

IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE LABOUR RELATIONS ACT, 1995

BETWEEN

IMPERIAL OIL LIMITED
(the “Employer”)

AND

UNIFOR, LOCAL 900
(the “Union”)

GRIEVANCE OF RYAN GIBBS

ARBITRATOR Peter F. Chauvin

APPEARANCES FOR THE EMPLOYER

R. Ross Wells	Counsel
Lennie Lejasisaks	Counsel
Russell Adamson	Operations Manager
Meghan McCormick	Human Resources Manager
Cassandra Roepke	Human Resources Analyst
Chris Blight	Business Team Leader
Don McNally	Process Supervisor
Jim Laughlin	Shift Manager

APPEARANCES FOR THE UNION

Ken Stuebing	Counsel
Dan Valente	National Representative
Keith Punchak	Local President
Ken Tryhorn	Chief Steward
Ryan Gibbs	The Grievor

Hearing conducted on December 17, 2015 and January 22, February 19 and 25, and
April 12, 14 and 27, 2016

AWARD

[1] The Employer operates an oil refinery in Nanticoke, on the shore of Lake Erie. Part of that oil refinery is a Waste Water Treatment Plant (“the WWTP”), which cleans liquids from the refinery.

[2] On December 17, 2014 Ryan Gibbs, the Grievor, was working as an Operator in the WWTP. The Employer concluded that the Grievor was careless or negligent in his draining of liquids from a Tank 403 to the WWTP, and gave the Grievor a nine-day “Major Suspension”.

[3] The Union submits that the Grievor was not careless or negligent, and should receive no discipline whatsoever. In the alternative, the Union submits that if the Grievor was at all careless or negligent, a nine day Major Suspension is excessive, and should be reduced to substantially less discipline. This is the issue in dispute.

[4] Don McNally, Process Supervisor, Jim Laughlin, Relief Shift Manager, Paul Munnings, Technical Group Leader, and Jason Manderville, WWTP Process Technician, testified on behalf of the Employer. The Grievor, Carl Schweyer, WWTP Operator, and Ken Tryhorn, Chief Union Steward, testified on behalf of the Union. Numerous documents pertaining to the WWTP were entered into evidence. The WWTP, and its operation, is very complex. It is not necessary, to address the issue in dispute, to provide inordinate detail regarding the WWTP and its operation. Rather, I will provide as simple an explanation of the WWTP as is sufficient to adequately address the issue in dispute. In this context, I find the relevant and pertinent facts to be as follows.

THE FACTS

[5] The Grievor commenced work with the Employer in 2009 and worked as a Tank Car Loader until 2014. In the Tank Car Loader position the Grievor did not work at the WWTP. In 2014 the Employer contracted out the Tank Car Loader position, and reassigned the Grievor to be a WWTP Operator.

The WWTP Process

[6] The refinery produces liquid waste that contains oil that must be treated and cleaned. The oil from these liquids must be removed so that the liquids can be converted to clean water that can be returned to Lake Erie. The WWTP is a large and complex facility that does this through a number of processes. It is not necessary to review all of those processes for the purpose of this Award.

[7] Rather, for the purposes of this Award, the processes of the WWTP can be narrowed to three of its component parts: (1) Tank 403; (2) the Contamination Pond (“the Contam Pond”), and; (3) the primary reservoir in the WWTP (“the primary reservoir”). A brief description of these three components is as follows.

Tank 403

[8] In this case, the liquids from the refinery were pumped to and stored in Tank 403. Tank 403 is a huge round holding tank that is approximately 40 feet high and holds significantly more than a million liters. The waste liquids can be stored there until the WWTP has the capacity to process the liquids. The WWTP can only process a certain amount of liquids at any given time. When the WWTP has the capacity, “waste water” at the bottom of Tank 403 (see next paragraph) can be drained from the bottom of Tank 403 to the primary reservoir of the WWTP, for processing.

The Three Liquids in Tank 403 – Waste Water, Muck and Oil

[9] The liquids in Tank 403 naturally separate into three different layers. First, at the top layer, there is oil, because oil floats on water. Third, at the bottom layer, there is water that has relatively little oil in it, because most of the oil has floated to the top. For ease of reference, I will hereinafter refer to this bottom layer of as of yet untreated water that has relatively little oil in it as the “waste water”.

[10] The second, and middle layer, is what the parties referred to as the “muck layer”. It is a relatively thin layer where the waste water and the oil meet, and intermingle, and form a layer of “muck”. A gauge can be used to determine how many feet of waste water there is in the bottom of Tank 403, and at what level in the tank the waste water ends, and the muck layer commences.

[11] This “muck layer” is very important to this Award, because only the waste water layer, and not the muck layer or the oil layer, must be drained to the primary reservoir of the WWTP. Draining muck or oil to the primary reservoir can overwhelm the WWTP, and possibly cause damage to the WWTP, or at least require that the WWTP be cleaned and/or rehabilitated.

[12] Accordingly, when draining waste water from the bottom of Tank 403 to the primary reservoir, the WWTP Operator must be aware of how many feet of waste water there is that can be drained from the bottom of Tank 403, before the muck layer reaches the drain, and then muck, and thereafter oil, starts to be drained to the primary reservoir.

Tier 1 Readings and Dilution

[13] Numerous readings of the chemical levels in the waste water being treated in the primary reservoir are taken throughout the day. One of these readings is the sulphide level. If the sulphide level is above 9 parts per million (“ppm”), this is considered to be a “Tier 1 reading”, and immediate action is required, to lower the sulphide level in the primary reservoir.

[14] This can be done in two ways. First, waste water can be drained from Tank 403 to the primary reservoir. Alternatively, waste water can be pumped from the Contam Pond to the primary reservoir (see next paragraph). Either of these will dilute the waste water in the primary reservoir, and thereby lower the sulphide level. However, as stated above, the diluting waste water must not contain muck or oil.

The Contam Pond

[15] The Contam Pond is another place where liquids can be stored until they can be processed by the WWTP. It is a pond, with earth berms as sides. The liquids in the Contam Pond can come directly from the refinery, or they can come from Tank 403, as Tank 403 can also drain liquids to the Contam Pond. Also, if there is excessive waste water in the primary reservoir, that excessive waste water can automatically overflow to the Contam Pond. However, it is important that the Contam Pond not be overfilled, because it could overflow over its earth berms, and this would result in oily fluids overflowing to the surrounding areas, resulting in an environmental incident.

The Grievor's Training for the WWTP

[16] As stated earlier, the Grievor worked only as a Tank Car Loader for about five years, from his date of hire in 2009 until 2014, when the Employer contracted out the Tank Car Loader position, and reassigned the Grievor to work as a WWTP Operator.

[17] The Grievor commenced his training to be a WWTP Operator on September 8, 2014. However, for three days in September he was removed from his WWTP Operator training, because he was needed to do other work in the refinery.

[18] On September 25, 2014 the Grievor wrote an e-mail to a number of his superiors, including Mr. McInally, expressing a concern that his WWTP Operator training was being interrupted. Notwithstanding this, the Grievor was removed from his training to do other non-WWTP work on a further two occasions in October 2014.

[19] From October 6 to November 20, 2014, the Grievor was supposed to be trained by shadowing with Matt Webb, an experienced WWTP Operator. However, from November 10 to 20, Mr. Webb was absent from work, so the Grievor worked alone, without the benefit of being trained by shadowing Mr. Webb.

[20] The Grievor testified that throughout his training he received no training specific to determining the muck layer, and the draining of Tank 403. Rather, the Grievor testified that his training focused on the many other, and complex, aspects regarding the operation of the WWTP.

[21] The Grievor testified that he reviewed a “Learning Guide” that he was given during his training, and a “WWTP Final Review” that he reviewed at the end of his training, but noted that neither of these documents contain any information pertaining to determining the muck layer, or the draining of Tank 403.

[22] The Learning Guide states that before the trainee reviews the Learning Guide, the trainee should have available the “WWTP Operator Rounds Manual”. The WWTP Operator Rounds Manual does have some information in it regarding the draining of Tank 403, including a caution to be aware of the muck layer in Tank 403, so as to not allow muck or oil to drain to the primary reservoir. However, the Grievor testified that he was never given this WWTP Operator Rounds Manual, and never saw this information.

[23] There is no written, detailed and separate procedure in place specifically regarding the determination of the muck layer and the draining of Tank 403. However, there are such procedures for other tasks.

[24] The log reports indicate that during his training the Grievor had some exposure to the draining of Tank 403. However, the Grievor testified that it was his trainer, and not him, that was performing this work, and that he therefore remained untrained regarding the determination of the muck layer, and the draining of Tank 403.

[25] On November 20, the Grievor received his “Final Review and Sign Off”. Mr. McNally took the Grievor throughout the WWTP for one or two hours and asked him a number of questions regarding its operation. The Grievor was not able to answer all of the questions, and expressed a concern to Mr. McNally that he may not be ready to be a WWTP Operator. Mr. McNally said that it was okay to not be able to answer all the questions, and that he could call for help if he needed assistance. Mr. McNally also told

the Grievor that it is okay to be a bit nervous about commencing to be a WWTP Operator, and assured the Grievor that he would be all right. Ultimately, the Grievor, and several of the Grievor's superiors, including Mr. McNally, signed a form, which states that "this document is to confirm certification in" the WWTP.

[26] After November 20, 2014 the Grievor commenced to work as a certified WWTP Operator. However the Grievor testified that up to December 17, 2014 he never had to use the gauge to determine the muck layer in Tank 403. At that point, he had been on this new job for just less than one month. Apparently, this task does not necessarily arise frequently. The Grievor testified that just before December 17, 2014 he asked to be trained on this task, and Mr. McNally told him that he would give him this training on December 17, 2014. However, this never occurred.

What Happened on December 17, 2014

[27] On December 17, 2014 the Grievor reported for his 12 hour shift that started at 5:30 AM. He is required to review the log entries from the previous night shift to assess the status of the WWTP. He did so. The log entries indicated that the previous night shift crew had been draining Tank 403 to the primary reservoir, to dilute high sulphide levels in the primary reservoir, but had stopped the draining for the shift change. Stopping the draining for the shift change was a standard precautionary practice, to ensure that Tank 403 would not be over-drained, if the next shift did not notice that it was being drained.

[28] The Grievor's log entries state that at his 5:30 AM shift change he was informed that the sulphides were high at 9 ppm, and that at 6 AM he took a sulphide sample and also found them to be high at 9 ppm, being a Tier 1 reading. So the Grievor called Mr. Laughlin, the Shift Manager. Mr. Laughlin told him to resume the draining of Tank 403 to the primary reservoir, to dilute the sulphides in the primary reservoir. The Grievor commenced to do so.

The Varec Gauge

[29] One of the first things that a WWTP Operator should do, before commencing to drain Tank 403, is to determine the height of the total liquids in Tank 403. A Varec Gauge is used to measure that. The Varec Gauge log entry for end of the previous night shift indicated that the height of the total liquids in Tank 403 was at 32.5 feet at 5:30 AM. The Grievor did check the Varec Gauge, but he made an error in reading it. He thought it read about 18 feet, when in fact it read 32.5 feet, as logged by the previous night crew.

[30] The Grievor and Mr. Schweyer testified that there were cobwebs or dirt under the Varec Gauge's glass covering that made it very difficult to read the numbers on the Varec Gauge. The Grievor also noted that it was dark at 5:30 AM when he was reading the Varec Gauge at the beginning of his shift, and that he did not have a flashlight, and this also made it difficult for him to read the Varec Gauge.

[31] A picture of the Varec Gauge indicated that there were no cobwebs or dirt, and that the numbers on the Varec Gauge could therefore be clearly read. However, this picture was taken in February 2015, approximately 2 months after the incident. The Union submitted that the glass covering to the Varec Gauge had been removed and cleaned, and the cobwebs and dirt had been removed, sometime during those two months. Mr. McNally and Mr. Manderville disputed this, but no reliable evidence could be given on the exact state of the Varec Gauge at 5:30 AM on December 17, 2014. Mr. McNally also testified that the Grievor should have had a flashlight to enable him to properly read the Varec Gauge, and that in any event there should have been sufficient floodlight lighting to enable the Grievor to read the Varec Gauge.

[32] Normally, there is a device that transmits the total fluid level in Tank 403 to a control room. This device is used as a double-check, in concert with the reading of the Varec Gauge, to ensure that the fluid level in Tank 403 does not exceed its level limits. Primarily, it is used to safeguard against exceeding the high level limit, so the Tank 403 does not overflow. As of December 17, 2014, this device had been out of operation since October, 2014. In view of this, the Employer had implemented a "Control of Defeat

(COD) Procedure”. Control of Defeat Procedures contain a “Mitigation Plan”, or an alternate or backup safeguard procedure, that is to be followed to attempt to ensure that an incident does not occur due to the other inoperative device. In this case, the Mitigation Plan stated that the WWTP Operator should closely monitor the Tank 403 Varec Gauge, three times per shift, and that an Allen-Bradley Date Transfer device was also installed.

Measuring the Muck Layer

[33] As stated earlier, another and important thing that a WWTP Operator must do before commencing to drain Tank 403 is to determine the height of the muck layer in Tank 403. However, the Grievor did not do this. Accordingly, he commenced to drain Tank 403 without first knowing how many feet of waste water there was at the bottom of Tank 403, and therefore when muck and oil, rather than waste water, would start to drain to the primary reservoir.

The Butterfly Valve

[34] To commence the draining of Tank 403, the Grievor had to open a valve on the Tank 403 drainpipe. That valve is a butterfly valve, rather than a gate valve. The significance of this is that it is harder to control and determine the flow of liquids using a butterfly valve, than it is when using a gate valve. A 2013 Joint Health and Safety Workplace Inspection Log states “Tank 403, install gate valve on drain, safeguard butterfly single block valve”. No evidence was given as to whether the butterfly valve did in fact present a problem for the Grievor on December 17, 2014, and therefore did in fact play a role in causing the incident.

The Slipstream Valve

[35] Once the draining has been commenced, a slipstream valve can be used at any time to determine what is draining from Tank 403. The slipstream valve allows some of the liquids that are draining from the Tank 403 drainpipe to be sampled, to ensure that it is only waste water, and not muck, or oil. However, the Grievor testified that when he

tried to use the slipstream valve, no liquids drained from it, so it was of no assistance to him in determining what was draining from Tank 403. The Union initially submitted that since it was Dec. 17, 2014, the slipstream valve may have been frozen. However, evidence indicated that on Dec. 17, 2014, the temperature was above freezing. Mr. Schweyer testified that the valve is unreliable, and commonly doesn't work. However, Mr. Manderville testified that the slipstream valve was operational prior to Dec. 17, 2014.

10 AM to 5 PM

[36] At 10 AM the Grievor took another sample, and found that the sulphide levels were significantly down. The Grievor informed Mr. Laughlin of this, and Mr. Laughlin told the Grievor that he could stop the draining of Tank 403. The Grievor did so.

[37] However, by 11 AM, the sulphide levels were again at 9 ppm. The Grievor informed Mr. Laughlin of this, and Mr. Laughlin told the Grievor to resume the draining of Tank 403 to the primary reservoir. Again, the Grievor did so. Mr. Laughlin said that he would also obtain samples for sulphide testing.

[38] Around noon, Mr. Laughlin's samples disclosed that the sulphide levels were very high, at 21 ppm. Mr. Laughlin discussed this with the Grievor, and said that they would have to continue the draining, to attempt to dilute the sulphides in the primary reservoir.

[39] Also around noon, the Grievor as well noticed that the liquids in the Contam Pond were quite high, at about 88% of maximum capacity. He informed Mr. Laughlin of this. Mr. Laughlin and the Grievor decided that some of the liquids should be pumped out of the Contam Pond to ensure that it did not overflow its berms. The Grievor tried to pump liquids out of the Contam Pond. However, the pump at the Contam Pond would not work. The Grievor is a trained diesel mechanic, so he tried to get the pump working, but he couldn't. The Grievor eventually called maintenance to have a new pump delivered.

[40] At 12:42 PM the Grievor was called away from the WWTP to try to move a pump from the refinery to the WWTP. Before he left, the Grievor stopped the draining of Tank

403, as standard protocol. The Grievor was unable to move any pump from the refinery to the WWTP, so he left the refinery at 1:11 PM, and returned to the WWTP.

[41] At about 2 PM, the sulphide levels were high again. The Grievor informed Mr. Laughlin of this. Mr. Laughlin told the Grievor to resume the draining of Tank 403.

[42] At no time throughout the day did Mr. Laughlin, the Shift Manager, attempt to determine why the sulphide levels in the primary reservoir were so high, or to determine whether a Tank 403 muck layer reading had been taken, or how much liquid in total had been drained from Tank 403 throughout the day.

[43] At about 2:30 PM, the Grievor saw that the Contam Pond was now very high, at about 98% of maximum capacity. Accordingly, he stopped the draining of Tank 403.

[44] By about 3:30 PM, at the latest, it was clear that two significant problems had developed. First, there were very high sulphide levels in the primary reservoir, and the Grievor could now see that there was excessively oily liquid in the primary reservoir. This was because at some point in the day, the waste water in the bottom of Tank 403 had all been drained out of Tank 403, and thereafter muck and oil had commenced to drain out of Tank 403 to the primary reservoir.

[45] Second, the Contam Pond was approaching maximum capacity. This was because excessive liquids had been drained from Tank 403 to the primary reservoir throughout the day, and the primary reservoir was automatically overflowing to the Contam Pond. Tank 403 had been drained from 32.5 feet to 13 feet, which represents an excessive amount of liquids to be drained to the primary reservoir, and then to overflow to the Contam Pond. Both of these circumstances overwhelmed the WWTP.

[46] At about 4:45 PM, the new pump was delivered by maintenance, and some of the liquids were pumped out of the Contam Pond. Mr. Laughlin, Mr. McNally and the Grievor worked beyond 5 PM to try to control and remedy the situation.

[47] There was some evidence that when the dilution of sulphides in the primary reservoir is required, the practice has been to pump waste water from the Contam Pond to the primary reservoir, rather than from Tank 403 to the primary reservoir. This is because it is easier to monitor when muck and oil, rather than waste water, is being pumped from the Contam Pond to the primary reservoir, and it is therefore a safer practice.

[48] However, this practice was not used on December 17, 2014, possibly because the pump that would be used to pump waste water from the Contam Pond to the primary reservoir was not working on Dec. 17, 2014. Since Dec. 17, 2014 the usual practice has been to drain Tank 403 to the Contam Pond, and not directly to the primary reservoir.

The Investigation

[49] Mr. Laughlin completed an “Incident Risk Analysis Tool” form prior to leaving the WWTP on Dec. 17, 2014. This form is used to assess the level of risk associated with an incident, and has three risk categories: Lower Risk, Medium Risk and Higher Risk.

[50] Under the heading “Actual Consequence Level”, Mr. Laughlin chose “Inconsequential or of no adverse environmental effects. Confined to the site or close proximity”, which is the lowest of the four risk Levels under that heading. Under the heading “Potential Consequence Level”, Mr. Laughlin chose the second lowest of the four risk Levels under that heading. These responses clearly put the incident in the overall “Lower Risk” category.

[51] The Union noted this “Lower Risk” category assessment during its cross-examination of Mr. Laughlin. On re-examination, the Employer’s counsel noted that Mr. Laughlin had filled in this form before he left the WWTP on December 17, 2014, and before he possibly appreciated the full impact of the incident. Employer counsel noted that the incident did require a rehabilitation of the WWTP, which took several days, and that possibly in view of this Mr. Laughlin might now reconsider his risk assessment. Mr. Laughlin replied that since the incident did not result in any spill, on or off site, did not result in any environmental incident, and did not require any reporting to the government,

he had no reason to change his risk assessment, other than to possibly increase the Actual Consequence Level by one Level, given that he now knew that the rehabilitation of the WWTP took a number of days. However, even in view of this, Mr. Laughlin testified that the overall risk assessment would still remain at the “Lower Risk” Level.

[52] A “Near Loss and Loss Investigation Report” was also subsequently completed regarding this incident, which states:

What should have happened: When draining water from Tank 403, monitoring of water quality to be done. When water starts to turn dark, draining is to be stopped before hitting oil. Tank 403 link to OM&S TDC is not available (COD entering on this outage). Stop gauge would have been entered and alarmed when draining reached the set layer. Currently Allen Bradley computer in the WWTP control room is used to monitor Tank 403 level.

The consequences of the Incident

[53] Little evidence was adduced regarding the actual consequences of the incident. However, it is clear that there was no actual environmental incident. No contaminated water was released to the surrounding area, or to Lake Erie. The Employer was not required to make any report to the government.

[54] The evidence was that the WWTP was “overwhelmed”, and had to be “rehabilitated”, which took a number of days. However, exactly what that meant, or entailed, was not specifically explained. There was no evidence that there was any damage to the WWTP which required any substantial reparation costs.

The Employer’s Progressive Discipline Guidelines

[55] The Employer has detailed Progressive Discipline Guidelines which contain four Levels of progressive discipline: Level 1 - verbal warning; Level 2 - written warning; Level 3 - suspension without pay, and; Level 4 - termination of employment. The suspension without pay Level 3 contains two subcategories: Level 3(a) Minor

Suspension - 1 to 2 twelve hour shifts, and; Level 3(b) Major Suspension - 3 or more twelve hour shifts.

[56] A Progressive Discipline Guidelines Matrix that is attached to the Progressive Discipline Guidelines states that with regard to the infraction of “Failure to follow (non-critical) procedures”, which is the infraction that the Grievor was disciplined for in this case, the recommended disciplinary progression is: (1) written warning; (2) Minor Suspension; (3) Major Suspension, and then; (4) termination.

[57] The Progressive Discipline Guidelines state that a Minor Suspension remains on the employee's file for six years. A Major Suspension remains on the file for 10 years.

[58] The Progressive Discipline Guidelines have been unilaterally established by the Employer. They have not been negotiated with the Union, and do not form part of the collective agreement. Accordingly, they are not binding on me. However, nevertheless, they indicate that, according to the Employer’s Guidelines, if the Major Suspension is upheld, and if the Grievor engages in a further failure to follow established (non-critical) procedures within the next 10 years, the Grievor should be terminated.

The Discipline Imposed upon the Grievor

[59] On March 12, 2015, almost three months after the incident, the Grievor was given a disciplinary letter which contained an unpaid nine-day Major Suspension (for nine 12 hour shifts) for “failure to follow established (non-critical) procedures”, and states that:

“This major disciplinary suspension is being imposed for your actions, which resulted in an incident on December 17, 2014 at the WWTP during which a large quantity of oil was drained into the primary reservoir. This incident had the potential to result in a significant environmental incident. Our investigation into the incident has led us to conclude that you failed to follow established (non-critical) procedures and exhibited negligence in carrying out your responsibilities...

You have two prior disciplinary actions on file for similar infractions:

1. Verbal reprimand (December 2011) for failure to follow acceptable practices resulting in damage to two railcars while shunting cars at the acid tank car loading rack.
2. Written reprimand (December 2011) for failure to follow established procedures, and exhibiting negligence in carrying out your responsibilities, resulting in propylene product being loaded into two empty isobutene cars.

Any future violations of company work rules or policies will be subject to further discipline, up to including termination of employment with cause, without notice or pay in lieu of notice. If you are uncertain about the standards expected of you, please seek clarification from me or your supervisor so that you may avoid future discipline.”

[60] The Employer noted that the above-referenced December 2011 written reprimand letter, that was entered into evidence, specifically states that the Grievor had failed to follow established (non-critical) procedures and had been negligent. The Employer submitted that the Grievor’s December 2011 negligence is very similar to, and compounds, the Grievor's negligence in this case.

[61] It would appear that this is the reason why the Employer skipped one of the steps on its Progressive Discipline Guidelines. Prior to December 17, 2014, the Grievor had the December 2011 written warning on his record for failure to follow established (non-critical) procedures. As noted above, the next recommended progressive discipline in the Progressive Discipline Guidelines for this same infraction is a Minor Suspension. However, the Employer skipped this step, and instead imposed a Major Suspension.

[62] Skipping a step is contemplated in the Employer’s Progressive Discipline Guidelines, which state that:

The term “progressive” does not mean that all Levels must be used in sequence in every case. Depending upon the seriousness of the infraction, and/or the number and type of previous infractions, it may be appropriate to start above Level 1 (or even at Layer 4), or to skip a Level.

[63] On March 12, 2015, the Union filed its grievance No. 3100315 (“the Grievance”), alleging unjust discipline, and requesting full redress.

The Grievor's Draft Tank 403 Procedure

[64] Since December 17, 2014, the Grievor has continued to work as a WWTP Operator. In view of this, the Grievor took it upon himself to write a draft Procedure entitled "Procedure: Draining Water from Tank 403 at WWTP", because the Grievor felt that there was no such procedure in place, and that one was needed. The Grievor gave his draft Procedure to his supervisors. This draft Procedure contains a detailed process for the measurement of the muck layer, and the draining of Tank 403, and recommends that Tank 403 be drained to the Contam Pond, rather than to the primary reservoir, and that draining to the primary reservoir requires the Shift Manager's approval and sign off. The Grievor's draft Procedure also recommends that Tank 403 be drained only in one foot per hour increments, to ensure regular muck layer monitoring.

The Previous Incident - June 9, 2005

[65] On June 9, 2005 an incident occurred that is very similar to the Grievor's incident. The report regarding it states that "the Operator [Ms. M] was not aware of and did not confirm the oil/sludge layer in Tank 403", and that "an incorrect gauge of Tank 403 layer was recorded", with the result that "the Supervisor observed oily foam in the aeration basins and clarifiers, as well as oil in the recycle ponds (downstream of clarifiers). The WWTP was placed on 100% recycle". The Union submitted that this incident, with "oily foam in the aeration basins and clarifiers, as well as oil in the recycle ponds (downstream of clarifiers)", was more serious than the Grievor's incident.

[66] The report makes recommendations to "perform a risk assessment of the Tank draining task to determine if a written procedure is required", and "include upgrading gauging system for Tank 403 to Saab radar to indicate both top layer and emulsion [muck] layer". Saab radar was installed to gauge the top layer and emulsion [muck] layer, but it didn't work very well, and is not currently used. The Union noted the current absence of the Saab radar to determine the muck layer, and also submitted that currently

there is still no written procedure specific to the draining of Tank 403, as was recommended in the report.

[67] Due to this incident, Ms. M was given only a warning letter for unacceptable work performance, stating that:

“During that shift you failed to properly monitor the Tank 403 draining operation. This resulted in a significant volume of oily sludge being drained into the API separator and ultimately overloading the WWTP. The impact of this incident was such that the processing efficiency of the Biox was severely compromised resulting in a high potential near miss in excess of our environmental release limits”.

[68] Based upon both of the description of the incident, and its consequences, as contained in the report, and in the warning letter, it certainly appears that this incident was at least as serious, if not more serious, than the Grievor’s incident. The Union relied on this, submitting that the imposition of only a warning letter upon Ms. M., and the imposition of a Major Suspension upon the Grievor, for what amounts to a less serious incident, is discriminatory and highly excessive.

THE EMPLOYER’S SUBMISSIONS

[69] The Employer stated that the Grievor was disciplined for failing to follow established (non-critical) procedures pertaining to the draining of Tank 403. The Employer noted that Mr. McNally testified that the draining of Tank 403 is “a very simple task” and that Mr. Manderville testified that it is “not difficult”. Based on this, the Employer submitted that there can be no justifiable excuses for the Grievor not knowing how to perform this task.

[70] Most importantly, and specifically, the Employer noted that the Grievor failed to determine the muck layer in Tank 403 before he commenced to drain it. In view of this, the Employer submitted that the Grievor failed to conduct one of the most elementary steps, and “had no idea” of where the muck layer was, and therefore “had no idea” of when muck, and then oil, would start draining from Tank 403 into the primary reservoir.

The Employer submitted that this is such a basic, and important step, that in failing doing to do this alone, the Grievor was certainly careless and negligent, and that the Major Suspension, rather than a Minor Suspension, is completely warranted.

[71] The Employer noted that the Grievor, throughout his shift, also failed to determine the amount of the waste water draining from Tank 403, which resulted in both the WWTP being overwhelmed with excessive waste water, and the Contam Pond also being seriously overfilled. The Employer submitted that this also amounts to negligence, and also warrants the Major Suspension.

[72] The Employer submitted that the consequences of the Grievor's actions were very serious, and also justify the Major Suspension. First, the WWTP was overwhelmed with excessive waste water, muck and oil, and required rehabilitation, which took a number of days. Second, the Employer submitted that the Grievor's actions potentially could have (but did not) result in a significant environmental incident which would have had to have been reported to the government, and would have required remedial actions.

[73] Finally, the Employer noted that the Grievor has two previous disciplinary sanctions, a verbal warning and a written warning, both of which pertain to careless work performance, and submitted that this also justifies the Major Suspension.

[74] The Employer relied upon *Quality Meat Packers Ltd. and UFCW, Local 175*, 2013 CanLII 15073 (ON LA) (G. Surdykowski), and the often quoted passage cited therein from *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.) which states that the credibility of a witness's testimony must be determined based upon its consistency and harmony with all of the other evidence in the hearing. The Employer submitted that the Grievor's testimony is not consistent and harmonious with all of the other evidence, and therefore the Grievor should not be considered to be credible.

[75] Also, the Employer admitted that although it had the burden of proving that the Grievor engaged in some misconduct that warrants at least some discipline, the onus then shifts, and the Union bears the onus of proving that there were factors outside of the

Grievor's responsibility, for which the Employer bears responsibility, and which thereby exculpate the Grievor from discipline. In this regard, the Employer relied upon *Vale Canada Ltd. and USW, Local 6500 (Denny Grievance)*, [2014] O.L.A.A. No. 287, in which Arbitrator Hayes did not accept the Grievor's assertion that there were factors that should mitigate his discharge, but rather upheld the discharge. The Employer noted that Arbitrator Williamson came to the same conclusion in *Metro Ontario Inc. and UFCW, Local 175*, (2011) 107 C.L.A.S. 87.

[76] Finally, the Employer submitted that I should be reluctant to change the discipline imposed by the Employer, and should rather defer to the Employer's judgement. In this regard, the Employer relied upon *Levi Strauss Canada and Amalgamated Clothing and Textile Workers Union* (1980), 26 L.A.C. (2d) 91 (H. Arthurs).

THE UNION'S SUBMISSIONS

[77] In response to this, the Union submitted that that there were many factors that caused this incident to occur, and that the Grievor was not at all responsible for these factors. Rather the Union submitted that Employer was responsible, in that these factors represented defects in the Employer's practices, procedures and facilities. Accordingly, the Union submitted that it is the Employer that must take full responsibility for these factors, and that the Grievor does not deserve any discipline whatsoever.

[78] Alternatively, the Union submitted that if the Grievor bears any responsibility at all for any of these events, the Employer shares this responsibility with him, due to the factors regarding which the Employer bears some responsibility, and the Major Suspension imposed upon the Grievor is therefore excessive, and must be replaced with much lesser discipline. The Union then reviewed these factors.

Not a Simple Task

[79] The Union submitted that the draining of Tank 403 is not the very simple task that the Employer portrays it to be, but rather is a complex task, among all of the other

complex duties and responsibilities that must be performed by a WWTP Operator. The Union noted that the Grievor was new to the WWTP Operator position, and that his training for the position took almost 3 months. The Union submitted that such a lengthy training period refutes the portrayal that the draining of Tank 403 is a very simple task. To the contrary, the Union submitted that it establishes that it is a complex and difficult task, which requires adequate training.

Inadequate Training

[80] The Union submitted that the Grievor's training was inadequate, in that it did not include any training specifically pertaining to the determination of the muck layer, and the draining of Tank 403. Accordingly, the Grievor was not trained in these tasks, and therefore cannot be held responsible for not performing them properly.

[81] Also, the Union noted that if the Employer maintains that the determination of the muck layer and the draining of Tank 403 are such fundamentally important tasks, it makes the Employer's failure to train the Grievor on these tasks all more culpable, and renders the Employer all the more responsible for the incident.

[82] Also, the Union noted that the Grievor expressed concerns, on September 25 and November 20, 2014, that his training had been interrupted, and that he was not ready to assume the responsibilities of a WWTP Operator, but the Employer failed to act on these concerns. Accordingly, the Union submitted that the Employer failed to properly and adequately train the Grievor, and that it is the Employer that must bear the responsibility for this.

Was Following the Directions of Mr. Laughlin

[83] Furthermore, the Union submitted that at all times the Grievor was very reasonably following the directions of his Shift Manager, Mr. Laughlin, and that it must be Mr. Laughlin, who is vastly more experienced, and in a managerial position, who must take all or at least a large part of the responsibility for the incident. The Union noted that

the Grievor was very new to the position, just recently having been deemed to have finished his training less than a month earlier on November 20, 2014, and that under these circumstances it was completely reasonable for the Grievor to follow the directions of Mr. Laughlin, and to believe that everything was alright. The Union submitted that in view of the very high sulphide levels, Mr. Laughlin should have made his own inquiries about why this was the case, and if Mr. Laughlin was not concerned about the draining of Tank 403, and indeed repeatedly directed the draining of Tank 403, it is completely unreasonable to give the Grievor a Major Suspension, and to not discipline Mr. Laughlin for not ensuring that there was no problem with the draining of Tank 403.

Other Factors – The Perfect Storm

[84] Finally, the Union reviewed a number of other factors that it submitted also caused or contributed to this incident, and are also the responsibility of the Employer, including: the inability to read the dirty Varec Gauge; the absence of the normal device that transmits the fluid level in Tank 403 to the control room, and the Control of Defeat Procedure, which the Union submitted was inadequate; the inability to properly assess the amount of liquids draining from Tank 403 due to having a butterfly valve rather than a gate valve, and; the inability to assess what liquids were draining from Tank 403 due to the malfunctioning slipstream valve.

[85] The Union submitted that all of these factors, when taken together, resulted in an emergency, or a “perfect storm”, that caused this incident to occur, and that the Grievor dealt with this perfect storm in a completely reasonable manner, given his limited training and experience, and the very challenging and compounding circumstances.

[86] Accordingly, the Union submitted that it is the Employer, and not the Grievor, that is responsible for these factors, and that it is a member of management that should have been disciplined, and not the Grievor.

[87] Alternatively, the Union submitted that if the Grievor bears any responsibility at all for the factors, the Employer shares this responsibility with him, and the Major

Suspension imposed upon the Grievor is excessive, and must be replaced with much lesser discipline. Again, in this scenario, the Union submitted that a member of management should also have been disciplined.

The Union's Case Law – The Employer's Responsibility

[88] The Union put forward many cases in which discipline was overturned or mitigated on the grounds that the Employer bore all or shared some of the responsibility for an incident. In *Goodyear Canada Inc. and United Rubber Workers, Local 232* (1977), 14 L.A.C. (2d) 340 (K. Burkett), an employee was demoted for poor work performance that resulted in a significant amount of product that had to be scrapped. The employer had experienced difficulties in maintaining proper thread length, and had hired a Quality Inspector, but the Quality Inspector was not on the employee's shift, because a supervisor considered the employee to be experienced. The employee had two previous notations for poor work performance. Arbitrator Burkett overturned the demotion, finding that it was the employer's failure to have a Quality Inspector on the shift, and to properly supervise the other crew members, that were the primary factors that caused the incident, and that the employer was wrongly singling out the employee for the incident.

[89] In *Alberta (Solicitor General, Correctional Services Division) v. Alberta Union of Provincial Employees (Erl grievance)* (2006), 145 L.A.C. (4th) 382 (T. Jolliffe), a prison guard was given a two-day suspension for failing to follow a standard operating procedure that required that he not place a prisoner who had been designated a sexual predator in a cell with another prisoner. In error, the prison guard did so, and the prisoner sexually assaulted his cell mate. This was considered to be a very serious error. Arbitrator Jolliffe found that the prison guard was not solely responsible for the incident, but rather other employees had also failed to adequately communicate and assess the situation, which could have avoided the incident. However, only the prison guard in question was disciplined. In view of this, Arbitrator Jolliffe found that the discipline was discriminatory, and reduced the two-day suspension to the written warning, notwithstanding the seriousness of the incident.

[90] In *The Queen in Right of Nova Scotia and Nova Scotia Government Employees Association* (1983), 10 L.A.C. (3d) 47 (P. Darby), a Research Assistant who was on an excursion by helicopter attempted to toss his contaminated boots out of the helicopter that was idling on the ground. However, his boot struck the edge of the idling helicopter rotor, but did not cause any significant damage to the helicopter, or any harm to anyone. The Research Assistant had not received any instruction in safety procedures regarding helicopters, and had been on relatively few helicopter excursions. It was noted in a report that “our helicopter pilot might have been at fault in not keeping a stricter control on the movements of the Research Assistant”. Notwithstanding this, only the Research Assistant was given a written warning, stating that his actions were very serious, and had been careless or negligent. Arbitrator Darby reduced the written warning to a verbal warning, citing the lack of training, and stating that “the pilot, as the person most immediately affected by and most knowledgeable about the consequences of improper conduct, bears roughly equal responsibility with the [Research Assistant]”.

[91] In *Canadian National Railway Co. and International Brotherhood of Electrical Workers System Council No. 11 (Halliday Grievance)*, unreported, Feb. 28, 2006 (M. Picher), an S&C Maintainer improperly assembled switch machine lock rod arms, and failed to perform a related test to determine whether they had been properly assembled, which created the potential for a head on train collision. The S&C Maintainer had a written warning and 10 demerit points on his disciplinary record. The employer concluded that in view of this previous discipline and the current incident, the S&C Maintainer did not have the necessary aptitude to perform highly safety sensitive work, and discharged him. The union submitted that the S&C Maintainer had been insufficiently trained, that the equipment was obsolete and had been improperly rebuilt, and that the procedures were insufficient to prevent this type of error. In view of this, the union submitted that the employer bears responsibility for the incident, and that the S&C Maintainer must be reinstated. Arbitrator Picher acknowledged that the S&C Maintainer’s error was very serious, but reinstated him, stating that due to lack of adequate training, the employer did bear much of the responsibility for the incident:

Firstly, there can be little doubt but that the Company's failure to provide the grievor the proper training in advance of assigning him to repair switching

machines is a matter which must be given some weight in mitigation in this grievance. The Arbitrator must agree with counsel for the union that there is some inequity in the Company failing to give the junior employee reasonable training in a relatively technical aspect of his job, and thereafter holding him fully responsible for any shortcoming in performance.

[92] However, Arbitrator Picher accepted that the S&C Maintainer did make some errors that he should not have made, most particularly the failure to perform the test, but did not accept that the S&C Maintainer was incapable of performing safety sensitive work. Accordingly, Arbitrator Picher reinstated the S&C Maintainer, but without any compensation, and conditional, at the employer's option, to be placed into a mentoring position, for a reasonable period of time upon his return to work.

The Major Suspension is Excessive

[93] Finally, the Union submitted that even if the Grievor's actions warrant some discipline, the Major Suspension is excessive and discriminatory, for four reasons.

[94] First, the Union submitted that the consequences of the incident were not very serious, and in view of the previous incident on June 9, 2005, which was more serious, and resulted in the imposition of only a written warning, a Major Suspension for this incident is discriminatory.

[95] Second, the Union noted that the Major Suspension was given to the Grievor on March 12, 2015, almost 3 months after the incident on December 17, 2014. The Union submitted that this significant delay in imposing discipline indicates that the Grievor's actions were not so serious as to warrant immediate discipline, and similarly do not warrant a Major Suspension.

[96] Third, the Union also noted that the Grievor's previous verbal warning and written warning were both in December 2011, three years earlier, when the Grievor was a relatively new employee, and was working in a completely different position in the Refinery, as a Tank Car Loader, and not in the WWTP. The Union submitted that this previous unrelated discipline does not support the imposition of a Major Suspension.

[97] Fourth, the Union noted that the Employer has skipped a step in its own Progressive Discipline Guidelines. The Union submitted that nothing in the facts of this case warrants the skipping of such a step. Rather, the Union submitted that when all of the facts are considered, only minimal discipline is warranted.

ANALYSIS AND RULINGS

[98] Most fundamentally, this incident occurred because the Grievor drained Tank 403 without first determining where the muck layer was in Tank 403. Accordingly, the Grievor did not know how much waste water he could drain from Tank 403, before muck and oil would start to flow from Tank 403 to the primary reservoir.

[99] If the Grievor had first determined where the muck layer was in Tank 403, he presumably would have stopped draining Tank 403 when it got near the muck layer, and no muck and oil would have drained into the primary reservoir. Also, excessive waste water, muck and oil would not have been drained into and overwhelmed the primary reservoir, and then overflowed into the Contam Pond. Accordingly, both aspects of the incident could have been avoided.

[100] The first issue is whether the Grievor warrants any discipline for not first determining where the muck layer was in Tank 403. If some discipline is warranted, the second issue is what discipline is appropriate. For the reasons that follow, I find that a two-day Minor Suspension is more appropriate than a Major Suspension.

The Grievor's Responsibility

[101] I cannot accept the Union's position that the Grievor's training was so inadequate that he should bear no responsibility for not determining where the muck layer was in Tank 403. The Grievor acknowledged that he understood that there was waste water in the bottom, and then oil on the top, in Tank 403. He said that he did not know that there was something called a "muck layer" where the water and oil intermingled, but he

acknowledged that he knew that there was a gauge that could be used to measure where the water and the oil intermingled. However, he said that he had not been trained in how to use that gauge. He testified that he knew that waste water could be drained from Tank 403 to dilute sulphides in the primary reservoir. Most importantly, he acknowledged that he also knew that oil must not be drained into the primary reservoir when doing so.

[102] In view of all of this, I find that the Grievor's failure to at all determine the muck layer in Tank 403, before commencing to drain Tank 403, was careless or negligent, and his actions cannot be completely exonerated by insufficient training, the instructions from Mr. Laughlin, or any of the other factors raised by the Union.

[103] The determination of the muck layer is such an important and fundamental step in the process, that the Grievor must bear at least some responsibility for completely failing to consider and conduct this step. Given what the Grievor did know about the need to not drain oil to the primary reservoir, even if he had not been given specific instruction on how to determine the muck layer, at a minimum, he should have at least asked for help from Mr. Laughlin, or some other supervisor, as he had been told he could do, rather than to completely skip this step.

[104] I do not accept that the circumstances of December 17, 2014 created an emergency or a perfect storm, which the Grievor adequately responded to, given his training. I do not accept that there was such an emergency or a perfect storm. Accordingly, the Grievor's actions warrant some discipline.

[105] However, that is not to say that the Grievor bears full and only responsibility for this incident, or that the Major Suspension is appropriate. Rather, management bears some responsibility for some of the factors that contributed to this incident, as follows.

The Grievor's Training

[106] The Grievor's training was less than complete. His training was initially interrupted by being called away on three occasions to do other work outside of the

WWTP. He wrote an email to his supervisors expressing concerns regarding this. There was no adequate response to his email. He was again called away on two occasions to do other work outside of the WWTP. Later, the Operator he was shadowing with was absent for numerous days, so the Grievor worked on his own, rather than being trained. The Grievor testified that throughout his training he did not receive any training or procedures specifically regarding the determination of the muck layer, or the draining of Tank 403. The Grievor again expressed concerns regarding his training when he was certified on November 20, 2014, stating that he had not been able to answer all of the questions that had been asked of him, and that he did not feel that he was ready to be a WWTP Operator. Mr. McNally replied to the Grievor, stating that it was okay to not be able to answer all of the questions, and that it was normal to be a bit nervous about commencing to be a WWTP Operator. Notwithstanding all of this, on November 20, 2014 the Employer certified the Grievor to be a WWTP Operator, and assigned him to perform that work.

[107] It is the Employer's responsibility to train its employees. There was no evidence that the Grievor had been specifically trained on and had actually performed the task of determining the muck level in Tank 403. The Grievor testified that he was never given the WWTP Operator Rounds Manual. There is no written, detailed and separate procedure in place specifically regarding the determination of the muck layer. There are such procedures for other tasks. If the Grievor had been fully and completely trained, including with regard to such an important task as the determination of the muck layer, this incident could have been averted. The Employer must bear some responsibility for not providing this specific training to the Grievor, especially when it seeks to discipline the Grievor for failing to properly perform this specific task.

Mr. Laughlin's Supervision

[108] The Grievor was very new to the WWTP Operator position, and throughout his shift he was in regular communication with and received supervision and instructions from Mr. Laughlin, his Shift Manager. The Grievor informed Mr. Laughlin of the sulphide levels, and Mr. Laughlin instructed the Grievor to drain Tank 403 to the primary

reservoir, on a number of occasions. Mr. Laughlin was well aware that the sulphide levels were very high. He took his own samples for testing. However, at no time did Mr. Laughlin question or attempt to determine why the sulphide levels in the primary reservoir were so high, such as whether oil was draining in to the primary reservoir, or determine whether a Tank 403 muck layer reading had been taken, or how much liquid in total had been drained from Tank 403 throughout the course of the day.

[109] These are not primarily Mr. Laughlin's responsibility. They are the Grievor's responsibility. Accordingly, Mr. Laughlin's actions do not absolve the Grievor of any responsibility. However, Mr. Laughlin, as an experienced Shift Manager, could have nevertheless considered these issues and asked the Grievor about these things, or made his own independent assessments regarding these things, which could have avoided the incident. In view of this, it is not warranted that the Grievor bear full responsibility and receive a Major suspension for the incident.

[110] These are the two main factors on which I find the Employer shares some responsibility with the Grievor, and which mitigate the severity of his discipline.

The Other Factors

[111] I do not find that the issues regarding the Varec Gauge, the absence of the normal device that transmits the fluid level in Tank 403 to the control room, the Control of Defeat Procedure, the butterfly valve, or the slipstream valve are of significant importance to this matter.

[112] The evidence was inconclusive as to whether the numbers on the Varec Gauge were obscured by cobwebs or dirt under the glass, or could not be adequately read in the dark by the Grievor, and whether the slipstream valve was inoperative on December 17, 2014. There was also insufficient evidence on whether the butterfly valve was in fact inadequate for determining and controlling the flow of liquids from Tank 403, and whether the absence of the normal device that transmits the fluid level in Tank 403 to the control room, and the Control of Defeat Procedure, had any bearing on this case.

[113] Also, these factors did not truly cause or contribute to the incident. The fact of the matter is that if the Grievor had in fact first determined the muck layer, he would have known how much waste water there was at the bottom of Tank 403 that could be drained, before he hit the muck and oil layers, and would have taken steps to ensure that the draining was stopped before the waste water was depleted, and excessive waste water, muck and oil flowed to the primary reservoir. However, the Grievor did not first do this. Accordingly, these subsequent factors are not mitigating factors with regard to the Grievor's discipline.

The Major Suspension is Excessive

[114] Finally, the consequences of the incident, the previous incident in June 2005, and the skipping of a step in the Employer's Progressive Discipline Guidelines, are also further grounds upon which I find that a Major Suspension is excessive, and that a Minor Suspension is more appropriate, for the following reasons.

[115] Mr. Laughlin's assessment, using the Employer's "Incident Risk Analysis Tool", even when he was asked about it again in re-examination, was that the incident fell within the overall "Lower Risk" category. This was because no contaminated liquids were released to the surrounding area, or to Lake Erie, and the incident did not result in any actual environmental incident that required any reporting to the government. Similarly, there was no evidence that there was any damage to the WWTP which required any substantial reparation costs.

[116] For the June 2005 incident, Ms. M was given only a warning letter for failing to properly monitor the Tank 403 draining, which resulted in a significant volume of oily sludge being drained, and which ultimately overloaded the WWTP. The impact of this incident was that "the processing efficiency of the Biox was severely compromised, resulted in a high potential near miss in excess of environmental release limits".

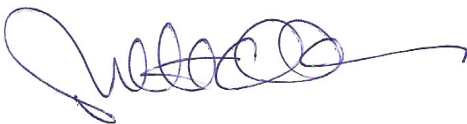
[117] Based upon the description of the incident and its consequences, it appears that this incident was at least as serious, if not more serious, than the Grievor's incident. The imposition of only a warning letter upon Ms. M. for that incident, and the skipping of a step and the imposition of a Major Suspension upon the Grievor, for what appears to be a less serious incident, in the absence of other extenuating factors, appears to be discriminatory and excessive discipline.

[118] Finally, the Employer skipped one of its steps in its Progressive Discipline Guidelines. Prior to December 17, 2014 the Grievor had the December 2011 written warning on his record for failure to follow established (non-critical) procedures. The next recommended progressive discipline in the Progressive Discipline Guidelines for that same infraction is a Minor Suspension. However, the Employer skipped this step, and instead imposed a Major Suspension. In view of the facts set out above, I am not satisfied that there are grounds to deviate from the normal progressive discipline, and instead skip a step in the Progressive Discipline Guidelines.

[119] For all of the reasons set out above, I find that the Grievor was careless or negligent, but does not bear full responsibility for the incident. Rather, the Employer shares some of the responsibility for the incident. Also, I find that the Major Suspension is excessive, and that rather a two-day (two 12 hour shifts) Minor Suspension is the more appropriate discipline. The Grievor must be compensated for seven 12 hour shifts.

[120] I remain seized with regard to the interpretation and implementation of this Award, including the resolution of any dispute regarding the calculation of the compensation awarded to the Grievor.

Signed at Toronto on June 5, 2016.



Peter F. Chauvin, Arbitrator