

IN THE MATTER OF ARBITRATION

BETWEEN:

TECK HIGHLAND VALLEY COPPER

(the "Employer")

AND:

UNITED STEELWORKERS LOCAL 7619

(the "Union")

(J. Budarick Grievance)

ARBITRATOR:

Corinn Bell

COUNSEL:

Keri Bennett
for the Employer

Stephanie Drake
for the Union

HEARING:

June 21-24, 27 & 28, 2016
Kamloops, BC

The parties to this claim are Teck Highland Valley Copper, (“the Employer” or “Teck HVC”,) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7619, (the “Union” or “USW Local 7619”). The Grievor in this claim is Mr. Jason Budarick, (the “Grievor” or “Mr. Budarick”). The parties agree that I am properly constituted as an Arbitrator under their Collective Bargaining Agreement. The subject of this grievance is the January 19, 2016 dismissal of Mr. Budarick. The Employer submits that Mr. Budarick was dismissed with just cause; the Union disputes his termination from Teck HVC and asks that he be re-instated as a result.

THE FACTS

At the time of his dismissal, the Grievor was employed as a Haul Truck Operator in the B Crew. The Grievor served as both Shop Steward and Chief Shop Steward for the Union (together referred to as “Shop Steward”). The Grievor’s termination letter reads as follows:

This letter will serve as a formal record of your termination effective 3:30pm, Tuesday, January 19, 2016.

You are responsible for this dismissal as a result of your conduct. You willfully failed to follow the direction of Supervision on multiple occasions. In addition, you have directed the workforce without the authority to do so and have deliberately undermined Supervisory authority. Finally, you have demonstrated consistent insolence and dishonesty and have failed to accept accountability for your actions.

Due to the nature of these infractions, the Company considers these to be the culminating incidents.

By your own conduct, you have severed the employment relationship and are responsible for this termination.

Given several instances of misconduct allegedly contributed to the Grievor’s eventual dismissal, for organizational purposes the following discussion will focus on the events leading up to and constituting each allegation of misconduct. After hearing the evidence submissions of the

parties, there are four events, or series of events, during which the Employer is alleging misconduct. Those allegations are as follows:

- (i) between June 2014 and May 2015, after receiving discipline from Mr. Baker, General Supervisor in Mine Operations, the Grievor attempted to “bury the Employer in paperwork” by filing an extensive quantity of Health and Safety grievances;
- (ii) in August 2015, the Grievor encouraged illegal strikes on two separate occasions, contrary to the terms of the Collective Bargaining Agreement;
- (iii) in September 2015, the Grievor disobeyed his supervisor and was out of his work area; and,
- (iv) in November, 2015 the Grievor falsely accused a Dispatch Supervisor, Mr. Pitre, of violating the human rights of Mr. Williamson and threatened to file a human rights complaint and refused on several occasions to provide a statement to aid the Employer in their investigations.

Teck HVC alleges that the above incidents in (iii) and (iv) above constituted a culminating incident which triggered an Investigative Interview in January 2016 following the Grievor’s return to the workplace after a medical leave of absence. After meeting with the Grievor in the Investigative Interview and determining that he was neither forthright nor remorseful, the Employer considered the totality of the culminating incident in light of the totality of his work record, including issues described in (i) and (ii) above and terminated him on January 19, 2016. I will outline the allegations of misconduct in more detail.

(i) June 2014 - May 2015

The Grievor's Supervisor during this June 2014 - May 2015 period was Mr. Andrew Baker, General Supervisor in Mine Operations. From 2013 until he was promoted to his current position, Mr. Baker supervised the Grievor in his capacity as Senior Shift Supervisor for B Crew Mining Operations.

The Employer submits that much of the Grievor's misconduct was in retaliation against Teck HVC due to the decline of the Grievor's professional relationship with Mr. Baker. As such, my discussion of the facts begins with this decline.

The decline of the Grievor's professional relationship with Mr. Baker began on June 23, 2014, when Mr. Baker sought a meeting with the Grievor to discuss and correct the Grievor's behaviour. Four people attended this meeting: the Grievor, Mr. Baker, Mr. Boyd Nolan, and a shop steward. Mr. Baker discussed the following concerns with the Grievor: a) the Grievor taking late breaks, and, b) the Grievor's Wenco system recordings¹. Mr. Baker testified that the Grievor did not respond well to this discussion. It was Mr. Baker's testimony that the Grievor blamed the Wenco system for any text message malfunctions and failed to take responsibility himself. The meeting concluded with Mr. Baker warning the Grievor that, should no improvement result, the Grievor risked disciplinary action. He also told the Grievor that he was extending him the, "benefit of the doubt".

¹ Wenco is a system that is fitted into every haul truck at Teck HVC. It tracks the course of the trucks on a GPS, and can send and receive text messages. These text messages come from the Haul Truck Supervisor and allow for employee communication with Management during the working day. Each truck is also fitted with a radio, and this radio has a public channel on which the supervisor can speak with all drivers, as well as a private channel onto which a supervisor and an employee could switch if need be.

Following this discussion, Mr. Baker testified that the Grievor responded in three ways: He filed a bullying and harassment grievance on September 24th, 2014. He sent an email to Mr. Baker on November 22, 2014 respecting Bill C-45, which Mr. Baker considered inflammatory. Finally, he telephoned Mr. Greg Brouwer, Operations Manager at Teck HVC to discuss his occupational health and safety concerns at the mine site as well as his displeasure with Mr. Baker's leadership.

The Grievor testified that he filed the bullying and harassment grievance after he was disciplined for falling asleep on the job. What made this discipline unfair, according to the Grievor, was the fact that other employees had similarly fallen asleep but had not been disciplined.

The Employer investigated the bullying and harassment grievance six months after it was filed, and concluded that no bullying and harassment occurred. That grievance was denied. Following Teck HVC policy, an 'Inappropriate Conduct' meeting was then held on March 12, 2015 to investigate the allegations contained in the grievance. Mr. Aaron Wylie, a Health & Safety Supervisor, as well as General Supervisor of Mine Operations at the operative time, testified that he attended this Inappropriate Conduct meeting, as well as the Grievor, Mr. Steve Schmaltz, Shop Steward, and Mr. Ross Duncan. On April 22, 2015, the Employer sent the Grievor a letter outlining that it had determined that no inappropriate conduct had taken place. Ms. Deanna Chala, Human Resources Advisor, testified to this investigation and confirmed Teck HVC's conclusion. She also testified that the Employer considered the September 24, 2014 bullying and harassment grievance to be a malicious complaint; however, the Employer did not take any disciplinary action.

The email sent to Mr. Baker from the Grievor on November 22, 2014 contained two hyperlinks. The first was a link to s. 271 of the *Criminal Code of Canada* (the "*Criminal Code*") as of March 31, 2004. Section 271 of the *Criminal Code* broadly establishes that supervisors can be held criminally liable for omitting to take reasonable steps to prevent bodily harm to their

employees. The second was a link to an article published in the Vancouver Sun. The Vancouver Sun article exemplified the application of s. 271 to a case involving the Steelworkers Union. Mr. Baker testified that he took these links to be a threat, although acknowledged that the Grievor had never formally accused him of criminal conduct. The Grievor justified his sending of the email with the two links because he felt that the Employer was not properly investigating a “near-miss” incident on November 20, 2014, two days before the email was sent.

The phone call to Mr. Brouwer was also a concern to Mr. Baker. Mr. Baker testified that he found this phone call to be malicious, as it constituted a jump of several rungs of Teck HVC’s hierarchy. The Grievor testified that he believed was permitted to jump as he did, because Mr. Brouwer’s office has an “open-door” policy. This “open-door” policy was confirmed by Mr. Baker in cross examination. The Grievor testified that he spoke to Mr. Brouwer several times, but Mr. Brouwer never followed up with him respecting these conversations. Mr. Wylie spoke to Mr. Brouwer and the Grievor individually about these phone calls on separate occasions, but could not recall an exact date. Mr. Wylie testified that his meeting with the Grievor about the phone calls “did not go well.”

The next event that occurred in this time period that management attributes to the decline of the relationship with the Grievor was on December 15, 2014. On this evening, six health and safety grievances were filed, of which five concerned “near-misses” occasioned by one individual Haul Truck Driver (the “Haul Truck Driver”) in the months of February, September, or December 2014. In the months leading up to the filing of these grievances, Mr. Baker testified that Teck HVC was aware of the Haul Truck Driver’s near-misses. Those near-misses gave the Employer pause for concern and the Haul Truck Driver was required by the Employer to be re-trained and certified up to standard in September 2014.

During the hearing, much was made of the contents of the individual grievances filed on December 15, 2014. Three of the six grievances were signed by the individual grievors and three were submitted unsigned by individual grievors. All six grievances filed that day were signed by Mr. Budarick. Mr. Baker suggested that the three unsigned grievances were so because the employees in question felt bullied into filing their grievances by the Grievor, and refused to sign out of protest. Mr. Nolan testified that he confirmed this in one instance by speaking to one of the grievors first-hand who told him that he felt bullied. The Grievor, however, explained the three unsigned grievances differently: for one grievance, Mr. Budarick had spoken to the grievor on the phone and filed it unsigned because of this fact; the other two were, in his words, “put in on the Union’s behalf” and that there was no bullying of union members.

The Employer held an Investigative Interview on December 24, 2014 with the Haul Truck Driver to discuss the near-misses. Mr. Baker testified that he was in attendance at this meeting and the Haul Truck Driver communicated feeling comfortable behind the wheel, although following yet another near-miss on December 29, 2014, the Haul Truck Driver was disciplined.

In addition to the six occupational health and safety grievances that were filed by Mr. Budarick on December 15, 2015, six more were filed on behalf of USW, Local 7619. These six grievances were filed between January and March, 2015, for a total of 12 occupational health and safety grievances filed between December 2014 and March 2015.

There is a strong disagreement between the Employer and the Union as to whether some or all of these 12 grievances were filed in good faith. Regarding those involving the Haul Truck Driver, Mr. Baker and the Grievor disagree as to whether the Haul Truck Driver’s conduct was a legitimate safety concern, which would validate the filing of multiple grievances. The Grievor maintains that the Haul Truck Driver was a health and safety risk throughout the entire time during

which the near-misses occurred, and therefore all six were filed in good faith. Mr. Baker, on the other hand, only viewed the Haul Truck Driver's December 29, 2014 near-miss as a safety concern, given that the Haul Truck Driver had been re-trained after the penultimate near-miss. Mr. Wylie concurred with Mr. Baker's opinion. Mr. Baker offered that in his experience receiving those many grievances was highly unusual.

There is also disagreement as to whether some, all, or none of these 12 grievances were investigated by the Employer. No testimony paints a clear picture as to what steps were taken after these 12 occupational health and safety grievances were filed. It was established that all 12 grievances were ultimately withdrawn by the Union.

Mr. Baker commented that dealing with these 12 grievances took up the majority of his time at work each day, and that other employees had to fill in for his day-to-day duties as supervisor. The amount of time spent by Mr. Baker dealing with the grievances was disputed by the Union. Mr. Baker and Ms. Chala both commented that filing 12 grievances in six months was unheard of in their experience at Teck HVC. The Grievor, however, justified filing them because he had spoken to either Mr. Jeff Jewell, Union Grievance Chair or Mr. Kyle Wolff, Union President, concerning them.

On April 12, 2015, Mr. Baker met with the Grievor to discuss his conduct over the previous four months and the grievances. At this meeting they also discussed the Grievor's performance generally. Mr. Baker sought to remind the Grievor that health and safety grievances should be used as a last resort; the most immediate way to make a positive difference for health and safety at Teck HVC is to report an issue to a supervisor. The fact that this is the common practice at Teck HVC was corroborated by Ms. Chala and Mr. Pitre. Ms. Chala did admit in cross

examination that there was no policy prohibiting the Grievor's filing of grievances without first speaking to a supervisor and confirmed that it was the Union that owned the grievances.

In the April 12th meeting, Mr. Baker testified that he also discussed how he did not appreciate the Grievor's affronts to his leadership, and in particular, sending the November 22, 2014 email and the phone calls to Mr. Brouwer. According to Mr. Baker, the Grievor responded by telling him that, if he was going to hold him accountable, the Grievor would do the same, which Mr. Baker testified he found threatening. At the close of the meeting, Mr. Baker testified that he told the Grievor that he would not be disciplined, but that the "benefit of the doubt" extended to the Grievor at the June 23, 2014 meeting would no longer be extended. Following this interview, the Grievor was issued with a Letter of Discussion, dated May 1, 2015. The Grievor testified that he felt that the letter was not justified, as it was provided to him simply for handing in grievances, which was part of his duties as Shop Steward.

(ii) — The Grievor's Encouragement of Illegal Strikes:

The Grievor was issued a letter of suspension on August 14, 2015 by Mr. Tyler Boice, following encouragement of illegal strikes on August 11 and 12, 2015, in violation of Article 4.01 of the Collective Bargaining Agreement. At the operative time, Mr. Boice was Mine Senior Supervisor for the B Crew. The Grievor served his one-day suspension on August 27, 2015.

Mr. Boice further testified that Teck HVC takes violations of Article 4.01 of the Collective Bargaining Agreement very seriously. Mr. Boice testified that Teck HVC chose to suspend the Grievor, as opposed to terminate him, because Teck HVC engages in a progressive discipline process. At the hearing, the Grievor took responsibility for his actions those days and testified that he did not file a grievance respecting the one day suspension.

(iii) — The Grievor Leaving his Work Area:

This conduct took place on September 22, 2015. There is some dispute between the parties as to the exact timelines between the parties on this day. At approximately 6:50 am, Mr. Nolan radioed to the Grievor and asked him to report to a meeting in his capacity as Shop Steward at 7:15 am. The Grievor parked his truck in advance of that meeting and before going to where the meeting was taking place the Grievor testified that he took a “detour through the Shop” (the “detour”). Mr. Nolan testified that Teck HVC takes employees being out of their work area seriously because, in the event of a need to evacuate, the Employer will not be able to account for the whereabouts of the employee. Mr. Nolan also explained the impact to operations can be considerable when employees are taken out of production.

While on his “detour”, the Grievor testified he ran into Mr. Colin Dawes who was also a shop steward. The Grievor stated that Mr. Dawes asked him if he wanted to attend the 7:15am meeting in place of the Grievor, to which the Grievor responded in the affirmative because he was frustrated with how the meetings were conducted. The Grievor accepted in cross examination that he knew that management specifically requested that he attend the meeting. The Employer witnesses suggested that the Grievor entered the Shop with the intention of asking Mr. Dawes to come to the meeting.

In any event, both the Grievor and Mr. Dawes arrived for the 7:15 am meeting although the meeting commenced later than originally scheduled. Mr. Dustin Yaciw, was also present at the meeting. Present from management were Messrs. Boice and Nolan. There is no dispute that at this meeting the Grievor told Mr. Boice he was, “stepping down” as Shop Steward. However, the Grievor testified that he should have said, “stepping back,” instead of “stepping down” as Mr. Dawes was taking over only for this specific meeting. According to the Grievor, once he told Mr.

Boice he was, “stepping down,” Mr. Boice became angry and told the Grievor he should have stayed in his truck.

Ms. Chala later spoke to Mr. Wolff after this incident regarding the Grievor’s “stepping down” and was surprised to discover that he would be continuing as Shop Steward. Ms. Chala then spoke to the Grievor on October 14, 2015 about this recent development. Both the Grievor and Ms. Chala testified that the thrust of this conversation concerned the Grievor’s desire for a “fresh start” vis-à-vis management. Ms. Chala testified that the Grievor asked that the discipline be removed from his file during this discussion, which was declined.

To address the Employer’s concerns that the Grievor was out of his work area on September 22, 2015, an Investigative Interview was held on October 7, 2015. In attendance were the Grievor and Mr. Yaciw, Shop Steward, and Messrs. Nolan and Boice for the Employer. As well as the Grievor being out of his area, concern was raised at that meeting that having two shop stewards present on September 22, 2015, (i.e. the Grievor and Mr. Dawes,) meant that one employee was not working at the material time. The concern was that this translated into a potential for financial loss for the Employer. No evidence of loss was offered by the Employer and the Grievor disputed whether it would have translated into any loss given the timing of the meeting at the end of his shift.

Ms. Chala testified that she met with three other members of the Human Resources department, including her supervisor, Ms. Candace Droder on October 30, 2015 regarding the Grievor’s discipline for the September 22, 2015 incident. Taking Teck HVC’s progressive discipline structure into account, she testified that the Grievor risked termination as that was the next “rung up the discipline ladder” following on from his suspension on August 27, 2015. However, no conclusion was reached as to how the Grievor would be disciplined at that meeting.

Ms. Chala testified that no discipline followed because Mr. Budarick left for his annual vacation shortly after the October 30, 2015 meeting.

(iv) — The Grievor's Allegation Against Mr. Pitre:

On November 7, 2015, after the Grievor's return from annual vacation, the Grievor accused Mr. Pitre of sending a text message over Teck HVC's Wenco system to Mr. Williamson, a bargaining unit member at Teck HVC. The Grievor addressed this matter with Mr. Pitre because the concern was that Mr. Pitre allegedly questioned Mr. Williamson's use of a washroom shortly before the end of his shift. This text message allegedly went something along the lines of: "is now really a good time to use the washroom?"

To preface the following discussion, I am satisfied on balance of probabilities that the alleged text message or radio communication respecting a washroom break was never sent. Notwithstanding the fact that the alleged Wenco message was not sent, the Grievor testified that he heard that it was sent from his friend and fellow employee, Mr. Bill Ross, during their carpool home from work on November 6, 2015. The fact that this allegation was passed along from Mr. Ross to Mr. Budarick during the car pool that day was not disputed and Mr. Ross later provided a statement of the allegation made by Mr. Williamson that day.

After receiving the concerns raised by Mr. Ross the day before the Grievor confronted Mr. Pitre in the Bull Pen, around 7:30 am on November 7, 2015. The Grievor testified that there were approximately 10-15 people in the Bull Pen at that time, but that there were 50 who may have been waiting outside for their morning meeting as the conversation took place during shift change-over.

To begin the conversation, the Grievor no doubt rhetorically asked Mr. Pitre words to the effect, "When is an appropriate time to go to the washroom?" Mr. Pitre testified that he was

confused and responded that someone could use the bathroom whenever one wanted. According to both the Grievor and Mr. Pitre, the Grievor then went on to explain that someone sent a Wenco message to a haul truck driver the day before about how his using the washroom near the end of a shift was inappropriate. The witnesses called by Teck HVC stated that the Grievor then accused Mr. Pitre of sending the message and asked him whether he was, “looking for a human rights complaint,” to which Mr. Pitre responded again that he did not send the message. The Grievor concluded the conversation with “someone apparently did,” to which Mr. Pitre responded, “we can pull records” and the Grievor ultimately replied “you better.”

Although Mr. Pitre and the Grievor testified to basically the same conversation, their respective testimonies diverge in how each perceived the conversation. The Grievor testified that his, “you better,” comment was not a threat. He described the tone of the conversation as, “joking or ... sarcastic,” and maintained this under cross examination. Mr. Pitre, however, described the Grievor’s tone throughout the conversation as, “aggressive and threatening,” and vehemently denied the suggestion that the Grievor’s tone of voice may have been joking. One witness to this conversation, Mr. Gary Dickinson, Equipment Foreman Supervisor, also described the Grievor’s tone as, “threatening,” and another, Mr. Mike Lukinchuk, Road Haul Supervisor, stated that the Grievor’s tone “felt hostile”.

There was a real possibility that the conversation between the Grievor and Mr. Pitre could have been overheard by those passing the Bull Pen. The Grievor testified that in hindsight, he ought to have conducted himself differently. Specifically, he testified that he ought to have called Mr. Pitre into a private meeting, and he should have contacted Mr. Williamson in advance of this conversation.

Because of the seriousness of this the allegation of a human rights violation, Mr. Pitre testified that he immediately commenced an investigation into the allegation that he sent the Wenco text to Mr. Williamson. According to Mr. Pitre, the Employer wanted to record a statement from the Grievor respecting the allegation made to him on November 7, 2015. This proved to be unusually difficult.

The first time that the Grievor was asked to provide a statement was during his shift on November 7, 2015, at the Scales Parking area of Teck HVC. Present during this meeting was Mr. Yaciw, Mr. Nolan, and the Grievor. There is inconsistency as to why Mr. Yaciw was present. The Grievor testified that Mr. Yaciw was there of his own volition and that the two ran into each other by coincidence at Scales Parking site. However, notes taken by Mr. Nolan at a subsequent Investigative Interview respecting the conduct of Mr. Yaciw during this incident show that Mr. Yaciw indicated that he was present, "representing a union member that had asked for representation".

Mr. Nolan arrived and saw both the Grievor and Mr. Yaciw in attendance, he asked Mr. Yaciw to return to his truck because the meeting was non-disciplinary. Mr. Nolan testified that in response to this, the Grievor ordered Mr. Yaciw to, "stay right there." In contrast, the Grievor testified that here he asked Mr. Yaciw to stay for the conversation. Whether directed or requested, Mr. Yaciw remained present at this non-disciplinary meeting at Scales Parking.

The conversation that then transpired was simple: Mr. Nolan asked the Grievor to provide a statement concerning his allegation against Mr. Pitre. When the Grievor asked Mr. Nolan of the reason for this statement, Mr. Nolan responded that it was to conduct an investigation into the allegation or, as Mr. Nolan put it on the stand, the "who, why, what, where". The Grievor agreed to provide the statement by the end of his shift that day.

The second time that the Grievor was asked to provide a statement was at the end of the shift that same day. Mr. Nolan went to retrieve the statement from the Grievor at the end of his shift, but the Grievor had not yet written it. His excuse was that he had no paper in his truck, which Mr. Nolan testified that he found surprising. Mr. Nolan asked him to bring the statement in the next morning, and the Grievor responded in the affirmative.

The third time that the Grievor was asked to provide a statement was when he was leaving the site at the end of his shift. He crossed Messrs. Pitre and Boice and Mr. Boice asked the Grievor whether he had written a statement. The Grievor responded in the negative. Mr. Boice told the Grievor that he needed the statement the next day. The Grievor testified that Mr. Boice was angry, but Mr. Boice testified that the tone of this conversation was “normal”.

The Grievor testified that as soon as he left the mine that day and had cell service, he attempted to call Mr. Williamson. He testified that he wanted to be able to write the statement and get details from him. He also phoned Mr. Wolff to inform him of what he knew of the situation.

On November 8, 2015, the Grievor met Mr. Nolan at the beginning of his shift. Mr. Nolan asked him if he had written his statement, to which the Grievor responded in the negative as he was, “still collecting information,” and, “had ... not talked to Mr. Williamson.” In response, the Grievor testified that Mr. Nolan insisted that the statement be written immediately. As the two were walking to the Conference Room, the Grievor once again told Mr. Nolan he was not prepared to write his statement. At some point during this walk, the two were joined by Mr. Eric Starrs, Supervisor, B Crew, and Mr. Yaciw. Mr. Starrs testified that he also asked the Grievor to write the statement, and the Grievor told him that he was not ready. Mr. Starrs testified that Mr. Yaciw took the position that the Grievor had a right to representation. Mr. Starrs told Mr. Yaciw to return to his truck, and Mr. Nolan informed Mr. Yaciw that the incident in question did not involve

discipline. On their way to the Conference Room, Mr. Nolan testified that he believed that the, “Grievor became paranoid”.

It was the common testimony of the witnesses that Mr. Yaciw tried to follow the group to the Conference Room that morning. According to the Grievor, Mr. Starrs tried to “football block” Mr. Yaciw from doing so. However, the Grievor did not actually see a “football block”, nor did Mr. Nolan, and Mr. Starrs denied ever physically touching Mr. Yaciw. Mr. Schewchuk who was working night shift, testified that he saw Mr. Starrs stand in the doorway to block Mr. Yaciw’s entry into the Conference Room.

When the group was outside the Conference Room, close to Mr. Baker’s office, Mr. Yaciw was told once again to return to his truck and the Grievor was told to write the statement. The Grievor testified that his response did not change and that he informed management that he wanted to speak with Mr. Williamson. The Grievor testified that he and Mr. Nolan walked into the Conference Room and Messrs. Starrs and Yaciw waited outside. The Grievor testified that Mr. Nolan threw his paper and pen on the table, and told the Grievor that he should, “do it now” (i.e. write the statement.). Mr. Nolan denied acting and speaking in this way.

In the Conference Room, Mr. Nolan testified that he was “almost pleading Mr. Budarick to write a statement.” It is agreed that the voices during this conversation were elevated. Mr. Starrs testified that from what he could overhear, Mr. Nolan and the Grievor’s voices were equally raised. At this point, the Grievor was still refusing to write the statement, so Mr. Nolan sought the aid of Mr. Baker.

When Mr. Baker arrived at the Conference Room, he testified that he calmly asked the Grievor to, “jot down a few notes in his haul truck and hand them in,” to which the Grievor responded in the affirmative. The Grievor testified that Mr. Nolan pointed to the pen and paper in

the Conference Room and insisted that the statement should be written immediately. Mr. Nolan denies insisting that anything of the like occur although candidly admitted that he found the Grievor's reluctance to provide a statement frustrating. The Grievor stated that he was, "shaken up and pretty upset," and that he eventually wrote the statement in the Conference Room at the start of the shift on November 8, 2015.

After the Grievor's statement was reluctantly provided, Mr. Starrs testified that he realized that Mr. Bill Ross was involved in the situation, so he sought a statement from him that day. Mr. Starrs testified that as Mr. Ross went away to write his statement, he saw the Grievor's "truck circling as if he was going to talk to Mr. Ross." In response to this, Mr. Starrs testified that "he pulled up and the Grievor pulled away." Mr. Ross provided the following statement (transcribed as written):

Nov 8/15

On Nov 6/15 @ 7:30-7:35 pm

A driver in on overtime on DW unit 61-71 haul truck Wade Williamson parked along side of myself Bill Ross #55797: At shift change, After putting down or wheel chocks I was approached and told that there was a message on the Wenco about using the restroom to close to shift end or something in that manner. He also said he had called 423 on Ch.5 to discuss it with Chris Pietre I'm not to sure what was said on the Radio.

Bill Ross #55797

Nov 8/15

On November 9, 2015, Ms. Chala and Mr. Nolan telephoned Mr. Baker from Ms. Chala's office to discuss the events occurring on November 7 and 8, 2015. The three were planning interviews for the Grievor and Mr. Yaciw. Ms. Chala testified that during the call, she was interrupted by a knock at her door. This knock came from Mr. Starrs, notifying Mr. Nolan that the Grievor and Mr. Yaciw were too stressed to complete their employment duties that day, and wanted to be seen by Mr. Schmaltz, one of Teck HVC's First Aid Personnel. Mr. Nolan left Ms.

Chala's office to speak with Mr. Yaciw, the Grievor, and Mr. Schmaltz in the Bull Pen. When Mr. Nolan arrived, he asked the three: "What is going on?" to which the Grievor loudly responded with words to the effect: "We are charging you and the other Foremen on B crew with harassment. We are tired of you yelling at us, chasing us down the hall, and forcing us to write statements." Mr. Nolan testified that he responded by asking them to go into the Conference Room to discuss what was happening. Mr. Budarick testified that "we" referred to the Union.

Once they were all in the Conference Room, Mr. Nolan testified that he went to get Mr. Baker. Mr. Nolan stated that the five men conversed, but that the Grievor did most of the talking in a heated tone, as he was upset. Mr. Nolan testified that he calmly asked the Grievor to lower his voice, to which the Grievor retorted words to the effect: "Sure, you speak in a calm tone, now that your boss is sitting beside you." Mr. Nolan testified that during this conversation, the Grievor claimed to have been threatened and harassed by management. According to Mr. Nolan, the Grievor was visibly angry when he left the room that morning to attend to first aid.

After an assessment with first aid, it was determined that the Grievor and Mr. Yaciw were unfit to drive. Security returned the two employees to Kamloops. The Grievor saw his family doctor on November 10, 2015, who wrote the Grievor a medical note for his medical absence. On the stand, the Grievor attributed his stress that day to the fact that he had not been sleeping well due to the events since November 6, 2015.

(v) — Investigative interview and dismissal of the Grievor on January 19, 2016:

The Grievor was on medical leave and was cleared on January 13, 2016 to return to work on January 17, 2016. The Grievor testified that he was looking forward to his return to work as he had a new supervisor. On his first day back, the Grievor received a voicemail from Mr. Boice notifying him that he was suspended indefinitely without pay pending further investigation.

That investigation, by way of an Investigative Interview, was held on January 19, 2016. Present were the Grievor and Mr. Winslow, for the Union, and Messrs. Boice and Nolan, for the Employer. The investigative interview concerned the Grievor's conduct spanning November 7 - 9, 2015.

Regarding November 7, 2015 interaction with Mr. Pitre, in the interview the Grievor suggested that he was sarcastic and joking, but that he was not threatening. Mr. Nolan testified that he believed that both of these assertions were lies based on other conversations he had with Mr. Pitre.

Regarding November 8, 2015, the Grievor testified that in the Investigative Interview, he said that he asked Mr. Yaciw to stay at Scales Parking as he believed he had a right to representation that day. He claimed in the Investigative Interview that he met Mr. Yaciw at Scales Parking coincidentally and he had not asked him to attend. He also maintained in the Investigative Interview that he did not provide a statement when asked because he had not spoken to Mr. Williamson about the Wenco text message.

The Grievor was questioned in the Investigative Interview why obtaining a statement turned into such a problem. According to interview notes, the Grievor responded, "I didn't know that that's all you wanted," referring to the truck number and name of the person involved, as well as the time at which it occurred. Mr. Nolan believed that this response was untruthful as Mr. Nolan repeatedly requested the information of Mr. Budarick. Mr. Nolan testified that he was "surprised and frustrated" that the Grievor took so long to provide a statement, given that the Grievor has a history of being rigorous with time limits. The Grievor testified that he made a more detailed statement of events after speaking to Mr. Williamson in late November 2015. The Grievor made the Employer aware of this statement during the Investigative Interview. The Grievor and

Mr. Winslow testified that he offered an apology in this final meeting. Management witnesses did not testify that any apology was offered, nor did notes taken by any individual that day including the union attendees, reflect an apology.

After the Investigative Interview, Mr. Boice briefly caucused with the Grievor, asking him whether he had anything to add. The Grievor responded in the negative. The Grievor was terminated and the termination letter was hand delivered to him. The Grievor testified that he did not understand why he was terminated when he read his letter. He described the wording as, “vague,” as there were, “no dates, times, or information telling him the reasons for his termination.

Ms. Chala testified as to the Employer’s reasons behind the Grievor’s termination. She testified that the Grievor was terminated because he: wilfully failed to follow direction; directed the workforce; and was insolent and dishonest. Ms. Chala testified that the Grievor wilfully failed to follow direction on two separate occasions: (i) when he took his “detour” on September 22, 2015; and, (ii) when he did not provide a statement when asked by management on November 7 and 8, 2015. She testified that the Employer viewed the Grievor as directing the workforce when he asked Mr. Yaciw to stay at Scales Parking with him on November 7, 2015. Finally, Ms. Chala testified that, according to Teck HVC, the Grievor was insolent and dishonest on three separate occasions: (i) when he spoke to Mr. Pitre on November 6, 2015 with intent to shame him; (ii) when he asked Mr. Yaciw to come to the Scales Parking notwithstanding the request was only that the Grievor come; and, (iii) insisting he was speaking in a joking tone regarding an alleged human rights violation, that in the opinion of the Employer was not a human rights violation, even if the alleged Wenco message was sent.

There is disagreement as to the tenor of the individuals involved in this final meeting. The Grievor described himself as calm, and testified that Messrs. Boice and Nolan began calm but

that Mr. Boice, “seemed to get frustrated as they progressed through the questions.” Mr. Boice, on the other hand, described the Grievor as, “very hostile,” and, “short,” and denied getting angry or yelling himself.

As the Grievor was leaving Teck HVC after this meeting, he alleged that Mr. Boice told him words to the effect that he “...will never be setting foot on the property ever again.” This statement was also heard by Mr. Winslow who testified at the hearing. Mr. Boice denies making this statement.

THE EMPLOYER’S ARGUMENTS ON THE MERITS

Counsel for the Employer submits that the Grievor was terminated for just cause. Firstly, they submit that the Grievor acted in the capacity of an employee, and not in the capacity of a Shop Steward, during the culminating incident from November 7- 9, 2015. Secondly, Teck HVC submits that the Grievor’s relationship with management spiraled downwards during the operative time to such a degree that the employer/employee relationship became irreparable. Thirdly, the Employer submits that where there is conflicting testimony, Employer witnesses should be believed, as opposed to the Grievor. Finally, Teck HVC reminds the Board of the general poor behavior and short service of the Grievor.

The Employer relies on the following cases in support of its argument that the Grievor was terminated for just cause: *British Columbia (Liquor Distribution Branch) and BCGEU (Re)*, 2005 Cardwell BC 4222 (Hope); *Calgary (City) v. A.T.U., Local 583*, 2008 CarswellAlta 2535 (Tensetor); *Canada Safeway Ltd. v. U.F.C.W., Local 2000*, [2003] B.C.C.A.A.A. No. 169; *Canadian Anglo Machine & Ironworks Inc. v. U.S.W.A., Local 9074*, 2003 CarswellMan 564 (Hamilton); *Cascade Construction Ltd. v. C.J.A., Local 2410*, 1986 CarswellAlta 908, [1986]

A.G.A.A. No. 5 (Beattie); *Code Electric Products Ltd. v. I.B.E.W.*, Local 258, 2009 CarswellBC 2510, [2009] B.C.C.A.A.A. No. 95 (Liang); *Cooper Industries (Electrical) Inc.*, 2015 CarswellOnt 8747 (Tacon); *Douglas Aircraft Co. of Canada v. U.A.W.*, 1972 CarswellOnt 1424 (Weiler); *Faryna v. Chorny*, [1951] B.C.J. No. 152; *GDX Automotive v. U.S.W.A.*, Local 455, 116 L.A.C. (4th); *Grand & Toy Ltd. v. U.S.W.A.*, Local 9197; *Hendrickson Spring Stratford Operations v. U.S.W.A.*, Local 8377, 2008 CarswellOnt 8472 (Verity); *Highland Valley Copper v. U.S.W.A.*, Local 7691, CarswellBC 3251 (Greyell); *Hilton Vancouver Metrotown v. U.N.I.T.E.-H.E.R.E.*, Local 40, 2010 CarswellBC 2094, [2010] B.C.W.L.D. 6531, [2010] B.C.W.L.D. 6516, [2010] B.C.C.A.A.A. No. 10, 100 C.L.A.S. 335, 191 L.A.C. (4th) 417 (McEwan); *Hotel-Dieu Grace Healthcare and CUPE*, Local 1132 (*Draskovic-Milojevic*), Re, 2016 CarswellOnt 8163 (Snow); *Nanimo Regional General Hospital and HEU (Bertram)*, Re, 1999 CarswellBC 3008 (Hope); *Port Hope & District Hospital v. C.U.P.E.*, Local 1653, 1982 CarswellOnt 2515 (Burkett); *Sun-Rype Products Ltd. v. Teamsters*, Local 213, 2010 CarswellBC 2047 (McPhillips); *Teck Coal Ltd. and USW*, Local 7884 (*Blain*), Re, 2015 CarswellBC 1938 (Glass); *University of British Columbia v. Canadian Union of Public Employees*, Local 116, [2002] B.C.C.A.A.A. No. 63 (Gordon); *Versacold Logistics Ltd. v. Teamsters*, Local 419, 2012 CarswellOnt 7547 (Carrier); *Walker Exhausts (2012)*, 222 L.A.C. (4th) 141 (Gray); *Westroc Inc.*, [2002] O.L.R.D. No. 164, 2002 CanLII 41383 (Rowan); *White Spot Ltd. and CAW-Canada*, Local 3000 (*Sihota*), Re, 2002 CarswellBC 4043, [2002] B.C.C.A.A.A. No. 133, 69 C.L.A.S. 40 (McPhillips); *Winfield Home Systems v. Industrial Wood and Allied Woodworkers Union of Canada Local 1-427*, [2003] B.C.C.A.A.A. No. 37, A-265/03 (Chertkow); and *William Scott & Co. (Re)*, [1976] B.C.L.R.B.D. No. 98.

Firstly, the Employer submits that during the culminating incident, the Grievor was not acting as a Shop Steward, and instead was maliciously attempting to publicly embarrass Mr. Pitre without confirming facts or evidence with others at Teck HVC, including Mr. Williamson. As such, the Employer argues that the Grievor is unable to take advantage of the leniency that Arbitration

Boards afford shop stewards when assessing their behavior. The Employer says that Mr. Budarick's behaviour ought to be evaluated to the standard of an ordinary employee. The Employer submits that the Grievor will only be found to be acting in his capacity as Shop Steward if he falls within the bounds of the *Sun-Rype, supra*, test. The Employer submits that the *Sun-Rype, supra* test is a two-step approach: the Board must first assess whether the Grievor is performing shop steward duties. If the Board finds this, they move to the second prong of the test and ask whether the Grievor's behaviour in performing this duty was legitimate. In explaining this second prong, the example given by Arbitrator McPhillips in *Sun-Rype* is particularly helpful: "If in fulfilling one's duties, a union official intimidates, bullies, or harasses other employees in the workplace, that will take those actions outside the bounds of acceptable behaviour of a union official."

Teck HVC contends that the Grievor was acting as an employee when he spoke to Mr. Pitre on November 7th because he fails the second prong of the *Sun-Rype, supra* test. This is because he was either reckless, or his statements were untrue, which will put him *ultra vires* the appropriate standard of conduct of a union official and accordingly outside of the bounds of the leniency of this Board. To establish requisite recklessness, it points to the fact that there is no evidence of the washroom text message being sent, and even if it was sent, the message itself would not constitute a human rights violation based on testimony from Ms. Chala referencing Teck HVC's human rights policy.

The Employer submits that the conversation with Mr. Pitre was threatening and, as a result, shop steward leniency should not be afforded to Mr. Budarick because his conduct towards Mr. Pitre amounts to bullying members of management. The Employer says, that as was found in *Sun Rype, supra*, this bullying takes the Grievor outside the scope of his Union responsibilities.

The Employer also contends that the Grievor was not acting as a Shop Steward during the other events of November 7 and November 8, 2015. The Employer highlights that that the Grievor refused to provide a statement despite orders to that effect from a Supervisor, and that the Grievor directed Mr. Yaciw to not perform his work duties during instances when the Grievor was informed that he did not need Union representation present. Therefore, the Employer submits that during these instances, the Grievor was not acting as Shop Steward; rather, he was interacting with management as an employee. In the case of the conversation at Scales Parking, the Employer argues that the Grievor was called to that meeting in his capacity of employee and breached his obligations as an employee by directing the work force, in that case, Mr. Yaciw.

Teck HVC also contends that the culminating incident, even though it is minor, is still a culminating incident: *Calgary (City) v. A.T.U., Local 583, supra*, paras. 106 and 107. In this case, the Employer argues that it is clear that the Grievor's relationship with Management is irreparable because he did not express true remorse for his actions: *see, for example, Teck Coal, supra*, at para. 86. Given this, the Employer contends that, in the words of Arbitrator Glass in the same case, "there can ... be no hope of re-establishing the trust of the employer which [the Grievor has] broken." The Employer submits that this conclusion is buttressed by many failed conversations between the Grievor and Management in which management attempted to resolve their conflicted relationship.

The Employer says the testimony of its witnesses should be preferred to the testimony of the Grievor for several reasons. Firstly, it is argued that the Grievor's testimony is imbued with circularity: e.g. the Grievor claimed to be acting as Shop Steward but was unaware of the Teck HVC Human Rights Policy about which he would be expected to have a detailed knowledge. Secondly, Mr. Nolan's testimony should be preferred to that of the Grievor's as it concerns the incident on September 22, 2015 for two reasons: the Grievor's timing of the meeting is not

consistent with his own notes, and, the Grievor gave conflicting evidence as to whether he was, “stepping back,” or, “stepping down” as Shop Steward. Thirdly, the Employer contends that all witnesses corroborate that the Grievor’s tone of voice was threatening on November 7, 2015, save the Grievor who described his tenor as, “sarcastic.” Finally, the Employer points to the fact that investigative interview notes submitted in evidence are detailed, and written by more than one individual and that the Grievor disagrees with portions of what was written. The Employer argues where there is conflict with what is written by management and what is testified by the Grievor, the notes should be preferred.

The Employer highlights that the Grievor disregarded Company standard process by filing 12 health and safety grievances without first discussing the safety issues with supervision. The Employer also reminds this Board that one health and safety grievance had occurred nearly a year before it was filed and is tendered as evidence that the grievances were not submitted in good faith.

The Employer also stresses that Grievor has prior discipline and encouraged an illegal strike at the workplace. The Employer argues that this encouragement should be viewed in light of *Nanaimo Regional General Hospital and HEU (Bertram), Re, supra*, which suggests that union officials have a leadership role to play, and employees look to people such as shop stewards for exemplary behaviour.

The Employer takes the position that the Grievor was outside of his work area on September 22, 2015 and that discipline is justified for this action. Although there is a dispute as to why he was out of his work area and whether the Grievor was “stepping down” or “stepping back” as Shop Steward, the Employer submits that it was uncontested that the Grievor was not where he was told to be before that meeting.

The Employer also reminds the Board that, when terminated on January 19, 2016, the Employer had regard to the Grievor's previous short service, his discipline history, including the disciplinary incident in September, 2015 that had yet to be addressed, and the unsuccessful attempts by Mr. Baker at coaching. The Employer points to the *William Scott, supra* factors as they apply to this case, particularly that the Grievor was a short service employee of five years, that his work history includes a suspension and difficult relationships with Management from 2014 onwards, that the Grievor filed an unsubstantiated bullying and harassment grievance, that the Grievor sent an inflammatory email to Mr. Baker respecting the *Criminal Code*, that the Grievor called Mr. Brouwer to complain about Mr. Baker, and, finally, the sheer number of grievances filed between November, 2014 and April 2015, which according to Teck HVC witnesses, were significantly greater than the usual grievance activity.

The Employer argues that the Grievor has not been forthright and did not apologize for his behaviour until the arbitration itself. It is submitted that I ought to find that the Grievor's intent was to embarrass and humiliate Mr. Pitre specifically on November 6th and B-Crew supervisors generally: *Re Highland Valley Copper and United Steelworkers of America, Local 7619, supra*.

Ultimately the Employer submits that the Grievor, by his own conduct caused his termination. As such, the Employer argues that the employment relationship with Teck HVC is irreparable, and that the grievance ought to be dismissed. Alternatively, the Employer submits that if I uphold the grievance, this is a case where damages ought to be awarded in lieu of reinstatement.

THE UNION'S ARGUMENTS ON THE MERITS

The Union disputes that the Employer has proved just cause for termination of the Grievor with, “sufficiently clear, convincing, and cogent evidence to satisfy the balance of probabilities test,” per Rothstein, J. in *F.H. and McDougall*, 2008 SCC 53, [2012] 3 S.C.R. 41, at para. 46. They remind me that I ought to come to my conclusion respecting the requirements of contemporary labour relations, which, “requires that an arbitrator assess the conduct of the grievor with a view to making a determination whether or not, in all of the circumstances ... the employment relationship is restorable,” as Arbitrator Ready puts it at para. 35 of *British Columbia Transit v. Independent Canadian Transit Union, Local 1*, [1993] B.C.C.A.A. No. 37.

To support its argument, the Union relies on the following cases: *British Columbia Transit v. Independent Canadian Transit Union, Local 1*, *supra*; *Canada Post Corp. v. Canadian Union of Postal Workers (Condon Grievance, CUPW 776-07-00079 Arb. Ponak)*, [2013] C.L.A.D. No. 316; *Communications, Energy and Paperwork's Union of Canada and Bell Canada (Hofstede Grievance)*, [1996] C.L.A.D. No. 914; *Convergys Customer Management Canada Inc. (Re)*, [2003] B.C.L.R.B.D. No. 62, 90 C.L.R.B.R. (2d) 238; *Convergys Customer Management Canada Inc. (Re)*, [2003] B.C.L.R.B.D. No. 111, 90 C.L.R.B.R. (2d) 287; *Dore v Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Excell Agent Services Canada Co. (Re)*, [2003] B.C.L.R.B.D. No. 171, 96 C.L.R.B.R. (2d) 161; *F.H. and McDougall*, *supra*; *Firestone Steel Products of Canada v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America Local 27 (Lawrence Grievance)*, [1975] O.L.A.A. No. 2, 8 L.A.C. (2d) 164; *Labour Relations Code*, RSBC 1996, c 244, ss 1, 2, 4, 6, and 8; *Overwaitea Food Group, a Division of Great Pacific Industries Inc. (Re)*, [2006] B.C.L.R.B.D. No. 193; *Pacific Press Ltd. and Graphic Communications International Union, Local 25*, [1996] B.C.C.A.A. No. 527, 59 L.A.C. (4th) 330; *Re Burns Meats Ltd. and Canadian Food & Allied Workers, Local P139*, [1980] O.L.A.A. No. 141,

26 L.A.C. (2d) 379; *RMH Teleservices International Inc. (Re)*, [2005] B.C.L.R.B.D. No. 188, 114 C.L.R.B.R. (2d) 128; *RWDSU Local 558 v. Pepsi-Cola*, 2002 SCC 8; *Taylor-Baptiste v. Ontario Public Service Employees Union*, [2015] S.C.C.A No. 412, [2015] C.S.C.R. No. 412; *Taylor-Baptiste et al. v. Ontario Public Service Employees Union et al.*, 2015 ONCA 495, [126 O.R. (3d) 481; *Teck Coal Ltd and USW Local 7884 (Halldorson Phase II)*, Unreported, May 25, 2015 (McPhillips); *Trevor J. Lowe Holdings Ltd. (Re)*, (BCLRB No. B212/2005 - Original Decision); *Trevor J. Lowe Holdings Ltd. (Re)*, [2006] B.C.L.R.B.D. No. 60, 122 C.L.R.B.R. (2d) 155; *Westar Mining Ltd. v. United Mine Workers of America, Local 7292*, Unreported, December 4, 1985 (Hope); *Westfair Foods Ltd. (Re)*, [2006] B.C.L.R.B.D. No. 246; and *Yellowed Road & Bridge (Ft. George) Ltd. v. British Columbia Government and Service Employees' Union (Gilchrist Grievance)*, [2015] B.C.C.A.A.A. No. 42.

The Union submits, principally, that the central events that the Employer relies on to support termination all relate to the Grievor's activities as a Shop Steward. It is argued that context is important — when a shop steward deals with a grievance and raises issues, they are, “always on the border of insult.”

The Union also submits that the Employer's interpretation of the *Sun-Rype, supra* test is too restrictive, and ultimately contend that a range of approaches exist in the case law to establish whether an employee is acting as a union official. The Union contends, for example, that the test, offered in *Canada Post, supra*, is helpful, but not determinative, and that although there are a variety of tests in the case law which decipher when an employee is acting in their capacity of union official, the Union concludes that the line between shop steward and regular employee is often drawn at conduct which is either objectively intimidating, or malicious. The Union argues that this conclusion is buttressed with analysis of both the *British Columbia Labour Relations Code* (the “Code”) and the *Canadian Charter of Rights and Freedoms* (the “Charter”).

The Union cites cases such as *Burns Meats, supra*, *Canada Post, supra*, *Bell, supra*, and *Yellowhead, supra* to point the Board towards the conclusion that in determining whether an employee is acting as a shop steward, there exist different tests in each of these cases which all thrust at the idea that a union official will be acting outside of the scope of their duties if their conduct was either objectively intimidating or malicious. The test from *Canada Post, supra*, was highlighted by the Union and described as helpful, but not definitive. The Union also asserts that arbitrators should also apply both the *Code* and *Charter* values of freedom of expression and association to its analysis of when an employee is acting as employee versus shop steward.

The Union argues that “malice” should be defined as was in *Burns Meats, supra*. In that case, it was found that the union official was reckless or knew that what he was advocating was false. Applying this definition to the grievance at hand, the Union submits that, although Mr. Budarick’s statements may have been false respecting the alleged Wenco message, they were said in his capacity as shop steward and were motivated by a belief that the statements were true after a discussion that occurred in his car pool. As such, the Union contends, there is no just cause for discipline in the case before me. First, because the Grievor was acting in his capacity as Shop Steward respecting a workplace issue and second, because the statements made to Mr. Pitre were not made with malice.

The Union then stresses that other evidence fails to prove the Grievor was acting with malice in his dealings with Teck HVC. The Union submits that the Grievor was candid and credible during his testimony. Specifically, the Union argues that there is no evidence that he attempted to “bury the Employer in paperwork,” and the Union disputes the malice to which the Employer attempts to attribute his bullying and harassment grievance. The Union contends that this grievance must be viewed in the context of the fact that the Grievor felt as if he was disciplined

unfairly, given other employees who committed the same infraction were treated differently than him.

The Union also strongly disputes that it took Mr. Baker hours per day to deal with the 12 occupational health and safety grievances, especially given it only took two meetings to resolve all twelve of them, and the Union stresses that there is no limit, under the Collective Agreement or the *Code*, to how many grievances can be filed by a Union. The Union contends that these facts must be considered in assessing the Employer's claim that the Grievor was acting maliciously.

The Union further disputes that act of filing of the 12 health and safety grievances, in addition to the email sent to Mr. Baker and the phone calls to Mr. Brouwer, imply any malice. The 12 grievances were not malicious, contends the Union, because they were all filed with a view to the fact that the Grievor, the Chief Shop Steward, was concerned that the Employer was not investigating near misses that had been reported in the past. The Union points to the fact that no concrete evidence of investigations to these grievances could be established. The Union asserts that the email to Mr. Baker was not threatening, but was sent on the heels of a "near miss" at the worksite. The Union also argues that the phone calls to Mr. Brouwer were not inappropriate because of his open-door policy.

Regarding "being out of the work area" on September 22nd, the USW Local 7691 submits that the Grievor was upset about the meetings he was being forced to sit and that I should accept his testimony that his decision to step back from that meeting was spur of the moment. Further, the Union says there was no evidence the Grievor intended to impede production or waste time. The Union also submits that the error ultimately boils down to the Grievor walking through a different building than usual to get to a meeting.

Regarding the November 7th incident, it is the Union's position that the Grievor did not threaten to inspire fear or intimidate, and that he only threatened to file a human rights complaint. The Union argues that that the, "you better," comment was not threatening but an assertive request for Mr. Pitre to follow up. That said, the Union agrees that the Grievor ought to have spoken to Mr. Williamson first, and spoken to Mr. Pitre in private. Regarding the fact that the message may have never existed, the Union's position was that the Grievor was nonetheless acting in the course of his duties because what one must look to in ascertaining this is the Grievor's purpose, and his purpose in this regard was to raise a workplace issue.

It is argued that his purpose was not to humiliate Mr. Pitre. In the Union's view, whether the Wenco message exists is beside the point: the Grievor was simply, pursuing a workplace issue. Regarding the statement that the Employer repeatedly asked the Grievor to write respecting the Wenco message, the Union argues that the Grievor provided the rationale for his hesitation to management and that he eventually wrote it, even though he had not spoken to Mr. Williamson.

Regarding the Grievor directing Mr. Yaciw at Scales Parking, the Union submits that the Grievor messaging Mr. Yaciw to come with him to that meeting with Mr. Nolan was not possible as there is no cell service in the valley in which the Grievor was working. The Union also stresses that the Grievor was confused by the Employer's insistence that they have meetings. The Union submits that the Grievor testified that he did not know the reasons behind him being called to the Scales Parking meeting. Therefore the Union argues that the Grievor asking Mr. Yaciw to stay with him at Scales Parking as legitimate as he was concerned that he felt that he might be in jeopardy. The Union compares this interaction to the facts of the *Firestone, supra* case.

The Union further argues that the cases relied upon by the Employer to uphold the termination can be distinguished for a variety of reasons. The Union seeks to distinguish the Grievor's case from cases cited by the Employer and argues that the cases relied upon by the Employer where an actual threat was made: see, for example *Code Electric Products Ltd. v. I.B.E.W., Local 258, supra* and *Versacold, supra*. The Union further distinguishes *Cooper Industries (Electrical), supra* on the grounds that that case involved a knowingly false claim against a supervisor, which Mr. Budarick did not make, on the evidence.

The Union argues that all of the evidence going to motives cited by the Employer contributing to the Grievor's termination, (i.e. malice, a desire to embarrass supervision, acting in bad faith,) is, "heavy on conjecture and light on facts". The Union also points out that one of factors that the Employer argues supports Mr. Budaricks' termination — the 12 health and safety grievances — is the Employer trying to fetter the grievance process, which engages fundamental labour law principles.

Ultimately, the Union contends that the Grievor, although not the "picture of diplomacy," was entitled, owing to his position in the union, to pursue Collective Agreement grievances with vigour, and is allowed to be incorrect when he does so. Further, it was not objectionable conduct for the Grievor to advise Mr. Baker that he was taking notes to hold management accountable as he was acting as Shop Steward. The Union disputes that this conversation amounts to bad faith. In the Union's submission, a Shop Steward is allowed to express himself regarding workplace issue and, at the end of the day, the Union argues that Mr. Budarick did not cross a line between acceptable and unacceptable behaviour.

As such, the Union requests that the grievance be allowed and the Grievor be made whole. In response to the Employer's alternative argument, the Union strongly disputes that awarding

damages in lieu of reinstatement would be appropriate in this case. The Union asserts that the Grievor is capable of returning to the workplace as a productive employee, especially in light of the fact that there have been many changes to staffing since his termination in January 2016.

DECISION ON THE MERITS

Mr. Budarick was terminated for a series of infractions that spanned from September 22, 2015 – November 9, 2015. After an Investigative Interview meeting, wherein the Employer determined that the Grievor was neither forthright nor remorseful, it decided to terminate his employment. For convenience, it will be recalled that this letter reads:

This letter will serve as a formal record of your termination effective 3:30pm, Tuesday, January 19, 2016.

You are responsible for this dismissal as a result of your conduct. You willfully failed to follow the direction of Supervision on multiple occasions. In addition, you have directed the workforce without the authority to do so and have deliberately undermined Supervisory authority. Finally, you have demonstrated consistent insolence and dishonesty and have failed to accept accountability for your actions.

Due to the nature of these infractions, the Company considers these to be the culminating incidents.

By your own conduct, you have severed the employment relationship and are responsible for this termination.

At the hearing, Ms. Chala detailed the Employer's justification for terminating the Grievor. Specifically, the Employer outlined that the Grievor was terminated for allegedly:

1. Willfully failing to follow direction of supervisors on two occasions:
 - (i) On September 22, 2015 when he was out of his work area; and,
 - (ii) In declining to provide a statement on November 7 & 8, 2015 despite requests from Management.

2. Directing the work force by demanding Mr. Yaciw to stay with him at Scales Parking on November 7, 2015 after Mr. Nolan told Mr. Yaciw that the Grievor was not in need of Union representation.
3. Being insolent and dishonest on three occasions:
 - (i) In addressing Mr. Pitre on November 7, 2015 during the conversation respecting the Wenco text message;
 - (ii) In asserting that that Mr. Yaciw was at the Scales Parking area on November 7, 2015 by coincidence and not at the behest of the Grievor; and,
 - (iii) In describing his own tone as “sarcastic,” or, “joking,” in the Investigative Interview, referring to his conversation with Mr. Pitre on November 7, 2015.

The evidence contains inconsistencies, owing to differing accounts from witnesses who have testified before this Arbitration Board. I am therefore guided by the comments of our B.C. Court of Appeal in *Faryna v. Chorny*, *supra*, which states:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may quite honestly be mistaken. For a trial Judge to say ‘I believe him because I judge him to be telling the truth’, is to come to a conclusion on consideration of only half the problem. In truth it may easily be self- direction of a dangerous kind.” (para 11).

Therefore, to structure this decision, I will address the decision to terminate referencing the allegations as detailed by Ms. Chala in turn, making determinations as to witness credibility as it becomes necessary.

As a starting point to establishing whether the Grievor was acting as a Shop Steward, I find the remarks of Arbitrator Ponak in *Canada Post Corp.*, *supra* from paras. 14 to 18 an instructive summary of the law in this area. At paras. 14, 15 and 18, Arbitrator Ponak writes:

14 There is little question that the Grievor's comment, had they been made by another employee who was not engaged in union representation duties, would have attracted discipline. The comment was vulgar and insulting. A comment of this nature directed at a member of management, unless said in response to a serious provocation, normally justifies discipline (see, *Canada Post [Torpy]* and *Northwest Waste*).

15 The arbitral authorities make it clear, however, that comments and behaviour that might otherwise result in discipline are treated differently when made by a union representative in the course of his or her union duties, even when the union representative is also an employee. In *Vernon School Board*, a 2002 decision, the grievor levelled an untruthful accusation against his manager in a physically threatening way in the presence of others. He also attempted to suborn a potential witness. Arbitrator Taylor summarized the prevailing arbitral approach as follows (paragraphs 21 - 24):

21 The extent to which an employer is entitled to use its powers of discipline with respect to union officials has been, for many years, the subject of vigorous arbitral debate. The standard of conduct which an employer is entitled to expect from union officials engaged in the conduct of legitimate union business is different from that expected of employees generally. This principle is expressed in *Re Firestone Steel Products of Canada and United Automobile Workers, Local 27* (1975) 8 L.A.C. (2d) 164 (Brandt):

"For the purposes of assessing whether or not conduct is insubordinate the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committee men engaged in the legitimate discharge of their duties. For, as Mr. Nickerson for the union put it, a committeeman is, while attempting to resolve grievances between employees and company personnel, always functioning on the border line of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the

discharge of that role he is to be exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially compromised. This is not to say that a committeeman has a carte blanche to ignore at will management instructions and to instruct others not to carry them out. His immunity, if it may be called that, is limited to acts or omissions committed in the discharge of his functions and to acts or omissions which may reasonably be regarded as a legitimate exercise of that function. To put it succinctly, a committeeman is not entitled to punch a foreman in the nose as one of his means of attempting to bring about a settlement of a grievance." (pp.167-168)

22 That principle has been adopted and applied in numerous cases. Clearly, union officials stand in a different position than other employees when exercising their legitimate union functions.

23 The necessity and common sense of that is readily apparent. Unions and employers meet each other, in theory at least, as equals. But, as the board put it in *Re Workers' Compensation Board and Workers' Compensation Board Employees Union* (1990) 15 L.A.C. (4th) 332 (Ladner):

"The theory becomes murky when the union official is also an employee." (p.335)

24 In *Re Alcan Smelters and Chemicals Ltd. and Canadian Auto Workers, Local 2301* (1996) 60 L.A.C. (4th) 56, Arbitrator Hope said:

"The issue raised in this dispute is fundamental to the work between an employer and a union. They are the contracting parties in a collective agreement and they meet as equals in the negotiation and administration of its terms. Both parties act out their relationship through their duly appointed representatives. However, the protocol that governs those relationships is complicated with respect to meetings that occur on an employer's premises and where the union is represented by shop stewards who are also employees and who are on shift at the material time." (p.69)

...

18 Based on these authorities (and the cases cited therein), the tests to be applied in determining whether discipline imposed on a union official is justified may be summarized as follows:

1. Was the official acting in the capacity of a union representative at the time of the impugned conduct?
2. Could the conduct be properly characterized as malicious in that statements made were knowingly or recklessly false?
3. Was the impugned conduct intimidating or physically threatening?
4. Did the conduct go too far and exceed what might reasonably be considered as a legitimate exercise of a union function?

I accept that there is not one test which is applied to determine whether discipline imposed on a union representative attracts immunity or is justified. I will consider the facts and arguments before me with the above passages in mind and apply the test as summarized above in para. 18 of *Canada Post Corp., supra*.

1. Willfully Failing to Follow Direction

(i) September 22, 2015

I do not find that the Grievor willfully failed to follow direction on September 22, 2015. I find that the Grievor received his call to attend the meeting in his capacity as Shop Steward, and intended to attend when he left his production area near the end of his shift. He was requested to sit the meeting, and for all intents and purposes did attend that meeting before it commenced, if only to explain to Management that he thought it best that he “stand down”. In my opinion, the Employer clearly established that the Grievor was out of his work area for a short period of time (the “detour”) where he was otherwise expected to be waiting for the disciplinary meeting to commence. I cannot conclude that his actions constituted a willful disregard of management. And, I have no reason to doubt the Grievor’s testimony that he had intended to attend the meeting and that he impulsively decided to “stand down” after speaking with Mr. Dawes as he was frustrated with aspects of the disciplinary interview process.

Although I am mindful that the Employer has legitimate safety concerns regarding employee movements in the mine and I accept that the Grievor ought to have advised someone that he was taking a “detour” to the meeting location, I do not find that he willfully failed to follow the direction of management. In fact, had the Employer considered this “detour” to be a blatant disregard for supervision, I would expect the disciplinary response to be swift after the October 7, 2015 disciplinary meeting.

(ii) Declining to Provide a Statement

I find that the Grievor raised a workplace concern with a Supervisor on November 7, 2015. I further find that the concern was taken seriously by Mr. Pitre as the Grievor clearly threatened to file a human rights complaint because of this perceived mistreatment of a bargaining unit member. After verbally receiving the Grievor’s accusation and call to action, Mr. Pitre justifiably commenced an investigation. A logical starting point to that investigation would be to follow up with the Grievor, who raised the issue.

As such, I find that Mr. Nolan was seeking a statement from the Grievor respecting the allegation relating to the Wenco text message and his testimony detailing that his purpose was non-disciplinary to be credible. I find that Mr. Nolan testified to the fact that his purpose in raising the issue with the Grievor was, as he put it, to obtain the “who, why, what, where”. As previously noted, obtaining that statement from the Grievor became difficult and, ultimately, numerous individuals were involved at the mine site before Mr. Budarick jotted down the statement as to his understanding of the Wenco message to Mr. Williamson.

I find that management’s frustrations with the Grievor were understandable in the wake of receiving the Grievor’s accusations. However, I cannot determine that the Grievor willfully or

maliciously failed to follow direction when he was asked to provide a statement on November 7 or 8, 2015. I accept that the testimony of the Grievor that his rationale behind his hesitation was that he had yet to speak to Mr. Williamson and that he had tried to contact him at the end of shift on November 7, 2015. I find that waiting to speak to Mr. Williamson to substantiate or gather further details respecting the allegation raised does not translate into willful disobedience.

While I do not dispute that management found this exercise to be perplexing and frustrating given that it was the Grievor who raised the issue and it was the Grievor who responded to Mr. Pitre's suggestion that he could pull the records with "you better". The situation became inexplicably heated when, in my opinion, there would have been no prejudice by the Employer by giving the Grievor a little more time to have a discussion with Mr. Williamson. It is with respect that I observe that obtaining a statement from the Grievor took on a life of its own over a period of two days and I accept Mr. Nolan's testimony when he detailed that it was his perception that the Grievor eventually became paranoid.

2. Directing the Workforce at Scales Parking

After hearing the conflicting testimony of Mr. Nolan and Mr. Budarick on the details of the first meeting on November 7, 2015, I find that Mr. Nolan asked the Grievor to meet him at Scales Parking and that Mr. Budarick then contacted Mr. Yaciw. I also conclude, based on the evidence provided, that that when Mr. Nolan arrived, he was surprised to see Mr. Yaciw in attendance and advised Mr. Yaciw and the Grievor that the meeting was non-disciplinary. It is undisputed that Mr. Nolan then directed Mr. Yaciw to return to his truck. After Mr. Nolan made the request of Mr. Yaciw to return to his vehicle, Mr. Budarick either asked or directed Mr. Yaciw to stay. The Grievor testified that he asked him to remain at Scales Parking because he was unsure of the content of the meeting. Mr. Nolan, on the other hand, testified that the Grievor told Mr. Yaciw to stay.

There is inconsistent testimony as to whether Mr. Budarick asked or directed Mr. Yaciw to remain at the Scale Parking area and I find that both witnesses were sincerely recounting what they remembered from that day. Clearly, one recollection is incorrect. Either way, on the evidence, I cannot find the Grievor's request of or direction to Mr. Yaciw, a union representative, to stay in these circumstances to constitute insubordination or directing the workforce. What is relevant, in my opinion, was Mr. Yaciw's autonomous decision to ignore the supervisor's instructions to return to his truck. This autonomous choice to defy Mr. Nolan's order was not Mr. Budarick's decision.

3. Insolence and Dishonesty

(i) The November 7, 2015 Discussion with Mr. Pitre

First, I do not find that the Grievor's actions towards Mr. Pitre on November 7, 2015 were dishonest. I do find the following: he acted on incorrect information; he acted before confirming the allegations or researching relevant policies and/or laws; and, he acted in a public venue. But, I do not find that he acted dishonestly in this interaction. In fact, I conclude that he was acting on the honest belief that such a text message was sent by Mr. Pitre to Mr. Williamson and, it was for this reason, he zealously approached the alleged sender of the text message.

I accept the testimony of Messers. Pitre, Dickinson, and Lukinshuk that Mr. Budarick was loud and antagonistic. However, I am satisfied that he was acting with *bona fide* concern for the well-being of Mr. Williamson, a union member, in his capacity as a Shop Steward in this public meeting. I find the following remarks from Arbitrators Dissanayake, Filion, and Switzman in the *Hofstede Grievance, supra* at para. 29 instructive:

Regardless of the individual's degree of tact and diplomacy, it comes with the territory [of being a union official] that on occasion [the official] will be bordering the line between vigourously representing his fellow workers and engaging in insubordination towards members of management. Given this difficult role undertaken, the right of a union official to properly carry out his duties must be strictly protected except in the most extreme cases. Mere militancy or over-zealousness should not result in penalty. A union official must be able to press his point of view with as much vigour and emotion as he wishes, even though it may turnout in the end that his point of view was wrong.

I note that had the Grievor elected to address this workplace issue, which he believed to be legitimate and true, in a different manner, it is likely that the outcome of the matter would have been very different. Although I find that the Grievor did loudly threaten Mr. Pitre with a human rights complaint, I find that his threat was legal in nature and that it was made in his capacity of a union official.

(ii) Scales Parking

I have previously stated that, after considering the evidence, I have come to the conclusion that that the Grievor asked Mr. Yaciw to come to the Scales Parking area once he had received a request for a meeting with Mr. Nolan on November 7, 2015. I cannot find that the Grievor was credible when he testified regarding this particular issue. I find that the preponderance of probabilities rests with the consistent testimony of Mr. Nolan, coupled with his notes of his investigation of Mr. Yaciw. Mr. Nolan's notes indicate that Mr. Yaciw's explained that he was at the Scales Parking in his union capacity aiding an employee who had asked for representation.

Further, I find the Grievor's explanation that he could not contact Mr. Yaciw because he did not have cell service improbable given that Mr. Nolan testified that there were pockets at the mine where cell phones could transmit. It simply defies logic that Mr. Yaciw would be serendipitously using the washroom at Scales Parking, which was nowhere near where Mr. Yaciw

was supposed to be working, at the exact time that Mr. Nolan requested a meeting with the Grievor. As such, I find that the Grievor was not forthright to management or at the hearing with respect to Mr. Yaciw's involvement that day.

(iii) The Grievor's Tone In Addressing Mr. Pitre

Because I agree with the Union that the Grievor was pursuing a workplace concern on behalf of a union member, I find that the conversation must be considered in this light. I accept the testimonies of Messrs. Pitre, Mr. Dickinson and Mr. Lukinchuk that the Grievor approached Mr. Pitre to discuss a serious issue and that in doing so he both accusatory and loud. Although I can imagine that the nature of the discussion could warrant sarcasm and perhaps the Grievor believed he was initially sarcastic, I cannot conclude that the majority of the conversation was delivered in a sarcastic or joking manner. I cannot accept, on the preponderance of evidence, that the tone and tenor of the overall conversation was joking or sarcastic.

As I have previously stated, the Grievor is granted some latitude in dealing with workplace issues given his position of Shop Steward and the fact that his tenor and tone were loud and serious and he was using what he (incorrectly) believed to be legal avenues to prompt action. However, the Grievor, whether union representative or not, is expected to answer questions with candour and honesty during disciplinary meetings. I find that Mr. Budarick's response to the question posed before him in the Investigative Interview meeting respecting his tone that day to be lacking in candour. Based on all the evidence before me, I cannot conclude that this issue was addressed by the Grievor in a "joking" manner at any point. I accept that he may have felt he was sarcastic with Mr. Pitre, but that description certainly does not accord with the evidence of others present that day who witnessed the conversation.

The issue before is me then is whether, after a consideration of the above determinations, the termination of Mr. Budarick's employment was excessive. It is trite law that the onus rests with the Employer to prove that termination was the appropriate response. The questions to be considered by an arbitrator in a discipline or discharge case are found in *William Scott and Co Ltd and Canadian Food & Allied Workers Union, Local O-162, supra*. Arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss/discipline the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge/discipline excessive, what alternative measure should be substituted as just and equitable?

Starting with the first question, I find that there was just and reasonable cause for some form of discipline. Specifically, I found that the Grievor was not honest with the Employer in the meeting where he was questioned about Mr. Yaciw's attendance at Scales Parking. I further find that he was less than forthright in the Investigative Interview meeting on January 19, 2016 respecting his tone with Mr. Pitre on November 7, 2015.

In regards to the second question, I find that the Employer's decision to terminate the Grievor's employment was excessive given the evidence. In coming to this decision, I agree with the Union that for many of the issues in this case, the Grievor was performing his duties as a Shop Steward. Although he did loudly confront and threaten a human rights complaint in a discussion with Mr. Pitre in a very public forum, I conclude that based on the circumstances and the test outlined at para. 18 of *Canada Post, supra*, that he did so in pursuing a concern on behalf of a union member. Granted, it would have been much more professional and courteous to address Mr. Pitre in private and only after ascertaining the facts before making such a threat.

However, I find that the Grievor genuinely believed that a Wenco text message was sent and that he was affronted that Mr. Pitre would question someone's bathroom breaks. With this genuine belief, he misguidedly approached Mr. Pitre in his capacity as Shop Steward. Further, in coming to the decision that termination was excessive, I find that the Employer did not meet its onus in proving the various infractions described as the culminating incident.

Given that I have found that the termination of Mr. Budarick's employment as excessive in this case, I must now consider the appropriate penalty. In assessing the appropriateness of the penalty, the arbitrator considers many factors as detailed in *William Scott, supra*:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration.

The Grievor has been employed for approximately five years with the Employer and had one previous suspension on record at the time of the termination. In speaking to the incident that occurred on September 22nd, Ms. Chala described that termination was the "next rung on the

ladder” for Mr. Budarick in accordance with the Teck HVC Progressive Discipline System Policy (the “Progressive Discipline Policy”).

The Progressive Discipline Policy allows Teck HVC to repeat a step, when mitigating circumstances permit. The Progressive Discipline Policy also permits the Employer to bypass steps in the progressive discipline process. That Progressive Discipline Policy accords with the remarks of Arbitrators Tettensor, Laird, and Faires in *Calgary (City) v. A.T.U., Local 583, supra*, at para. 82:

The purpose of progressive ... discipline is to bring to the attention of an employee matter that the employer finds unacceptable, in a way that will cause the employee to change their behaviour. A progressive discipline policy sets out escalating degrees of discipline, not because the employer will rigidly apply each step in the process without regard to the circumstances, but to set out the various levels of discipline that may be applied ... There is no rigid set of steps, nor is there an inflexible rule that all steps must be followed before terminating the employee.

I find that the Employer failed to prove all aspects of the alleged events that constituted the culminating incident, and therefore, the disciplinary response must accordingly be reduced. The Employer asks me to consider the acrimonious history with the Grievor in assessing the penalty. Briefly, it is clear that the Grievor was frustrating management in the way that he chose to raise workplace issues and his conduct, although not malicious, was clearly ineffective. That said, I cannot find that sending the email to Mr. Baker, contacting a Manager with an open-door policy, or filing the grievances that were before me were malicious.

The grievances filed were out of date and without following the normal processes and channels which are established to efficiently and expertly deal with occupational health and safety matters. However, I cannot conclude based on the evidence before me that Mr. Budarick was acting with malice. Rather, again, in filing those grievances, I find that he was acting as Shop

Steward, raising concerns that were frustrating him at Teck HVC. Finally, while the Employer considered that the bullying and harassment grievance filed by the Grievor was malicious, no disciplinary action was pursued at the conclusion of that investigation, pursuant to Teck HVC Policy. To assert that it was a malicious complaint at the hearing after the fact does not accord the Grievor proper process.

To be clear, I do not consider the means or methods that the Grievor chose to raise workplace issues to be helpful or respectful (ex: sending Mr. Baker an email regarding Bill C-54 without letting him know of the purpose of the email in advance), but this evidence does not change that fact that the elements on the culminating incident were not established based on all of the evidence before me.

Further, the Employer failed to consider the Grievor's role as Shop Steward in assessing the appropriate penalty. These are significant mitigating circumstances that I find warranted consideration and substitution of a lesser penalty than termination. I must add at this point that the Grievor recalled that he had apologized during the Investigative Interview meeting for his behaviour vis a vis Mr. Pitre. The Employer witnesses testified that no such apology was tendered. While I note that Mr. Budarick apologized while testifying, I cannot find that he apologized for his actions during the Investigative Interview meeting.

Therefore, I am left with considering alternative measures. As previously stated, I conclude that the Employer has not met the onus of establishing just cause for termination in this case. I pause here because the Employer argued that in the event that just cause for termination is not proven, damages ought to be awarded in this case because the relationship cannot be

repaired. I respectfully do not agree that this case warrants the extraordinary remedy of damages in lieu of reinstatement. The Grievor was polite and professional during the hearing and he testified that he had an appreciation of his job and an eagerness to return to the workplace.

I order that the Grievor's termination be substituted to a repetition of Step 3 of Teck HVC's Progressive Discipline Policy. Therefore, his termination shall be replaced with a letter of suspension of one shift cycle. With the letter of suspension for the misconduct, the Grievor should return to the workplace with the appreciation of his job and eagerness that he testified to at the Arbitration hearing. Put plainly, the Grievor must understand that his employment at Teck HVC is at an important crossroads and that he must take his return to the workplace very seriously.

Dated: September 7, 2016



Corinn M. Bell, Arbitrator