

Pacific Northern Gas Ltd. v. International Brotherhood of Electrical Workers Local 213 (Guy Dyer Termination Grievance)

British Columbia Collective Agreement Arbitration Awards

British Columbia

Collective Agreement Arbitration

Panel: Gabriel Somjen, KC (Arbitrator)

Heard: October 17-20, 24 and November 26, 2023.

Award: December 7, 2023.

[2023] B.C.C.A.A. No. 149

IN THE MATTER OF an arbitration Pursuant to the Labour Relations Code, R.S.B.C. 1996, C. 244 Between Pacific Northern Gas Ltd. (the "Employer" or "PNG"), and International Brotherhood of Electrical Workers, Local 213 (the "Union")

(94 paras.)

Appearances

Ryan Copeland and Jaime H. Hoopes, for the Employer.

Brandon Quinn, for the Union.

Guy Dyer Termination Grievance

1 This grievance arises from the termination of Guy Dyer ("Dyer" or the "Grievor") because of an altercation between him and Ruslan Roman ("Roman") on November 28, 2022.

2 The incident and the investigations subsequent to it led to the termination of the Grievor and a day suspension for Roman.

I

3 The Employer has facilities for gas processing and distribution in Northern BC. It has a small office in Tumbler Ridge and a gas plant about 40 kilometers from Tumbler Ridge. This plant processes "sour gas" and converts it to "sweet gas" for distribution to about 1,200 customers in the area.

4 Dyer is 53 years old. He worked for PNG for 5 years, first as a gas plant operator and then as senior gas plant operator. Roman had been working only a few months at the plant under the supervision of Dyer and was still on probation. They worked together with little direct supervision and their supervisor, Dwain McRae ("McRae"), regularly worked in Dawson Creek, over an hour away. For the first month or two the Grievor and Roman got along but that changed.

5 Several incidents and problems with Roman's performance led to a tense and mistrustful relationship. On November 28, these 2 employees had a physical altercation which I will describe in more detail. It was recorded on a CCTV camera.

6 The Employer called as witnesses Diana McDaniel ("McDaniel"), an investigator retained to look into the incident, Roman and Dominic Feenan ("Feenan"), Director of Operations and Customer Service. Feenan is responsible for operations of PNG in Tumbler Ridge including supervision of Scott Spence ("Spence") and McRae, managers of the operation responsible for supervising Dyer and Roman. Neither Spence nor McRae were called as witnesses.

7 The Union called several witnesses, including the Grievor.

8 I heard argument about what use I should make of the evidence of McDaniel and her investigation report. Much of the report is hearsay and makes conclusions about the witnesses' credibility and factors the Employer might consider relevant in its deliberations.

9 I gave some general directions regarding her evidence before I heard any witnesses. The Union did not object to her evidence but sought to limit its use.

10 McDaniel interviewed Dyer, Roman, Feenan, McRae and Spence. The first three testified in the hearing; therefore, I do not rely on her interviews of them because the *viva voce* evidence in the hearing is preferable to the hearsay evidence in her report, except for contradictions in her interviews with evidence I heard.

11 I do not rely on her conclusions with respect to credibility or factors to be considered in discipline because those are issues that I must decide. I consider what the Employer relied on in reaching its decision to terminate the Grievor, including McDaniel's report.

12 The situation of McRae and Spence is different. They were not called as witnesses but gave statements to the investigator. These are clearly hearsay statements in this hearing and, to the extent they relate to matters central to this case, would be given little or no weight if not corroborated, as their direct testimony would be preferred. However, some of their statements to the investigator fall within the exception to the rules regarding hearsay evidence because they are admissions against interest. Both parties agreed that I could consider this evidence and I have considered these statements.

II

13 On Monday, November 28, 2022 Roman arrived at the Tumbler Ridge office before Dyer, at around 7:00am. He cleaned snow off his company truck and put some personal items into the truck.

14 Roman had complained to McRae that some tools had been taken from him. McRae had told Dyer of this complaint. On the Friday before, Dyer decided to park the truck that Roman would use on Monday in front of the tv camera at the office. This was for the camera to record any suspicious activity. Dyer was concerned that Roman might accuse him of taking the missing tools. Dyer shared this plan with McRae who approved it. Dyer's evidence on this point was not contradicted.

15 Dyer arrived a little later than Roman on Monday. He checked in the truck and saw the tools were still there. He went into the office. He could see Roman on the tv monitor. He became suspicious of Roman's actions and went to Roman's truck to look inside.

16 Roman blocked Dyer's attempt to inspect the truck. He tried to shut the rear door but Dyer forced the door open. Roman pointed his finger at Dyer's chest saying he had no right to look at his personal things. He took a step toward Dyer. Dyer then pulled Roman out of the way and tried to push past him. They engaged in a scuffle with pushing and pulling, but no blows. This lasted about 2 minutes; then Roman got into his truck and drove away to report the incident to the RCMP. At one point in the altercation Roman bit Dyer's hand, drawing blood.

17 This was recorded on CCTV, which I saw in the hearing. There was no audio recording.

18 Management considered this a serious incident and retained McDaniel to investigate. PNG also did their own investigation.

19 Roman received a one-day suspension. Dyer was terminated on January 25, 2023. The reasons for termination are set out in a letter reproduced below. Dyer was terminated, not just for his role in the November 28 incident, but also for his subsequent conduct and his responses during the investigations.

We have completed our investigation into the altercation that occurred in Tumbler Ridge on Monday, November 28, 2022. A summary of our conclusions is set out below:

1. In reaching our conclusions, we have reviewed video footage from the incident, the report of the external investigator, and we have interviewed you and Ruslan Roman,
2. As set out below, we have concluded that you instigated a violent altercation with Ruslan. This incident was entirely avoidable. We have also concluded that you have not been honest in your discussions of this event, you have not taken responsibility for your actions, and you have not apologized. It is therefore our decision to terminate your employment, for just cause.
3. The Tumbler Ridge Gas Plant has two employees on site, a Senior Gas Plant Operator (Guy Drier) and a Gas Plant Operator (Ruslan Roman). The Manager, Dwain McRae, works out of the Dawson Creek office which is an approximately 1 hour and 15-minute drive from Tumbler Ridge. Management is on site in Tumbler Ridge approximately one day per week on average,
4. On the morning of November 28, 2022, Ruslan Roman was the first to arrive at the Tumbler Ridge office at approximately 6:45 am. Ruslan parked his personal vehicle, started his work truck and entered the office to begin his workday.
5. You arrived at work at approximately 6:50 am. Upon arrival, after parking your vehicle, you approached Ruslan's work truck and opened the passenger doors and looked inside. After looking in the work vehicle, you entered the office.
6. In the office, you requested Ruslan's timesheets and there was a discussion the two of you about the work plans for the day. The work plans included Ruslan going to the plant,
7. At approximately 7:16 am, Ruslan walked out of the office and was seen on the video walking towards the work truck with two bags. He opened the driver's side front and rear doors and placed the bags in the back seat.
8. Before he had even closed the back door, and within 30 seconds of him walking to the truck, you walked to the truck and attempted to prevent Ruslan from closing the back door. You physically grabbed the passenger back door while Ruslan was trying to close it, and you pushed it wide open.
9. Ruslan objected to you forcing open the truck and stood in your way to prevent you from gaining entry. You continued to try and gain entry to the truck even though it was clear that Ruslan was not agreeable to this. Ruslan places one leg into the truck to try and get into the driver's seat but rather than simply leaving the scene, you continued to try and force your way into the truck, and you then escalated the situation by grabbing Ruslan and attempting to throw/push him aside.
10. Your actions at that time instigated the physical altercation that followed, which was an entirely avoidable altercation that could have resulted in serious injury to yourself and/or Ruslan. We understand that following the incident you required treatment in hospital for a heart condition.
11. After you tried to throw/push Ruslan aside, he resisted and you then wrestled each other heavily for almost two full minutes, before Ruslan got into the truck and drove away. We understand that you tried to call the police during and after the altercation.

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12. During the altercation, Ruslan bit your hand when you pushed your arm/hand towards his face while holding his collar. You then threw his hat and glasses onto the ground, and he was forced to grope around in the snow trying to pick up his glasses while you held onto him.
13. Based on the video footage, we have concluded that you appeared in control of the altercation and had many opportunities to de-escalate the situation. Ruslan explained to the external investigator and to PNG management that he called for help and although the video has no sound, it appears to support his statement. Further, in the video Ruslan appears at times to be exhausted, but you continued to hold onto him.
14. During the incident, the rear-view mirror on the truck was broken off.
15. During the meeting with the external investigator, several times you stated that Ruslan had instigated the altercation. You explained that you said at the outset of the incident, "we should call management" at which point Ruslan got into the truck to drive away. If that had been the case you should have let Ruslan drive away and reported the incident to management. It is accurate that Ruslan tried to get into the truck, presumably to drive away, but you prevented this by pulling him back out of the truck. You were clearly determined to find out what was in the truck and resorted to violence to do so.
16. You also explained to PNG management and to the external investigator, that after you first checked the truck and went into the office, you saw Ruslan come and go several times to the truck. You said you saw him take something from the passenger side of the truck and that he was acting suspiciously. When we asked to confirm this, you stated that you were confident this was the course of events. However, this is not what happened. After you first checked the truck and then went into the office, the only time Ruslan went to the truck was the time that you followed immediately after him. And at no time did Ruslan go to the passenger side door of the truck or take anything from the truck.
17. It is our view that there was nothing suspicious in Ruslan's actions at that time, He was moving at a regular pace, he was not looking around and he was clearly not trying to hide anything from view of the camera, which he was aware of.
18. You also told the external investigator that Ruslan had initially started "swinging" at you and pushed you away. However, when questioned about this during our interviews, you could not recall saying that and commented that if Ruslan had swung at you, the outcome would have been different. You did not elaborate on what that statement meant.
19. We note that your account of the incident shifted between the time you spoke with the external investigator and with PNG management. Your recollection was also inconsistent with the video evidence. We have concluded that your account of events is not reliable.

After reviewing the video evidence, the external investigative report and our interviews, our conclusion is that you were the aggressor and instigator of a violent incident involving a colleague on November 28, 2022. You engaged in an act of physical violence contrary to PNG's Prevention of Violence in the Workplace Policy, our Respectful Workplace Policy and our Code of Ethics. Your conduct fell significantly short of the standard of behaviour expected of PNG employees. We note that you have read and acknowledged our Prevention of Violence in the Workplace Policy, Respectful Workplace Policy along with our Code of Business Ethics during our annual policy review between December 2021 and January 2022. We also understand you completed training on our Prevention of Violence in the Workplace and Respectful Workplace policies on May 15, 2020 and Respect in the Workplace on August 22, 2022. These policies make it clear that a breach can result in termination of employment.

PNG strictly prohibits workplace violence and has a duty to take all reasonable precautions to ensure the safety of our workers. In your position as Senior Gas Plant Operator, you were in a position of trust and responsibility. Your duties and responsibilities include ensuring the safe and efficient operation of the gas plant and directing and overseeing the work performed by other PNG employees at the gas plant.

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If you genuinely had concerns regarding Ruslan's conduct on November 28, 2022, there were many options available to you short of engaging in violence. You should not have approached him in the way you did. You could have spoken to him in the office, or you could have called management. Additionally, there were opportunities for you to have backed away during the incident. You did not take steps to remove yourself from the situation or to de-escalate it.

Following the incident, you have not shown any remorse or taken accountability for your actions. While you did state that in hindsight you should have walked away, you also blamed Ruslan and PNG for your actions. You have not apologized to Ruslan.

As a result of your actions, you have irreparably broken the trust that management placed in you. Due to the nature of your position, you often work with only one other person in isolated environments. We cannot trust that you will not engage in similar behaviour again nor can we return you to working with Ruslan. Therefore, the decision has been made to dismiss you from your employment with PNG, effective immediately.

In reaching this decision we have considered your length of service and that your record is free from any recent discipline. We have also considered Ruslan's involvement in the altercation. These factors have not persuaded us to change our decision.

On Friday, January 27, 2023, you will be paid any outstanding wages for all time worked up to and including today, as well as any accrued vacation pay and other accrued entitlements (if any),

Your entitlement to the PNG benefit, pension and savings plans will cease effective immediately. You will be entitled to termination benefits from the PNG pension plan and a complete withdrawal from your PNG savings plan account. Should you wish to convert your life insurance coverage and/or spouse life coverage, you may do so with 30 days of termination, without evidence of insurability. Please contact Industrial Alliance at 1-877-422-6487.

We wish you all the best in your future endeavours.

20 The Union concedes there were grounds for discipline. Therefore, I answer the first *Wm. Scott* question in the affirmative.

21 The Union argues that discharge was excessive in the circumstances. The Employer says the Grievor's conduct warranted discharge, especially because Dyer engaged in a physical altercation which he instigated and then was dishonest about the incident.

22 There is considerable background related to the second *Wm. Scott* question.

23 In discipline cases involving workplace violence arbitrators generally consider such violence to be serious misconduct. Similarly, dishonesty during an investigation can result in significant discipline. Each case must be examined on its own facts. Often there are factors aggravating the misconduct and some mitigating it. That is the case here.

III

Factors Supporting Significant Discipline

24 The incident was serious.

25 There was a scuffle. Roman moved toward Dyer and pointed a finger at him, seeking to keep Dyer from looking into the truck. Dyer was the first to make physical contact. They pushed and pulled each other for about 2 minutes, but no blows were exchanged; eventually Roman got in the truck and drove to the RCMP station.

26 No one was seriously hurt but Roman was very traumatized by it and eventually quit PNG.

27 Charges were initially laid against Dyer by the RCMP on November 28. While Dyer was at the RCMP station on November 28 facing a criminal investigation he appeared unwell and was taken to the hospital. He had 3 blocked arteries and required a stent in one. He was charged that day and put on undertakings, including no contact with Roman. The charges were eventually stayed based on representations by Dyer's counsel, including a written apology to Roman, which he never received.

28 From the evidence and videos it is clear that Dyer was the first to initiate a struggle when he forced the truck door open while Roman was trying to close it. In cross-examination Dyer admitted he was the aggressor and violated company policies prohibiting violence.

29 The Employer also places significant emphasis on Dyer's dishonesty in the investigations as well as his refusal to take responsibility for his actions and show remorse. He was interviewed by McDaniel and later by management. In these interviews Dyer appeared to minimize his role in the altercation. He said Roman was the instigator. He said he had seen Roman go between his vehicle and the truck 2 or 3 times and this had made Dyer suspicious. These statements were not true. The Employer relied on this and the altercation to justify termination.

30 The Employer also argued that Dyer did not show remorse or apologize to Roman.

31 If these factors were all supported by the evidence, the combination would indicate very serious misconduct, warranting significant discipline, even termination.

Mitigating Factors

32 There are several mitigating factors some of which the Employer considered but, nevertheless, concluded that termination was appropriate.

33 The Union argued that Roman provoked the altercation by pointing his finger at Dyer and taking a step toward him. I do not find that this was provocation such as to mitigate the misconduct. Dyer had already initiated the altercation by forcibly opening the truck's rear door despite Roman's attempt to shut it. At this point Roman was responding to Dyer's aggressive move, defending himself from Dyer and telling him that he could not search Roman's private belongings. This was not provocation.

34 However, several factors do mitigate against the ultimate discipline of termination. None of them excuse Dyer's conduct, but they do tend to support a lesser penalty.

35 Dyer was a good employee with 5 years service; he had no prior discipline. His supervisor, McRae described him to the investigator in these terms:

DYER was not originally hired as Senior Operator but due to staffing, he had a lot of the responsibilities. With ROMAN, DYER was thrust into the mentorship, leadership role. Trying to guide him and teach him. DYER is a doer - he learns things by doing them. He tried to teach by doing. He's not a trained manager or trainer - he's a worker. He cares a lot about the facility and made a lot of sacrifices to keep the plant going.

36 At times Dyer displayed a tendency to get angry and swear, but he had not been disciplined for that. After his termination he has taken an anger management course.

37 There had been no prior incidents of violence between Dyer and other employees or contractors at PNG. The incident on November 28, 2022 was a sudden action. The Union argued it was not pre-meditated.

38 The Employer argued it was premeditated. PNG says Dyer was attempting to get Roman fired. He planned a confrontation with Roman, in front of the CCTV camera.

39 I find that Dyer planned to monitor the truck over the weekend to see if there was any suspicious activity around it. He discussed this plan earlier with McRae. Dyer also had suspicions that Roman was doing something inappropriate on November 28. There was no evidence that Dyer planned to confront Roman that morning; Dyer reacted to something at the time and went to check the truck's contents. The confrontation appears to have been a reaction to Roman's refusal to let Dyer examine the truck. It was not premeditated.

40 Nor do I accept the Employer's suggestion that Dyer was trying to get Roman fired in this altercation. Dyer already knew PNG was considering firing Roman. He had been asked to provide information about difficulties he had with Roman and was in the process of putting that together. If Dyer wanted Roman fired, he did not need to set up a confrontation.

41 Dyer expressed remorse in the hearing. He also apologized to McRae and Spence after his termination. The Employer argued that this was too late; Dyer should have apologized to Roman much earlier. The Union argued that he wanted to apologize to Roman but had been instructed by the court, management and the Union not to contact Roman.

42 While an earlier apology would have been more effective, Dyer was concerned about a direct apology to Roman when he was being told not to contact him. It is unfortunate that the written apology accompanying Dyer's lawyer's letter to Crown Counsel did not reach Roman; there was no explanation why. Dyer thought his probation officer would forward the apology letter to Roman; however, Dyer did not follow up, nor did he apologize to Roman in the hearing when the two were present.

43 I, therefore, conclude that Dyer's remorse, while late, carries some weight. The fact that he never apologized to Roman weakens the impact of his expressions of remorse to the Employer.

44 Dyer said that three parties were responsible for the incident, not just him. I find that Dyer was largely responsible but Roman also had some responsibility because he could have avoided the incident by de-escalating or simply letting Dyer inspect the truck and grieve it later if he felt it was inappropriate. PNG also recognized Roman had some responsibility in this matter: he was given a 1-day suspension.

45 As to the Employer's role, some background is required. Feenan did not feel the Employer had any role in the incident. He said Dyer instigated it and was solely responsible. To understand the Employer's role. I have reviewed the history of the deteriorated relationship between Dyer and Roman.

46 Roman started work on May 9, 2022 as a probationary gas plant operator. Dyer was tasked with directing and training Roman. Dyer had no training for this supervisory/training role. In McRae's interview with McDaniel, he recognizes this was part of the problem (see quote from McRae in para. 35).

47 It soon became apparent that Roman was having difficulty with his work. This was partly due to competence issues but also communication problems because English was difficult for him. This led to friction between Dyer and Roman.

48 There were no standard operating procedures at the plant. This made training Roman difficult for both employees. Roman complained to McRae, about Dyer being rude and Dyer complained about Roman's competence. McRae and Spence knew about the friction between these employees and had concerns about Roman's competence.

49 Before November 28, McRae and Spence had concluded that Roman should be terminated before the end of

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his probationary period. They asked Feenan for permission to terminate Roman, but Feenan wanted more clear evidence.

50 In the end, Feenan agreed with the idea of terminating Roman but was going on vacation and wanted to get more details before finalizing this decision. Dyer was aware of this. Then the incident on November 28 occurred.

51 Spence's characterization of this tense situation was well described in his interview with McDaniel:
He truly believes that MCRAE put in a lot of effort, and he saw something coming and he made his supervisors aware, he made people aware of it. "I feel the lack of the decision to act and to move and empower MCRAE to go to dismissal with this person is a big contributing factor and DYER has put in countless hours of overtime. He's stressed about the relationship, stressed about his health and he wasn't happy with the working relationship, and it was well known above MCRAE and I and there is only so far that we can go but we need support from upper management, and it wasn't given." "Now that's changed a person's life possibly for good which is terrible to hear. We are there to protect our people when our hands are tied, it doesn't go well."

52 This incident may have been prevented had there been better early intervention or possibly the termination of Roman before November 28. The Employer has a responsibility to provide a safe workplace. While it was Dyer who physically started the altercation the Employer had been forewarned about the tension between these employees.

53 To that extent, some of the reason for the unfortunate events on November 28 can be partially attributed to the Employer's slow response to the complaints of both employees.

54 Dyer was stressed in November 2022. He was having health issues and just before November 28 was wearing a Holter monitor to study his heart. He was expecting the test results around November 28, wondered whether he should work that day and decided to because he was concerned about leaving Roman alone at the plant. It turned out that his concerns were well founded. While at the RCMP station on November 28 Dyer was taken to hospital and required a stent to remedy a blocked artery.

55 Because Roman was not competent to operate the plant alone, Dyer worked 5 days a week and then was on call for emergencies on evenings and weekends. Roman did not share the on call responsibility. This meant Dyer worked a lot and rarely had time away from work although contractors were sometimes hired to provide him some relief. This created stress for him.

56 The incident on November 28 was not premeditated but was perhaps foreseeable, taking into account the stress on Dyer and the tense relationship with Roman.

57 In addition to these ongoing tensions there were some incidents prior to November 28 that increased the mistrust and animosity between Dyer and Roman.

58 On October 3, Dyer noticed that a valve did not have the correct tag, which could have created a safety issue. Roman and Dyer argued over this and McRae and Spence became involved.

59 On October 18 & 19 the plant experienced two emergency shutdowns. Roman had difficulty restarting the plant and Dyer was critical of Roman. Roman complained that Dyer was not helping him. McRae sent Roman home to calm things down.

60 On November 23, Roman was replacing a filter in a part of the plant where both the intake and exits to the area had been closed off. Roman was sprayed by a liquid that he believed to be a hot chemical and accused Dyer of deliberately opening the intake valve while Roman was replacing the filter. Again, Roman was sent home. McRae and Spence investigated Roman's allegation and concluded that it was not founded.

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61 A week before November 28, Roman told McRae that he thought some of his tools had been stolen. Dyer was aware of this complaint. This made Dyer worry that he might be accused of taking these tools.

62 That background meant that by November 28 Dyer and Roman were frustrated with each other and mistrustful. Management knew of these issues but were slow to take any action to permanently solve the problems. McRae recognized that the slow response to these concerns contributed to the problem:

If I did everything I could have, maybe it wouldn't have happened I think we recognized we needed to get somewhere but I think we didn't get there quick enough.

63 Some of Dyer's statements after the incident were inaccurate and tended to shift blame to others. This was a factor in the Employer's decision to terminate him. I agree that Dyer's answers to some questions were inaccurate and, taken out of context, would support the conclusion that he was being dishonest.

64 However, Dyer was not allowed to view the videos of the incident, despite his requests to see them. He was not allowed to see the videos during either of his interviews nor before the meeting in which he was terminated. He first saw them long after his termination. Thus, the Employer could assess the accuracy of his statements with the benefit of the videos, but Dyer was not able to do the same. Had he been allowed to see the videos his statements may have been more accurate. It is not unusual for a person's recollection to be imperfect after a stressful event such as this altercation. That does not give him license to create any version of events to suit his situation, as the Employer argues Dyer did.

65 Both parties agreed that the Employer was not required to show Dyer the videos before his termination. However, I agree with the Union that it is harder in these circumstances for the Employer to argue that Dyer was intentionally dishonest in the investigations.

66 Once he did see the videos, after his termination, he was shocked at seeing his own aggressive conduct and took more responsibility for his actions. It would have been preferable if Dyer had been allowed to see the videos after he had exhausted his memory but before he was terminated. Taking this into account as well as the stress of his health condition, the strained work relationship, and the excitement of the altercation itself, I find that his initial accounts of the incident were inaccurate, but he was not deliberately dishonest in his statements.

67 The actions of Dyer on November 28 were not pre-meditated. He was suspicious of Roman, especially after the allegation of stolen tools. Roman did not lower those (unsubstantiated) suspicions by refusing to allow Dyer to see into the truck.

68 Whether Dyer had a right to inspect the truck in these circumstances is debatable but either of them could have easily avoided the altercation: Dyer by backing off and asking for management help; Roman by allowing Dyer to look into the truck, and grieving if he thought that was improper.

69 Tumbler Ridge is a small community with few employment opportunities. Dyer does not want to leave the area because of his wife's health issues. His employment options are limited.

70 The Union argues that Dyer's discipline should be proportionate, considering that Roman was suspended for only 1 day. It says a short suspension would be more appropriate.

71 A mitigating factor to consider with the others above is that Roman was given a short suspension. However, Dyer's involvement in the altercation was much more serious than Roman's. Both could have de-escalated easily. The similarity ends there.

72 Roman's pushing and pulling was defensive while Dyer initiated the altercation and was aggressive in trying to move Roman out of his way. Dyer was the senior operator, both in terms of seniority on the job and supervisory

responsibility. Roman was also more forthcoming in the investigations. Therefore, Dyer's conduct is deserving of much greater discipline, although Roman's 1-day suspension is a mitigating factor.

73 These various factors mitigate against termination. Taking all factors into account, both aggravating and mitigating, I conclude that discharge was excessive.

IV

74 What is an appropriate level of discipline?

75 Based on the various mitigating factors I would have concluded that reinstatement with a significant suspension would be appropriate. The Employer argues that a further incident which occurred after Dyer was discharged, along with the incident of November 28 and Dyer's initial poor response to the investigations have irreparably harmed the relationship with Dyer and he should not be reinstated. The Employer also argues that Dyer surreptitiously recorded one of the meetings with the Investigator and that also should result in a remedy of no reinstatement. The recording was not known to PNG until it was disclosed in these proceedings.

76 After his termination Dyer noticed a Facebook ad for a truck toolbox. He contacted the vendor and learned the vendor was Mr. Hingley, a PNG employee at the plant. The toolbox was one that Dyer had ordered for a new company truck while he was still working for PNG. Dyer was suspicious about whether this employee had permission to sell this toolbox but Dyer bought it anyway because "It was a good deal...and good deals don't last...".

77 After purchasing it he was worried and asked a friend who still worked at PNG to make inquiries. It turned out the toolbox was PNG's and Hingley did not have permission to sell it.

78 Dyer returned the toolbox and got his payment back. Hingley was fired.

79 While Dyer eventually disclosed he bought the toolbox, he should have disclosed the suspected fraudulent sale to PNG rather than completing the transaction and then disclosing it.

80 This incident shows bad judgement by Dyer and gives PNG another reason to believe they cannot trust Dyer. I do not find that Dyer intended to participate in a theft from PNG. His conduct in this was indicative of poor judgment but not intent to steal.

81 Similarly, Dyer's secret recording of a meeting with the Investigator was not illegal or deserving of discipline of itself but does show bad judgement. It is a practice that should be discouraged because it fosters mistrust. It is understandable that PNG believes Dyer cannot be trusted.

82 There are rare cases where termination is found to be excessive and damages, rather than reinstatement, are ordered. One leading case is *DeHavilland Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 112 (Mayer Grievance)*, [1999] O.L.A.A. No. 767; 83 L.A.C. (4th) 157. It has been followed in BC, e.g., in *Coca Cola Canada Bottling Inc. v. Teamsters, Local Union 213 (Davis Grievance)*, [2021] B.C.C.A.A. No. 32; 326 L.A.C. (4th) 24.

83 In *DeHavilland*, several factors were suggested as relevant to such a remedy:

The cases referred to cite several factors that are relevant to the decision to award compensation in lieu of compensation (sic). In no particular order those factors are:

1. The refusal of coworkers to work with the grievor.
2. Lack of trust between the grievor and the employer.
3. The inability or refusal of the grievor to accept responsibility for any wrongdoing.

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4. The demeanour and attitude of the grievor at the hearing.
5. Animosity on the part of the grievor towards management or coworkers.
6. The risk of a "poisoned" atmosphere in the work place.

Many of these factors, but not all, exist in the present case. The demeanour and the attitude of the grievor at the hearing was particularly revealing. As I stated in my earlier award dealing with the merits of the grievor's discipline.

84 The *DeHavilland* factors are not necessarily exhaustive. Applying those factors here:

85 There is no evidence of coworkers refusing to work with Dyer. Roman quit in part because of the altercation. No other employees have indicated a reluctance to work with Dyer.

86 The Employer says it does not trust Dyer. Dyer does not have the same mistrust. A subjective mistrust alone does not satisfy this criterion. PNG has some basis for mistrusting Dyer, including the toolbox incident and the secret recording incident but I also find there are good reasons to believe Dyer is contrite and capable of working at PNG in a reliable manner as he did before November 28. The Employer rightly has concerns in trusting Dyer because of these incidents. I also heard PNG's concern that Dyer must be particularly trustworthy because he works in a remote location with little direct supervision.

87 Dyer has accepted his responsibility for the altercation, especially once he saw the videos.

88 In the hearing Dyer was remorseful and ashamed of his conduct especially after reviewing the videos of November 28. He was shocked at his own behaviour and wanted to return to work.

89 He expressed no animosity towards management or coworkers.

90 I do not believe the workplace will have a "poisoned" atmosphere if he returns. McRae and Spence were somewhat sympathetic to the stress Dyer had been under. McRae and Spence are no longer with PNG and Roman has left.

91 Thus, few of the factors in the exceptional cases like *DeHavilland*, exist here. I cannot conclude that the work relationship has been irreparably broken as the employer argues.

92 I conclude that in all the circumstances a 4-month suspension should be substituted for the termination. Why 4 months and not a 1-day or 2-day suspension as the Union argues? The November 28 incident warrants a serious disciplinary response. Dyer's initial recounting of that day was flawed but not dishonest.

93 A 4-month suspension is long but deserved in these circumstances. In keeping with the concept of progressive discipline Dyer will be able to work at PNG but must know that workplace disputes cannot be resolved by violence. Other employees will also be deterred from such conduct, seeing the significant penalty in this case.

94 I retain jurisdiction to address any issues re damages or implementation of this award.

DATED at Vancouver, British Columbia, this 7th day of December 2023.

"Gabriel Somjen"

Gabriel Somjen, KC
Arbitrator