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Finally, I would add that the company did not present a shred of evidence that the remarks (or for that matter, the article) caused it any harm.

Given the circumstances of this case I cannot find that there was justification for any discipline. I would have allowed the grievance and removed the suspension from the grievor's record.

RE PACIFIC FOREST PRODUCTS LTD. (SOOKE LOGGING DIVISION) AND INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-118

D. R. Munroe. (British Columbia) August 31, 1984.

Disciplinary penalties — Demotion — Unexplained incident causing considerable damage to employer's property — Incident connoting either medical incapacity or incompetence — Demotion for fixed period appropriate.

Grievance procedure — Time-limits — Relief against non-compliance — Only explanation for delay administrative error in processing grievance — Relief not granted.

[See *Brown & Beatty*, 2:3140; 7:3520; 7:3544]

EMPLOYEE GRIEVANCES alleging unjust suspension and unjust demotion. Suspension grievance not arbitrable; demotion grievance denied.

F. A. Schroeder, for the union.
J. R. Parrott, for the employer.

AWARD

The parties agreed that I was properly constituted as an arbitration board under their collective agreement with jurisdiction to resolve the issues in dispute.

I am concerned with two grievances. In both cases, the grievor is Regis Cahill, an employee of some eight years' seniority. At all material times, the grievor was a logging truck driver. On November 4, 1983, and again on January 9, 1984, he was involved in job-related driving mishaps. The employer responded to the first incident by assessing the grievor a five-day suspension. Following the second incident, the employer decided that the grievor must be removed from the trucks — *i.e.*, demoted.

The five day suspension

With respect to the grievance over the five-day suspension, the employer's initial position is that the matter is not arbitrable by reason of the trade union's failure to adhere to the time-limits set forth in the parties' grievance procedure.

The material provision of the collective agreement is art. XXXIII, s. 2. It reads as follows:

> If a grievance has not advanced to the next stage under Step Two, Three, Four, or Five within fourteen (14) days after completion of the preceding stage, then the grievance shall be deemed to be abandoned, and all rights of recourse to the grievance procedure shall be at an end. Where the Union is not able to observe this time limit by reason of the absence of the aggrieved employee or the Shop Committee from the camp the said time limit shall not apply. The Union shall be bound to proceed in such a case as quickly as may be reasonably possible.

Thus, the parties have agreed that grievances must be advanced from step to step within 14 days of completion of the preceding step, failing which ". . . the grievance shall be deemed to be abandoned". That is subject to specified exceptions, in which event the trade union ". . . shall be bound to proceed . . . as quickly as may be reasonably possible".

Here, the time-limits were followed for the first two steps. However, as the trade union acknowledges, the matter was not thereafter pursued in timely fashion. And the trade union seeks relief under s. 98(*e*) of the *Labour Code*, R.S.B.C. 1979, c. 212, which empowers an arbitration board to "relieve, on just and reasonable terms, against breaches of time limits . . . set out in the collective agreement".

The sequence of events was as follows. On or about November 15, 1983, the grievance was presented at first step. A few days later, there was an investigative meeting which was attended by full-time officers of the trade union. That was the second step of the grievance procedure, at the conclusion of which the matter remained unresolved.

On November 27th, the employer's operation was shut down due to winter weather. Apart from a few days' work later the same month, the winter shut-down did not end until January 9, 1984.

In the meantime, on November 26th, an officer of the trade union wrote to the employer asking that the grievance be held over until the crew had returned to work. While there was no written response to that letter, there was a telephone conversation on December 7, 1983, during which the employee relations supervisor agreed to the trade union's request.

As I have already stated, the logging operations were resumed on January 9, 1984. However, the trade union took no further steps with respect to this grievance until April 13th — some three months later. Of course, that exceeded by a considerable margin the limits prescribed by the agreement. It also went far beyond

the indulgence which the trade union sought and obtained from the employer.

Why the delay? At the outset of this award, I noted that on January 9, 1984, the grievor was involved in another driving mishap. (It will be recalled that January 9th was the first day of work following the winter shut-down.) As a result, the grievor was hospitalized for a week or so. Then, following an investigation, the grievor was demoted. A grievance over the demotion was filed and pursued in a manner consistent with the collective agreement. In the process, the grievance over the earlier suspension appears simply to have fallen by the wayside.

In *Re Pacific Forest Products Ltd., Nanaimo Division and Pulp, Paper & Woodworkers of Canada, Local 7*, November 14, 1983 (Munroe) [reported in part 14 L.A.C. (3d) 151], the following observations were made:

> Section 98(*e*) of the *Labour Code* provides that an arbitration board may "... relieve, on just and reasonable terms, against breaches of time limits ... set out in the collective agreement". As with other discretionary powers, this one must be exercised judicially: a decision to relieve against apparently mandatory time-limits must be a reasoned decision, one which proceeds from the premise that relief against any provision of a collective agreement is an extraordinary event. Moreover, and implicit in what I have already said, the party who seeks such relief should bear the burden of showing why it is proper in the circumstances.

In my view, a determination of whether the burden under s. 98(*e*) has been satisfied should proceed on the following considerations: (a) the degree of force with which the parties have given contractual expression to the time-limits; (b) whether the breach of the time-limits was in the early or later stages of the grievance procedure; (c) the length of the delay; (d) whether the applicant for relief has a reasonable explanation for the delay; (e) the nature of the grievance — *i.e.*, the impact on the grievor of a refusal to grant relief against the time-limits; (f) whether the employer would suffer prejudice by the granting of such relief, and (g) any other factors peculiar to the circumstances at hand.

In the instant case, the time-limits are quite forcefully expressed; the breach was at an early stage; the delay was one of several weeks, and for most of the delay, no reasonable explanation can be advanced.

Is all of that outweighed by the nature of the grievance? Certainly, a five-day suspension is not insignificant. But nor is it overwhelming. In sum, it is a neutral consideration.

Thus, the only factor which might favour the granting of relief under s. 98(*e*) is the absence of any real prejudice to the employer.

However, in the circumstances, I do not think that is enough. Here, the dominant consideration must be the duration of unexplained delay. Were I to shunt that consideration aside, solely on the basis of lack of prejudice, it would be tantamount to holding that for the typical arbitral dispute, a contractual expression of time-limits is really meaningless. That was not the intended result of s. 98(*e*) of the *Labour Code*.

It is always with regret that an arbitration board finds it necessary to deny a grievance without an examination of the merits thereof. However, in the present circumstances, I must give effect to the employer's contention that the matter is not arbitrable. Accordingly, the grievance is dismissed.

The demotion

This grievance arises from the demotion of the grievor, in mid-February, 1984, from the position of logging truck driver to a lower-rated position in the bargaining unit.

The employer's logging operation is located near Sooke, British Columbia. In part, the enterprise consists of taking logs from the woods to a dry land sorting ground, and, once the logs are sorted, to a beach where they are arranged into booms.

The sorting ground is in the hills, about one and one-half miles from the beach. Normally, logs are transported from the former to the latter location by means of logging trucks known as "trains". Each "train" comprises a tractor unit and two trailers. The load capacity is 320,000 lb. The replacement value is approximately $400,000.

On January 9, 1984, the grievor was assigned to drive the route between the sorting ground and the beach. That was not an unusual assignment. In his eight years with the company, the grievor had worked that route on dozens of occasions.

It is common ground that the run between the sorting ground and the beach is not very difficult. It is short, and the road is quite good. Indeed, in cross-examination, the grievor agreed with the description "milk run".

As I earlier indicated, the sorting ground and the beach are approximately one and one-half miles apart. As one leaves the sorting ground, one passes over the brow or crest of a hill, then heads in a straight line down the hill for about 1,000 ft. and then around a fairly gentle corner to another straight stretch, *etc.*

On the day in question, at about 4:00 in the afternoon, the grievor left the sorting ground on his way to the beach. To all outward appearances, everything was normal as the grievor drove

over the brow of the hill. However, about 600 ft. later, the grievor abandoned the truck by leaping out of the cab onto the left shoulder of the road. The truck carried on to the bottom of the hill. Naturally, with no driver aboard, it failed to negotiate the corner. Instead, it plunged into a gully. The entire unit was demolished.

The grievor's explanation for this extraordinary occurrence is as follows. He said that as he was arriving at the brow of the hill, he attempted to shift from fourth to third gear. However, the transmission was in "lock up" because the R.P.M.'s were too high. Accordingly, he tapped the throttle to reduce the R.P.M.'s. Surprisingly, instead of a reduction, the motor began to race and get out of control. So according to the grievor, he hit the brake pedal with his right foot, and the retarder with his left foot.

The brake pedal should have activated the principal braking systems on both the tractor and the two trailers. The retarder acts as a "transmission brake". While the retarder cannot bring the unit to an abrupt halt, it can slow it down to the point where control is assured. The grievor testified that neither the brake pedal nor the retarder brought any response.

Next, so the grievor stated, he pulled the hand lever which engages a back-up system of brakes on the trailers. Again, there was no response. Finally, so the testimony continued, he pushed the "dynamite" button which triggers yet another back-up system of trailer brakes. Still, nothing worked.

At that point, as the truck was gaining momentum down the hill, the grievor made the decision to jump. He testified that as he opened the cab door, he also turned the steering-wheel hard to the right ("I think all the way around to the steering stop"). His stated purpose was to force the truck into a ditch on the right side of the road. Then, he leapt from the cab to the roadside.

The grievor was knocked unconscious by the fall. The next thing he recalls with any clarity is awakening in the hospital. All things considered, the grievor's injuries were fairly minor, the most serious being a broken nose and cheek-bone.

A few minutes following the accident, the sorting ground foreman, Joe Zigay, arrived at the scene. After ensuring that the grievor was safely on the way to the hospital, Zigay examined the road and the wreck at the bottom of the hill. The condition of the road was such that one could clearly see the tracks made by the grievor's truck as it travelled from top to bottom. Zigay testified that ". . . the tracks were as straight as an arrow; there were no skid marks at all; it appeared to have gone straight down the road

and then over the edge". Other witnesses gave evidence to the same effect. Thus, if the grievor is correct that he turned the steering-wheel before jumping from the cab, it would appear that the steering system, like so many other systems of the truck, failed to properly function.

Evidence was adduced concerning the general mechanical condition of the truck. The weekly and monthly service reports show (and it is not disputed) that the vehicle was in good repair. The day following the accident, a visual inspection of the wreck was undertaken by Donald Chaplin, a motor vehicle inspector employed by the provincial government. Chaplin's report concludes with the opinion that ". . . the brakes on this unit were in good operating condition prior to the accident"; further, that ". . . there was nothing to indicate that the vehicle was in poor mechanical condition or lacked proper maintenance".

On a number of occasions, the grievor was interviewed by members of management about events surrounding the accident. The interviews disclose a few minor inconsistencies. However, by and large, the grievor has not wavered in his account of the mishap.

At one point, in late January, it was agreed between the grievor and management that the possibility of a medical explanation — *e.g.*, a seizure or black-out — should be pursued. The grievor underwent a neurological examination. The subsequent reports were to the effect that no medical reason had been found for what occurred on January 9th.

By mid-February, the grievor had fully recovered from his injuries, and he indicated his intention to return to work. From management's perspective, that presented a problem. Simply stated, the management team was unwilling to accept the grievor's account of the accident. In their view, while not entirely sure of the true cause of the mishap, the grievor's proposed return to the position of logging truck driver represented a serious potential hazard. In the result, the grievor was demoted.

Having reviewed the evidence, I find myself in the same quandary as management. How did the accident happen? I have concluded that I must reject as incredible the grievor's version of events. On the evidence, the truck was in good working order immediately prior to the critical moments. Yet, I am asked by the grievor to find that the truck suffered simultaneous malfunctions of the motor, the steering, the transmission (retarder) and no fewer than three different braking systems. It is too much to ask. It defies credulity.

concern is medical, the demotion must still be for a fixed period — as things now stand. I say "as things now stand" for this reason. The evidence to this stage does not allow a finding that the mishap of January 9th was medical in origin. But nor does the medical evidence absolutely discount the possibility. Accordingly, if fresh medical evidence surfaces, different decisions may have to be taken.

In some respects, this case is reminiscent of what was said in *Re Newman Steel Warehouse Ltd. and U.S.W., Local 8214* (1977), 16 L.A.C. (2d) 386 (O'Shea) at p. 389:

> Having considered all the evidence, the representations of the parties, I find the issue concerning the nature of the demotion, *i.e.*, disciplinary or non-disciplinary, to be of only academic interest in view of the facts of this case. From the grievor's point of view, his demotion certainly appears to be disciplinary. From the company's point of view, the demotion could be considered non-disciplinary since the company's objective was to promote the efficient and safe operations of its tractor-trailer units.

In an effort to reconcile those competing viewpoints, I must take account not only of the immediate events which justifiably gave rise to the employer's concerns, but also the fact of the grievor's eight years of largely unblemished service on the trucks. In the result, making the best of unusual and difficult circumstances, I have concluded that the proper disposition of the grievance is as follows. The removal of the grievor from the logging trucks shall be permitted to stand until July 1, 1985. On that date, the grievor shall be permitted to resume the position from which he was demoted unless, in the meantime, fresh medical evidence surfaces which shows that the grievor's return to the trucks would be unduly hazardous. Any dispute about the existence or significance of such new medical evidence (should any be uncovered) shall constitute a separate arbitral matter. Finally, a resumption by the grievor of his logging truck duties on July 1, 1985, shall be subject to a probationary assessment for a period of 20 working days.

RE HEALTH LABOUR RELATIONS ASSOCIATION AND HOSPITAL EMPLOYEES' UNION, LOCAL 180

E. R. Peck, H. Brown, A. Hamilton. (British Columbia) December 11, 1984.

Procedure — Record — Request by party to make an official stenographic record of hearing — Request in discretion of arbitrator — Request denied.

[See *Brown & Beatty*, 3:2000]

PRELIMINARY ISSUE relating to request to prepare a steno-