BRITISH COLUMBIA LABOUR RELATIONS BOARD

FORTISBC ENERGY INC.

(the "Employer")

-and-

LOCAL 213 OF THE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

(the "Union")

PANEL:	Elena Miller, Vice-Chair
APPEARANCES:	C.G. Harrison and Lindsey Taylor, for the Employer Brandon Quinn, for the Union
CASE NO.:	66222
DATE OF DECISION:	March 11, 2014

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Employer applies under Section 99 of the *Labour Relations Code* (the "Code") for review of an award by Arbitrator Mark J. Brown (the "Arbitrator") issued November 4, 2013 (Ministry No. A-089/13) (the "Award"). The Employer submits the Arbitrator denied it a fair hearing and rendered a decision inconsistent with principles expressed or implied in the Code. It seeks to have the Award set aside and the Union's grievance referred to a new arbitrator for adjudication.

2 This application can be decided on the basis of the parties' submissions and attached materials, which includes the Award.

II. THE AWARD

3 The Award concerned the termination of a grievor, TD, who had his own private welding business in addition to working for the Employer as a crew leader and welder. The Employer was aware of TD's private business (para. 2). The Employer terminated TD after it became aware that some material TD had used on a private job was Employer material (para. 3).

4 When the Employer interviewed TD about his use of Employer material for a private job, TD stated that he did not know the material belonged to the Employer and that he had been given the material by JJ, who worked for a contractor, Marwest (para. 9). Marwest does 99% of its work for the Employer and keeps Employer material in its yard (para. 17). JJ acknowledged TD came to Marwest to borrow a trailer to do the private job, but stated he did not give TD any of the Employer's material (para. 13).

5 After setting out a detailed account of the evidence given by the witnesses (paras. 5-67), the Arbitrator summarized the parties' arguments. With respect to the Employer's argument, he stated in part:

> In summary, the Employer argues that the evidence about where TD sourced the material is irreconcilable between TD, JJ and AH. TD maintained at the meetings with the Employer and at the hearing that he received pipe, risers and elbows from JJ at Marwest. JJ completely denied it. There is no credible explanation why JJ would lie about it. The Employer argues that the evidence of TD, TD's son, AD and DY is all unreliable.
>
> The Employer argues that TD's dishonesty and breach of trust should result in termination. (paras. 69-70)

6 With respect to the Union's argument, the Arbitrator stated in part:

> The Union acknowledges that if I conclude TD lied to the Employer and to me at the hearing then TD should remain terminated. If I conclude JJ lied, then TD had no intention to steal and was not dishonest in the investigation and should be reinstated. (para. 73)

7 The Arbitrator then summarized the applicable legal framework for discipline and discharge cases (paras. 77-78) and for resolving conflicts in witness testimony (paras. 79-83). He noted that the testimony of TD and JJ was irreconcilable on the key issue of whether JJ gave TD the Employer material:

> TD says that JJ gave him pipe, helped him load it on the trailer, gave him other fittings, met his son and forgot to invoice TD for the material. JJ says he helped TD hook up the trailer but denies giving him any material and never met his son. (para. 94)

8 The Arbitrator noted that both TD and JJ "were not shaken on cross examination and their testimony remained internally consistent" (para. 95). The Arbitrator therefore turned "to the question of whether their evidence is consistent with other witnesses and what fits within the preponderance of probabilities" (*ibid.*).

9 In considering that question, the Arbitrator noted that, if he accepted JJ's evidence, "then TD attended at the Marwest yard to obtain the trailer, and after JJ left took over 200 metres of pipe and other supplies", and when confronted by the Employer "TD conspired with his wife and son to lie about JJ giving him the pipe and fabricated the invoice from Beaver" (para. 100). The Arbitrator acknowledged TD had been disciplined for falsifying time sheets, but stated that "this is much more severe and involves securing false support from others" (*ibid.*).

10 The Arbitrator further noted that no party had asserted, and it was "extremely unlikely", that "JJ and TD were both stealing from their employers and doing a cash deal between them" (para. 102). He then stated that the "only other possible explanation that would be a motivation for JJ to deny TD's version of events is that he made a mistake and gave TD the Employer's property and then forgot to invoice TD. When he realized his mistake, he decided not to invoice TD for the material and instead denied giving it to him" (*ibid.*).

11 The Arbitrator then concluded:

> As I have noted more than once, this is a difficult case. If I accept JJ's evidence I must find that TD lied and conspired with his son and wife to lie at the hearing. I find this unlikely. On the balance of probabilities, I conclude that it is more likely than not that JJ provided TD with the material, forgot to invoice him and then tried to cover up the mistake by denying ever giving him the material. TD's evidence is corroborated by the credible evidence of

> his son and wife. Although the invoicing sequence and inventory check is troubling, I find that it does not persuade me to conclude that TD was lying when all the facts and testimony of all the witnesses is considered.
>
> Accordingly, I conclude that there was no just cause to terminate TD. He is to be reinstated and made whole subject to any mitigation issues which I leave to the parties to sort out. If they cannot, I remain seized of that issue. (paras. 103-104)

III. POSITIONS OF THE PARTIES

Employer

12 The Employer submits that the Arbitrator failed to make a "reasoned" assessment of the credibility of the central witnesses and failed to engage in a reasoned analysis and/or to consider "in any meaningful way" a central submission of the Employer. It submits the Arbitrator "focused his credibility assessment on whether or not he believed that the Grievor and his family had engaged in a conspiracy to lie" but "disregarded" where TD's evidence was not corroborated by his family members (underlining in original). The Employer further submits that the Arbitrator's assessment of this evidence "stated a conclusion only and provided no reasoned basis for reaching that conclusion". The Employer submits that this constituted a reviewable error because it did not conform with the approach to assessing credibility established in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA) ("*Faryna v. Chorny*").

13 The Employer submits that the "sole basis" the Arbitrator stated for preferring the evidence of TD was that he found it "unlikely" that TD's wife and son would have lied when they corroborated his evidence (Award, para. 103). The Employer submits this is inconsistent with the approach set out in *Faryna v. Chorny*, which required that an assessment of credibility is done on the basis of all the circumstances of the case, and not on one factor alone.

14 The Employer takes issue with the reasons the Arbitrator gives for preferring the evidence of TD over JJ. It submits there was "no evidence from anyone but the Grievor" suggesting that JJ had engaged in a "cover up" in relation to giving TD the material, and submits that therefore the Arbitrator's conclusion was "purely speculative".

15 The Employer further submits that TD's evidence with respect to obtaining one element of the material, the risers, was not corroborated by his family, and there was "objective evidence" which demonstrated that TD's claim that JJ gave him the risers was false. The objective evidence was that no risers were missing from Marwest's inventory: "all risers that had been there in November 2011 were fully accounted for in June 2012". The Employer submits that the Arbitrator merely noted that the inventory check evidence was "troubling" (Award, para. 103), but failed to explain how that evidence was reconcilable with his conclusion that JJ gave TD the risers.

16 The Employer submits that it is appropriate for the Board to review the Arbitrator's assessment of credibility because he "misapplied the test in *Faryna v. Chorny* by relying on the presence or absence of a conspiracy amongst witnesses to lie to the adjudicator, and failed to weigh and assess other important evidence". The Employer submits that he thus "failed to consider the preponderance of probabilities in all the circumstances as required by the law, and it resulted in a decision that was inconsistent with the principles expressed or implied in the *Code*" (underlining in original).

17 The Employer also submits that the Arbitrator failed to provide reasons in respect to one of its principal arguments: that it had not dismissed TD for theft but rather for dishonesty in the investigation. In particular, the Employer says it argued that the inventory check evidence, independently from JJ's evidence, demonstrated that TD's claim to have obtained the risers from Marwest was false. The Employer submits the Arbitrator failed to address this argument in concluding that TD's version of events was true. In failing to do so, the Employer submits, the Arbitrator denied it a fair hearing by failing to provide a reasoned decision.

18 The Employer submits that, as this case turned on a question of credibility, it cannot be remitted back to the Arbitrator but must instead be referred to a new arbitrator: *British Columbia Nurses' Union v. British Columbia Women's Hospital*, [1997] B.C.J. No. 855 (CA) at para. 14.

Union

19 In reply, the Union submits the Employer has raised no reviewable error and is simply trying to have the Board re-weigh and re-assess evidence that was before the Arbitrator. It submits that it is clear from the Award that the Arbitrator considered the evidence and argument before him and came to a conclusion with which the Employer disagrees. The Board does not interfere with an award in such circumstances. In particular, the Board is particularly reticent to interfere with an arbitrator's credibility findings: *Guljit Randhawa*, BCLRB No. B33/2012 (Leave for Reconsideration of BCLRB No. B107/2012) at paras. 17-19 ("*Randhawa*"), citing *F.H. v. McDougall*, 2008 SCC 53 at paras. 70-72 ("*McDougall*").

20 The Union submits that, in any event, the Arbitrator did not make his credibility finding by focusing solely on whether TD and his family conspired to lie and, in the process, ignored the evidence of the Employer's riser inventory check. The Award demonstrates that the Arbitrator considered the surrounding circumstances, including the Employer's evidence regarding its inventory check, in deciding the central issue of whether TD or JJ was telling the truth about whether the material at issue came from Marwest. There were aspects of the evidence which supported each version, and aspects which did not. For example, the Arbitrator noted that, in order to believe JJ's version, he would have to believe that TD's family conspired to lie under oath. On the other hand, he noted that the Employer's evidence relating to the riser inventory at Marwest was "problematic" to TD's version of events (Award, para. 84).

21 The Union submits that the Arbitrator recognized and stated in the Award that this was a very difficult credibility assessment to make in these circumstances. Ultimately, the Union submits, he simply found that the evidence supporting TD's version of events was more persuasive than the evidence supporting JJ's version. In coming to this conclusion, he expressly recognized that the riser inventory check evidence did not support TD's version, but this was only one piece of evidence before him that he considered in making his credibility finding. The Union submits that the Employer has not shown that the Arbitrator ignored the riser inventory check evidence, merely that he preferred other evidence, which is not a ground for appeal under Section 99.

22 The Union further submits that the Arbitrator's reference to JJ's potential motives for being untruthful was not "purely speculative" as alleged by the Employer. Rather, the Arbitrator simply set out in the Award the only three possibilities in the circumstances: either TD was lying, or JJ was lying, or they were both lying. He rejected the conclusion that they were both lying, which was not advanced before him by any party, and concluded that JJ was lying. In doing so, he answered the Employer's argument that there was no credible reason for JJ to lie (Award, para. 69) by pointing out that there was a credible reason why JJ would lie: to cover up his mistake in giving Employer material to TD and forgetting to invoice him for it. The Union submits this is not speculation but a conclusion based on all the evidence before the Arbitrator, and accordingly not a reviewable error.

23 With respect to the Employer's submission that one of its principal arguments was ignored, the Union submits it is clear on the face of the Award that the Arbitrator heard and considered the Employer's argument that the termination was for dishonesty, not theft, and the inventory evidence supported the argument that TD had been dishonest. The Arbitrator considered this argument and evidence in light of the arguments and evidence before him as a whole, and in the end was not persuaded by it. The Union submits that, as the Arbitrator did not fail to consider either the Employer's evidence or its argument, but simply was not persuaded by them, the Arbitrator did not commit any error and the Section 99 application should be dismissed.

Employer's Final Reply

24 In its final reply, the Employer disagrees that the Arbitrator merely preferred and did not ignore evidence. The Employer submits that the Arbitrator preferred TD's version of events without explaining how his version could be reconciled with the Employer's riser inventory check evidence. The Employer submits that, having identified that evidence as "troubling" and "problematic" to TD's version of events, the Arbitrator could not accept that version without addressing that evidence. Effectively, the Arbitrator simply ignored or failed to address that evidence because he was "fixated on whether he preferred the Grievor's evidence with respect to the source of the pipe (as supported by his son and wife) over that of JJ". In focusing on the evidence regarding the pipe, he ignored the riser evidence, which constituted a reviewable error.

IV. ANALYSIS AND DECISION

25 Section 99 provides limited grounds for review of arbitration awards; it is not a full-fledged avenue of appeal: *Simon Fraser University*, BCLRB No. 16/76, [1976] 2 Canadian LRBR 54. In particular, the Board does not interfere with arbitrators' findings of fact or inferences drawn from the evidence absent palpable and overriding error: *PCL Constructors Pacific Inc.*, BCLRB No. B327/99 (Leave for Reconsideration of BCLRB No. B208/98), 53 C.L.R.B.R. (2d) 143 ("*PCL*") at para. 21.

26 In *Office and Professional Employees' International Union, Local 378*, BCLRB No. B160/99 ("*OPEIU*"), the Board stated:

> Provided the principles of the Code are respected and there is no denial of a fair hearing, evidentiary determinations are for the arbitrator (who has heard and assessed the witnesses). This approach is designed to further the Code's policy of expeditious dispute resolution before arbitrators chosen by the parties. (para. 26)

27 An award must provide a reasoned analysis of the issues before the arbitrator: *Driftwood Motor Hotel (Rupert Management Ltd.)*, BCLRB No. 29/78. However, the Board will not assume that an arbitrator failed to consider an argument, a piece of evidence or an authority merely because it was not set out in the award: *Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Canadian LRBR 377. As explained in *Castlegar and District Hospital*, BCLRB No. B380/99, 54 C.L.R.B.R. (2d) 87 ("*Castlegar*"):

> While an arbitrator must have regard to the respective merits of the positions of the parties, this does not, in our view, require an arbitrator to expressly address in the award every twist and turn of a party's argument. It is sufficient that the award clearly reflects an understanding and appreciation of the essential elements of each party's position on the significant issue or issues in order to fulfil the requirements of Section 82(2). This may mean, for example, that a party's argument on a significant issue is implicitly rather than expressly addressed or negated by the findings of fact or the reasoning of the arbitrator. (para. 20, underlining in original)

28 This approach is consistent with what the Supreme Court of Canada has said more recently in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ("*Newfoundland*"):

> Arbitration allows the parties to the agreement to resolve disputes as quickly as possible knowing that there is the relieving prospect not of judicial review, but of negotiating a new collective agreement with different terms at the end of two or three years. *This process would be paralyzed if arbitrators were expected to*

> *respond to every argument or line of possible analysis.* (para. 25, emphasis added)

29 In the present case, the Arbitrator noted that this was "one of those rare cases where some testimony is at polar opposites" (Award, para. 81). In particular, the testimony of TD and JJ was both central and irreconcilable. The Award summarizes key aspects of that conflicting evidence as follows:

> JJ testified that TD called to borrow the pipe trailer. JJ checked with AH to see if it was possible to do so. JJ stated there was no discussion about materials.
>
> Based on cell phone records there is no dispute that TD called JJ at 3:09 p.m. to pick up the trailer on March 22, 2013.
>
> JJ stated that he showed TD which trailer to use and helped him hook it up. There were a few coils or laps of 2" pipe on the trailer. JJ stated that there was no discussion about materials. JJ asserted that he left the Marwest yard before TD.
>
> In cross examination it was put to him that TD's son was with TD, TD's son got out of the truck and shook JJ's hand, and JJ helped TD load pipe on the trailer. JJ disagreed with all of this and in fact stated he has never met TD's son. (paras. 22-25)

30 Noting that there was "obviously conflict in some of the testimony", the Arbitrator stated that, in order to resolve the conflict, he "must determine the version of events that I accept based on the principles set out in *Faryna v. Chorny*..." (para. 79). He then summarized the required approach under those principles. The Employer does not allege the Arbitrator misstated the *Faryna v. Chorny* principles or approach and I am satisfied he did not.

31 Rather, the Employer alleges that, despite referencing and accurately summarizing the applicable principles, the Arbitrator misapplied those principles by "ignoring" certain evidence that was incompatible with TD's version of events. Specifically, the Employer submits that, while the testimony of TD's son corroborated TD's evidence that JJ gave him pipe, the son did not specifically corroborate that JJ also gave TD risers. The Employer's evidence was that its inventory check did not show any missing risers.

32 I find it is clear on the face of the Award that the Arbitrator did not ignore the Employer's evidence that its inventory check showed no missing risers. The Arbitrator specifically noted that evidence and its significance:

> The riser inventory at Marwest was accurate according to the Employer. If TD's version of events is preferred that aspect is problematic as one would think the inventory would show four risers short. (para. 84)

33 I further find it is clear on the face of the Award that the Arbitrator understood that the case turned on whether he found TD or JJ was lying about what occurred, and that he had to decide that issue by considering the preponderance of probabilities in all the circumstances:

> As I noted above, this is one of those rare cases where some critical evidence is at polar opposites and cannot be easily reconciled as miscommunication or different perceptions of the same conversation. TD says that JJ gave him pipe, helped him load it on the trailer, gave him other fittings, met his son and forgot to invoice TD for the material. JJ says he helped TD hook up the trailer but denies giving him any material and never met his son.
>
> Both TD and JJ were not shaken on cross examination and their testimony remained internally consistent. *I turn therefore to the question of whether their evidence is consistent with other witnesses and what fits within the preponderance of probabilities.* (paras. 94-95, emphasis added)

34 The Arbitrator noted that a witness, DY, testified he met TD and his son that afternoon when TD was at the job site to unload pipe, and that this evidence, which the Arbitrator described as "reliable", "places TD's son in the vehicle that day" (para. 96). He further noted that TD's son and wife, AD, "provided evidence that corroborates TD's version of events" and they were "not shaken in cross examination" (para. 97). Against this, the Arbitrator noted that the "invoice sequence and inventory check is troubling", but he found that it "does not persuade me to conclude that TD was lying when all the facts and testimony of all the witnesses is considered" (para. 103).

35 Thus, I find it is apparent on the face of the Award that the Arbitrator did not ignore the inventory check evidence when deciding the key issue of what occurred at Marwest between JJ and TD with respect to Employer material. The Arbitrator not only considered the inventory check evidence in that context, he recognized that it was not supportive of TD's version of events. However, when he considered that evidence in the context of "all the facts and testimony of all the witnesses" (para. 103), which he had found included evidence supportive of TD's version and inconsistent with JJ's version, he was not persuaded that TD was lying.

36 I therefore find the Arbitrator did not ignore or fail to consider the inventory check evidence, and he did not fail to apply the *Faryna v. Chorny* approach of deciding credibility on the preponderance of probabilities in all the circumstances. The Arbitrator recognized that there was evidence before him which tended to cast doubt on each version of events (TD's and JJ's).

37 For example, JJ said TD was not accompanied by his son when he came to Marwest to get the trailer before driving to the site, yet an independent witness, DY, said TD's son was in the truck when TD arrived shortly thereafter at the job site (Award, para. 41). The son also testified that he was present at Marwest and that his father "introduced him to JJ and they shook hands" (para. 31). In the face of this evidence, as

the Arbitrator noted, the Employer urged him nonetheless to accept JJ's version of events and to find "the evidence of TD, TD's son, AD [TD's wife] and DY is all unreliable" (Award, para. 69).

38 Ultimately, the Arbitrator did not reject the evidence of TD, TD's son, AD and DY as unreliable. He accepted their evidence as credible notwithstanding some unsupportive evidence, including the Employer's inventory check evidence. In answer to the Employer's position that JJ should be believed because there was "no credible explanation why JJ would lie about it", the Arbitrator found that this was not so; there was a credible explanation on the evidence why JJ would be untruthful about having given TD Employer material (Award, para. 103). I find this was not speculation but rather an answer on the evidence to the Employer's argument that JJ had no possible motivation to lie about the events in question.

39 I find the Arbitrator gave sufficient reasons for preferring the evidence of TD over that of JJ on the issue of whether JJ gave TD Employer material, and that his approach in coming to this conclusion was not based on ignoring evidence or only considering one factor. It was based on his assessment of the evidence as a whole and the preponderance of probabilities, as required under *Faryna v. Chorny*. To the extent the Employer complains that the Arbitrator did not expressly explain in the Award why he was not persuaded otherwise by the inventory check evidence, I find that the Arbitrator was not required to expressly address every piece of evidence and every argument in the Award: see the passages from *Castlegar* and *Newfoundland* set out above.

40 To the extent the Employer suggests that its inventory check evidence proved irrefutably that TD's version of events was false, I find that is not established. The Arbitrator recognized that evidence was significant and was unsupportive of TD's version; however, I find it is implicit in his reasons that he was satisfied there could be some other explanation why the inventory check did not show missing risers. He was evidently not persuaded, when that evidence was considered in light of the circumstances as a whole, that it established irrefutably that TD's version of events was false. I find this was a conclusion he was entitled to reach. The Employer has not established that the inventory check evidence was of such a nature that there could be no other explanation for it, or no other inference drawn when it was considered in light of the evidence as a whole, but that TD was lying.

41 It is not the Board's role to decide whether an arbitrator's factual and credibility findings are right or wrong; as noted in the passages from *PCL* and *OPEIU* quoted above, the Board is not in a position to second-guess such findings as it did not hear the evidence or see the witnesses. Absent palpable and overriding error, which is not alleged and which I do not find in this case, the Board does not interfere with the evidentiary determinations of arbitrators.

42 Awards must be consistent with Code principles and arbitrators must not deny a party a fair hearing. However, as explained in *Castlegar*, this requires that the merits of both parties' positions be considered and addressed, not that arbitrators expressly address in the award every twist and turn of a party's argument. For reasons already

given, I find the following requirement set out in *Castlegar* is met by the Award in this case and the Employer was not denied a fair hearing:

> It is sufficient that the award clearly reflects an understanding and appreciation of the essential elements of each party's position on the significant issue or issues in order to fulfil the requirements of Section 82(2). This may mean, for example, that a party's argument on a significant issue is implicitly rather than expressly addressed or negated by the findings of fact or the reasoning of the arbitrator. (para. 20)

43 With respect to the requirement to provide a reasoned analysis, I find that is met in this case too. As observed by the Supreme Court of Canada in *McDougall*, quoted by the Board in *Randhawa* (at para. 26):

* * *

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.,* that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected. (para. 72)

44 I find the Arbitrator articulated with sufficient precision what was undoubtedly a "complex intermingling of impressions" that emerged after he watched and listened to the witnesses and attempted to reconcile the various versions of events and the evidence before him. I find that, in doing so, he provided sufficient reasons for his conclusion that he accepted TD's version of events and not JJ's to meet the Board's requirement for a reasoned analysis under Section 99 of the Code.

45 In summary, I am not persuaded the Award is inconsistent with Code principles or that the Employer was denied a fair hearing. In particular, I find the Arbitrator not only correctly referenced and summarized the approach to credibility determinations outlined in *Faryna v. Chorny*, but also applied that approach to the evidence before him. He recognized and stated that the testimony of key witnesses with respect to key events was conflicting and that he was required to assess credibility and make factual determinations based on a consideration of the preponderance of probabilities in all the circumstances. He did so, and concluded that TD had not been dishonest and that his version of events was to be preferred over JJ's. In light of that finding, there was no just cause to terminate TD, and accordingly he was to be reinstated and made whole.

46 I find it is not established that the Arbitrator failed to consider the merits of the Employer's position and address the Employer's evidence and argument to the extent necessary to meet the requirement of providing a fair hearing and a reasoned analysis. The Arbitrator applied the proper approach under *Faryna v. Chorny* and gave sufficient

reasons for why he found TD credible and accepted his version of events. In these circumstances, I find no basis to interfere with the Award under Section 99.

V. CONCLUSION

47 For the reasons given, the Section 99 application is dismissed.

LABOUR RELATIONS BOARD

"ELENA MILLER"

ELENA MILLER
VICE-CHAIR