IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARIBOO PULP & PAPER COMPANY

(hereinafter referred to as the "Employer")

AND:

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 1115

(hereinafter referred to as the "Union")

(Larry Fex Arbitration)

Arbitrator:	H. Allan Hope, Q.C.
Counsel for the Employer:	Alan J. Hamilton, Q.C.
Counsel for the Union:	John Rogers
Place of Hearing:	Quesnel, B.C.
Date of Hearing:	March 4 and 5, 2004

AWARD

The Dispute

[1] The Union alleged that the Employer imposed discipline upon the Grievor, Larry Fex, a Shift Millwright, without just cause, or, alternatively, if just cause existed to impose some form of discipline, the penalty selected was excessive. The discipline was a 15-hour unpaid suspension and a six-month demotion, (which was lifted after four months). There was no question that the suspension was disciplinary and thus required facts which would constitute just cause for its imposition. However, the Employer was ambivalent with respect to whether what the Union characterized as a demotion was truly a demotion and whether it was responsive to culpable or non-culpable conduct.

[2] The disputed "demotion" was the removal of the Grievor from his position as "Shift Millwright" and his reassignment to a temporary position as an "Oiler", a lesser-rated position, but with rate retention at the Millwright rate. The Employer, with some diffidence, suggested that, in the context of the arbitral authorities, the Grievor had been the subject of a forced transfer rather than a demotion. In addition to the question of how the Employer's initiative was to be characterized, there was a question with respect to whether the Employer was obliged in the circumstances to establish just cause for the removal of the Grievor from his Shift Millwright position separate from the suspension, and, if so, what facts could it rely on to discharge that onus of proof.

[3] That latter question was of some significance because the Employer introduced a significant body of evidence which was not admissible with respect to the initial question set out in Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162 [1976] 1 C.L.R.B.R. 1 (Weiler), relating to whether the facts disclosed conduct deserving of some form of discipline. Its admissibility was restricted to the second question relating to whether the penalty selected was excessive.

[4] Turning back to the first question of conduct deserving of discipline, in addressing that question the Employer did not distinguish between the conduct that triggered the suspension and the conduct that it relied on to support the removal of the Grievor from his position. The question arising is whether the Employer could rely on a finding that the conduct giving rise to the suspension was deserving of discipline to support a finding that there was conduct deserving of discipline with respect to the removal of the Grievor from his position. That question arose in the context of the fact that the Employer failed to prove any conduct deserving of discipline other than a single incident of carelessness in the operation of a pick up truck that collided with a stationery forklift. The question was whether the Employer could rely on that single incident of misconduct to justify the double penalty.

[5] Imposing a demotion in addition to a suspension does not offend the rule with respect to multiple penalties, (see Brown & Beatty, Canadian Labour Arbitration, (2000) para. 7:4240, pp. 7-224 to 226), but the facts must disclose just cause to impose a demotion as an act of discipline before reference can be had to

evidence which is restricted to the question of whether the penalty selected is excessive. The submission of the Employer, in effect, was that its initiative was spurred by a legitimate concern about whether the Grievor was capable of performing his duties safely and that its initiative, whether seen as a disciplinary or non-disciplinary demotion or a forced transfer, was a legitimate response to a pattern of conduct as opposed to the imposition of the suspension, which was in response to a particular act.

Facts

[6] As stated, the incident giving rise to the suspension was a collision that occurred in the yard of the Employer's pulp mill in Quesnel between a pickup truck operated by the Grievor and a forklift operated by a fellow employee, Roger Harvey. On the facts, the Grievor was at fault. The actions of Mr. Harvey did not contribute to the accident and no discipline was imposed on him. Damage to the truck was approximately $600. Both employees reported to the Mill's First Aid Department, (First Aid), but did not require treatment. At the most, on the evidence, they were shaken up in what must be taken to have been an impact of moderate force.

[7] The Union did not call evidence. The Employer called one witness, Russell Boyle, the Grievor's second line maintenance supervisor. The incident occurred on July 4, 2002 in circumstances which were recorded in an incident investigation report. It was prepared with Union participation. The circumstances were summarized as follows:

Description of Injury:

Larry Fex – jarred and sore back. Roger Harvey – whiplash to neck. [As stated, no treatment was required.]

Events Preceding Incident (including unsafe acts or conditions):

Larry was working on the pressure diffuser hydraulics. He was attempting to open a oil barrel but did not have a bung wrench, he returned to the shop but was unable to locate one. He was in the process of making a tool to open the barrel. Larry returned to the truck. His shift radio was on and he was listening because he thought he might be called to work on a problem with W65. The truck was parked between the tracks and the shop at an angle. Larry checked the side mirrors but did not do a shoulder check, the window mounted mirror was missing. Larry was wearing his seat belt.

Roger Harvey was coming from the Butler Building to stores. At the steel rack he saw Larry come out of the shop and head towards the running truck. Roger continued on towards stores, when Roger reached the tracks he noted that Larry did not look behind him and assumed that Larry did not see him so he stopped the forklift, laid on the horn and raised the forks so they would take the hit on the upper part of the forks. Roger was also wearing his seat belt.

Description of Incident:

Larry reversed the pick-up and backed into the forklift that Roger had stopped on the tracks. The back bumper of the pick-up impacted the front of the forklift. (emphasis added)

Recommended Corrective Action:

Recommended Corrective Action to Prevent Recurrence	Responsibility
1. Insure a new window-mounted mirror on pick-up 191-454 is installed.	Russ Boyle
2. Insure proper shoulder check is done before backing up.	Larry Fex
3. Install a bung wrench at the diffuser oil barrel. -	Russ Boyle

(emphasis added)

[8] That was the incident relied on by the Employer to support the suspension and, in the first instance, the removal from the Shift Millwright position. It was imposed on the Grievor following an investigation conducted on July 4, the same day as the incident. The Grievor's removal from his position was also said to be responsive to "ongoing safety concerns", none of which had resulted in prior discipline. The Employer's initiatives were recorded in a letter which was also issued on July 4, 2002. It reads as follows:

> Please be advised that due to failure to safely operate a mill vehicle resulting in damaged equipment and injury to yourself as well as potentially serious injury to another employee, you are to be suspended for your shift on July 5. In addition, due to ongoing safety concerns, you are to be moved from shift work to dayshift effective July 8, 2002. This move will be of a six month probationary nature and your performance will be evaluated both ongoing and at the end of the six month period. Further violation of safe work procedures is not acceptable and will result in further discipline if repeated in the future. (emphasis added)

[9] The suspension was for part of July 4 and a full suspension on July 5 for a total of approximately 15 hours. Secondly, the Grievor was "moved from shift work to day shift effective July 8, 2002", being the move that the Union viewed as a demotion. Its reasoning was that the position of Shift Millwright was

distinct from the position of Millwright with wage benefits in the form of premiums that exceeded those of a Millwright. The Union also viewed the assignment to the Oiler position as a demotion despite retention of the Millwright rate because it was a position which was non-trade and lesser rated and because the Grievor viewed the assignment as a criticism of his performance as a tradesman.

[10] In support of the suspension, the Employer submitted that the Grievor's conduct in the accident was a serious departure from its Safety Policies & Procedures in which the role of discipline is defined as action taken "[T]o change employee conduct that could or has resulted in harm to the employee, her/his co-workers or the company". The response of the Union was that the facts adduced by the Employer did not support its characterization of the accident in terms of its severity. Its further submission was that the Grievor had no prior discipline record in his 26 years of employment prior to his demotion other than a verbal warning for minor misconduct unrelated to safety. The Union referred in that context to the Safety Policy which provides as follows:

> The discipline shall be consistent with the seriousness of the violation and shall consider an employee's entire work record. In most cases, progressive discipline, for example, written reprimand, suspension, followed by discharge, shall be utilized to afford the employee an opportunity to improve her/his job performance before affected her/his employment status. (emphasis added)

[11] The position of the Union was that the facts did not support the imposition of a one-day suspension in an application of the Employer's own policy. The response of the Employer was that the Safety Policy also provided that

conduct that involved a "risk of serious injury" to employees, or property damage, could justify the imposition of a suspension for a first offence. The response of the Union was that the facts did not invite the conclusion that the accident at issue involved the risk of serious injury.

[12] In terms of the demotion, the Employer, in addition to the accident, relied on evidence of what it characterized as the Grievor's poor attitude with respect to safety and on his minor discipline record. No reference to a discipline record was made in the letter. The safety question was addressed in the suspension letter in the phrase, "due to ongoing safety concerns". No details were included. In these proceedings the particulars relied on by the Employer included an incident that occurred on June 12, 2002. The circumstances were set out in an incident investigation report dated June 13, 2002. It reads as follows:

> **Events Preceding Incident (including unsafe acts or conditions):**
>
> The maintenance forklift was stuck beside the effluent clarifier catwalk. A loader was called out to pull it free.
>
> **Description of Incident:**
>
> After the forklift was pulled out the shift MW, [the Grievor], set the brake and got between the loader and the forklift to remove the tow chain from the loader. This was noticed by all the witnesses. The steam SS and services operator yelled at the MW to look out while the loader operator used his horn. The MW looked around and got out of the way before the fork lift hit the loader. In this case there were no injuries.

Recommended Corrective Action:

Recommended Corrective Action to Prevent Recurrence	Responsibility
1. Review the use the 920 Loader to transport effluent sludge pumps at Mor … … ning "Tool Box" Meetings.	All Supervisors
2. Ensure fork lift safety brakes work properly.	Russ Boyle
3. Use chock blocks when stopped on an incline.	Larry Fex

[13] The Employer was hard pressed in its evidence to identify anything done by the Grievor in the incident which would constitute unsafe conduct on his part. He was the operator of the forklift. It became stuck with a heavy load on the forks. When it had been pulled out by the loader, the Grievor set the brakes on the forklift and stepped between the two machines to remove the tow line. The Grievor's first line supervisor was present at the time and gave no direction with respect to what the Grievor was doing.

[14] No witness was called who was present during the incident, but the implication was that the forklift brakes were not sufficient to fully immobilize the forklift because it had a load on its forks and it was on a slope. There was no indication that the forklift brakes had failed or that it had moved with any degree of speed. In any event, a review of the "Recommended Corrective Action" in the investigation report as it applied to the Grievor was limited to the requirement that he, "use chock blocks when stopped on an incline". It was conceded in the evidence that there were no chock blocks on the forklift and no indication that chock blocks were part of the safety accessories supplied.

[15] On the evidence, the Employer failed to establish that the incident provided any support for its decision to suspend the Grievor or to demote him.

Hindsight is a useful viewpoint from which to formulate safety precautions in unanticipated circumstances. It can be less reliable as a medium for the imposition of discipline. To justify discipline, it is necessary to establish conduct that constitutes a departure from an established standard. To conclude in retrospect that an unsafe act could have been avoided with the benefit of foresight is not sufficient. There must be facts that indicate blameworthy conduct and there was an absence of such facts with respect to the June 12 incident.

[16] The Employer also adduced evidence of a series of first aid reports that recorded minor incidents reported by the Grievor over the period between August of 2001 and July of 2002. None of the incidents involved any lost time. Six of them required minor first aid treatment and three were limited to the Grievor filing a report. The Grievor's presumed purpose in reporting the incidents was to comply with the requirements of the Employer that any incident involving any degree of injury should be reported. That requirement was re-emphasized in a July 8, 2002 memorandum which required the Grievor to "report all injuries to first aid and [his] supervisor".

[17] Because the Grievor did not give evidence, his reasons for being so assiduous in reporting incidents was a matter of some conjecture. However, on hearsay evidence developed in the proceedings, it can be concluded that the Grievor was concerned to have all incidents recorded to protect him in the event of later complications that may trigger a need for a Workers Compensation Board (WCB) claim. That latter potential was reflected in one of the incidents which was reported by the Grievor in response to receiving a wood sliver under a nail on

September 19, 2002. No significant treatment was required. However, on September 22, 2002 he was required to visit a physician because the sliver had caused an infection that required medication. On that occasion he was absent only for the time required to visit the doctor and obtain treatment and medication for the infection. However, it indicated that trivial incidents could become exacerbated by progression or circumstances which may require the Grievor to have some proof of their origin.

[18] The Employer viewed the first aid reports as revealing a pattern of preventable accidents which, statistically, were seen as a precursor of a serious accident, presumably on the basis that they demonstrated an unsafe approach to work. In a detailed review of the several incidents by the Union, none were shown to have arisen from carelessness on the part of the Grievor. The significance attributed to the pattern by the Employer was recorded in the following note made by Mr. Boyle on June 26, 2002:

> I spoke to Larry Fex about his first aids over the last year. Larry has 9 first aids and 1 medical aid. We reviewed them and I gave Larry a list. Told him that we have concerns because statistic's show the more first aid you have the greater the chance of serious injury. I explained that compared to the other shift workers he has many more. I asked him a number of time if he understood what I was trying to tell him, he said he did but I can't compare him to the other shift workers because he reports everything and he thinks that a lot of other people don't. I told him I have no way of knowing that but even so he has enough first aid that it set off alarm bells and we are concerned. I told him to take his time on the job and assess the situation before starting. To try and think

> more about his safety. I'm not sure that he understands what I was trying to do, I get the feeling that he thinks this is discipline and I'm on his back when he is doing the best he can. I explained to him that this is not the case the main point of the discussion to make him a safer worker. (emphasis added)

[19] It is of interest that the discussion was not presented as a disciplinary intervention, nor was there any caution about disciplinary consequences if the record did not improve. Rather, as indicated, Mr. Boyle took pains to assure the Grievor that his discussion had no disciplinary consequences. On those facts the first aid record was not admissible as evidence of conduct deserving of discipline, although it could be admissible in a consideration of the question of whether the demotion was excessive.

[20] The incident of prior discipline relied on by the Employer was recorded in a disciplinary memorandum dated September 20, 2001. The memorandum referred to three incidents, only one of which attracted discipline. That incident involved the Grievor's failure to remain at a meeting scheduled for September 20, 2002. The Grievor's explanation was that he viewed the proposed meeting as disciplinary in nature and he expected a particular Union representative to attend. He left, despite being instructed to remain, after he learned that the Union representative had not attended. Mr. Boyle recorded that a verbal warning had been given to the Grievor with respect to that incident. That incident was not shown to have any relevance in this dispute in terms of the principles of progressive discipline.

[21] The response of the Union to the discipline imposed in this dispute was to file a grievance on July 8, 2002. It reads in part as follows:

> Larry Fex has been disciplined unjustly by the [Company] in his suspension [1 day] and removal from shift [mill worker] position. This is a violation of Art. XXX; Art. XXI; and others of the Labour Agreement – as well as ignoring a Labour Board hearing/decision ('98).

[22] The grievance was discussed between the parties in a standing committee meeting on July 25, 2002. The following exchange was recorded in the joint minutes:

> **Larry Fex**
>
> CEP: Disciplined unjustly – suspension and removal from shifts for 6 months. The company said he had too many unsafe incidents. The company's position is unsubstantiated. He is being penalized for reporting his first aid incidents. It's a violation of seniority.
>
> Larry feels that his supervisors who wanted him off shift were discriminating against him. Larry has since been asked to work overtime.
>
> CPP: Larry had two very serious incidents in the last two weeks. He has been taken off shift temporarily, not permanently.
>
> We do not know why Larry was asked to work overtime unsupervised. Russ Pomeroy will look

> into it. The suspension will stand and we will review the shift coverage. (emphasis added)

[23] The significance placed on that exchange by the Union was the assertion by the Employer that the Grievor "had two very serious incidents in the last two weeks" was not correct. In context, those comments were a reference to the accident that triggered the discipline at issue in this dispute and the earlier incident on June 12, 2002 in which the forklift crawled forward against its brake to come in contact with the loader. As stated, the position of the Union was that the facts relating to that latter incident did not support the conclusion that it resulted from the actions of the Grievor. Reliance on that incident, said the Union, was ill-founded and mitigated in favour of the finding that the penalties selected in response to it were excessive.

[24] The Grievor was first employed in June of 1976 and served most, if not all of the 26 years of his service before his demotion as a Millwright. In 1996 he was successful in obtaining his position as Shift Millwright. In that capacity he rotated between two 12-hour day shifts from, 6 a.m. to 6 p.m., and two 12-hour night shifts from 6 p.m. to 6 a.m. As stated, that work schedule included shift premiums that resulted in higher compensation than dayshift millwrights and was seen as more desirable by some, if not all millwrights. For that reason, Shift Millwright positions were posted and filled under Article XXI(1)(a). It reads as follows:

Section 1: Principles

(a) The Company recognizes the principles of seniority in their application to the promotion, demotion, transfer, layoff, recall and permanent movement from day to shift positions of an employee, providing the employee has the qualifications and ability to perform the work.

[25] The dispute raised questions with respect to whether the conduct relied on by the Employer to support its discipline was culpable and, in any event, whether the Employer met the arbitral criteria required in the application of the principles of progressive discipline. In addressing those issues, the Employer, as stated, called evidence from one witness, Mr. Boyle.

[26] Mr. Boyle is a second line supervisor who was responsible for shift supervisors and between 12 and 14 Millwrights who worked from 8 a.m. to 4:30 p.m., Monday to Friday. Mr. Boyle also worked that shift. In addition, he and first line supervisors had supervisory responsibility for four Shift Millwrights, two of whom worked the 12-hour day shift and two of whom worked the 12-hour night shift. One of those was the Grievor. Those four shift workers rotated between day shift and night shift. Mr. Boyle had no direct supervisory contact with the millwrights working the night shift but he did have contact with those working day shift for the eight hours of his shift. In addition, he had continuing contact with all millwrights through first line supervisors who were assigned to all shifts.

[27] Mr. Boyle gave evidence of the incident on July 4, 2002 that precipitated the discipline. His knowledge of it came from interviewing the

Grievor and the operator of the forklift, Mr. Harvey. In recounting the incident as he understood it, Mr. Boyle may have inadvertently exaggerated the circumstances. As his evidence progressed, he described it as involving the Grievor walking quickly into a waiting truck which he then operated in reverse at a high rate of speed until it struck the forklift. At one stage Mr. Boyle said that the Grievor, "jumped into the truck and slammed into reverse". He also quoted Mr. Harvey as having said that the Grievor had "backed up rapidly". Mr. Boyle later quoted Mr. Harvey as having described the Grievor as exiting the building "without pause – going to the truck – and moving at a pretty good clip". Mr. Harvey did not give evidence.

[28] In cross-examination, the account given by Mr. Boyle was contrasted by the Union with the account recorded in the accident investigation. There is no indication of high speed in the report. I note in that context that Mr. Boyle was being asked to recall events which had occurred several months earlier. In particular, he was being required to recall discussions which were not recorded in the investigative material. It was clear on the documentary evidence that Mr. Boyle and the Employer viewed the accident at the time as extremely serious. However, in reconstructing what occurred, the best evidence is what was recorded at the time.

[29] The documented facts reveal a manoeuvre in which the Grievor, having angle parked the truck in front of the shop with the motor running, returned to the vehicle and backed out for a short distance as a prelude to driving forward. In doing so, he was required to turn the vehicle before proceeding in a forward

direction. The facts do not support a finding that he travelled in reverse for any great distance or at a high rate of speed.

[30] The conclusion I reached from all of the evidence was that the Grievor had parked the company-owned pickup truck at his shop and left the motor running. He was distracted by a desire to find or fashion a bung wrench needed to complete a work assignment. When he came out of the shop, he got into the truck and put it in reverse to back out of his angle parking position. Mr. Harvey was proceeding in the forklift towards the shop from which the Grievor was leaving. It was clear that Mr. Harvey could see the Grievor as he was approaching the parked truck, thus inviting the conclusion that the Grievor would have been able to see him.

[31] The presumption is that the Grievor simply did not look while walking to the truck, nor did he do a full shoulder check before backing out after he entered the truck. Because the windshield mirror was not attached, the Grievor blindly operated the truck in reverse into an obstruction which was there to be seen. There were side mirrors in which he would have seen the forklift if it were in a position to be seen. That fact invites the conclusion that the forklift was stopped close enough to the truck that it could not be seen in the side mirrors. The Grievor should have seen the forklift if he were maintaining a proper lookout.

[32] The position of the Employer was that the Grievor's conduct in the operation of the pickup constituted conduct deserving of discipline in the sense contemplated in the first question posed by the Labour Relations Board in Wm.

Scott & Company. Its further submission was that the second question relating to whether the penalty imposed was excessive should be addressed in the context of the decision of the Labour Relations Board in BC Central Credit Union and Office and Technical Employees' Union, Local 15, January 31, 1980, No. 7/80, unreported (Germaine). On p. 39 vice-chair Germaine wrote as follows in that context:

> It is well settled that, having determined that the grievor provided the employer with just cause for some form of discipline, the arbitrator must then determine whether, in all of the circumstances of the grievor's employment relationship, the decision to discharge was an excessive response on the part of the employer. (emphasis added)

[33] In support of its position with respect to the suitability of a disciplinary demotion, the Employer cited the following authorities:

> Re Comox Valley Distribution Ltd. and I.W.A.-Canada, Local 363 (Stevens), (2001) 102 L.A.C. (4th) 22 (Hope); Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910, (1983) 13 L.A.C. (3d) 261 (Hope); Re British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6, (1988) 1 L.A.C. (4th) 72 (Hope); Re Toronto Electric Commissioners and Canadian Union of Public Employees, Local 1, (1990) 19 L.A.C. (4th) 105 (Springate); Re Canadian National Railway Co. and Rail Canada Traffic Controllers (Rutkowski), (1993) 37 L.A.C. (4th) 405 (Frumkin); Re Pacific Forest Products Ltd. (Sooke Logging Division) and International Woodworkers of America, Local 1-118, (1984) 17 L.A.C. (3d) 435 (Munroe); Re District of Kitimat and Canadian Union of Public Employees, Local

> 707, (1980) 26 L.A.C. (2d) 316 (MacIntyre); and City of Sudbury and Canadian Union of Public Employees, Local 6 (Mathieu Grievance), [1999] OLAA No. 849 (Marcotte).

[34] The Employer urged that the facts in this dispute are apropos those before the arbitrator in Wirerope Industries. In particular, it cited the following extract from p. 272:

> Minor injuries, on the evidence, were a routine hazard in the rigging department and the submission of the union was that the grievor had accumulated a significant record because he was assiduous in reporting every incident. Assuming a commendable adherence to the rules by the grievor, he had nevertheless accumulated a substantial record of accidents in the two years and five months prior to his demotion. In 1980 he had 14 first aid reports and 20 days off on compensation, in 1981 he had 17 first aid reports and 10 days off on compensation and for the first five months of 1982 he had 9 first aid reports and 4 days off on compensation. The employer had spoken to him on three occasions and was entitled to escalate its response. Nor was it significant that the employer did not demote all employees with high accident records. Quite apart from all other factors, the factor of deterrence must be assessed. Compliance with safety rules, including safe working practices, is one area of employee activity which may be seen as uniquely responsive to the deterrent effect of discipline. In this dispute, as in the Whitby Boat Works Ltd. case, we feel that the facts supported a demotion for a period of time but that a permanent demotion was not appropriate. (emphasis added)

[35] In that case the grievor, as indicated in the extract, had a significant safety record which, despite its length, was not viewed as indicative of an inability to perform the work assigned to him. Rather, it was seen as responsive to an attitude of carelessness which the employer viewed as having the potential to respond to discipline. The Employer here cited the following extract from p. 271:

> [T]he variance does not cloud the clear inference to be drawn from the evidence that the employer saw the deficiencies of performance of the grievor as emanating from a poor attitude. That conclusion would be in keeping with industrial experience. Discipline is the essence of a safety programme, be it self-discipline or discipline imposed to compel adherence to safety rules. An accident record is a reasonable barometer of safety attitudes on the part of an employee and can imply an inability or carelessness about working safely. We are satisfied that the employer concluded on this case that the accident record of the grievor arose from his attitude rather than his ability to work safely. Our conclusion on all of the evidence was that the employer failed to meet the onus of establishing that the grievor was incapable of achieving and maintaining a proper standard with respect to his accident record. Whether conduct in the form of poor work performance is culpable or non-culpable is irrelevant with respect to the obligation of the employer to bring its consequences to the attention of the offending employee in the context of his employment status. (emphasis added)

[36] The Employer also relied on the following extract from the decision of Arbitrator Springate in Toronto Electric Commissioners:

> Having regard to this reasoning, the demotion of an employee has been rejected where the employee's misconduct involved insubordination, lateness or a minor altercation which did not relate to his or her particular job. Disciplinary demotions have, however, been upheld in instances where the offence giving rise to discipline had a direct relationship to the employee's suitability for a particular job. Thus a demotion has been upheld in response to the negligent operation of equipment, poor attitude, a lack of initiative and unsatisfactory work performance. (emphasis added)

[37] The position of the Employer with respect to the Grievor's removal from the Shift Millwright position was that, while the Grievor's performance of his duties was satisfactory, his apparent inability to work safely justified removing him from the position so as to place him under closer supervision. The Employer conceded that there was no suggestion that the Grievor could not perform the work of a Shift Millwright. Its concern was its perception that he was unable to perform it safely. In its submission, the Employer assumed that the misconduct it had proven with respect to the accident constituted proof of conduct deserving of discipline with respect to the suspension and, in addition, with respect to his removal from the Shift Millwright position.

[38] That approach was problematical in the sense that the only conduct asserted by the Employer to be deserving of discipline was the actions of the Grievor in the truck accident. The Employer, as stated, did not choose in its submission to characterize the Grievor's removal from the Shift Millwright position in terms of whether it was a forced transfer or a demotion. More particularly, the Employer did not consider it necessary to distinguish between a

forced transfer, a disciplinary demotion, and a demotion deemed to be in response to performance deficiencies which, while non-culpable, were capable of redress through a disciplinary intervention. In addressing the removal, the Employer appeared to invite the conclusion that the demotion was in response to non-culpable deficiencies in the Grievor's performance with respect to safety which it viewed as capable of responding to a disciplinary initiative.

[39] I concluded on the evidence that the removal did amount to a disciplinary demotion for which the Employer was required to prove just cause. Not only was it imposed as an act of discipline, but the Employer appeared to have been under the mistaken impression that the Grievor had been disciplined prior to the demotion with no results, thus justifying a more severe penalty. That was apparent in its third and fourth step responses to the grievance, (dated December 20, 2002 and March 17, 2003 respectively), in which the Employer wrote:

> 3. Larry Fex: Unjust Discipline
>
> We put Larry on dayshift so that he would have ongoing supervision to help address his work habits and attention to his work. We put Larry back on shift 2 months earlier than planned due to both a request from the Union and a review of his work performance, which has been excellent since the incidents.
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> . . . . . .
>
> Larry Fex – Discipline (Removal from Shift
>
> Mr. Fex's removal from shift has had the desired effect. Other forms of progressive discipline did not change [his] behaviour. (emphasis added)

[40] On the facts, there had been no form of progressive discipline. The only prior discipline of any kind was the verbal warning in response to completely unrelated conduct, which could not be associated with the events giving rise to the demotion. Hence, the only evidence upon which the Employer could rely to establish just cause for the removal of the Grievor from his position was that relating to the truck accident.

[41] The Union position was that the most that can be said for the evidence adduced by the Employer with respect to the accident was that it indicated a momentary lapse of attention on the part of the Grievor. That lapse, said the Union, was blown out of proportion by the Employer in a retrospective and belated expression of concern about the Grievor's safety record. The Union cited the following authorities:

> Re Int'l Ass'n of Machinists and Gabriels of Canada Ltd., (1968) 19 L.A.C. 22 (Christie); Brown & Beatty, Canadian Labour Arbitration, 3rd Edition, (1999) para. 7:3544; Edith Cavell Private Hospital and HEU, Local 180, (1982) 6 L.A.C. (3d) 229 (Hope); Re Cominco Ltd. and USWA, Local 480, (1975) 9 L.A.C. (2d) 233 (Weiler); McKilligan v. Pacific Vocational Institute, (1981) 28 B.C.L.R. 324 (C.A.); and Re City of Vancouver and Vancouver Regional Employees, (1983) 11 L.A.C. (3d) 121 (Hope).

[42] The position of the Union was that the evidence adduced by the Employer failed to establish sufficient grounds to impose a one-day suspension on the Grievor and, in any event, the evidence did not support the imposition of a demotion of any kind. The Union cited the decision of Arbitrator Christie in

Gabriels of Canada for the proposition on p. 25 that a disciplinary demotion, "can only occur within the limitations imposed by the collective agreement upon the Company's right to demote an employee".

[43] That restriction would remove the right of an employer to impose a disciplinary demotion unless it could be seen as consistent with a right to demote recognized in the collective agreement. Contemporary authorities do not impose a similar restriction. An arbitral consensus has emerged that a disciplinary demotion can be imposed without an enabling provision in the collective agreement where the misconduct relied on relates to the employee's performance in a context that questions her or his fitness to perform the work at issue.

[44] The Union next urged that there was nothing in the evidence to indicate that the Grievor was not capable of performing the duties of a Shift Millwright and that anything less would not meet the test prescribed in the arbitral authorities. In that context, the Union cited the following from p. 237 of Edith Cavell:

> The nature of a disciplinary demotion and the onus imposed upon the employer was discussed in Re Cominco Ltd. and U.S.W., Local 480, (1975) 9 L.A.C. (2d) 233 (Weiler). In that case Professor Weiler was speaking as chairman of the Labour Relations Board of British Columbia and he described a disciplinary demotion on p. 237 as follows:
>
> > By contrast, disciplinary demotion occurs when some specific action by the employee, viewed by management as misconduct, precipitates a

> decision to remove the employee from his job and then transfers him to a lower-rated position. If the circumstances surrounding that decision indicates that the demotion is really a penalty imposed ... then that is to be treated by arbitration as a disciplinary demotion.

> Professor Weiler then goes on to give consideration to a number of the authorities dealing with the concept of a disciplinary demotion and observes that the response of arbitrators generally is that a demotion is an unsuitable penalty if it is intended purely as a disciplinary response. On p. 238 he considers the necessary criteria that will permit a demotion as an act of discipline: "Demotion as a disciplinary measure has been held to be proper where the immediate offence of the employee testifies directly to his unsuitability for the particular job which he had held". (emphasis added)

[45] The facts, said the Union, compel the conclusion that the demotion of the Grievor was not related in any respect to his ability to perform the duties of a Shift Millwright. In its response to the alleged deficiency in the Grievor's ability to work safely, the Union submitted that the Employer had failed to take the preliminary steps required before a demotion can be imposed. In that sense, said the Union, the Employer failed to bring the facts within the governing authorities. In that regard, it cited City of Vancouver and the following comments appearing on p. 131:

> Professor Beatty was speaking of a demotion but the reasoning applies with added force to a dismissal. Where the issue is the capacity of an employee to perform to a particular standard, the evidence must disclose that the employee was made aware of his deficiencies and the

> clear consequences of a continued failure to perform. It is only when the employee has been warned that he faces loss of employment as a consequence of a failure to improve that the inference of an inability to perform is justified. On p. 283 Professor Beatty said:
>
> > In the present case then, and for the same reasons, until one had similar evidence of such an unequivocal warning to the grievor, the poor performance described by his supervisors could not reasonably be attributed to the limits of his abilities. Quite simply, without such evidence, one could not have any objective basis for concluding the grievor's performance was beyond his capacity to correct. (emphasis added)

[46] The reference in that extract to Professor Beatty related to his decision in Re Labatt's Ontario Breweries, Division of Labatt Brewing Co. Ltd. and Canadian Brewery Workers Union, Local 304, (1980) 29 L.A.C. (2d) 275 @ p. 282. That reasoning, said the Union, has direct application to the facts present in this dispute. Here the evidence disclosed that the Grievor was not cautioned that if his first aid record and approach to safety did not improve, he would face disciplinary action, including a demotion.

[47] The Employer sought in that context to rely on the discussion between the Grievor and his supervisor in which his number of first aid reports was questioned. The response of the Union to that initiative was that it contained no caution and no intimation that an improvement in performance was required or discipline may be imposed. The Union concluded that neither the facts nor the authorities supported the imposition of a suspension for what amounted to a

momentary lapse of attention in the course of a work record of more than 20 years and, in addition, that no basis was established for the demotion of the Grievor from his Shift Millwright position.

Decision

[48] I agree with the Employer that the facts compel the conclusion that the Grievor was careless in the operation of the pickup truck. In particular, he was observed going to his truck by the operator of the forklift, indicating that the forklift was there to be seen approaching as he went out to his truck. Obviously he simply did not look. As he was entering the truck, the forklift, which had been brought to a halt by its operator, was again there to be seen if he had looked. Operating a vehicle backward without taking any steps to ascertain what is behind was careless, and perhaps even reckless. It was particularly dangerous to back into an area routinely used by other vehicles and machines without maintaining a proper lookout.

[49] In those circumstances, it was not necessary for the Employer to shoehorn the facts into the catalogue of serious infractions defined in its Safety Policy. The Grievor's move into a travelled area of a mill yard without looking had the potential to cause a serious accident and thus fell within the spirit of the policy. I am of the view on those facts that the imposition of a one-day suspension could not be viewed as an excessive response to the circumstances.

[50] The real issue is whether the Grievor's removal from his position was excessive. The question is whether the Employer succeeded in bringing the circumstances within the patterns of conduct which has been found by arbitrators to warrant a demotion. I agree with the Employer that a proven inability to work safely can be a basis for imposing a disciplinary demotion. It is not necessary to prove an inability to perform the work itself. That is, the fact that the Grievor was a good Millwright did not insulate him from disciplinary initiatives designed to redress his approach to safety, assuming his safety record could be viewed as deserving of discipline.

[51] A review of the authorities relied on by the parties makes it clear that the question of when employee's conduct or misconduct will justify the imposition of a demotion is not without complexity and, aside from broad general principles outlined in the Canadian Labour Arbitration article cited by the Union, the resolution of issues raised by a demotion invite a resolution in response to the particular facts. However, within the broad guiding principles, it is clear that an employer cannot impose a demotion without first putting the employee concerned on notice with respect to the deficiencies in performance perceived as requiring correction and advising that a failure to correct the pattern may result in a demotion.

[52] The Employer agreed in that context that the Grievor was not perceived as deficient in any respect in the performance of his duties as a Millwright. Mr. Boyle conceded that there was "no concern about [the Grievor's] ability. His supervisors were pretty happy about his work as a Millwright".

Hence, if the decision to demote is to be defended by the Employer, it must be defended on the basis that the Grievor's record justified the conclusion that he was unable to work safely, that a period of removal from his job as a Shift Millwright was justified, and that he had received notice that he may face discipline, including a demotion.

[53] I digress to note that there was an ambivalence in the position taken by the Employer with respect to assigning the Grievor to an Oiler's position. Initially it was submitted that the reason for that assignment was because Oilers work a particular route which facilitated closer supervision. However, the facts did not reveal any higher degree of supervision and the Employer appeared to concede that the assignment of the Grievor to an Oiler position was because there was a vacancy and because it was desirous of introducing Shift Millwrights to Oiler duties on an organized basis.

[54] Shift Millwrights were given four-month transfers in the past which involved spending one month on each of four Oiler routes. The Grievor was returned to his position as a Shift Millwright after four months. Thus, by coincidence, the Grievor had completed the four months of the Oiler assignment program, following which he was returned to his Shift Millwright position. That is not to suggest that the Oiler assignment was flawed by bad faith. It is to say that the facts implied that the demotion of the Grievor was seen as convenient as well as remedial. The same result would have occurred if the Grievor had been the subject of a temporary transfer to a training assignment as an Oiler in order to achieve the familiarization goal of the Employer.

[55] The Employer imposed the demotion to bring home to the Grievor the fact that he had to take more time and exercise greater care in the performance of his duties. His assignment to the Oiler position was the option chosen to drive that message home coincidental with a training objective that met the Employer's needs. The flaw in the Employer's approach was that, absent from the facts was the pattern of supervisory intervention which justifies a disciplinary demotion as a final step. Employers are recognized as having the right to impose discipline in response to unsafe practices, both culpable and non-culpable in the sense of being unintentional. But commencing a disciplinary response to safety infractions with a demotion, assuming it could ever be seen as justified, would require more compelling facts than those proven in this dispute.

[56] In my view, the Employer failed to establish the grounds required to support a disciplinary demotion. On that basis, the grievance is granted in part. It is dismissed with respect to the suspension but the Grievor is entitled to have the demotion removed from his record and to be compensated for his wage loss. I will retain jurisdiction to assist the parties in the implementation of the Award if that becomes necessary.

DATED at the City of Prince George, in the Province of British Columbia, this 19th day of April, 2004.

"H. Allan Hope, Q.C."

H. ALLAN HOPE, Q.C. – Arbitrator