of your suspension, you will remain off the worksite.

> If you continue to engage in behavior worthy of discipline or if you take retaliatory action against anyone as a result of this investigation, you will be subject to progressive discipline, up to and including termination of employment.
>
> Sincerely,
>
> Tony Christy
> Production Manager
>
> Cc/ Unifor Local 1115

Mr. Durocher did not grieve his suspension.

II

Employer witness Rob Milligan was the Shift Supervisor since July 2, 2014, testified that in Materials Handling there are four (4) core jobs and that there are three (3) hours on each job. He described the first job as Pile Pusher and that the Pile Pusher and No. 4 Operator also do Rail Car Switches and that thirty (30) minutes is a reasonable time for a switch.

He testified that on July 2, 2014 he started his shift at 6:00 pm and that he was responsible to cover a large area of the mill and that there were difficulties inside the mill. He testified that he received a phone call from Bob Stubbs and at the time he was trouble shooting some problems. Stubbs call was at about 8:00 pm and Bob gave him the heads up that two people were are Materials Handling on overtime. It was the Grievor, Ed Sankey, and Ron Durocher. Bob said that Ed wasn't rotating, that Ron was hauling lime, and that he needed to do something about it. Mr. Milligan testified that he went to the control room, called the fellows on the radio on the Materials Handling channel, and that he talked to everyone on

the Materials Handling channel. He said he did a roll call about who was in and who was doing what and then an argument erupted between Gerry Taylor and the Grievor. He then said, “You guys need to rotate” and then Ed said, “I’ll do that”, and then Gerry swore at Ed. Then Ed said something about how Gerry didn’t park the dozer properly. They were mad at each other. Stubbs was not on the radio, he didn’t speak. Rob said he told them, “you guys need to rotate”. At 11:00 pm they were all in the lunch room and he was going to talk to them concerning language over the radio. In the phone call from Stubbs, Bob said he couldn’t take it anymore and had gone home and was phoning from his house. Mr. Milligan told Stubbs that he was AWOL and Stubbs said he wasn’t coming back to work. Stubbs also said Gerry Taylor had also left work. Mr. Milligan said that he finished his call with Stubbs and then called Gerry Taylor. He told Gerry that he was also AWOL and that he needed to come back to work, but he also declined. Gerry said that he felt that if he had stayed at work he would have done something physical. Gerry said he couldn’t take the picking on Stubbs by Durocher and the Grievor. Stubbs and Taylor were disciplined for leaving.

At 11:00 pm, Mr. Milligan spoke to all the workers: Larry, Ed, and Ron. He said he had to call in another worker and that he moved Ron into the rotation. He said that in the lunchroom there were lockers and a coffee machine. He said he just wanted the facts, that he was as diplomatic as he could be, and that he took their statements.

A report was sent on July 3, 2014 to Dan Wilson, the Operations Superintendent and to Tony Christy by Rob Milligan, and reads as follows:

Tony, Dan

Tonight I had 2 guys from materials handling go AWOL.
I am writing you firstly to let you guys know what happened and secondly to jog my memory when I am ask what happened.

July 2nd Night shift I had 2 guys in on overtime Ron Durocher and Ed Sankey.
Ed was called in for basic crew coverage and Ron was called in so we could get caught up with the stockpile of lime that needed to be hauled to the landfill.
Also on shift were Bob Stubbs, Larry McMann, and Gerry Taylor doing there regular jobs.

Ron and Ed's Side of the story
Ron was driving the mill dump truck hauling lime to the landfill and Ed was filling Ron with the loader.
From 3pm till aprox. 10pm the guys hauled 18 loads of lime to the landfill, and did a warehouse switch.
At aprox 9:45pm Ed says he called Bob Stubbs over the radio (he admitted that he just called Bob's name, no explanation why he was calling)
Bob never answered; Ed was says he was calling to see what Bob wanted to do next, relieve him loading the dump truck or continue on with what he was doing.
Because Bob never answered, Ed continued to load Ron with lime.
Larry's Side of the store
At this point Larry McMann heard the chatter over the radio and said that he would text Bob because maybe he didn't hear.
My Side of the story
I was extremely busy out trying to clear some plugged lines in the MCO 2 plant and unaware of anything other than having 2 guys on overtime tonight,
I received a phone call on the company cell. It was Bob Stubbs he reminded me that we had Ed and Ron in on overtime tonight and that Ron was in for strictly hauling lime but Ed was in for regular crew coverage. He said that Ed wasn't rotating and that I needed to talk to Ed.
I did I came back up to the bleach plant control room and called over the radio; basically the guys gave roll call and I asked who is doing what tonight?

The saying "boy that escalated quickly" fits. Once I talked over the radio asking who was doing what, all kinds of hurt feelings came to the surface.
Gerry started by telling Ed to do his fucking job, Ed responded by telling Gerry to park the CAT properly next, the two verbally spard over the radio for a minute or so followed by silence. The next thing I know I get a phone call from. Bob Stubbs, he is very upset and tells me that he has gone home and that Gerry Taylor has left as well. I talked to Bob for 5-10 mins on the phone but he said there was no way he could come back to work.
Bob's Side of the story
As I meationed Bob and I talked for 5-10 mins on the phone but he said there was no way he could come back to work, he asked if I heard them on the radio,
he was very upset and felt that the anger was directed at him. Bob was remoseful that I had to deal with him going AWOL, but willing to acept whatever the future punishment shall be.
Gerry's Side of the story
Similar to Bob's story we talked for 5-10 mins on the phone once again no way he could come back to work, he said that Ed and Ron were lieing they didnt call over the radio, and that he was tired of them picking on Bob. he said that the two of them were not working hard in fact they were off eating somewere.
He had to leave before he did something dumb like hit one of the two of them .

I feel like a cop, or a kindergarden teacher.
give me a call at home
250-747-2326 (home#)
250-991-9826 (cell)
Rob

Mr. Milligan testified that the interview with Larry McMann was short. Larry said that he didn't think Bob heard anything over the radio, therefore he texted Bob. He also testified that it was not unusual for employees to be in the lunch room; that it was typical for that time of day, between 10:00 and 11:00 pm.

In cross-examination, he testified that he had been a supervisor for three (3) years, but had never worked in Materials Handling. He testified that people start at about 4:30 pm in Materials Handling, but that he didn't start his shift until 6:00 pm. He said he did not know who was starting off in the rotation and that the overtime start was a No. 4 Operator. He said most vehicles have radios and also had hand-held radios. He said he never spoke to Stubbs by radio, but that Stubbs called him from home. He said he didn't know Stubbs' place in the rotation. He testified that the Hog Loader and Chip Reclaimer require constant attention and that there was no problem with the Hog Loader or Chip Reclaimer. He said there is flexibility when breaks are taken. He testified that Gerry swore on the radio and that Gerry said, "Do your fucking job".

Summoned witness, Robert (Bob) Stubbs, testified that he worked in the Materials Handling department since 1977 on 'B' Crew. He testified that the last four pages of the Vellins report were his notes of July 15th and July 2nd, 2014. He said, with respect to the July 15th notes that Dan Leblanc, at the time, was on "D" Crew. He said that Ed and Ron were constantly going at Dan. He said that he went into Gord Olsen's office and told him that Dan was "a nervous wreck; someone needs to straighten this out." Olsen didn't say a lot about it and didn't offer a lot of help. Bob then spoke to the Union Executive. He said they were far more forthcoming and were more helpful and that meetings occurred with the Company and Dan. Dan was given a crew change; it was a seniority move. He then said, "I don't think that they (Ron and Ed) were aware that I approached the Union. He said that he stood up for Dan. He had gone to the Company and the Union. Bob testified that in the lunchroom Ron would leave the room when I came into the room, isolating me. Bob testified that Ed continued to talk to him. There was an undertone to everything. He said, "It could be that I was a bit paranoid". He testified that

comments were made daily, that Ed wasn't being true, that's how he took it. Bob had asked the Company to change his shift. He changed shift with someone on "B" Crew. He said that everyone was talking about it. He said the shift change cost him dollars as he gave up Christmas and New Year's stats. He said he asked if he could change lunchrooms when he was on "D' Crew as he was uncomfortable with Ed in the same room and that he had heard different things said about him. He testified that his July 15th report, on page 2, was accurate about how he felt. People were telling him to be calm and carry on. He said it was worse that it truly is, embellished, just being stressed. He testified that "B" Crew was fabulously very enjoyable, in a friendly atmosphere. Going to work was enjoyable. He said that Ed and Ron came to work overtime on "B" Crew and he tried to isolate himself. On July 2nd, when they came in, they said they were going to haul lime mud, which upset him. They were running roughshod over us. We got off on the wrong foot to start the shift. A little later they were gone. No one knew where they went. The start of the shift was about 4:00 pm.

Bob described the rotation as four (4) positions and you do your job for three (3) hours and then hand off to the next person for three (3) hours. With five (5) people on the shift that night, we could have done 2 1/2 hours each; the fifth guy is the extra guy. Some crews say the fifth guy does the same thing the whole shift. Bob testified that Hog and Chip Reclaim are more intense and require more attention. He said on July 2nd he started on Chip Reclaim. He testified that at 8:00 pm he should have been relieved on Chip Reclaim; it would have been Larry who relieved him at 8:00 pm. He said a call came through to do a Warehouse Switch, that he was expecting to do the Warehouse Switch, but that Ron and Ed did the Warehouse Switch and he heard them on the radio. He said then he would go to No. 4 Operator, which was a less intense job. Bob testified that he went to the

lunchroom when Larry came to relieve him and he said he was looking for Ed and Ron at that point. He said he then went to the Lime area and no one was there. There was a pickup there; it did not have a two-way radio. He said the Loader in the Lime area had a radio but that he got in the mechanic truck and drove around the mill and said he didn't have anything to do and that Larry was on the Chip Reclaim. Bob said that he didn't believe that he contacted Mr. Milligan. He said he talked to Gerry who told him that Ron and Ed were out at the Guard Shack for a BBQ. Bob testified that he called Milligan on his cell phone and that he didn't recall Milligan calling anyone on the radio. He said when he walked into the lunchroom, Ed and Gerry were on the radio and that profanity was a daily thing. He said he had enough and decided to leave the mill. Bob testified that he drove around about an hour and a half and that Ed and Ron never showed up at Lime. Bob testified that he was disciplined for leaving the mill. He also testified that Ed did not approach him while testifying in these proceedings.

In cross-examination, Bob said that the July 2nd notes were his idea. He also testified that with regard to the July 15th notes that he did not recall if someone asked him to write those notes. He testified that he did not recall being told that there would be an investigation and that the Employer couldn't find harassment in 2013. He testified that Dan did not remember the date and that it had been ongoing; that he transferred to "C' Crew in November or December of 2013. Bob testified that the situation was worse between him and Ron, more than Ed. He said that Ron and he didn't speak. He testified that Ed would say "hi" to him and that Ed didn't cold shoulder him. In January of 2014 Ron said that Bob was a liar and not to trust him. He said he didn't remember anything threatening coming from Ed and that it was more Ron than Ed. He changed crews in December of 2013, not 2012, and that the bullying was more Ron than Ed. He said that on July 2nd he was

uncomfortable; that Ed was working overtime, and that Ed didn't say anything threatening. He testified that in 2013 he got the cold should from Ron. He said it could just be in his mind, feeling stressed, not because Ed was saying anything directly to him. He said that he never heard Ed threaten his family. He said Ed never threatened to punish him. He testified that he had heard Ed say, "I'll slash people's tires or burn their house down", however he did not know the dates. He said he could not put a date on it and that he did not know who Ed was talking about. He said Ed didn't threaten him and that he never complained about Ed's comments. In about September 2010, he said Ed had said that he'd been to jail and was not afraid to go back. Bob testified that everyone complained about Dan in one way or another, including me, pretty much across all the crews. Bob testified that Ed followed Dan on the rotation and that Ed coached Dan and told him how to do things properly. Generally, Dan had problems and Ron made comments, not Ed. Bob said he did not recall issues with Ed but that he didn't think Ed was being sincere. Bob testified that Ed said, "If you have a problem come talk to me anytime you want." Bob said that he didn't speak to Ed concerning the rotation on July 2nd, 2014, that there was a lot of confusion, and that the No. 4 was loading the lime. He testified that Ed said, "I guess I am here to load lime", but that he didn't hear what Ron said. It was the No. 4 Operator who loads lime. Bob said he started at the Chip Reclaim taking care of the boiler and that sometimes you can leave early in other jobs. He testified that the Warehouse Switch was between 7:30 and 8:00 pm. He said they didn't really know what Ron and Ed were doing as there was no discussion, we were confused. One would 'truck' and one would run the loader. He testified that Larry texted him and said Ed was suggesting that he 'push pile'. Bob said the first break was just after 8:00 pm in the Materials Handling lunchroom and lasted about 15 minutes. Bob said he did not take a hand-held radio with him as he thought he would be loading lime. He said he went to the

pickup and didn't want to feel like he was their boss. He said Gerry told him they were at the Guard Shack and he took Gerry's word for that. He said he could have gone to the Guard Shack but that he was just driving around. He said that the No. 4 takes care of bunkers, the ash system, and cleans out ponds and ash. He said he never heard Rob Milligan. That he just heard Ed and Gerry about 8:30 to 9:00 pm. He said he made a phone call to Rob but didn't recall the time. He said Gerry would have been on the Hog Loader and that Ed and Gerry's debate over the radio just got to him. He said it seemed like Ed and Ron was running the shift and that we were all equally confused. He testified that he could have asked for a meeting or gone to the Guard Shack. He said Gerry was telling Ed to "fuck off" and "fuck you", and that Ed said, "stop parking the CAT wrong". He said he had been a part of a couple of meals with Ed and that he gave Ed a key to his locker and that Ed sometimes shared food with him. Bob said that Ed was gracious that way with a lot of people.

In re-direct, Bob said he felt intimidated and did not want to go to the Guard Shack.

Summoned Employer witness, Gerry Taylor, testified that he worked in Materials Handling for over 39 years and that he had worked with the Grievor, but that he did not work with Dan. On July 2nd, Gerry said he started work at 4:00 pm and that he was on the Pile Pusher. He said someone was off with back surgery so two guys came in on overtime, Ron and Ed. He testified that he was there when they arrived and that Ron said that he was 'hauling' all night and Ed was in the line of progression, starting at the No. 4 position. Gerry said that the rotation was always the same, at 8:00 pm, 11:00 pm, and at 2:00 am. He said Ed would start at No. 4 and then goes to Pile Pusher. He said he would have expected Ed to replace him

on Pile Pusher, but that Ed didn't show up, which means the next guy has to do six (6) hours on the Pile Pusher. He said that Ed and Ron were at the Guard Shack and that he saw them there. Gerry testified that Bob was coming off of Reclaim and that Bob was not able to haul lime with Ed and Ron at the Guard Shack. He said no one was at Lime and you need two people, one to load and one in the truck.

Gerry testified that he met with the lady lawyer concerning the investigation. He said that Bob was looking after the Chip dump (utility position) and that he was driving the pickup around the mill. He said they started hauling mud again and he said he was not confused. He said that Bob phoned Milligan and that Milligan did not get ahold of him on the radio and that he didn't remember a discussion with Milligan. He testified that Bob was supposed to be on No. 4, and that Ron and Ed were gone about 2 ½ hours. He said that Ed jumped into the Loader and that Ron was in the Lime truck. He said that he got upset. He said he didn't remember Ed trying to call Bob and that Ed said to him that he better learn to park the CAT. Then he said that he just went home because he was pissed off. He testified that Dan had been harassed by Ed and Ron. He said that Bob was also upset and that he bumped into Bob in the parking lot. Gerry said that he was aware of a history by talking to Bob; it was about Dan being harassed. He said he had heard Ed and Ron make derogatory comments about the crew but that there were no particular ones that he remembered. He said that on July 2nd he did not have a clue where their mind was at. Ed would switch at the regular times, 2 and 2 ½ hour absence doesn't happen frequently, and that was part of the reason he went home. Gerry testified that the Grievor hadn't spoken to him about this hearing.

In cross-examination, Gerry said that Ed and Ron came back about 9:00 pm and that he (Gerry) was in the Hog Loader. He said he was on the radio with Ed but he did not recall the time. He said that Ed and Ron did the Warehouse Rail Switch

between 7:30 and 8:00 pm and that he was on the Hog at 8:00 pm. He said he started as Pile Pusher, then Hog Loader, then Chip Reclaim, and then No. 4. He said that Ed started at the No. 4 and then should have gone to the Pile Pusher, then the Hog. He agreed that the Hog Loader and the Chip Reclaim were intense jobs. He said that on the Pile Pusher and at No. 4 you could go home early at the end shift. He said that he can't remember when Ed and Ron came back from the Guard Shack and that Bob never went to the Guard Shack. He said that Bob never called on the radio. He said that these two would not listen to anyone and that he did not attempt to reach them on the radio. He said that he was not with Bob and didn't know what he was doing. Gerry testified that his comment on the radio was, "Why don't you do your fucking job?" He said that everyone backs the CAT in and that he fronts it in and that he has parked it the same way for thirty-nine (39) years. Gerry testified that Ron is 'more nasty' than Ed and that he never witnessed directly any harassment of Dan. He said that Bob doesn't have an issue with anybody. He said that on the next rotation, Bob would have pushed pile and that Larry would have been Pile Pusher in the fourth rotation. He said that he drove by the Guard Shack and saw Ron and Ed at the Guard Shack.

Summoned Employer witness, Roy Norman, said that he worked in Materials Handling for about forty-three (43) years on Crew "C" and that he had worked with the Grievor. He said that he had heard the Grievor make threats about spiking tires and keying vehicles on the night shift. He hadn't heard anything, threat wise, concerning Bob or Dan. He said that Bob turned in Ed with regard to Dan and that Dan didn't back up Bob. Ed came back working OT. Ed had made a reference about being in jail and that he didn't mind going back. He said he didn't want to work overtime with Ed; he'd rather just stay away from the threats.

In cross-examination, Mr. Norman said that he was on "C" Crew for about forty (40) years and that Ed started on "B" Crew. He said that Gerry and Darcy left work one time and Ed got stuck doing the work as they left work for "B" Crew and "C" Crew also left work for Ed. He testified that he did not have a recollection of saying that he would shoot Ed. He said that Ed's jail time was as a result of an assault during a hockey game, but that he didn't recall when that occurred.

Summoned Employer witness, Dan Leblanc, said that he was "D" Crew for a couple of years and that he left "D" Crew about two (2) years ago. He said he wanted to leave that crew because he didn't get along with Ron and Ed. He said that there was lunchroom harassment and that there were pokes and stabs about everything and that it was too much; that it was constant. He said it was more Ed than Ron but that he was not threatened with physical harm. He did his interview by speaker phone and he said Ed said he would scratch my car but that he did not report the comments. He said, "You just get used to it". He testified that Bob did a report in 2013 and that the Company did an investigation. He said that he did not participate as he was afraid due to threats. He said that he now has a very quiet relationship with Ed and Ron.

In cross-examination, Dan said it was four (4) years ago that he went to Materials Handling on "D" Crew. He said that Ed followed him in rotation and that Ed had concerns in me doing my job. He said that Ed gave him pointers, advice, support, and help. He said Ed never threatened to harm me. He said that the 'car scratch' comment was about four (4) years ago and that it was not Ron. He said his car never got scratched. He testified that in the November 2013 investigation there wasn't sufficient evidence of harassment. He said that now he has very little contact with Ed and that people swear on the radio.

Summoned Employer witness, Ken Williams, said he was on “D” Crew in September of 2013 and that Bob was there and that Ed said, “Bob was a fucking asshole”. He said he didn’t like being approached like that as he makes his own judgments. He said that Ed made frequent comments about Bob. He testified that Ron said that he would throw Bob off the roof. He said that Bob took him aside and said that Ed and Ron hate him because he stood up for Dan Leblanc. Ken said that he felt sorry for Bob. He described the comments as “mill talk”. He said that no one else made comments about burning the house down. In the lunchroom Ken said that he heard Ed say to Gerry Taylor, “next time I will push you down the fucking stairs”. Ken described this as just ‘mill talk’ and that he said that he got to know Ed a little better.

In cross-examination, Ken said that ‘mill talk’ occurs in the lunchroom and on the radio and it involves many people, not just Ron and Ed. He said that Bob had a problem with Ron and that Bob said that Ron was more of a problem than Ed. He was aware of the November investigation and he said that he did a computer module on harassment training; the whole crew did. In September of 2013 there were comments that concerned Ken. He said he never heard Ed threaten directly, he did not remember when threats occurred, and that he didn’t go to Dan. He said these comments went on every shift, including ‘burn the house down’ of Bob. Bob said he was at home and heard rustling in the bushes and that he thought it was Ed. Ken said that he did not acknowledge the conversation and didn’t want to be part of it. He said there is a lot to learn in the rotation and that the fifth person went home and that Bob changed in the rotation, fucking Ed around. Ken said that Ed was good to work with.

In re-direct, Ken said that Bob was concerned about Ron at work and that Bob was intimidated and that everyone knew this was going on. He said no one did anything. He said that everybody knew and that he didn't see anything being done and that he suspected that the Supervisors were aware.

Summoned Employer witness, Larry McMann, worked in Materials Handling. He said that on day shift there were Supervisors around and there would be visits by Supervisors occasionally, as Supervisors were in the mill. He said that some Supervisors come out a couple of times and some only once. On July 2nd, he was on shift and that at the beginning we all showed up. Ed said he was on Lime. We thought Ron was on rotation and he talked to Ron, who said that Ed was on rotation. He said it didn't give him any concern about who was doing what. He said that on the phone conversation with the lawyer he said that Ed was having a bad day and that he had started shift about 4:00 pm on the Hog. Job rotation was supposed to be at 8:00 pm and Ron and Ed decided to have lunch. Ed would have been on the CAT and that Ed was trying to get ahold of Bob between 9:30 and 10:00 pm. Larry said he didn't recall calls for the Warehouse Switch. Larry said that he told Ed that he would text Bob to 'push' chips and that Bob was the Utility man and Ed wanted Bob to 'push' chips. He said that Bob didn't have a radio but that he did text Bob and that Bob said, no, that he didn't want to do it. Larry didn't tell Ed as he said that he didn't want to add fuel to the fire and that was the end of it. Larry said that he came off the Chip CAT at 11:00 pm. He said that Milligan was involved and that Milligan did roll call to find out who was doing what. Larry said that he was on the Chip CAT, heard Gerry Taylor say, "Why don't you do your fucking job Ed?" and that Ed said, "Why don't you park the CAT correctly?" Larry said he got a text from Bob saying that he and Gerry were leaving. He said that Ron and Ed went to the Security Shack for lunch but that he did not know for

how long. He said that when hauling lime, it takes three (3) buckets and the truck is full. He said there was silence on the radio for a period of time, and then Ed called Bob and said, “Hello Bob”. He said he did not remember what Ed said to Milligan. He did recall that Ed said something about pushing Gerry down the stairs and that he had heard it from a number of people, including Ed. Larry said that over the years Ed and Ron treated Dan a little rough. He said that Dan was a slow learner and that Bob tried to help Dan. Ed and Ron weren’t happy about Bob helping Dan. They weren’t happy with Bob; there was shop talk and colourful language. He said it was years ago when Ed talked about slashing tires. He said he’d heard this kind of thing since the 80’s, including burning down houses. He said everybody heard it, including Supervisors. He said that 99.5% of Supervisors heard something. Larry testified that Ed said that he had been in jail and was not afraid to go back. He said he heard this second hand. Larry testified that Ed has never carried out a threat and that he didn’t think he would go out and do it. Ed has never done anything pre-planned.

In cross-examination, Larry testified that he has never seen Ed do anything violent to anyone at work. He said that Ed never threatened him or harassed him. Larry said that he started at the Company in 1980 and that in 2009 he went to Materials Handling. He described ‘mill talk’ as swearing and criticizing employees and threats, sometimes in the plant and at Materials Handling. He said he worked with Ed on “D” Crew. He said Virgil was threatened with slashed tires and burning his house down but that it was so long ago, it was not serious and Larry just blew it off. On July 2nd, Ed was the No. 4 Operator and was loading lime. He said he did not recall Ed say, “I guess I’m loading lime”. He said that where they were dumping it, some loads would take longer than others, ten to fifteen (10-15) minutes to dump. Ron was hauling for the whole shift and that on overtime it is up

to the individual. He testified that Ron and Ed came back from lunch into the second rotation between 9:30 and 10:00 pm and that Pile Pushing was easy to catch up. He said Bob was not waiting in the Lime area.

Employer witness, Heather Wuensche, is the Human Resources Manager for the Pulp Group at West Fraser and that West Fraser is a part owner of Cariboo Pulp. She testified that she has been in Labour Relations with Cariboo Pulp for three (3) years. She identified the harassment report of December 2013. She advised that Tony Christy was the Production Manager and that Dan Wilson was the Operational Superintendent. She testified that Dan Leblanc didn't file a complaint and she said that she approached the Union executive and there was joint ownership of the harassment policy. She said she was involved with the Union.

Dan Leblanc got a Crew change. Bob asked for a shift change as Bob was uncomfortable with Ron; he had no complaints about Ed. They did proceed with an investigation as they were obligated by law to investigate. They held interviews with the rest of the crew. Ron and Bob were not talking. There was no investigation of Ed. She didn't hear about threats about Ron or Ed. They interviewed Ed and there was an undercurrent. The Employer rolled out the new policy and went over the policy with all that were interviewed and gave them a copy of the policy during the investigation. She testified that on July 2, 2014 two had walked off the job and on July 3rd they had an investigation led by Dan Wilson. The two were disciplined and they concluded that further harassment investigation was required. Stephanie Vellins did a report. Ms. Wuensche testified that she reviewed the report and that there was material that had not been brought to her attention before. Harassment and bullying had occurred by Ron and Ed. She reviewed the report and the facts. The allegations were true, they believed. She

testified that she agreed with the discipline for Ed as the discipline was for bullying and harassment. July 2nd created confusion and a lack of communications and there were comments about Dan Wilson. There was also the extended lunch and no rotations. She said they considered termination for Ed, however he was a long term employee and they decided to send a strong message.

In cross-examination, she testified that she didn't believe Ed or Ron were there when Ms. Vellins interviewed others. She said that Ron was a long term employee and therefore, was given a four-shift (4) suspension. With Ed, she said that they also looked at a verbal warning. She said that she believed that Ed was the ring leader. She said that Ron and Ed's Supervisor's said that they were not aware of any problems. Ron had nothing on record. There was a meeting with Ed in 2013.

Union witness, Ron Durocher, was with the Employer for forty (40) years with thirty-five (35) years in Materials Handling. He testified he was called in on July 2nd and normally there is a four or five (4-5) man crew. He said he was called in on "B" Crew to haul lime and that he was not in rotation. He said he started around 4:30 pm and only saw Larry and didn't know who all was there. Ed was No. 4 Operator and loaded into the truck. They hauled for a few hours and supper was around 7:30 pm. He said that he and Ed did the Warehouse Switch after lunch. He said it takes about twenty (20) minutes if you don't get stuck hauling lime. He said he could do thirty (30) loads per shift and they were on a fast pace – that they did eighteen (18) loads before supper. He said they took lunch at the Guard House, that it was not planned in advance, and that it was a first time for him. He said he didn't have a radio at lunch and that they got back after an hour and a half. There was no discussion about what job after lunch. Ed was 'pushing pile' and got a call for the Warehouse Switch. He said he went with Ed to do the Warehouse Switch.

He said he was still loading lime and he didn't know who was loading because two guys went home. He said Ed didn't load lime after lunch and that he never saw Bob all night. He said there was a big stockpile. He said we did take a longer break, but not to upset Bob. He said he never heard Ed make comments about 'slashing tires' or 'burning the house down' or 'beating up Bob'. He said he saw the pickup truck and assumed it was Bob in the gravel pit. He said Bob hides there all the time.

In cross-examination, Ron said that Bob always goes up and hides and smokes. He said it was possible that Bob was on Chip Reclaim, but he didn't know for sure. He said later on Bob was supposed to load for him. He said he didn't see who was in the truck. He said it was not appropriate to threaten, but there is such a thing as 'mill talk'. He said they had lunch at the Guard Shack and that there were big piles of lime and that they emptied out the bunker. He said he was interviewed by the lady lawyer and that he did not recall threats.

Union witness and Grievor, Ed Sankey, started with the company in 1980 at age seventeen (17). He said that on July 22nd it will be thirty-five (35) years. He said that he started as a summer student and got a full time job via arbitration. He became a Machine Room Utility and moved up the ladder and bid out with thirty (30) years seniority in 2010 into Materials Handling. He bid in December of 2009 and Larry and he got the bid. The first week in February of 2010 he said he trained people behind him and then went to the yard. He said 'mill talk' went on inside for thirty (30) years. He said when people get together, people talk. Good things and bad things; its rabble. No one takes it serious. There is swearing and threats. He testified that he never took threats seriously and that, yes, he had been involved, however there was no malice, it was just talk. He said he made comments to make

a point and that he said he was loud. He said he was the new guy in Materials Handling and that his reputation preceded him. He said that the crew he was put on didn't receive him well and that they didn't tell him how the rotation went. Roy Norman was the person that left work on the cross-shift; the work he was leaving, I filled in that slot and so would have to clean up extra work and it went on for months. I asked him (Roy) if he was trying to get Gerry Taylor or Darcy. He said to Roy that if he were trying to get them, he was doing a poor job. Roy said. "Tough luck". Then Ed said, "I will put four inch spikes under your tires" and Roy said, "I will shoot you". Ed said he never put spikes under his tires. It stopped; no extra work. Ed said he didn't take the "shoot" comment seriously. Roy was putting work out there and he was getting the wrong guy. Ed said he just wanted it to stop. The intent was to get him to stop.

Virgil Lowe bid in 2009 and had fifteen (15) years less seniority than Ed. He had a temp job for over a year. The job should have been posted. Ed put in a grievance about the job. He said then he got his job posting. Virgil was a day shift worker. They used him to cover a shift. Ed said to the Supervisor that they can't use a day shift guy to cover. Ed said he went to Virgil and said they had a problem. Ed said he never threatened Virgil Lowe. Everybody in the yard was a senior member.

Ed said he was in jail for assault and that he phoned Dan Wilson and explained the situation. Ed said an Arco truck driver didn't want Ed to hit him in the head. Ed said that he never hurt anyone on the worksite. Ed testified that the second paragraph of the discipline letter was directed at someone not in the bargaining unit and that it was three or four years ago.

Ed said that Ken Williams was watching out for Bob screwing him over. Ken was the number five guy, the floater, to take up vacancies. Bob jumped into that position. They needed to show him the proper way and Ed explained it to Ken. Bob came down and they had a conversation. Bob agreed that he (Ed) was right and that is how it works. Ed said nothing about doing something to Bob and Bob agreed. Ed testified that Dan Wilson started the same day as Ed and that they had disagreements over the years. Ed said that people had put Dan in the locker at school but he did not. Ed said it was just talk about high school. It wasn't to call down Dan. He said he never threatened Wilson.

With regard to Dan Leblanc, he said that Leblanc got a bid into the yard and that he was slow into picking things up. Ed said he tried to train Dan. He said Dan was always trying his best but that his best wasn't very good. Ed said he was always cleaning up Dan's mess. Ed said that if he didn't tell Dan on the radio, then he messed things up. Dan had to walk back and do his job. Ed said that there was seventeen (17) steps in a 'Switch' and that Dan would forget sixteen (16). He said that Bob and he switched rotations. Ed said he worked behind Dan every day, that he made comments about Dan's work performance, and that he put a lot of work into Dan, which was four (4) years ago. He said he had never threatened anyone's tires; that it was just campfire talk. Ed said Bob is a kind, gentle man and that Bob and he shared a lunch locker. Ed said that he was unhappy that Bob supported Dan. Ed said he said hello to Bob every day and that he never threatened to beat up Bob or burn his house down. Ed said that he told people he was unhappy with Bob for backing up Dan. He said he told Bob that he was approachable, that if there was something he didn't like to come and talk to him.

Ed said, with regard to the Pile Pusher job, there is some flexibility as the CAT moves material fast. Hog Loader requires more attention and Chip Reclaim requires more attention. He said 'Hog' is used for a fuel source and if it stops, it costs the company money for gas. Ed said shifts are twelve (12) hours long and some employees come in at 4:00 pm. He said he comes in at 4:30 pm and that the first rotation is 4:30 to 8:00 pm. Ed said there was no rule about where to take breaks and that people go visit friends and family and take the radio with them. No one has said that they must take their break in the Materials Handling lunchroom.

On July 2nd Ed was on overtime and started as the No. 4 Operator. He said he was asked ahead of time to work the No. 4 and then do the rotation. He said that when he came to work Ron was there and that they now had five (5) guys. He said he followed Ron into the lunchroom and that Ron said that he was there to haul lime and that Ed said he was loading lime on the first rotation. He said they went to work about 4:30 pm. He said the Warehouse Switch was about 7:30 pm and that he and Ron went and did the Switch and finished about 8:05 pm. He said that winter conditions are different than summer, that it was hot, and lime is caustic. He said that Ron and he worked together very well and that they were pretty efficient. They took lunch about 8:00 pm and that they had done 18 loads of lime, which is way more than most people do. Ed said they had the radio with them at lunch and that Rob Milligan called them about 8:40 pm. Rob wanted to know who was on what job. Ed told Rob he was Pile Pushing on the next rotation. At 9:10 pm when they finished lunch, Bob was waiting for them. Ed said that he had to go 'push pile'; Ron said that he didn't want to sit in the truck and do nothing. Ed said that he didn't know where Bob was. Ed said he called Bob and Bob never answered. Ed said that Larry McMann said that he didn't think that Bob had a radio. Larry texted Bob and then he said he loaded Ron. Ed testified that Gerry

Taylor started yelling on the radio. Ed said, as a courtesy, that he should park the CAT back in. Everyone does that except Gerry. Ed said on the radio that Gerry should learn to park the CAT. Ed said that Gerry swore at him on the radio and that Ed said that he guessed he was loading lime. Ed said that he did his job and that his communication was down a little bit. He said there were two lime piles and that there was lots of time to do Pile Pushing at 11:00 pm. He said they flattened it in twenty-five (25) minutes.

Ed testified that he got an eight (8) shift suspension and that he also missed on five (5) overtime shifts. Ed said that on July 2nd it was a bit confused, which caused two men to go home. Ed said he did all his other duties and that he did everything he was asked to do. Ed said he wasn't supposed to load Lime after 8:00 pm but no one else was there. With regard to Dan Leblanc, Ed said that he didn't realize that he was so sharp. He said he helped Dan every day and that he might have shown frustration. He said he was upset at Bob but that they still shared a locker. He said Bob is a nice man. Ed said that he is a kind person and he shares his lunch with people.

In cross-examination, the Grievor testified that he was unclear about the July 2nd incident until he had a talk with Tony. He had a meeting with Tony and Dan and said that he got an eight (8) day suspension and lost five (5) overtime shifts and that he was stunned by the suspension. He testified that he was frustrated with Dan Leblanc and with Dan's work. He agreed that a few comments with Dan were out of line. He said, "Mill talk is mill talk". He testified that he has taken ownership of what he has done. He said that most people are just talking or just kidding. He said that how people take things at the campfire (lunchroom) is their perception. He testified that he was threatened to be shot and that he blew it off and never

reported it. He said things at the campfire are just bantering and that they are all just ‘bullshitting’. He agreed that threatening to slash tires or burn a house down is inappropriate. He said he thinks that the statements (his threats) were very unfair because they were not true. He said that he was sorry that they felt that way. He said that he complained about people not doing a good job to management but that nothing was done. He said it was his role to train Dan and point out his deficiencies to make him better and safer. He said that training Dan was ongoing and that many people complained about Dan. On July 2nd he said that he and Ron did a switch at about 7:30 pm and that he never went to the pile and that nobody changed his job. He said it was a common thing to help each other out and that rotations are automatic. He said that he did go to the loader machine and that Ron had said that he should come and load him. He said he never got an opportunity to finish his rotation and that there was an hour and a half left in the second rotation. There are no set breaks. He said that he did have an extended lunch break. He testified that he wasn’t preventing Bob from loading Ron and that they contact each other by radio. He testified that Larry tried to contact Bob by phone and that Larry never got back to him. He said that he knew he was going to be loading lime and that he could not assume what others were thinking. He testified that Gerry and he didn’t get along.

III

The Employer’s argument reads as follows:

Background

The Materials Handling Department is made up of approximately 24 bargaining unit employees, on four separate crews referred to as Crews A, B, C, and D. Materials handling is a 24/7 operation and each crew works 12 hour days: two day shifts followed by two night shifts and then four days off. The materials handling work takes place outside of the mill on various pieces of equipment and requires employees to work very independently without much in the way of supervision.

Each materials handling crew has an assigned supervisor. However, in addition to materials handling, the supervisor supervises approximately 20 other employees working in the bleach plant, at the dry end and in the warehouse. The supervisor's office is in the bleach plant and the supervisor spends most of his time inside the mill.

During a shift a materials handling crew working outside rotates between the following jobs:

- PILE PUSHER - This job requires the use of a bulldozer. The pile pusher flattens a pile of wood chips being blown out from the mill and spreads it out. The pile pusher is also expected to assist the number 4 operator with other tasks.
- HOG LOADER - This job generally requires the use of a front end wheel loader. The hog loader pushes waste wood from the mill onto a conveyor to allow the waste wood to be burned and used for energy purposes.
- CHIP RECLAIM/RECLAIM CAT - This job requires the use of a bulldozer. The operator pushes wood chips onto a conveyor which carries chips into the mill. Pulp is eventually manufactured from these chips. There must be an operator performing the tasks associated with this job at all times to ensure constant flow of raw material into the mill.
- NUMBER 4 OPERATOR - This job is somewhat of a "floater". The operator cleans up garbage with the loader and is involved in doing all of the rail car switches (assisted with the pile pusher).

The number 4 operator, again together with the pile pusher, also loads

lime mud as part of the chemical recovery process.

There is a fifth person who may be called into work on the shift. This person is often assigned to drive a dump truck hauling away lime if there is a lot of lime piled up. Other times they may be part of the rotation. Crews are supposed to rotate between four regular jobs every three hours at set times.

The Context

The first thing to recognize in a case like this is the uncomfortable context created by having to call employees under subpoena to give evidence which might harm the interest of another worker. It was clear from all of the bargaining unit employees that they were uncomfortable with giving their evidence and, from time to time, would understate their evidence until having their memory refreshed by reference to the investigatory notes in exhibit four. This was to be expected. However any hesitations in their evidence ought not to diminish its credibility. To use the vernacular they were put "between a rock and a hard place". It is to their credit that, on the matters that truly mattered, they spoke the truth. The other element of context which must be born in mind is what this case is not about. While the events of July 2nd 2014 provided an initial focal point for the company's investigation, it soon became clear that there was a far more deep-rooted and pervasive problem with the activities of Mr. Sankey and Mr. Durocher. Both of those employees were disciplined, not simply as a result of their actions on July 2nd 2014 but, as Mr. Wuensche testified, as a result of the pattern of bullying and harassment that the investigation into the events of July 2nd uncovered. You have Mrs. Wuensche's evidence with regard to why different levels of evidence were imposed on Mr. Sankey and Mr. Durocher and, in our submission; the evidence supports the distinction which she drew between them. As she testified, the difference in the level of discipline was related to the more frequent use by Mr. Sankey of threats, the length of the harassment, and her conclusion that Mr. Sankey was more the instigator than Mr. Durocher. The level of discipline was chosen to emphasize the unacceptable nature of the bullying and harassment combined with a concern that the length of the suspension had to be sufficient to bring home the message to Mr. Sankey not only that this conduct was unacceptable, but that his future

employment was in jeopardy. As she testified, the company took Mr. Sankey's length of service into account and had initially been considering termination of his employment.

The Facts

To fully appreciate the facts in this matter one must have regard to the chronology of events outlined in exhibit five, the harassment investigation report of December 2013. This harassment report, as Mrs. Wuensche testified, was directed to the "shunning" conduct engaged in by Mr. Durocher regarding Bob Stubbs. This manifested itself in Mr. Durocher leaving the lunch room on every occasion when Mr. Stubbs entered. This created a very uncomfortable environment and it was this environment which was the focus point of the investigation in exhibit five.

It is important to know that there had been a previous occasion when Mr. Stubbs brought to management's attention that Dan LeBlanc was being bullied on B crew. However Mr. LeBlanc did not put in a harassment report, and when the matter was canvased with him, he was very reluctant to talk about it. Indeed, he testified in this hearing that he was too intimidated to participate in the initial investigation. As Roy Norman testified (investigator notes page 70), after Bob Stubbs had brought up the issue, Dan did not "back him up". This upset Mr. Norman, as he felt Bob was just a good guy trying to come to Dan's defense, and Dan did not back him up.

The evidence establishes that, as a result of Mr. Stubbs intervening on Mr. LeBlanc's behalf, and the subsequent investigation, Mr. Durocher and Mr. Sankey turned their attention to Mr. Stubbs. In fact, the events of July 2nd were simply another instance of Mr. Sankey and Mr. Durocher intimidating and frustrating Mr. Stubbs. Mr. Stubbs testified that he felt he needed to step in to help Dan, who was a nervous wreck, and had been treated "like garbage" by Mr. Sankey and Mr. Durocher. He concluded, as did others, that Mr. Sankey and Mr. Durocher turned their attention to him solely because he came to Mr. LeBlanc's assistance. The situation had gotten so bad that he had asked the garage mechanics to give him a key to their lunch room because it was too uncomfortable to be where either Ron to Ed were, even if they weren't speaking to him. The situation was so difficult

that Mr. Stubbs was prepared to accept an offer from another employee to change shifts, even though that was going to cost him his Christmas and New Year's stats. He said this was a price he was prepared to pay in order to try to isolate himself away from Mr. Sankey and Mr. Durocher. The handwritten document assigned to exhibit three, headed "schedule B", is a heartfelt explanation of the distress that Mr. Stubbs felt. Thus, the events of July 2nd were simply a continuation of the behavior which had caused Mr. Stubbs to leave B crew. He couldn't take it anymore, he said. And as Mr. Taylor said, it was so bad and he felt so sorry for Bob on the night of July 2nd that he had to leave before he did something physical.

The disciplinary letter in this matter sets out, in the first two paragraphs, the elements of the conduct which was revealed by the investigation into the events of July 2nd, which served as the basis for Mr. Sankey's suspension. However, before turning to the individual elements of exhibit ten, two particularly telling pieces of evidence speak volumes about the impact of Mr. Sankey's conduct on Mr. Stubbs. As Ken Williams said, "The straw that broke the camel's back was when Bob confided in him that he was so scared all the time that when he heard a rustle in the bushes when he was at home working in his yard, that he thought that it might be Ed there." In re-examination, he said that Mr. Stubbs was very nervous, scared, and intimidated at the work place by Ron and by Ed at home. Mr. Stubbs's fragile state was of such concern to Mr. Williams that he simply stopped reporting to Mr. Stubbs the things that were being said about him because it just made matters worse.

As further evidence of the pervasively intimidating nature of Mr. Sankey's conduct (as well as Mr. Durocher's), we have the evidence of Larry McMann, who testified that, after Mr. Stubbs had told him on July 2nd that he was not prepared to go and push pile in Mr. Sankey's stead that he wouldn't relay that via the radio to Mr. Sankey because in that situation he did not wish to be the bearer of bad news and simply add fuel to the fire.

These observations are important because they are consistent ONLY with the existence of an ongoing pattern of intimidation in the work place. Experienced employees-do not become so intimidated that they would make the comments referred to above unless they have been worn down over the years, as the company's investigation disclosed.

The Discipline letter

The first allegation in the discipline letter is that the employer concluded that the allegations of bullying and harassment were true on the shift of July 2nd. Again, this conclusion is the only conclusion consistent with Mr. Taylor telling Mr. Milligan that if he stayed he may do something physical, and Mr. Stubbs's statement that he simply couldn't take it anymore. Indeed, Mr. Stubbs testified that it just "got to me" that night, after "all I had gone through over the years". It is also important to remember the evidence of Mr. Taylor when pressed on a number of occasions in cross-examination about why it wouldn't have been appropriate for Mr. Stubbs to go to the guard shack to find Mr. Sankey and Mr. Durocher to find out what was happening and when they intended to report to their jobs. As Mr. Taylor testified, "These two were ignoring us. Why would we or he go and try to talk to them. His job is to sit there and wait to load mud. It is not any of our jobs to go and find them and ask them to come to work." Those two would not listen to anyone but a supervisor anyway. He stated emphatically on a number of occasions "they ignore us". We will deal with other elements of the bullying and harassment which occurred on July2nd when we canvas the evidence about Mr. Sankey and Mr. Durocher ignoring existing work assignment protocols in an attempt to cause Mr. Stubbs discomfort.

The key revelation which arose out of the company's investigation into the events of July 2nd was the exposure of a long-standing pattern of threats made against employees. Mr. Stubbs, Mr. Taylor, Mr. Williams, and Mr. Norman all agreed that they had heard Mr. Sankey make comments about slashing people's tires, and burning houses down. Mr. Norman also testified that Mr. Sankey made it clear that if you do anything to him, he'd spike your tires with four inch spikes, or key your vehicle. Larry McMann, Ken Williams, and Gerry Taylor all testified about Mr. Sankey telling a story about having Gerry Taylor by the collar at the top of some stairs, and threatening to throw him down and ride him all the way down. Mr. McMann testified specifically that Mr. Sankey had made threats against Virgil Lowe, that he was going to slash his tires and burn his house down. Dan LeBlanc confirmed that if he left the chip pile and there weren't enough chips there, Mr. Sankey would say, "I'll break your arm and

then laugh" and that if there wasn't enough hog left, that he would scratch his car in the parking lot. Employees testified that Mr. Sankey boasted about having been in jail in the past and not being afraid to go there again. Mr. Stubbs confirmed telling the investigator that Ed said things like, "I've been to jail. I don't care. I'll slash tires. I'll burn their house down" (Investigator's report page 8). Mr. Norman testified that the remarks about going to jail were made to the crew generally and not about a truck driver, and that he felt that the implication was that he was the type of person who would carry out his threats.

Mr. Williams testified that he had never heard anyone else in the mill use this kind of language, and when pressed to give examples about occasions when these comments might have been made, he said that it happened almost every tour that he was on. Indeed, there is no evidence of anybody else ever making the type of threats made by Mr. Sankey. With regard to the reference to demeaning people in front of others, Mr. Stubbs testified to comments like, Dan LeBlanc was an idiot, and untrainable, and Dan LeBlanc himself testified that Mr. Sankey said he looked "gay" with a beard, and made comments about other employees and their girlfriends to such an extent that he just got sick of it. Ken Williams testified that shortly after he started on D shift Mr. Sankey approached him and told him that Bob's a "fucking asshole". He also testified that the comments came mostly from Ed. He confirmed the entry in the investigator's report (page 26) that two weeks after he started on the crew, Mr. Sankey approached him and said "you need to get on board. You need to get with the program. Bob is screwing you over, taking advantage of you. Bob is going to tattle, rat you out, and screw you over and take advantage of you by making me do all of his work." Mr. Williams testified that he felt they were trying to turn him against Bob. With regard to the reference in exhibit ten to ignoring proper work assignment protocol in an attempt to cause another employee (in this case Bob Stubbs) discomfort, given the background we have examined, it can be no coincidence that the employee most victimized and most frustrated by the behavior of Mr. Sankey and Mr. Durocher was Bob Stubbs. The evidence established that, upon entering the lunch room, Mr. Sankey said I'm here to load lime. In fact, and this was not challenged on cross-examination, Mr. Stubbs said that Mr. Sankey said "I'm here to load lime, and that's it". In any event of what was said at that time, the evidence establishes that the employees follow the normal rotations unless there has been a

mutual Agreement on the crew to the contrary. As Mr. Taylor said, Mr. Sankey and Mr. Durocher made no attempt to make any arrangements with anyone, and Mr. Sankey made no attempt to go to pile pushing. With regard to Mr. Sankey's explanation to Mr. Milligan over the radio that he was loading Ron because he couldn't find Bob Stubbs, Mr. Williams testified that that was "bullshit". He testified that he could see from his position on the chip pile that the truck was not running at all at the lime dump. Mr. Stubbs testified that he was frustrated because he felt that, from the outset of the shift, Mr. Sankey and Mr. Durocher were "taking over" and running the shift, leaving the impression that "we're gonna do this, and if you don't like it-tough." There cannot be any debate about reference in exhibit ten to the prolonged lunch break delaying and disrupting work operations. All of the employees testified that Mr. Sankey and Mr. Durocher were absent from the normal rotations for at least an hour and a half to two hours. It's not enough to justify this to say that the two more important jobs were getting done. Mr. Sankey and Mr. Durocher were being paid to perform their jobs, and they were not doing it. Productivity is just as important as insuring that two of the four functions are up to task. As Mr. Taylor said, again emphatically, they were leaving six hours of work for Bob Stubbs to do in a three hour shift.

The final reference in exhibit ten is to disparaging comments made about management. Mr. Williams gave evidence with regard to this, stating that Mr. Sankey bragged about bullying Mr. Dan Wilson, his superintendent, in high school, and further, in addition to threats against Bob Stubbs, he specifically threatened to slash Dan Wilson's tires. (Investigator's report page 30). The final issue I wish to address, while not a matter referred to in exhibit ten, is the idea that supervision knew about these ongoing patterns of behavior and simply did nothing about them. The only supervisor, who testified, Rob Milligan, wasn't even asked. That speaks volumes. In cross-examination of Mrs. Wuensche, it was drawn to her attention that in the investigator's report, Mr. Riley, the supervisor of D shift, said he was not aware of any of the problems between Mr. Sankey and Mr. Stubbs. The only evidence to the contrary, and it dignifies it to call it evidence, is Mr. William's stated belief that he "suspected" that management must have known. These suspicions are not evidence. There is no evidence that management knew of the threats being made, nor of the ongoing problems between Mr. Stubbs and Mr.

> Sankey. Mr. Stubbs had brought the problems of Mr. LeBlanc to management's attention, and Mr. LeBlanc was too intimidated to verify them.
>
> **SUMMARY**
>
> No employee ought to require any form of training in order to be aware that threatening people is unacceptable. In addition, subsequent to having the harassment policy read to him and completing the on line training module Mr. Sankey was unable to resist engaging in the behavior he engaged in July 2nd. Clearly a significant suspension is necessary to bring home to him the unacceptable nature of his behavior and attitude as lesser steps such as training were not successful.

The Employer's submission included the following case law:

In *Re: Brewers Distributors Ltd. and Brewery Winery and Distillery Workers Union, Local 300 (Heuring Grievance)* [2014] B.C.C.A.A.A. No. 2; 240 L.A.C. (4th) 213, (Stan Lanyon, Q.C.), January 9, 2014. At paragraph 164 through 166, Arbitrator Lanyon commented as follows:

> 164 Fourth, the Union maintains that the Employer has failed to employ progressive discipline in respect to the Grievor. First, the Employer as I found, did not have knowledge of the Grievor's many employment offences over many years. Second, progressive discipline does not apply in circumstances of egregious and serious misconduct. Brown and Beatty in *Canadian Labour Arbitration*, Canada Law Book 2013 at 7:4416 state the following:
>
>> Indeed, some acts of misconduct such as theft, intimidation and assault, sexual and other forms of harassment and abuse, conflicts of interest, drug offences, and the like, may be regarded as so serious and antithetical to a viable employment relationship that, even if the employer fails to warn an employee that serious disciplinary sanctions will be imposed, the arbitrator may choose not to intervene. In other words, even

> a corrective approach to disciplinary penalties may not inevitably require that every first offence always be punished by a written warning or that a short suspension be given before a longer one or a discharge is meted out.

165 I achieve that the Grievor's misconduct, indeed his deliberate pattern of physical intimidation, harassment and verbal abuse of other employees over many years calls for the termination of the Grievor. The Employer has an obligation to ensure a safe workplace. As BS stated there is no reason why employees should have to work in the unsafe and toxic workplace created by the Grievor. I also accept the Employer's conclusion, and the conclusion of the previous Plant Committee, that other employees are afraid of the Grievor, and that they would prefer him not to return to the workplace.

166 Finally, as the Employer noted the Grievor failed in his testimony to apologize for his conduct. The Union's reply was that to have the Grievor apologize at this point could be seen or interpreted as being overly contrived. However, a full, honest and heartfelt apology is never a contrivance. Indeed, by its very nature, just the opposite. In addition, the Employer stated that during its investigation and the disciplinary process the Grievor also failed to reveal any remorse for his conduct.

In *Re: Lilydale Inc., and United Food and Commercial Workers International Union, Local 1518 (Mangat Grievance)* [2014] B.C.C.A.A.A. No. 56 (John P. Sanderson, Q.C.), April 28, 2014. At paragraph 55 and 58, Arbitrator Sanderson commented as follows:

55 Counsel has directed me to an important and well-reasoned decision of Arbitrator Larson in the matter of *Shoppers Drug Mart Store No. 222 v. UFCW, Local 1518 (Sidhu Grievance)*. While the facts of this arbitration decision are very different, the arbitrator carefully and thoughtfully considered the nature of threats in the context of an employment relationship and the interaction of an employee speaking with a senior management person. I accept and

will apply the analysis provided by Arbitrator Larson in the following paragraphs of his decision:

...

> 50 Threats are a particularly egregious form of misconduct because they carry the potential for substantial harm if carried out and there may be no way for the victim to know if the threat is a serious one. As despicable as it may be, bullying in the school grounds by children assumes proportionately greater potential for harm in the workplace amongst adults. Therefore, a mere threat, even one not intended to be carried out must be regarded as a disciplinable offence if it is reasonably sufficient to cause fear in the person to whom it is directed. The nature of the threat itself must be weighed in the balance, as are other elements such as whether the threat is repeated or persistent. A substantive threat of actual physical harm may constitute a tort of assault or may in some cases amount to criminal conduct. One must also bear in mind that employers have a statutory obligation to maintain a safe and respectful work environment, which includes protecting all employees from harm, even from each other.
>
> …
>
> 60 There is always an important context to a threat that must be understood, in addition to the trigger event, particularly where the threat is of a vague nature, as in this case, in order to know how serious it might be. Some threats are empty. The person making them may be incapable of carrying them out or the circumstances may make it unlikely that it would be done. Or it may be an aberration or impulsive rather than deliberate or planned: *Grant Forest Products and CEP* (1999) 58 CLAS 269 (Rayner); *Galco Food Products Ltd. and Amalgamated Meat Cutters & Butchers Workmen of North America, Local P-1105* (1974) 7 LAC (2d) 350 (Beatty). Other threats may be mature, or even imminent. The malefactor may be capable of carrying out the threat and likely to do so, in some cases almost simultaneously with the threat. Or the person may have a history of violence, harassment or bullying: *Extendicare (Canada) Inc. -- St. Paul and Canadian Union of Public Employees, Local 2677* (2006) 151 LAC (4th) 84 (Smith). Some are in between but all threats constitute disciplinable

> misconduct. The difference is that all must be weighed in the balance. The more serious the threat, the greater the discipline.
>
> …
>
> 58 The grievor neither acknowledged nor apologized for his behaviour on June 25 and 26. At the hearing, he refused to offer any excuse or reason for his behaviour other than to say a friend had died at the time. Critically, he offered no apology, explanation or justification for anything that had happened during that two-day period. Not only did he make no apology for his behaviour but he offered no commitment that if his grievance succeeded and he was given a chance to return to employment, his abusive behaviour would stop and he would act in a respectful manner to and with his fellow employees. In his testimony, he was deliberately evasive and did not admit any responsibility for what happened.

In *Re: Fortis Energy Inc. and International Brotherhood of Electrical Workers, Local 213* [2015] B.C.C.A.A.A. No. 14 (R.K. McDonald), February 16, 2015. At paragraph 86, Arbitrator McDonald concluded the following:

> 86 The Employer bestowed on the Grievor its trust that he would act responsibly and lawfully in serving the public needs of its customers. His grave misconduct in the stalking, threatening and deliberate intimidation of Ms. Argent on company time and in a company vehicle was a betrayal of that trust. In addition, the Grievor subsequently breached his duty to act honestly and in a forthright manner in his dealings with the Employer. He was deceitful, displayed a lack of concern for the truth and he removed relevant evidence from his company cell phone. I find that the Employer's discharge of the Grievor was for just and reasonable cause and that it was the only response to be reasonably expected in the circumstances. The legitimate interests of the Employer demand acceptance of that result.

In *Re: Teck Metals Ltd. (Trail Operations) and United Steelworkers, Local 480 (Oliver Grievance),* [2015] B.C.C.A.A.A. No. 27 (Julie Nichols), April 7, 2015, beginning at paragraph 88, Arbitrator Nichols stated:

> 88 I agree. In the instant case, the Grievor understood the expectations for respectful workplace conduct. The Employer attempted to address his behaviour through the application of progressive discipline and provided him with repeated opportunities to correct his ways. His continued actions have, ultimately, eroded the foundation of a viable employment relationship. He offers the same assurances as he has in the past; but, in my view, he has provided no reasonable basis for concluding that his behaviour will be different in the future.
>
> 89 I am cognizant of the serious impact termination will have on the Grievor. Dismissal is challenging for any employee, but is particularly difficult for an individual at his stage of life and after over 34 years on the job. However, even giving those factors significant weight, they are insufficient to overcome the other circumstances. I cannot require the Employer to do more than it has already done to try and work with him. I conclude that termination was not an excessive response.

In *Re: F.H., Appellant; v. Ian Hugh McDougall, Respondent, and between F.H., Appellant; v. the Order of the Oblates of Mary Immaculate in the Province of British Columbia, Respondent. and between F.H., Appellant; v. Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Respondent* [2008] S.C.J. No. 54; 2008 SCC 53 (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron, and Rothstein JJ.), October 2, 2008, at page 16, the High Court commented as follows:

> 44 … In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

…

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

In *Re: Waddah Mustapha (a.k.a. Martin Mustapha), Appellant/Respondent on cross-appeal; v. Culligan of Canada Ltd., Respondent/Appellant on cross-appeal* [2008] S.C.J. No. 27; [2008] SCC 27 (McLachlin C.J., and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein JJ.), May 22, 2008, at paragraph 13, the High Court commented as follows:

> 13 Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" *(Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617, at p. 643).

In Re: Toronto (City) and Toronto Civic Employees' Union, Local 416, (Covelli Grievance), [2014] O.L.A.A. No. 425- Nos. 10461-RR-14, 834482, 10043 (Brian Sheehan), November 6, 2014, at paragraph 146 and 147, the Arbitrator commented as follows:

> 146 The result reached in <u>Perley and Richelieu Veterans Health Centre</u> *supra*, underscores the significance of the surrounding circumstances in terms of assessing whether in fact the employee

actually intended to fraudulently claim sick leave. In that case, the employee was a resident assistant with the hospital who went off work on an approved sick leave due to issues with her back. While on sick leave, the grievor pursued a full course of study in medical administration. As part of her educational program, the grievor was placed at a hospital and performed certain physical duties that were ostensibly inconsistent with the identified restrictions that purportedly prevented her from performing the resident assistant job with her employer. Examining the evidence as a whole, Arbitrator O'Neill relied on the fact that there were certain undisputed facts that were incompatible with a finding that the grievor intended to commit fraud. In particular, reliance was placed on the fact that the grievor had requested that her educational placement be with her employer. As has been determined, in the case at hand, the surrounding circumstances associated with the grievor's absence from September 10 to 24, 2010 clearly point to the conclusion that he intended to fraudulently claim sick leave.

147 In conclusion, notwithstanding the existence of certain significant mitigating factors, the planned and deliberate nature of the grievor's fraudulent misconduct, as well as his failure to fully acknowledge his aberrant behaviour, leads to the conclusion that upholding his termination is just and appropriate.

In *Re: Deas Pacific Marine Inc. and B.C. Ferry and Marine Workers' Union (Banno Grievance)* [2006] B.C.C.A.A.A. No. 200; 87 C.L.A.S. 238 (J. Korbin), November 21, 2006, Arbitrator Korbin concluded the following beginning at paragraph 109:

109 Therefore, I conclude the Grievor provided the Employer with cause for discipline and its termination of Mr. Banno for the improper and unauthorized purchase and removal of Company product from the worksite, and his lack of forthrightness, must be upheld.

110 In the result, the grievance is dismissed.

IV

The Union's argument reads as follows:

Cariboo Pulp and Paper and Unifor, 1115 - Sankey Agreement
Union Outline of argument

Discipline not warranted, or in the alternative, excessive for July 2, 2014 incident

- no harassment in Ron and Ed's actions on the shift
- at best, they were interested in accommodating a longer lunch
- no interference with production based on break length or based on Ed assisting Ron
- if there is a concern, appropriate response was a verbal warning for a 34 year employee with a clean discipline record, consistent with the discipline given to Bob and Jerry for leaving the shift
- look at allegation at Ex 10 in relation to July 2
- ignoring work assignment protocol in a deliberate effort to cause a fellow worker discomfort
- taking an extended lunch break, delaying and disrupting work operations

- Ed was called in to do an OT shift, everyone agrees that the person on OT goes into number 4 rotation
- Ron called in specifically to haul lime
- consistent with everyone's expectations to have Ron haul lime and Ed load lime
- Ed and Ron worked hard to haul lime nonstop for 3 hours and then did the warehouse switch
- they took a break at the guard shack from approx. 8 onwards until after 9 pm (estimates vary)
- Rob Milligan's evidence is that Ron and Ed did 18 loads in 3 hours, far more than typical when loads, at that time, can be up to 15 minutes
- practice is that there are intense jobs, chip loader and hog loader, and easier jobs, #4 operator and pile pusher
- Ed's job was the #4 operator and he took a longer first break than normal because he was on the two jobs that he could easily work hard, break, then catch up on

- never been a rule that people must take lunches in the lunch room
- practice that employees on #4 operator and pile pusher can leave early if work is done
- no discipline warranted for taking lunch at the guard shack
- Ed taking his break did not interfere with the ability of Bob to do his job,
- if Ed had returned from his break at 8:30 it would have not have allowed Bob to start work
- it was Ron's return from work which dictated this

- **KVP principle, UBOA Tab 1, para 34**

- can't have a practice with allows for flexibility on easy jobs, including leaving early if work is done and then discipline some for using that same flexibility to take a longer lunch break if work is done

- Ed returned to push pile with sufficient time to complete the work by the 11 pm rotation
- Bob had decided to leave the work area with his truck and drive to the gravel pit, out of contact and without a radio
- Ed decided to assist Ron because he wasn't doing any work, not an attempt to take over Bob's rotation
- there was a suggestion that Bob switch with Ed, but always understood that Ed was in the rotation
- at best, communication breakdown, no abandonment of job by Ed or bullying behaviour
- Bob did not try to sort out who was doing what; he created his own stress by staying away from the loading area and not communicating

- there should be a reduction in the eight shift suspension down to four shifts once the July 2 conduct is taken out of the equation

In the alternative, if discipline is justified for taking a long lunch breaks, the discipline was excessive and must be reduced from an 8 shift suspension to a 4 shift suspension, if the harassment allegations are justified, and a verbal warning for the July 2 conduct
- the verbal warning is consistent with the discipline for Bob and Jerry, job abandonment

Discipline not warranted, or in the alternative, excessive for pre July 2, 2014 conduct

The discipline of an eight shift suspension is not warranted for the following reasons:

- Allegations not sufficiently detailed to be proven in almost all cases,
- Inconsistent treatment with Ron Durocher engaging in similar conduct
- Employer improperly relied upon the verbal warning that was expunged from the discipline file due to the sunset clause
- failed to take into account changed behaviour after November 2013 investigation and harassment training
- disciplined for a range of conduct going back 5 years that the company condoned

Reliance on verbal warning

- Heather's testimony was that she considered a verbal warning from May 2013 that pre-dated the July 2, 2014 incident by greater than 12 months, contrary to the sunset clause in the collective agreement
- a sunset clause is a negotiated restriction on what the employer may rely upon in supporting discipline
- This is not contrary to statute, either the Labour Relations Code or Worksafe

- **Wire Rope, UBOA, Tab 2, para 4,10**

- **BC Rail, UBOA, Tab 4, para 10, 12**

- Reliance on an improper factor is grounds for an arbitrator to determine that the discipline is excessive, per WM Scott #2

Inconsistent discipline
- reviewing the allegations, it is clear that there is little material difference between the conduct of Ron and Ed
- Ron was disciplined for grounds set out in second paragraph of ex 12
- Clearly they were serious
- Ed's discipline letter, ex 10, had similar allegations

- what is different is that Ed was also alleged to have ignored work protocols on July 2 cause a co-worker discomfort, part of a pattern of harassment and that Ed had a verbal warning, which was inadmissible
- employee discipline should be consistent

MacMillan Bloedel, UBOA, Tab 6, para 31. 32.

Grimms, UBOA, Tab 8, para 79 to 83

<u>Stale dated incidents</u>
- the employer relies on conduct of mill take going back years, most of which supervisors were aware of ... one witness said he was 99.5 certain that supervisors knew of shop talk and participate in lunch room gossip
- it is fundamentally unfair to discipline based on vague allegations of comments where there are no specifics and it is impossible to defend the allegations
- witnesses made comments that they had heard Ed say he'd slash tires, years ago, but could not provide any specifics, no ability to respond when people can't give the circumstances of when and where the comments were made

- **City of Vancouver, UBOA Tab 3, para 50**

- Teck, UBOA, Tab 11, page 19-20

<u>Failure to take into account changed conduct</u>
- The evidence of the allegations are over a wide range of years
- Conduct which is impulsive is less deserving of discipline than premeditated conduct

- Dryco, UBOA Tab 9, para 31 to 34

<u>Key evidence of witnesses</u>

Bob Stubbs
- More problems with Ron than with Ed
- No direct threats by Ed, but Ed made comments about Dan being untrainable

- Concerns about Dan shared with others on the crew, all had concerns with Dan and his abilities and were frustrated
- Comments about one marble in the head were Ron, not Ed
- Comment about you can approach me Bob, wasn't threatening
- Behaviour from Ron was isolating, not having lunch with Ron
- had never heard Ed make statements about slashing tires and burning house down
- Ed always greeted him, didn't shun or ignore him
- No suggestion that Ed ever had any interaction with Bob outside of work

Jerry Taylor
- Ron was a more of an instigator than Ed
- The behaviour of both towards Bob was to ignore him
- Never complained about or mentioned the threat to be thrown down the stairs

Ken Williams
- Not threatened by Ed
- felt that Ed would only act impulsively
- When pressed on cross, was not sure if Ed had made comments or threats regarding Dan Wilson
- Ed repeated a story about Dan Wilson being put in lockers in high school, not in a bragging mood

Larry McCann
- acknowledged that there was lots of mill talk
- Mill talk includes threats, swearing, criticism of people and their jobs
- All participate in this, since 1980
- Supervisors regularly visit the lunch room and are aware of this
- 99.5 certain about this
- Larry did not say that he was intimidated by Ed
- There was no evidence that Ed and Ron ignored them that shift
- testified he was not watching the area of loading lime the whole time

Roy Norman
- One incident in which there was a discussion of slashing tires
- Consistent with Ed's version of putting 4 inch spikes in tires
- Example of mill talk

- Likely this comment gets repeated into slashing tires through mill talk

Dan Leblanc
- No specifics of allegations against Ed
- heard a statement of slashing tires approx. 4 years ago
- acknowledged that Ed helped him on the shift
- Dan's comment

Ron Dorocher
- Statement made regarding not doing load after break is contrary to Bob
- Bob Stubbs stated that he came down because he saw Ron with a load of lime, page 11

Ed Sankey
- did give evidence in a straight forward manner
- Only defensive when Mr. Jordan was aggressive
- owned up, admitted comments on 4 inch spikes with Norman
- owned up to treatment of Dan Leblanc
- owned up to the conduct of the talking about jail time

The Union's submission included the following case law:

In *Re: F.H., Appellant; v. Ian Hugh McDougall, Respondent. and between F.H., Appellant; v. the Order of the Oblates of Mary Immaculate in the Province of British Columbia, Respondent. And between F.H., Appellant; v. Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Respondent* (*supra*), the Union pointed to paragraph 46 of the Employer's cite which reads as follows:

> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious

> cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

In *Re: KVP Co. Ltd., and Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)* [1965] O.L.A.A. No. 2; 16 L.A.C. 73 (J.B. Robinson C.C.J. (Chair), D. Wren and R.V. Hicks, Q.C. (Nominees)), May 30, 1965, at paragraph 34 the Board found the following:

> 34 A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.
>
> Effect of Such Rule re Discharge
>
> 1. If the breach of the rule is the foundation for the discharge of an employee such rule is not binding upon the board of arbitration dealing with the grievance, except to the extent that the action of the company in discharging the grievor, finds acceptance in the view of the arbitration board as to what is reasonable or just cause.
> 2. In other words, the rule itself cannot determine the issue facing an arbitration board dealing with the question as to whether or not the discharge was for just cause because the

very issue before such a board may require it to pass upon the reasonableness of the rule or upon other factors which may affect the validity of the rule itself.

3. The rights of the employees under the collective agreement cannot be impaired or diminished by such a rule but only by agreement of the parties.

In *Re: Wire Rope Industries Ltd. and United Steelworkers Of America* [1978] B.C.C.A.A.A. No. 15; 19 L.A.C. (2d) 409 (J. M. Weiler, J. Hill, L. Fairfield), August 16, 1978, the header of the Wire Rope decision read as follows:

> The union preliminarily objected to the admissibility of an employee's prior record. The employee had received a warning two years prior to his discharge. The union argued a provision of the collective agreement expunged an employee's warning after 12 months from the date of the infraction. The employer submitted the provincial Labour Code, and its interpretation in the Scott case, required cognizance of the entire employee record by the arbitrators to exercise their remedial authority. The employer argued if there was a time limit in the collective agreement it should be waived.
>
> HELD: The provision's language and its understanding by the parties confirmed the record's irrelevancy after 12 months from the date of the infraction. The remedial authority of the arbitrators has not been usurped by the provision of the collective agreement. The prior record was not a circumstance of the case. The arbitrators' power to relieve against breaches of time limits dealt with the procedural aspect of a grievance through to arbitration. If the arbitrators had the authority to waive the time limit found in the provision of the collective agreement, there were no just and reasonable terms upon which to exercise that authority. The grievor's disciplinary record was not inadmissible.

In *Re: City Of Vancouver and Vancouver Municipal and Regional Employees Union* [1983] B.C.C.A.A.A. No. 204; 11 L.A.C. (3d) 121 (H. A. Hope, Q.C.), July 6, 1983, at paragraph 50 Arbitrator Hope commented as follows:

> 50 I do not agree with the interpretation of the city. It would lead to the absurd conclusion that the parties intended that matters formalized and reduced to writing would be excluded if the employee was not informed but matters not recorded in documentary form could be adduced to the prejudice of the grievor. Arbitrators have long taken a jaundiced view of evidence critical of the conduct of an employee led in support of a dismissal which is neither formalized nor brought to the attention of the employee. There are two reasons for disdaining such evidence. The first is that the failure of the employer to formalize the matter invites the inference that the employer placed little significance on the conduct. The second reason is that a failure to document and formalize criticism of an employee's conduct denies to the employee the right to challenge the factual base upon which the criticism is mounted.

In *Re: B.C. Rail Ltd. and United Transportation Union, Locals 1778 and 1923* [1984] B.C.C.A.A.A. No. 325; 17 L.A.C. (3d) 402 (D. R. Munroe), November 26, 1984, Arbitrator Munroe commented as follows at paragraph 40 to paragraph 43:

> 40 I have distinguished between the reception of hearsay and reliance thereon in the fact-finding process. That distinction has been elevated to a point of law. In *Board of School Trustees of School District No. 68 (Nanaimo) and C.U.P.E., Local 606 (Mid-Island School Employees)*, [1977] 1 Can. L.R.B.R. 39 (Baigent), the Labour Relations Board of British Columbia, acting in its review capacity under s. 108 of the *Labour Code*, propounded the following two propositions (at p. 43): (a) uncorroborated hearsay evidence should not be preferred to direct sworn testimony; (b) hearsay evidence alone should not be permitted to establish a crucial and central fact. In setting forth those rules of arbitral conduct, the labour board adopted the following passages from the Ontario Divisional Court's decision in *Re Girvin et al. and Consumers' Gas Co*. (1973), 40 D.L.R. (3d) 5-9 at p. 512, 1 O.R. (2d) 421:
>
> > It is to be observed that the board in this case made a finding of fact excluding, in effect, the evidence of the grievor and relied exclusively on hearsay evidence, some of which evidence was

> in conflict. Such evidence may well be admissible by reason of the subsection of the *Labour Relations Act* ... referred to, but it must be borne in mind that in cases of this type the burden is on the employer to show that the employer acted properly in the discharge of the employee, and in order to satisfy that burden in this case the employer, in effect, relied exclusively on hearsay evidence. Even though that evidence may well have been admissible we are all of the view that the employee did not receive a fair hearing in the circumstances. His counsel had no real opportunity to cross-examine on the evidence that was presented.

41 In my view, to all intents and purposes, I am being asked to rely exclusively on hearsay evidence for the ascertainment of an essential and disputed fact. If I have misused the word "exclusively", it cannot be denied that hearsay is the *principal* basis upon which I am asked to decide a crucial factual issue in favour of the party on whom the burden of proof lies. That is a dangerous course for an adjudicator especially where, as here, the consequences on the other party would be so onerous -- loss of employment. It is a course which I must reject.

V

42 I appreciate that it is not particularly satisfactory for a case to be decided largely on the basis of the law or policy surrounding the reception or utilization of evidence. It can be frustrating for the parties to the arbitral process. Nevertheless, in the circumstances and for the reasons expressed, I cannot conscientiously find that the grievor "missed a call" in the blameworthy sense. Accordingly, I must hold that just cause for discipline for the events of September 7th has not been established. In view of that holding, which is to the effect that a culminating incident has not been shown, it is unnecessary to record in detail the grievor's prior record. It is also unnecessary to address the question of the proper relationship between the Brown System of discipline and an arbitrator's remedial mandate.

43 The grievor is to be reinstated to his employment as a trainman with 10 demerit marks removed from his record. The matter of back

> pay and benefits is left to be determined and calculated by the parties. I retain jurisdiction to resolve any disputes in that connection.

In *Re: Burns Meats (Div. Burns Foods (1985) Ltd.) and United Food and Commercial Workers Union, Local 832* [1994] M.G.A.D. No. 66; 43 L.A.C. (4th) 416; 37 C.L.A.S. 95 (P.S. Teskey), September 26, 1994, at page 16 the following conclusion was decided:

> In this instance, I think that something less than discharge is appropriate and sufficient to balance the legitimate concerns of all involved in this instance. Accordingly, I allow the grievance to the extent that the discharge is rescinded but I substitute in its place a four month suspension without pay. I might add that I consider that to be a very severe disciplinary penalty and one sufficient to bring home to the grievor the importance of correction of her own behaviour as well as being amply severe such as to deter any other employee from similar misconduct.

In *Re: MacMillan Bloedel Ltd. and Communications, Energy and Paperworkers Union, Local 76 (Lentz Arbitration)* [1997] B.C.C.A.A.A. No. 510; 65 L.A.C. (4th) 240, (H.A. Hope, Q.C.), June 16, 1997, Arbitrator Hope concluded the following in referencing Mr. Chertkow's decision in *Esso Petroleum Canada and E.C.W.U., Local 614, [1989] 9 L.A.C. (4th) 390*:

> 31 But, read in context, Mr. Chertkow concluded that any change in approach must be preceded by notice to employees affected. On p. 400 he also wrote:
>
> > But as of the date of the incident in question it viewed similar acts of negligence of the same relative magnitude as being worthy only of a written reprimand notwithstanding an employee did not have a discipline-free record. However, if it does adopt such a course of action [of increased penalties] it is incumbent upon the employer to notify all of its employees, and the union which represents them, that its expectations have

> changed and it intends to follow either a more vigorous policy of enforcement of safety matters or that it will view certain aspects of safety-related misconduct more seriously than it has in the past. There was no evidence adduced at these hearings that the company had given such notice. Nothing, however, bars it from doing so at any time in the future.

> 32 Those comments are apropos the facts present in this dispute. The dismissal of the grievor was an escalation in the penalty the Employer had imposed for similar infractions in the past. Nothing in the evidence took the incident involving the grievor outside the circumstances present in prior infractions in which a 30-day penalty was imposed in the first instance or agreed to between the parties. It was incumbent on the Employer to give notice of its intention to change that approach. In the result, the grievor is entitled to be reinstated and a 30-day suspension substituted for dismissal. He is also entitled to be compensated for his wage loss in an amount to be determined between the parties. If the parties are not able to calculate that amount, jurisdiction is reserved to impose it.

In *Re: University of British Columbia and Canadian Union of Public Employees, Local 116 (Sunset Clause Policy Grievance)* [2009] B.C.C.A.A.A. No. 125 (David C. McPhillips), October 9, 2009, beginning at paragraph 52, Arbitrator McPhillips commented as follows:

> 52 In this case, as there is no clear preponderance in favour of one meaning to be given to the terms contained in Article 8.05(c), the thirty years of past practice between the parties from 1976 to 2005 can be relied on as an aid to interpretation to indicate what UBC and CUPE must have intended when they negotiated the terms of this sunset clause in 1976. From that time, for a period of almost thirty years, the parties consistently and without controversy have treated the sunset clause as applying to suspensions and, in my opinion that is determinative. The situation in our case leads to the adoption of the following remarks made by Arbitrator MacIntyre in *British Columbia Nurses' Union, supra*, at paragraph 38:

> All of this is very debatable, but an answer must be found. The one clear conclusion is that the agreement is ambiguous. I have great difficulty preferring one argument to the other. In such a situation, past practice and the apparent assumptions of the parties are a legitimate resource; not to amend an agreement; not to contradict the contract, but to reach a conclusion as to the meaning agreed or apparently agreed to by the parties. Counsel agreed that both parties have acted, for over ten years, as if the union's asserted meaning was correct.
>
> > There was no evidence led which would indicate that the employer did this as a gratuitous benefit over and above its contractual obligations, to which it could return (perhaps only after some estoppel period). This situation continued until at least the proposals of 1992, when it tried to limit its obligations, not to argue their meaning. The arbitrator refused to accept the proposals. Her comments in passing appear to have encouraged the employer to question its own previous practice and to feel that there could be support in the existing contract to achieve the limitations which it sought on its obligations, even without having gained its proposals. It is possible that the employer might have convinced an arbitrator with its current arguments, if a case had arisen right after the initial provisions were signed, several years ago

53 Therefore, it has been concluded the language of Article 8 is ambiguous, and the past practice of the parties over the last thirty years provides the best indication of what the shared understanding of the parties was with respect to the application and scope of the sunset clause. As a result, the sunset provision in Article 8.05(c) is to be read as permitting the removal of suspensions from an employee's file after 24 months has passed and such removal has been requested by the employee.

AWARD:

54 For all of the above reason, the Union's policy grievance is upheld. I hereby declare the Employer breached the terms of Article 8

> when it unilaterally changed its practice and denied employee requests for the removal of suspensions from their files.

In *Re: Grimm's Fine Foods and United Food and Commercial Workers Union, Local 247 (Costas Grievance),* [2010] B.C.C.A.A.A. No. 146 (Mark J. Brown), October 12, 2010, the header in this case read as follows:

> The union grieved the termination of the grievors, who had been involved in a fight in the workplace. The employer was a meat producer. It had a policy against horseplay. Employees were informed of the policy when they were hired. The grievors, C and S, engaged in horseplay which ended with each of them punching the other. After investigating the matter, both grievors were terminated. C had no disciplinary record, and S had a written warning for absenteeism. The employer argued that the worksite was a safety sensitive and highly regulated area. The policy on horseplay and WorkSafe regulations were made clear to all employees. The union argued that the employer discriminated against the grievors by imposing a penalty that was greater than for previous similar incidents involving other employees.
>
> HELD: Grievance allowed. The employer's response to the case at hand when the employees were honest about what happened was not consistent with past responses. Both grievors immediately admitted to punching each other. While the matter was serious, termination was excessive in both cases. The grievors had relatively long service, good work records, no discipline to speak of, the incident was spur of the moment and not premeditated and, most importantly, the employer's response on balance was more severe compared to previous incidents. S was to receive a one-month suspension. C was to receive a two-month suspension. They were both to be rescheduled to work.

In *Re: Dryco Drywall Supplies Ltd. and Teamsters Local Union No. 213 (Sobieski Grievance),* [2013] B.C.C.A.A.A. No. 18; 231 L.A.C. (4th) 1; (Mark J.

Brown), February 19, 2013, beginning at paragraph 36, Arbitrator Brown concluded the following:

> 36 Given all the circumstances of the case, I conclude that termination is excessive. The incident was serious; however, while Sobieski was careless and stupid I do not find he was malicious or reckless. He took responsibility and apologized. It was a spur of the moment act. He is a long service employee.
>
> 37 Having reached this conclusion I must substitute a lesser penalty. I do not agree with the Union that only a short suspension is warranted. Given the seriousness of the event and Sobieski's carelessness, a lengthy suspension is more appropriate to bring home the seriousness of the issue so that he does not repeat any sort of similar behavior.

In *Re: Nicholson Manufacturing Ltd. and Machinists' Fitters & Helpers Industrial Union, Local No. 3 (Anderson Grievance)*, [2014] B.C.C.A.A.A. No. 77 (David C. McPhillips (Chair); James Halliday (Employer Nominee), George MacPherson (Union Nominee)), July 2, 2013, the Panel concluded the following at para 55:

> 55 The grievance is partially allowed. The Grievor's termination is rescinded and he is to be reinstated to his position, effective July 8, 2013. The period from May 1 to the date of his reinstatement is to be a suspension without pay but there will be no loss of service or seniority. Mr. Anderson's disciplinary record should be amended to reflect this decision.

In *Re: Teck Coal Limited and United Steel Workers, Local 7884, (Rob Halldorson Termination Grievance-Phase II) (*David C. McPhillips), May 25, 2015, at page 19 Arbitrator McPhillips referred to *BC Railway Co*, 8 L.A.C. (3d) 233 (Hope) and quoted Arbitrator Hope as follows:

> Arbitrator Hope reiterated that sentiment in his decision in the *Smith*

Grievance between these parties. He stated, at para. 39:

> 39 It is appropriate at this stage to reject that submission. In weighing a discipline record in an application of the doctrine of the culminating incident, both parties are bound by the record. Where, as here, the record has been established in accordance with an established code or policy which involves notice to the employee, the employee is bound by those aspects of the record that have not been challenged by grievance. That is, it is not open to grievors or their unions to mount a belated challenge of the record where the incidents recorded in it were not challenged in a timely fashion under the grievance and arbitration provisions of the agreement.

I agree with that approach. As a result, the formal disciplinary record with respect to Mr. Halldorson must speak for itself and no further evidence can be presented by either party to enhance or diminish those events for which discipline was imposed.

The second group of behaviours include relatively serious actions which might have given rise to discipline but the Employer chose at the time not to proceed in that manner. I would include in this grouping Items #2, #6 and #8.

2. In August 2010, the Grievor refused to attend training sessions due to lack of food and being paid at straight time rates.

6. In February 2011, Mr. Halldorson left his shift early on two occasions.

8. In February 2011, the Grievor along with other employees took an unnecessarily long break.

The jurisprudence indicates that acts of alleged misconduct which were not subject to discipline at the time they occurred cannot be "resurrected" subsequently. There are a number of reasons for this approach: the employee may not have had an opportunity to protest at the time; the employee may have felt the employer condoned the incident; given the length of time that has elapsed, the oral evidence

may not be nearly reliable enough. In that regard, Arbitrator Hope stated the following in *Vancouver (City), supra,* at p. 135:

> Arbitrators have long taken a jaundiced view of evidence critical of the conduct of an employee led in support of a dismissal which is neither formalized nor brought to the attention of the employee. There are two reasons for disdaining such evidence. The first is that the failure of the employer to formalize the matter invites the inference that the employer placed little significance on the conduct. The second reason is that a failure to document and formalize criticism of an employee's conduct denies to the employee the right to challenge the factual base upon which the criticism is mounted.

V

In the Employer's reply, the Employer referenced Ken Williams' evidence with respect to the Vellins evidence, the report was confirmed by witnesses. The Grievor, in cross-examination, denied issuing threats. Mr. McMann said that threats happened every tour (shift). The Employer said that it is not okay to sit down and do no work for one and a half hours. The Employer said that Ed threw Ron under the bus and that Ed was also at the BBQ and that there was no lessening of Ed's responsibility. The Employer said that Ed's comments compared to Ron's were a different factual matrix and therefore not relevant. The Employer argued that WorkSafe BC laws can't be contracted out of a statute. The Employer argued that Ed never admitted to the conduct in the first place. The Employer said that Ed left six hours of work for Bob to be done in three hours and that a one and a half to two hour meal break interferes with production. The Employer said that Ed was evasive.

VI

In *Brewers Distributors (supra)*, Arbitrator Lanyon, Q.C. commented:

> First, the Employer as I found, did not have knowledge of the Grievor's many employment offences over many years. Second, progressive discipline does not apply in circumstances of egregious and serious misconduct.

Arbitrator Lanyon dismissed the Grievance. In the particular circumstances of the *Brewers Distributors* case, in my opinion, Arbitrator Lanyon was correct.

In *Lilydale Inc. (supra)*, Arbitrator Sanderson, Q.C. upheld the termination of the Grievor. In that case the Grievor had been disciplined nine times. In the instant case the Grievor had not been disciplined other than a disputed warning, which the Union argued had exceeded the time limit set out in the sunset clause of the Collective Agreement, which reads as follows:

> Article XXX – DISCIPLINARY ACTION
>
> …
>
> The disciplinary record of an employee, including letters of reprimand or warnings, shall not be used against them at any time after twelve (12) months.

The warning occurred in May of 2013 and the incident that gave rise to the Grievors suspension occurred on July 2, 2014.

In *Fortis Energy Inc. (supra)*, Arbitrator McDonald upheld the termination of the Grievor. The cause as described by Arbitrator McDonald read as follows:

> His grave misconduct in the **stalking, threatening and deliberate intimidation of the customer on company time and in a company vehicle** was a betrayal of that trust. The grievor's subsequent behaviour was deceitful and displayed a lack of concern for the truth. He removed relevant evidence from his company cell phone. The termination of the grievor was for just and reasonable cause and that was the only response to be reasonably expected in the circumstances. (Emphasis added)

In the current case there was no proof of the type of conduct as outlined above in the *Fortis Energy* case. There was however threats and harassment, per Ms. Vellins' investigation and findings.

In *Teck Metals Ltd. (supra)*, Arbitrator Nichols concluded the following, beginning at paragraph 88:

> 88 I agree. In the instant case, the Grievor understood the expectations for respectful workplace conduct. The Employer attempted to address his behaviour **through the application of progressive discipline and provided him with repeated opportunities to correct his ways.** His continued actions have, ultimately, eroded the foundation of a viable employment relationship. He offers the same assurances as he has in the past; but, in my view, he has provided no reasonable basis for concluding that his behaviour will be different in the future. (Emphasis added)

In the *Teck Metals* case the Employer had tried to address the Grievor's conduct through progressive discipline and consequently, in that circumstance, Arbitrator Nichols upheld the termination of the Grievor. In the current case there had been no progressive discipline beyond the disputed warning.

The Supreme Court in *F.H. v. McDougall (supra)*, concluded the following at paragraph 49:

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

In the current case this Board will follow the above advice from the High Court.

The Supreme Court in *Waddah Mustapha v. Culligan of Canada Ltd*. *(supra)* commented as follows:

> 13 … The degree of probability that would satisfy the reasonable foreseeability requirement was described in T*he Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" *(Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617, at p. 643).

In the instant case the challenge will be to satisfy "the reasonable foreseeability requirement" with respect to the Employer's onus of proof.

In *Toronto (City) (supra)*, Arbitrator Sheehan concluded the following:

> 147 In conclusion, notwithstanding the existence of certain significant mitigating factors, the planned and deliberate nature of the grievor's fraudulent misconduct, as well as his failure to fully acknowledge his aberrant behaviour, leads to the conclusion that upholding his termination is just and appropriate.

In the above case the conduct of the Grievor included fraudulent behavior. In the current case there is no evidence of fraudulent behavior beyond the taking of a long dinner break; the evidence was that there is no set time for breaks. Ron Durocher testified that he began his shift at 4:30pm and that they went to lunch

around 7:30 pm and stated that they were on a fast pace completing eighteen (18) loads before lunch.

In *Deas Pacific Marine Inc. (supra)* Arbitrator Korbin concluded the following beginning at paragraph 109:

> 109 Therefore, I conclude the Grievor provided the Employer with cause for discipline and its termination of Mr. Banno for the improper and unauthorized purchase and removal of Company product from the worksite, and his lack of forthrightness, must be upheld.
>
> 110 In the result, the grievance is dismissed.

In the above case the Grievor was terminated for what was essentially theft of Company product. That is not the case in the current matter.

In *KVP Co. (supra)*, the Robinson panel concluded the following:

> CONCLUSION
>
> 122 For the reasons outlined above, the board chairman has concluded that the discharge of the grievor on June 24, 1964, was not warranted under the circumstances due to two reasons, viz.:
>
> 1. The company rule in question as written was beyond the competence of the company to introduce unilaterally several years after the grievor commenced his employment with the company.
>
> 2. In any event, even if the rule had been within the competence of the company to so introduce (which this board considers it was not), the penalty actually imposed (discharge after two garnishees) was unjust under the particular circumstances in view of the length of service and good record of the grievor.

> 123 Accordingly this board must find that the grievor was unjustly discharged by the company and that he is entitled to be reinstated on his job with back pay and with no loss of seniority.

In the above case the Board found that the Grievor was unjustly discharged. In the instant case the Employer's discipline policy was implemented sometime after the anti-bullying and harassment policy was published and the evidence is that certain of the Grievor's conduct was, in fact, years before the policy came out.

In *Wire Rope (supra)* the Weiler panel concluded the following:

> 15 In conclusion, we hold that the evidence of the grievor's disciplinary record (in this case a written warning) is not properly admissible before this board. Having made this ruling, we may now proceed with the balance of this hearing.

The Union argued that the warning the Grievor received was not admissible as it had exceeded the time limit in the Collective Agreement sunset clause.

In *City of Vancouver (supra)* Arbitrator Hope, Q.C. concluded the following at paragraph 106:

> 106 Finally, the city urged that the grievor had failed to prove adequate efforts to mitigate her loss. The question of mitigation was addressed at some length in *Re Metropolitan Toronto Board of Com'rs of Police and Metropolitan Toronto Police Assoc.* (1977), 14 LAC (2d) 1 (Arthurs). Commencing on p. 8, Professor Arthurs examined a similar submission that the grievor had failed to prove adequate efforts to mitigate. On p. 10 he concluded that **the onus of proving that the loss, or some part of it, could have been avoided is on the employer**. In any event, the grievor did give evidence that she pursued employment in the various avenues open to her. She was cross-examined on that point and no evidence arose in the cross-

> examination, nor was any adduced by the city, to indicate that there were steps available to the grievor that she failed to take. Bearing in mind that the onus in that regard rests with the city, I can find no basis for denying compensation on that ground. In the result, the grievance is granted in the terms outlined. (Emphasis added)

The above case concerns mitigation, which is not a factor in the current case.

In *B.C. Rail Ltd. (supra)* Arbitrator Munroe concluded the following, beginning at paragraph 42:

> 42 I appreciate that it is not particularly satisfactory for a case to be decided largely on the basis of the law or policy surrounding the reception or utilization of evidence. It can be frustrating for the parties to the arbitral process. Nevertheless, in the circumstances and for the reasons expressed, I cannot conscientiously find that the grievor "missed a call" in the blameworthy sense. Accordingly, **I must hold that just cause for discipline for the events of September 7th has not been established.** In view of that holding, which is to the effect that a culminating incident has not been shown, it is unnecessary to record in detail the grievor's prior record. It is also unnecessary to address the question of the proper relationship between the Brown System of discipline and an arbitrator's remedial mandate. (Emphasis added)
>
> 43 The grievor is to be reinstated to his employment as a trainman with 10 demerit marks removed from his record. The matter of back pay and benefits is left to be determined and calculated by the parties. I retain jurisdiction to resolve any disputes in that connection.

In the current case, proof that the disciplinary sanction was warranted is the Employer’s onus.

In *Burns Meats (supra)* Arbitrator Teskey concluded the following at page 16:

> In this instance, I think that something less than discharge is appropriate and sufficient to balance the legitimate concerns of all involved in this instance. Accordingly, I allow the grievance to the extent that the discharge is rescinded but I substitute in its place a four month suspension without pay. I might add that I consider that to be a very severe disciplinary penalty and one sufficient to bring home to the grievor the importance of correction of her own behaviour as well as being amply severe such as to deter any other employee from similar misconduct.

In the current case the Employer must satisfy its onus to the balance of probabilities standard.

In *MacMillan Bloedel Ltd. (supra)* Arbitrator Hope, Q.C. concluded the following, beginning at paragraph 31:

> 31 But, read in context, Mr. Chertkow concluded that any change in approach must be preceded by notice to employees affected. On p. 400 he also wrote:
>
> > But as of the date of the incident in question it viewed similar acts of negligence of the same relative magnitude as being worthy only of a written reprimand notwithstanding an employee did not have a discipline-free record. However, if it does adopt such a course of action [of increased penalties] it is incumbent upon the employer to notify all of its employees, and the union which represents them, that its expectations have changed and it intends to follow either a more vigorous policy of enforcement of safety matters or that it will view certain aspects of safety-related misconduct more seriously than it has in the past. There was no evidence adduced at these hearings that the company had given such notice. Nothing, however, bars it from doing so at any time in the future.
>
> 32 Those comments are apropos the facts present in this dispute. The dismissal of the grievor was an escalation in the penalty the Employer had imposed for similar infractions in the past. Nothing in

> the evidence took the incident involving the grievor outside the circumstances present in prior infractions in which a 30-day penalty was imposed in the first instance or agreed to between the parties. It was incumbent on the Employer to give notice of its intention to change that approach. In the result, the grievor is entitled to be reinstated and a 30-day suspension substituted for dismissal. He is also entitled to be compensated for his wage loss in an amount to be determined between the parties. If the parties are not able to calculate that amount, jurisdiction is reserved to impose it.

In the instant case the penalty imposed on the Grievor was twice the penalty that Mr. Durocher received. As Ms. Vellins pointed out, “both respondents had engaged in bullying and harassment”.

In *University of British Columbia (supra)* Arbitrator McPhillips award held as follows:

> HELD: Grievance allowed. The employer violated the collective agreement when it unilaterally changed its practice and denied employee requests for the removal of suspensions from their records. The language in the collective agreement was ambiguous. The employer's past practice of over thirty years provided the best indication of what the shared understanding of the parties was with respect to the application and scope of the sunset clause.

This was part of the Union’s argument with respect to the sunset clause within the current Collective Agreement.

In *Grimm’s Fine Foods (supra)* Arbitrator Brown concluded the following at paragraph 92:

> 92 With respect to Costas, I conclude that she threw the first punch. She put Solis and Dhanda at risk and she has shown little remorse. She has a good employment record and is a long service employee. Given that she initiated the incident, I conclude that her

> suspension should be longer than Solis'. I substitute a two month suspension without pay. Costas' personnel should be amended to reflect the suspension; she should be re-scheduled to work as soon as possible and made whole.

In the current case, should the Grievor receive a longer suspension than Mr. Durocher? That is the fundamental question before this Board.

In *Dryco Drywall (supra)* Arbitrator Brown beginning at paragraph 36 concluded the following:

> 36 Given all the circumstances of the case, I conclude that termination is excessive. The incident was serious; however, while Sobieski was careless and stupid I do not find he was malicious or reckless. He took responsibility and apologized. It was a spur of the moment act. He is a long service employee.

The question in the instant case is: Was the Grievor's suspension appropriate in all the circumstances of this case?

In *Nicholson Manufacturing (supra)* Arbitrator McPhillips Award reads as follows:

> 55 The grievance is partially allowed. The Grievor's termination is rescinded and he is to be reinstated to his position, effective July 8, 2013. The period from May 1 to the date of his reinstatement is to be a suspension without pay but there will be no loss of service or seniority. Mr. Anderson's disciplinary record should be amended to reflect this decision.

In the current case, if the Grievor's suspension was warranted, is the length of the Grievor's suspension appropriate?

In *Teck Coal (supra)* Arbitrator McPhillips, at page 19, commented as follows:

> The jurisprudence indicates that acts of alleged misconduct which were not subject to discipline at the time they occurred cannot be "resurrected" subsequently. There are a number of reasons for this approach: the employee may not have had an opportunity to protest at the time; the employee may have felt the employer condoned the incident; given the length of time that has elapsed, the oral evidence may not he nearly reliable enough. In that regard Arbitrator Hope stated the following in *Vancouver (City) supra;* at p. 135:
>
> > Arbitrators have long taken a jaundiced view of evidence critical of the conduct of an employee led in support of a dismissal which is neither formalized nor brought to the attention of the employee. There are two reasons for disdaining such evidence. The first is that the failure of the employer to formalize the matter invites the inference that the employer placed little significance on the conduct. The second reason is that a failure to document and formalize criticism of an employee's conduct denies to the employee the right to challenge the factual base upon which the criticism is mounted.

As outlined by the Supreme Court decision, the Employer has the onus to prove its case to the civil standard. In *Re Miller v Minister of Pensions* [1947] 2 All ER 372 (Denning, Lord J), Lord Denning summarized the requirements for the standard of proof. He then set the standard of proof for civil cases as follows:

> If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not.

In *F.H. v. McDougall (supra)* it is worth noting that the Supreme Court commented as follows at paragraph 46:

> Similarly, **evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test**. But again, there is no objective standard to measure sufficiency. In serious cases,

> like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. (Emphasis added)

In the above case the High Court outlined the appropriate test required to satisfy the balance of probabilities standard.

In *Re: Wm. Scott & Company Ltd. Canadian Food and Allied Workers Union, Local P-162*, [1976] BCLRB Decision No. 46/76 (P.C. Weiler, Chair, C.J. Alcott and A. Macdonald, Members), July 26, 1976, the Weiler panel set the modern standard for arbitral review of disciplinary sanctions in the Decision section of that award, as outlined below, beginning at paragraph 13:

> 13 Instead, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?
>
> 14 Normally, the first question involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the discharge. But even at this stage of the inquiry there are often serious issues raised about the scope of the employer's authority over an employee, and the kinds of employee conduct which may legitimately be considered grounds for discipline. (See for example *Douglas Aircraft* (1973) 2 L.A.C. (2d) 56.) However, usually it is in connection with the second question -- is the misconduct of the employee serious enough to justify the heavy penalty of discharge? -- that the arbitrator's evaluation of management's decision must be especially searching:

(i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?

The Grievors conduct was serious however it was not theft. Also there was no evidence proffered that the Grievor ever carried out any of the threats he made.

(ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)? (*Wm. Scott)*

The Grievor's conduct was repetitive however, in a November / December 2013 Harassment Investigation Report conducted by the Employer, the conclusion was:

> At the conclusion, we were not satisfied there was enough evidence presented to conclude that bullying and harassing behaviour had occurred.

The above finding has some relevance in the adjudication of this matter.

(iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history? (*Wm. Scott)*

The Grievor does have a long record of employment with this Employer.

(iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)? (*Wm. Scott)*

In this case there had been no earlier attempts of corrective discipline other than a disputed warning.

> (v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)? (*Wm. Scott)*

The discipline imposed is not in accord with the consistent policies of the Employer. For example, Ron Durocher's discipline was a four-shift (4) suspension (one week). Paragraph 2 of Ron's suspension letter included the following threats: "I'll punch him out", threatening to throw an employee off a roof, "meet him in the parking lot", and "I'd like to kill Bob". In my view, Mr. Durocher's comments were more serious than Mr. Sankey's. Saying, "I'd like to kill Bob", crosses the line from a civil matter and could be construed as a criminal threat. In Mr. Stubbs' testimony he said Ed continued to talk to him and that when he came into the lunchroom Ron would leave. A number of witnesses testified that Ron was worse than Ed. Gerry Taylor testified that Ron is more nasty than Ed and that he never witnessed directly any harassment of Dan. Larry McMann testified that he has never seen Ed do anything violent to anyone at work. He said that Ed never threatened him or harassed him. Dan Leblanc testified that Ed gave him pointers, advice, support, and help. He said Ed never threatened to harm him. He said that the 'car scratch' comment was about four (4) years ago and that it was not Ron. He said his car never got scratched. The result is that, in my opinion, a conclusion that the length of the Grievor's discipline is appropriate is not sustainable per the balance of probabilities threshold.

I do agree with the Employer's summary:

> No employee ought to require any form of training in order to be aware that threatening people is unacceptable. In addition, subsequent

> to having the harassment policy read to him and completing the on line training module Mr. Sankey was unable to resist engaging in the behavior he engaged in July 2nd. Clearly a significant suspension is necessary to bring home to him the unacceptable nature of his behavior and attitude as lesser steps such as training were not successful.

In my view, the suspension received by Mr. Durocher was a significant disciplinary sanction (one week) and was a clear message to other employees that threatening and harassing other employees is unacceptable.

Continuing with the *Wm Scott (supra)* criteria following the five questions in paragraph 14:

> …
>
> The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. (That attitude may be seen in such recent cases as Phillips Cables (1974) 6 L.A.C. (2d) 35 (falsification of payment records); Toronto East General Hospital (1975) 9 L.A.C. (2d) 311 (theft); Galco Food Products (1974) 7 L.A.C. (2d) 350 (assault on a supervisor).) Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question. Within that framework, the point of the third question is quite different than it might otherwise appear. Suppose that an arbitrator finds that discharge and the penalty imposed by the employer is excessive and must be quashed. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off scot-free simply because the employer overreacted in the first instance. It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case, perhaps

> even utilizing some measures which would not be open to the employer at the first instance under the agreement (e.g. see Phillips Cables, cited above, in which the arbitration board decided to remove the accumulated seniority of the employee).

The answer to the first *Wm. Scott* question is 'yes', this Grievor's conduct gave cause for some degree of discipline. As outlined in Ms. Vellins' conclusion concerning Ed Sankey and Ron Durocher, the report read as follows:

> The above findings indicate that the respondents and each of them have engaged in bullying and harassment in breach of the West Fraser Policy and contrary to WorkSafe BC's Occupational Health and Safety policies.

With regard to the second *Wm. Scott* question, I find that the sanction to Mr. Sankey was excessive in that Mr. Durocher's threats were more serious than Mr. Sankey's per the Durocher suspension letter at paragraph 2. In my view, there is a requirement for the Employer to impose consistent disciplinary sanctions for similar conduct. In that regard Ms. Vellins' finding was that both Mr. Sankey and Mr. Durocher were involved in the following unacceptable behaviour: "each of them have engaged in bullying and harassment". In this case the Grievor's sanction has not satisfied the (*Wm. Scott)* criteria. The Grievor's suspension, in my view, was not "in accord with the consistent policies of the employer" and as such it appears "to single out this person for arbitrary and harsh treatment".

Based on a careful review of the case law, the submissions of Counsel and the testimony of witnesses, an appropriate "alternative measure should be substituted as just and equitable" (*Wm. Scott).* This Board has determined that an eight (8) shift suspension is excessive in light of Mr. Durocher's four (4) shift suspension for similar conduct, therefore in place of the eight (8) shift suspension to Mr. Sankey,

this Board is substituting a four (4) shift suspension, which is consistent with the penalty imposed on Mr. Durocher. Mr. Sankey is to be made whole for the other four (4) shifts.

It is so ordered.

I will retain jurisdiction in the unlikely event of implementation difficulties.

I thank Counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 24th Day of July, 2015.

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Ronald S. Keras
Arbitrator

File: 697