

IN THE MATTER OF AN ARBITRATION

Between

CARIBOO PULP & PAPER COMPANY
(The Employer)

And

UNIFOR, LOCAL 1115
(The Union)

Grievance: Mr. Ed Sankey - Termination

Arbitrator:

Ronald S. Keras

Counsel for the Employer:

Mr. Donald J. Jordan, Q.C.

Counsel for the Union:

Mr. Craig Bavis

Hearing Date:

November 9, 10 & 11, 2015

Location:

Quesnel, BC

Published:

December 29, 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.

The Grievor, Mr. Ed. Sankey has grieved that the Employer has terminated him without just cause on February 13, 2015.

At the time of his termination the Grievor had been employed at the company for about thirty-four and a half (34½) years and he had one previous discipline on his file.

The Employer's February 13th, 2015 termination letter to Mr. Sankey read as follows:

This letter confirms the action taken at our meeting today. Your employment with Cariboo Pulp & Paper is terminated due to the event that occurred on February 3rd night shift. Through our investigation, we have concluded that you willfully buried the excavator. Your termination is effective immediately.

Sincerely,
Cariboo Pulp & Paper
Tony Christy
Production Manager
Cc/ Unifor Local 115

Article XXX - DISCIPLINARY ACTION of the Collective Agreement reads as follows:

The Company has the right to discipline or discharge employees for just and reasonable cause.

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.

In cases involving suspension, the disciplinary notice will remain on the employee's file for twenty-four (24) months and not used after that period provided no other discipline has occurred during that time.

The presence of a Union Shop Steward is mandatory at any meeting during which the employee is disciplined. (Emphasis added)

II

The Employer's first witness summoned was bargaining unit employee Mr. Graeme Hill. Mr. Hill testified he had been at Cariboo Pulp for twenty-one (21) years and the last three and a half (3½) years in Material Handling. He said that the chips and hog were in separate piles and that the hog was used to provide fuel. He advised that piles #1, #2 and #3 were chips. Piles #3½, #4 and #5 were hog.

Mr. Hill was working on February 3rd. He testified that hog gets delivered by truck and is dumped on the main hog pile and that employees push the hog into the pile. Mr. Hill was interviewed by Mr. Dan Wilson who was the Operations Superintendent. On February 3rd Mr. Hill was pushing hog on #4 pile from 4pm to 8pm. At 8pm he went to chip reclaim and pushed chips on #2 pile from 8pm to 11pm. Mr. Hill said he noticed the excavator and that it was over the edge of the pile. The excavator wasn't covered up; it did have hog on it but it was not buried. The excavator was at the base of the hog piles; he did not notice anything out of the ordinary. He was shown some photos and observed that there was a chip truck

in the first picture. He advised that they were instructed to push North and that it was probably not pushed accidentally, it would take quite a few pushes to bury the excavator. He advised that hog piles move around a little bit.

In cross-examination, Mr. Hill testified that there were hog piles #3½, #4, and #5 and that the excavator was between the #3½ and #4 hog piles. It was parked there on December 28th, 2014. He advised he worked January 15th and that the #3½ pile and the #4 pile had merged together and covered the tracks of the excavator.

In one of the photos Mr. Hill said that there was snow on top of the hog and that the snow was up to the tracks of the excavator and snow on the cab. Mr. Hill said he worked the night shift on February 3rd and that it was getting dark and he was not looking at the excavator. He testified that a Cat can push larger volumes than a loader. He also said he was using a loader to push and that there was less visibility with the loader and that the loader was slower than the Cat. He was making flatter piles with the loader. He advised you can't push as much with the loader, that the trucks back up onto the hog and then dump the hog. He advised that the pile was 12 to 16 feet high, the excavator was parked below, the hog was reasonably close to the tracks, the lighting was poor, and the excavator was at the side of the pile, that there were five to eight trucks dumping hog in the four hours. He said that there could be four trucks waiting to push and that he was not typically checking the tracks of the excavator. There was no lighting at #4 hog pile. He said the hog pile gets pretty hot and there is a cloud of steam which hampers visibility. He also said that when driving on the hog pile at night the visibility is not good.

Mr. Hill testified that people have pushed chips onto the reclaim wall, over the wall, as there is poor visibility, and that the reclaim wall gets buried in the chip area and people get disciplined with a two-day suspension. He said chips have

gotten underneath into the light standard and that the hog goes up to between 80 and 100 feet high, and further that building hog up on an incline creates an entry way for trucks requiring them to maintain a certain angle.

In redirect, Mr. Hill said that there was good lighting at #1 and #3 chip piles. There was one bright light on the loader with a light bar on top. He advised he had no problem seeing the lights on the loader in the chip area.

The Employer's second witness summoned was bargaining unit employee Mr. Larry McMann. Mr. McMann had worked at Cariboo Pulp for thirty-five and three quarter ($35\frac{3}{4}$) years and that he worked Material Handling since 2009. He said that piles #1, #2 and #3 were chip piles and piles #3½, #4 and #5 were hog piles. He worked on February 3rd and from 4pm to 8pm he worked as pile pusher on the chip piles and from 8pm to 11pm he worked the hog piles. He did not see the Gamache excavator that day. He was interviewed by Mr. Wilson on February 8th and said he didn't remember seeing the excavator. He said that he ran the loader on the hog, that he saw the loader on the hog and Mr. Sankey. He said there was a lot of hog that night. He testified that he didn't see Mr. Sankey pushing into the excavator, that he saw the Grievor pushing in that direction toward the excavator. He said the excavator wasn't buried when he was there.

In cross-examination, Mr. McMann testified he could see the Cat lights of the Grievor's machine, which is used on that pile. He said he remembered seeing the Grievor driving the Cat at that time. He advised that he himself was on the #1 chip pile. There were no lights at #4 hog pile and there was a #3½ pile. He said he knew where the excavator was parked and that he didn't go out there.

He agreed the excavator was there in late December, and said he thought it was a stupid place to park the Gamache machine. He felt it could happen, the #3½ and #4 piles pushing together. Mr. McMann was pushing hog from about 9pm or 10pm. He said the hog height is different every time you build the pile. He testified there were a lot of trucks; that trucks were not backed up. He said when he was on the hog he was using the Cat, which was available and that he would maintain ramps for the trucks. He said they were getting a lot of hog. He said he was pushing hog North and building the pile, gradually going up and that you lose some of the hog along the way. He said piles of hog were building up on the side and the pile was getting wider and that there were trucks from one end to the other. On February 3rd he saw a lot of hog trucks and that he didn't see the excavator.

The Employer's third witness summoned was bargaining unit employee Mr. Robert Stubbs who testified he had been at Cariboo Pulp for forty (40) years and at Material Handling since 1976. He said that #1, #2 and #3 piles were chip piles and that #3½, #4, and #5 were hog piles. On February 4th Mr. Stubbs was on the hog from 2am to 4am. He said he saw the boom of the excavator and didn't actually see the whole excavator and advised that the hog would have been pushed there. He advised it could have come out of the sides of the blades, which was 8 to 10 feet high.

He said that on February 8th he met with Mr. Wilson. He testified that when he started pushing the loader boom above the pile, the excavator was partially covered; there was some hog on the back end of the excavator. He was told to push North and that they were not supposed to join the two piles.

In cross-examination, Mr. Stubbs said he was last on the hog from 2am to 4am, there were a lot of hog trucks, at least three, and there was a lot of pressure. You can tell them where to dump on the radio, however, they don't check every time. He said he just jumps in the loader and goes. Mr. Stubbs said there was no inspection and he didn't look at the Gamache machine. The Cat broke down; didn't know what time, and that he was driving the loader. It is easier to push with the Cat than the loader, the loader spins out easy with rubber tires, and the hog pile got higher as you went up. The excavator was on the ground and stood 12 to 16 feet high. Hog piles #3½ and #4 got closer at the excavator. Two days earlier the piles were up to the back of the excavator, you could see most of the excavator. He said he didn't think the tracks were covered; no one reported it.

Mr. Stubbs said that on the February 3rd night shift, from high up in the loader he could see the boom of the excavator. On February 3rd he pushed North. The pile became wider as the hog spilled off both sides. He said that trucks would have been winding down 40 foot long semi-trailers. The Loader maintains the ramp at a 15° incline; the trucks back up onto the pile. He said that he had seen some people push to the sides, which extends the width of the pile. He had never heard of anyone disciplined for extending the width of the piles. They have to keep the hog workable. He said that sometimes there is steam on the hog pile; it depends on the temperature. I have heard of people getting lost on the pile, disorientation. The lighting on the chip pile is one hundred times better than on the hog. The hog pile does not have as good light; the light on the loader is focused forward and fender lights shine off to the sides.

In the Employer's re-examination of Mr. Stubbs, he said there was not much steam on February 3rd.

The Employer's fourth witness summoned was bargaining unit employee Mr. Roy Norman. Mr. Norman has worked at Cariboo Pulp for forty-three (43) years and has been in Material Handling eleven (11) years. On February 4th he saw the excavator. He said that the hog fuel was pushed by the Cat pushing North.

In cross-examination Mr. Norman advised he was on "C" Crew and he saw the excavator shortly after he came in.

The Employer's fifth witness summoned was bargaining unit employee Mr. Dan Leblanc. He testified that he had been with the Employer since February 1989 and in Material Handling for five (5) years. On February 4th he was asked to dig out the excavator. He said somebody pushed hog to it. On January 24th he worked overtime with the Grievor, pushing North. He told the Grievor not to join #3½ and #4 piles and the Grievor commented saying he would bury it.

In cross-examination, Mr. Leblanc said he was on "C" Crew. On February 4th he was told to dig out the excavator. He said he had seen the excavator four days before and it was parked between #3½ and #4 piles. He said he did not know how it got buried. He said it was a "dumb location" to park the excavator between #3½ and #4 piles. He said it was not a good place because it was going to get buried and a lot of people were saying it. He said the Grievor said it was a stupid place to park the excavator; that it was going to get buried. There was no boss around on night shift. He didn't tell management that Mr. Sankey made that comment. He said that the plies were moving closer and closer together and that they were told more than once to push North and to not join #3½ and #4. The Gamache employee had parked their excavator between the piles, which were slowly moving together.

He said there was nothing on the board about not pushing the piles together, and wasn't asked to separate the piles. At about 4am he was told to dig out the excavator. His evidence was that on January 24th the Grievor said he was going to bury it and they chuckled and he thought Mr. Sankey was making a joke. He said they have all buried the chip reclaim, over the wall, and that there was zero discipline for burying the reclaim.

In the Employer's re-examination of Mr. Leblanc he said there were several truck loads and a lot of guys said it's going to get buried.

The Employer's sixth witness summoned was bargaining unit employee Mr. Larry Dagneau who said he saw the Grievor push hog toward the Gamache excavator, a couple of pushes; that they were supposed to push North. He said that he was on "D" Crew, the same as the Grievor.

In cross-examination, Mr. Larry Dagneau said he wasn't working on February 3rd or 4th. He said he was on the chip Cat on January 31st. He said he saw Mr. Sankey around the area of the trucks. He didn't ask him what he was doing. He testified that piles #3½ and #4 migrated and moved together. Mr. Sankey was cleaning the bottom of the pile. Mr. Sankey was also maintaining the ramps, that it was easier to push North, that the hog was close to the tracks of the excavator, that maintaining the ramps for the trucks required keeping it wide enough, and some hog spills off to the side. He said he never heard anything from management, that piles were not supposed to stick and #3½ and #4 piles merged. Mr. Dagneau said he did not see Mr. Sankey pushing hog onto the excavator.

In the Employer's re-examination of Mr. Dagneau, he said the hog was not off to the side.

The Employer's seventh witness was Mr. Dan Wilson, Operations Superintendent, who oversees Supervisors in the Material Handling department. Mr. Wilson had concluded that the Grievor buried the excavator as he pushed hog from 11pm to 2am on February 3rd. The white board said push North, not West. Mr. Wilson interviewed employees and concluded that the Grievor willfully buried the excavator, that he did it on purpose; that hog could not have ended up on the excavator in the normal course of events. The Union objected, pointing out that Mr. Stubbs never said that the Grievor buried the excavator.

Mr. Wilson interviewed the Grievor on February 7th to discuss February 3rd and the burying of the excavator. The Grievor's supervisor, Kyle Hackney, was present. Mr. Sankey asked if he needed a Shop Steward. When told there was evidence that he did it, Mr. Sankey said it wasn't him who buried the excavator. Mr. Wilson said he made the decision based on the people he had interviewed. The Grievor said it was not buried at the beginning of his shift at 11pm; it was close but not buried. The Grievor said it was not an investigation hearing and he thought he was fired. Mr. Wilson asked Mr. Sankey to stay away until the investigation was finished.

Mr. Wilson met with Mr. Hill, Mr. Stubbs and Mr. Norman. Mr. Hill said the excavator wasn't buried at the end of the shift from 4pm to 8pm and said it would have been deliberate. Mr. McMann was on the hog from 8pm to 11pm and said the excavator was not buried at that time. He said he saw the Grievor driving in the general area of the excavator. Mr. Stubbs took over from Mr. Sankey and said the excavator was buried. Mr. Stubbs said it would have been deliberate and

instructions were to push North. You would have to push west to bury the excavator. Mr. Norman said it would have been deliberate and that they were instructed to push North. Mr. Wilson testified that Mr. Leblanc said that on January 24th he saw Mr. Sankey pushing West and Mr. Sankey had said he would bury it. All interviews were prior to February 13th. Mr. Wilson said that when chips were pushed over the reclaim wall an employee received a two-day suspension for undue care and attention, that it was not deliberate.

In the Union cross-examination of Mr. Wilson, he advised it wasn't just him who made the decision to terminate the Grievor and at the time the Grievor had an 8-day suspension on record, which is a maximum. Mr. Wilson had been Operations Supervisor for two (2) years as of July 2015 with responsibility for about 120 employees. Mr. Wilson testified that he never worked in Material Handling. Mr. Wilson also advised that he didn't take the photos and that he never showed the photos to employees during the investigation. One photo (Exhibit #3) showed the excavator with snow in front of it. He said he didn't know how long the snow had been there. He said he did not know that the excavator was parked between #3½ and #4 hog pile. He said it was of no concern for where it was parked. The Supervisors didn't raise a concern of hog on the tracks of the excavator. Mr. Wilson said he talked to the Grievor on one occasion on February 7th for about 15 to 20 minutes. Mr. Wilson said he didn't remember taking notes when talking to the Grievor. Mr. Wilson spoke to the crew on February 8th and didn't show them the photos or maps. He did not talk to the Grievor after that.

Mr. Wilson said Mr. Leblanc recalled that on January 24th the Grievor said, "Fuck the 'mach', I'm going to bury it". Mr. Wilson said that he couldn't remember what Mr. Peel said except that Mr. Sankey was going to bury it; that he did not ask the

Grievor what he had said on January 24th; that he did not ask the Grievor about pushing hog on January 24th or January 31st; that he did not ask the Grievor about Mr. McMann's observation; that he did not speak to anyone on "B" Crew, that he didn't speak to anyone on the February 3rd day shift; that he didn't ask what position the piles were in; that there were two-day suspensions for pushing over the wall; and that there were written warning disciplines for pushing chips over the reclaim wall.

Mr. Wilson said he was not aware of any permanent damage to the excavator. Mr. Hill did not notice that the excavator was buried at the beginning of his shift 4pm to 8pm. Mr. Wilson said he didn't use the big site photo during the investigation. He said he did not do a formal write up of the investigation and that he was not present at the termination meeting.

In the Employer's redirect of Mr. Wilson, he said he was not able to conclude that the chip over the reclaim wall was deliberate.

The Employer's eighth witness was Mr. Sankey's supervisor, Mr. Kyle Hackney, who was the Fibre Line Supervisor in Material Handling. Mr. Hackney attended the February 7th meeting when Mr. Wilson interviewed the Grievor. Mr. Hackney testified that he told Mr. Sankey he didn't need a Union representative at that time. Mr. Wilson told the Grievor he pushed hog over the excavator and the Grievor said it was not him. Mr. Sankey said he had worked on "B" Crew and they don't like him. The Grievor said the hog was close to the excavator but it was not buried. When asked if he had anything else to say, the Grievor said, "This feels like discipline". Mr. Hackney drove Mr. Sankey back to Material Handling to get his stuff. The Grievor said it seems like this happens every time he works with "B" Crew. The Grievor said he "didn't bury that thing".

In cross-examination, Mr. Hackney said that Mr. Sankey had told them they should talk to Mr. Stubbs as he was on shift after him. Mr. Hackney said there were no maps or photos at the meeting; no one asked the Grievor where he was on the hog piles; the Grievor's previous shift had been on February 1st, and there was no discussion about where the hog was. The Grievor had said it was close. There was no discussion about the excavator being buried. Mr. Hackney said that he was there as the Grievor's Supervisor. Mr. Hackney took notes and summarized them in an e-mail. Mr. Hackney was not present at the discipline meeting. Prior to February 3rd Mr. Hackney was aware that hog was touching the excavator tracks and that the #3½ and #4 hog piles had actually merged. No one said to make sure the hog doesn't touch the excavator.

Mr. Hackney had no concerns about the quality of Mr. Sankey's work. Mr. Hackney said that Mr. Sankey had said he was telling the truth.

III

Union witness Ed Sankey testified that he started at Cariboo Pulp on July 22, 1980 and in February 2010 began in Material Handling. In 2015 Mr. Sankey was on "D" Crew. On February 3rd he was on an overtime shift on "B" Crew. In his third rotation he was on the hog from 11pm to 2am. His first rotation was as the #3 Operator/Utility man, and the Break man. He said that as the chip pile pusher he levels the piles, he also does switches of box cars, and drives the Cat. When working the hog he uses the loader to push reclaim to the hog. When there is big flow they go to excess piles, normally using a Cat. The Cat broke down on the first rotation. Mr. Hill was pushing up the hog trucks; all trucks were going to the

#4 pile. Mr. Sankey said he finished in Chip Reclaim and that #2 chip pile is opposite #4 hog pile. If chips aren't flowing it stops production.

When Mr. Sankey got there on February 3rd there were 4 trucks unloading at #4 pile and at #3½ pile. He said he smoothed out the grade. He advised that it is not uncommon to be pushing on the #2 pile using the chip pile pusher. On February 3rd the lights were on, lighting toward the reclaim but that it was pretty dark and not very well lit up. Mr. Sankey said that between 8pm and 11pm the trucks were unloading.

The Hog loader maintains the ramps and everyone operates a little different. The Cat takes about four (4) pushes to load a truck; with the loader it takes seven or eight (7 or 8) pushes. Mr. Sankey said he drove across the pile, leveling it off so the trucks could get in there. Mr. Sankey said that hog spills off the side if it's on the edge of the pile. From the #3 pile he could see the top of the cab on the excavator, which is about 15 to 20 feet high.

Gamache and Sons is a contractor that moves hog piles up to the hog reclaim. Gamache has a couple of excavators, a big Cat, a small Cat and self-unloading trucks. The Excavator, in December 2014, moved from hog pile #4 up to the hog reclaim and at the end of December they stopped work and the operator parked the excavator on the edge of the asphalt between pile #3½ and pile #4; there was room to drive through between the excavator and the hog piles. Piles #3½ and #4 kept getting closer together; people were pushing it in there. I knew it was getting close to the excavator.

On January 24th Mr. Sankey said that he talked to Brian Peel. Mr. Sankey said that he never said, “fuck the ‘mach’, I’ll bury it”. He said it was a stupid spot to park the excavator. Mr. Sankey said he worked January 31st, was off on February 1st, and on overtime on February 3rd.

On January 31st he moved the hog according to what needed to be pushed. Mr. Sankey said he needed to smooth out the pile. No one said anything to him. On February 3rd he was on an Overtime Shift from 11pm to 2am on the hog pile. He went out there and started doing the job. No one mentioned anything to him about the excavator. At the top end of the ramp it was 60 or 70 feet high and that the #3½ and #4 piles were now one pile. At 11pm on February 3rd he could see the excavator as he was pushing up the hill but only saw part of it because at night you don’t see that well. He said he never looked at the excavator, that he could see the cab and the engine compartment as it was facing away from him. He didn’t go see where the excavator was in relation to the hog; he never got that close. There were no lights shining on the excavator. He said he was operating the loader on the top of the pile; that you can’t run the loader close to the edge, and that you need to be at least 10 feet away from the edge. The Cat was broken down so they were using the loader, smoothing out the level of the pile, and that he would park by the road waiting for the trucks. He said he didn’t push hog onto the excavator and nobody mentioned anything to him until the 7th.

On February 7th Mr. Sankey said he had been there since 4am and they called him down on the radio. Kyle Hackney, Dan Wilson and Gord Olson had a painful look. Mr. Sankey asked if he needed a shop steward and Kyle said no, that it was just an investigation. He was stunned when accused of burying the excavator. He said

that he did not do that. They said that he was on thin ice following his 8-day suspension and that he was going to be terminated.

He testified that the suspension had been reduced to a 4-day suspension. On February 3rd, it was a 20 minute meeting with Mr. Wilson. Mr. Sankey said he wasn't asked about January 24th or January 31st and that he wasn't asked about what other employees had said. Gamache and Sons was doing bargaining unit work. He (Gamache) had his scraper stuck and Mr. Sankey said he got him out.

After February 7th there was no other meeting. They said that next time it was termination. Mr. Sankey said that he didn't push over the edge re the excavator. He told them he didn't do it and that he told Kyle that he was telling the truth. After termination he could not fill his prescription for diabetes; it was the first realization that he had been there for thirty-five (35) years. It made him feel lost. He said he hadn't done anything wrong.

In the Employer's cross-examination of the Grievor, he said he saw the excavator when he drove by. He pushed North as previously as on the white board it had said that. The top of the cab of the excavator was 15 or 20 feet from the ground. He had pushed North. The top of the hog is flat; the truck goes onto the flat. By February 3rd new hog was getting close to the excavator. He said that someone had to have pushed it there. He said that he didn't push it there; he didn't do it.

In the Union redirect, concerning the page two photo in Employer's Exhibit #3, on the west side of the pile, the top was flat.

Union witness Bryan Peel said he did not remember Mr. Sankey saying he was going to bury the excavator.

In cross-examination, Mr. Peel said his memory was not as good as it used to be.

At the conclusion of the evidence I conducted a site visit.

IV

Mr. Jordon made the following points in argument in support of the Employer's argument:

Mr. Sankey, in cross-examination, said "Someone pushed it to get it there". Employer witnesses said that covering the excavator with hog was a deliberate act. The witnesses including Mr. Sankey all agreed that it was at least one truckload of hog pushed on the excavator and we know that it would take four (4) pushes with a Cat and seven or eight (7 or 8) pushes with a loader.

In light of the clear statements in the evidence of Graeme Hill, Larry McMann, Bob Stubbs, Roy Norman and Larry Dagneau, that the covering of the excavator by the hog was a deliberate act. Indeed, the witnesses, including Mr. Sankey, all agreed that it was a least one truckload of hog pushed on the excavator.

In light of those statements in the evidence, I do not have to consider issues such as whether the lighting was a problem, steam arising from the piles, hog falling off the edge of a blade or bucket, smoothing the area, or any other such explanation.

Those explanations are not consistent with the evidence, which is unanimous that the act of covering the excavator was deliberate.

Mr. Hill testified that the excavator had some hog on it weeks earlier and snow. It had been sitting there for quite a while and there was hog on the tracks. Mr. McMann said he saw the Grievor driving the loader in the direction of the excavator. Between 8pm and 11pm the excavator was not buried. Mr. Stubbs said he could only see the boom of the excavator and there was hog on the back of the machine.

Also, the Employer pointed out that labour arbitrations are civil matters, requiring only one standard of proof on the balance of probabilities. Arbitrators are required to “scrutinize the relevant evidence with care to determine whether it is more likely than not that the alleged event occurred”.

The Employer asserted that even though there may be other possibilities for who may have buried the excavator, this case must deal with what is “probable” and the Employer is asking this Board to conclude that it was more probable than not that Mr. Sankey buried the excavator.

The Employer described willful damage and/or sabotage of an employer’s property as being a most serious employment offence akin to theft and should be viewed within the context of criminal conduct. The Employer stated that “as a result arbitrators “... have consistently affirmed management’s rights to suspend, or more commonly discharge an employee who willfully inflicts such damage on the property of his employer”.” The Employer asserted that Mr. Sankey’s actions were not spur of the moment, but intentional and willful.

The Employer argued that the Grievor's refusal to acknowledge and take responsibility for his conduct and to persist in lying throughout the Employer's investigation provides the arbitrator with clear evidence that there is no viable, sustainable employment relationship.

In referencing Mr. Sankey's employment record, Counsel submitted that in a previous proceeding before this Board Mr. Sankey had denied making threats, and asserted that they were not true. The Board disbelieved the Grievor's evidence and found that he had engaged in threatening behaviour. Notwithstanding this conclusion the Board mitigated the length of the imposed penalty. However, the fact of the Grievors failure to be honest and take responsibility for his conduct on that occasion is a highly relevant factor.

The Employer relied on the following case law in support of its argument:

Re F.H. v. McDougall [2008] 3 S.C.R. 41; S.C.J. No. 54 (McLachlin C.J. and LeBel, Deschamps, Fish, Albella, Charron and Rothstein JJ), October 2, 2008, para. 49

Re Cariboo Pulp & Paper Company and Unifor, Local 1115 Ed Sankey Suspension, [2015] B.C.C.A.A.A. No. 78 (R. Keras), July 24, 2015, para. 88

Re Mustapha v. Culligan of Canada Ltd. [2008] 2 S.C.R. 114 (McLachlin C.J. and Basterache, Binnie, LeBel, Deschamps, Fish, Albella, Charron and Rothstein JJ.), May 22, 2008, para. 13

Re United Food and Commercial Workers. Local 1400 v. Prairie Pride Natural Foods Ltd., Saskatoon, Saskatchewan (Yel-Malual Grievance) [2013] 239 L.A.C. (4th) 213 (Panel: William F.J. Hood, Q.C., B. McGrath (Union Nominee); R. Smith (Employer Nominee)), December 6, 2013, para. 79-82

Re Babine Forest Products Ltd. v. United Steelworkers Assn., Local 1-424 [2006] 155 L.A.C. (4th) 396 (S. Lanyon), August 21, 2006, para. 39

Re City of Kelowna & Canadian Union of Public Employees, Local 338 [2014] B.C.C.A.A.A. No. 29; 241 L.A.C. (4th) 252; 118 C.L.A.S. 81; 2014 Carswell BC 743, No. A-018/14 (C. Sullivan), February 14, 2014, para. 43

Re Overwaitea Food Group and UFCW, Local 1518 (FS Grievance) [2012] 223 L.A.C. (4th) 437 (Mark J. Brown), September 5, 2012, at para. 89 and 90

Labour Relations Board of B.C. Section 108 decision *Re University of British Columbia –and- Association of University and College Employees, Local 1 (Re: Sandra Jackson)* #L28/80, (Donald R. Munroe), February 20, 1980, beginning at page 3

V

In his closing argument Mr. Bavis asserted the following in support of the Union's position:

“The morning of February 4, 2015, the Employer noticed that an excavator owned by a contractor, Gamache, had hog pushed up against the back of the excavator, partially covering it. After a perfunctory investigation, the Employer blamed the Grievor who was one of four employees working the previous shift, B Crew, for pushing the hog against the excavator. Although the Employer characterized this action as "burying" the excavator, the excavator was not buried in hog, only the rear portion of the cab and engine compartment (to the east) was in contact with the side of the hog pile. The tracks had been in the hog pile for several days.

There is no evidence that the Grievor was responsible for this movement of hog against the excavator on the February 3, 2015 shift or that the hog accumulated on that shift at all. Although the Union takes the position that Mr. Wilson's investigation was inadequate and hence the termination was without just cause, the role of an arbitrator in a termination case is not to review the decision of the employer to see if it reasonable.

Rather, the role of an arbitrator is to undertake his or her own independent review of the fact adduced at the hearing to determine if the discipline and termination met the statutory just cause standard. In this case, this task involves the arbitrator to determine first whether the Grievor was responsible for pushing hog against the excavator and then second, although the Union submits that this is not the case, whether this act is just cause for termination.

In a case where there is an allegation of equipment having hog pushed against it, similar to though much less serious than equipment damage, the Employer obviously must prove on a balance of probabilities that the Grievor was responsible for pushing the hog against the excavator with clear, cogent, and convincing evidence. (F.H. v McDougall, para 46; and Western Forest Products, para 59)

The Employer has failed to establish that the Grievor was responsible for this due to lack of any direct evidence and insufficient circumstantial evidence. The evidence adduced by the Employer fails to establish when the hog accumulated against the excavator to the extent seen in Exhibit #3. While the Union accepts that the photo in exhibit #3 shows the accumulation as of mid-morning on February 4, 2015, the evidence of witnesses, and as confirmed in the same photo, that prior to February 3, 2015, there was already hog accumulated against the excavator to the top of the tracks of the excavator. The Employer has not established with clear, cogent, and convincing evidence that prior to Grievor's rotation on the hog loader the hog was not accumulated to the extent seen in exhibit #3 or when it accumulated to the extent in exhibit #3.

There was a migration of hog from the base of the 3.5 and 4 piles towards the migration over the course of 5 weeks from approximately December 28 to the end of January/ beginning of February. The only evidence of the extent of accumulation was from Bob Stubbs who testified that a few days prior to Feb 3, the hog had accumulated to the tracks of the excavator.

All of the bargaining unit employees working B Crew testified that they did not observe the bottom of the excavator or take any note as to what extent hog had accumulated against it. This is not an area in which they would go and the road is approximately 50 feet away from where the excavator was parked at its closest point to the road. It is not surprising as B Crew did not observe the excavator closely as they worked in the dark between 4 pm and 4am in early February in an area of the materials handling yard which was poorly lit.

The workers were driving equipment on top of the hog pile at a point approximately 15 to 20 feet or 12 to 16 feet (depending on the evidence) above the level the base of excavator was on. There was a suggestion made during the cross examination of the Grievor that he was working "on the other side of the pile" seen in exhibit #3. All of the B Crew witnesses testified that they were working on top of the hog pile.

As the site visit confirmed, the trucks are unloaded on the top of the pile, the excavator was parked on the pavement at a level approximately 15 feet below the top of the pile.

The site visit also confirmed that there was no lighting in the vicinity of the area the excavator was parked in and the sight lines to the excavator from the area in which the trucks were unloaded were such that the boom would be visible, but not the tracks and the bottom portion of the excavator. The accumulation of hog against the excavator seen in exhibit #3 could only be noticed from standing to the west of excavator, near the end of hog pile #3.5 or from the top of the pile #4, looking down. Witnesses on B Crew were asked if they examined the area in which the excavator was parked or viewed the excavator closely and they all agreed that they did not go near the excavator to inspect the excavator during the shift.

B crew worked its last day on February 3, then had days off, back on February 8. After leaving the shift the morning of February 4, employees did not have the opportunity to see the excavator, nor were they shown pictures during their interviews shown to what extent hog had accumulated. The evidence of the first worker on B Crew on the hog pile rotation, Graeme Hill who started the shift as it was getting dark at 4 pm was that he did not notice to what extent there was hog against the excavator. He did not notice anything different about the excavator from where he was working on top of the pile.

Indeed, Mr. Wilson's evidence in direct that Hill had said that the excavator was not buried was corrected on cross when his notes were put to him which reflected Hill said he could not tell if the excavator was buried. The evidence of the next worker on B Crew Larry McMann, next on the hog pile rotation, was that he did not recall seeing the excavator when he was on hog, but said that on his next rotation, while on the chip pile, he saw the Grievor operating a cat on the hog pile in the vicinity of the excavator, but not pushing hog.

The Employer makes much of the fact that McMann responded no when asked if the excavator was buried in an interview with Wilson on February 8. However, McMann was never asked what meant by "buried" a subjective term in this context. Wilson refers to the accumulation of hog against the machine as being "buried" when buried could mean anything from some accumulation to complete coverage. From the view point of an employee working on the top of the pile, the boom and cab of the excavator were visible: the machine was not "buried." From the view point of an employee looking from the ground up at the back of the excavator, it may be more likely to be classified as buried.

The evidence of Bob Stubbs is of limited value because he doesn't recall to what extent he saw the excavator and accumulations. To the extent that he told Mr. Wilson in an interview that the excavator was "partially covered" that doesn't assist the arbitration board in determining when the excavator reached that state. Stubbs did confirm that the amount of hog on the excavator shown in Exhibit 3 was more than he had seen on the excavator days previously, but that does not establish a time frame which proves with clear, cogent and convincing evidence the Grievor was responsible.

Wilson had photos available that he could have shown B Crew to ask if this matched their observation but did not. Wilson could have asked them to describe to what extent hog was accumulated against the excavator, he did not. Wilson could have asked them to draw out where they pushed hog and their opportunities to observe the excavator, he did not. In the circumstances, McMann's statement that the excavator was not buried isn't clear, cogent, and convincing evidence that the excavator was not in the condition that it was shown in exhibit #3 at the end of his rotation and the start of the grievor.

The Employer interviewed B Crew on February 8, 2015, the day after it interviewed the Grievor. It never put the observations of the B Crew to the Grievor nor allowed him to respond to the degree to which the excavator had hog accumulated or what the movements on the pile were. If the Employer had, issues such as the opportunity to observe the excavator, where hog was being pushed, visibility, and the size and direction of pushes could have been canvassed. The Grievor could have also responded to the allegation he said he'd "bury it".

The Employer called Roy Norman, on C Crew the following shift. His evidence is of no probative value as February 4, 2015 was this first day back

and he had no opportunity to observe the excavator prior to the shift. The Employer called Dan Leblanc to testify that the Grievor said "fuck it, I'll bury it" on January 24, 2015 in the presence of Brian Peel. LeBlanc was clear that the Grievor made the statement loudly in the lunchroom.

LeBlanc's evidence was contradicted by the Grievor's who testified he commented that it was a stupid place to park the excavator, others shared the view, and that it is going to get buried. LeBlanc's evidence was also contradicted by Brian Peel, who was interviewed by Wilson, February 12. Wilson confirmed as did Peel after having his memory refreshed, the following question and answer during his interview:

Dan: Did you ever hear Ed brag he was going to bury it?

Brian: No

Dan: You didn't hear him threaten to do it back on January 24th when you were working OT with him?

Brian: No.

Wilson did not provide any reasons as to why he accepted LeBlanc's evidence over Peel without putting it to the Grievor. The Employer called Lee Dagneau who confirmed that the Grievor was pushing hog near the excavator on Jan 31. This was not canvassed with the Grievor as Dagneau was interviewed after the Grievor was fired, but in any event is consistent with the evidence that hog is sometimes pushed near the unloading area to level the ramp.

Significantly, no one said anything about this movement of hog, despite the fact that around this time hog was pushed up against the tracks of the excavator. While there was a direction to push the pile north, the evidence that operators sometimes need to move hog near the unloading area to maintain the ramps and area was uncontradicted. There is no evidence to suggest that an operator maintaining the ramp area, even if it involved a push in another direction of some material, was a violation of a work rule. (KVP, para 34)"

The Union submitted further that the Employer's investigation was fundamentally flawed; that the Employer did not present their evidence to the Grievor on February 7th; none of the information gained through interviews from February 8th through 20th of seven witnesses was presented to the Grievor; no Shop Steward

was present at the one meeting with the Grievor. If, in a review of the evidence of the witnesses, the Arbitrator cannot establish on a balance of probabilities that the Employer's allegation is more likely to have occurred, then the grievance must succeed as the Employer has not met the onus of establishing that the Grievor was responsible. The Employer has not established when, and in what amount, the hog accumulated against the excavator. Only that it was "noticed on February 4th that there was more than had been there previously".

The Employer did not provide any motivation on the part of the Grievor, and having received a suspension earlier in 2015 and told he was on the verge of termination, it is difficult to accept that he would engage in a deliberate act and risk termination. The Union argued that, on a balance of probabilities, it is likely that the hog gradually accumulated against the back end of the excavator which was noticed on February 4th. The top of the hog pile was about fifteen (15) feet above the ground where the excavator was parked and that hog spread towards the excavator from the base, eventually up to the tracks. Exhibit #3 showed an accumulation of hog covered in snow up to the top of the tracks of the excavator. This spreading of hog was not a deliberate act on the part of any employee; employees operating equipment on the hog pile could not observe the tracks and the bottom portion of the excavator due to the height of the piles and the machinery being used cannot be driven near the edge of the pile.

If the Arbitrator finds on the balance of probabilities that the Grievor did push all or some of the hog on February 3rd against the excavator, the Employer must prove that the action was either deliberate or negligent to justify discipline. If the Employer has established a prima facie case and the Union produces reasonable or believable alternate explanations of events, these factors are to be weighed in the

Employer's attempt to prove its onus. The Union is not required to prove the innocence of the Grievor.

If the evidence that the hog may have accumulated while the Grievor was working on the hog on February 3rd is accepted, the Union fulfilled its obligation to provide a reasonable explanation as to how the hog may have accumulated without it being a deliberate attempt to bury the excavator by providing the following:

- 1) the continuous pushing of hog up the pile over six weeks resulted in the spread of the pile as material spilled over the side;
- 2) operators levelling and smoothing hog ramp to allow trucks to dump resulted in the spread of hog to the side of the dumping area;
- 3) multiple trucks dropping product across the width of the ramp, up to four at a time, widened the pile at the dumping area.

Any of these could have caused the pile to widen without a deliberate intention to bury the excavator. If the Grievor's movements on the hog pile contributed to the accumulation of hog on the excavator, then the Union submits that only deliberate operation (denied by the Grievor) or negligent operation, where he did not realize his actions caused hog to accumulate, could justify discipline, not accidental or unintentional. If a workplace incident is accidental, then there is no cause for discipline as the Employer cannot adopt a zero tolerance policy.

The Union submitted that the Grievance should be allowed.

The Union pointed to the following case law:

Re KVP Co. v. 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., D. Wren and R. Hicks, Q.C., Nominees), May 30, 1965, para. 34.

Re Grand Lake Timber Ltd. and Canadian Paperworkers' Union, Local 104 [1981], 3 L.A.C. (3d) 264 (B.D. Bruce, A. Levine, W. Goss), October 14, 1981

Re B.C. Rail Ltd. and United Transportation Union, Locals 1778 and 1923 [1984] B.C.A.A.A. No. 325; 17 L.A.C. (3d) 402 (D.R. Munroe), November 26, 1984:

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

Re Burns Meats and UFCW, Local 832 [1994] 43 L.A.C. (4th) 416 (P.S. Teskey), September 26, 1994, page 14- 16

Re Victoria and Municipal Systems of British Columbia Transit v. Independent Canadian Transit Union, Local 3 [1995] B.C.C.A.A.A. No. 608 (B. R. Bluman), September 10, 1995

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, para. 3-32

Re Fording Coal Ltd. and United Steelworkers of America, Local 7884 (Lal Grievance) [1999] B.C.C.A.A.A. 305 (R.S. Keras), June 11, 1999. para. 77-84

Re Abitibi-Consolidated Co. of Canada and Communications, Energy and Paperworkers Union, Local 76 (Traer Grievance) [2005] B.C.C.A.A.A. No. 220 (H.A. Hope, Q.C.), September 7, 2005, para. 35-39

Re F.H. v. McDougall [2008] 3 S.C.R. 41; S.C.J. No. 54 (McLachlin C.J. and Lebel, Deschamps, Fish, Albella, Charron and Rothstein JJ), October 2, 2008, para. 46

Re Asco Aerospace Canada Ltd. v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Shopmen's Local No. 712 (Niedbalski Grievance) [2012] B.C.C.A.A.A. No. 14 (R.S. Keras), January 27, 2012, para. 112

Re Western Forest Products v. United Steelworkers, Local, 1-1937 (Harper Grievance) [2013] B.C.C.A.A.A. No. 125 (David C. McPhillips), August 8, 2013, para. 62, 74

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, J. Halliday, G. MacPherson), July 2, 2013, para. 37

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In *Re William Scott & Company Ltd., and Canadian Food and Allied Workers Union, Local P-162* [1976] BCLRB No. 46/76 (P.C. Weiler, Chair, C.J. Alcott and A. Macdonald) July 6, 1976, the Weiler panel set the modern standard for arbitral review of disciplinary sanctions. Succinctly stated, such review is to determine if the employee has given just and reasonable cause for some form of discipline; and if so, was the penalty imposed appropriate in all of the circumstances.

When assessing cause, arbitrators are mindful of the sufficiency of evidence standard, specified in *Re F.H. v McDougall (supra)*:

“... evidence must always be **sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.** (Emphasis added).

In applying that standard to the evidence in this case, I find the following testimony noteworthy:

- The Grievor denied burying the excavator, and testified that he was “pushing North”, as per instruction on the white board;
- The excavator was parked in a bad spot and would likely get buried (see testimony of Mr. Leblanc);

- Prior to February 3rd the excavator already had hog on the tracks (see Mr. Hill's testimony);
- The piles migrate as a natural outcome of the constant pushing of the hog, flattening the top and maintaining the ramp; trucks don't always ask where to dump (see testimony of Mr. Hill, Mr. McMann and Mr. Stubbs);
- Hog drops off the sides of the blade (windrow) when pushed; when pushing hog to the North, the hog would fall off the sides of the blade to the East (towards the excavator) and West; if pushing hog to the West (away from the excavator), the hog would fall off the sides of the blade to the North and South sides of the machine;
- The Grievor commented that the excavator was parked in a stupid spot and that it was going to get buried. Many other employees had said the same thing. There is no evidence, aside from an off-hand comment, that was laughed at and received as a joke, that the Grievor intended to push hog onto the excavator;
- Mr. Hackney testified that he had no concerns about the quality of Mr. Sankey's work. Mr. Hackney also said that pile #3½ merged into #4 pile.

No one saw the Grievor bury the excavator, and in my view there are other possible reasons why there was hog on the excavator: an undirected truck could have dumped onto the excavator; and/or pile #3½ could have merged with #4 piles during the normal course of keeping the hog workable and the ramps maintained.

In short, there is no clear, cogent and convincing evidence that the Grievor committed the offence. I am therefore unable to conclude that the Grievor "willfully buried the excavator", as alleged in the Employer's termination letter.

Just and reasonable cause for discipline in this case has not been established.

In light of my conclusion as to the absence of cause, it is not necessary to consider the 2nd or 3rd questions of *William Scott* regarding appropriate penalty, or the Union's alternative arguments.

In the result, the grievance succeeds and Mr. Sankey is to be reinstated. In terms of back pay and mitigation, the Grievor is to be made whole.

All of which is so ordered.

I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 29th Day of December 2015.

Ronald S. Keras
Arbitrator

File: 718