

ARBITRATION AWARD

BETWEEN:

UNITED STEELWORKERS, LOCAL 6480
(hereinafter called the "Union")

AND:

TORNGAIT SERVICES INC.
(hereinafter called the "Employer" or the "Company")

GRIEVOR: Henry Saunders

COUNSEL: For the Union

Tom Harris

For the Employer

Harold M. Smith, Q.C.

ARBITRATOR: James C. Oakley

The Arbitration hearing was held at Happy Valley-Goose Bay on February 21, 2008. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter in the event there was a question of interpretation or compensation arising from the Award, to be referred to the Arbitrator within sixty (60) days following publication of the Award.
5. The parties agreed to waive any applicable time limits for the filing of the Award.
6. The parties agreed that witnesses could remain during the hearing.

In the Award, the Complainant will be identified by initials, for the purpose of protection of privacy.

The following exhibits were entered at the hearing:

Consent 1 - Grievance Report dated December 9, 2007

Consent 2 - Grievance Response from the Employer

Consent 3 - Collective Agreement between Torngait Services Inc. and United Steelworkers, Local 6480 dated June 11, 2007

Consent 4 - Letter dated October 3, 2007 from the Employer to Henry Saunders

Consent 5 - Letter dated November 28, 2007 from the Employer to Henry Saunders

HS - 1 Grievance Report dated September 30, 2007

Nature of the Grievance

The Union grieves a two week disciplinary suspension issued to the Grievor by letter dated November 28, 2007. The Unions submits that the matter for which discipline was imposed was already settled and the discipline offends the rule against double jeopardy. The Employer submits that no prior discipline was imposed for sexual harassment, the offence for which the two week suspension was imposed and the rule against double jeopardy does not apply.

The parties dispute whether the scope of the grievance also includes the issue as to whether the Employer had just cause to impose discipline. It was agreed that the Arbitrator would address the issue of double jeopardy in this award and any issue concerning the scope of the grievance would be addressed with the parties at a later date, if necessary.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 6 Discipline and Discharge

- 6.01 The Company reserves the right to discipline employees for just cause.
- 6.02 The Company agrees that when an employee is to be disciplined and/or discharged, he/she may request to be accompanied by his/her Shop Steward. An employee shall suffer no loss of pay or other benefits while attending meetings under this Article.

6.03 Any written warning, suspension, or discharge given to any employee shall be given in writing, in duplicate, within seven (7) Goose Bay office business days of it being determined by the Company that there has been an infraction warranting discipline.

...

6.12 The Company agrees that an arbitration shall have jurisdiction to determine whether or not the following rule(s) was violated, and where the arbitrator determines it was violated shall have additional jurisdiction to determine if the degree to which the rule was violated (seriousness of the violation in all the circumstances) warrants the expulsion from the Site where such expulsion is tantamount to termination of employment.

- (1) Harassment;
- (2) Intentional release of any pollutants to the environment;
- (3) Harassment of feeding of wildlife.

Evidence

The witnesses called by the Union were Henry Saunders, Nelson Brown and Darren Cove. The witness called by the Employer was Rick Young.

The Grievor, Henry Saunders, is employed by the Employer, Torngait Services Inc. ("TSI") as a fuel truck driver and equipment operator at the Voisey's Bay, Labrador mine site. The site includes camp accommodations. The Grievor works a schedule of two weeks on and two weeks off.

A female worker at the site, NN, filed an allegation of sexual harassment against the Grievor arising from an incident on September 19, 2007. An investigation was conducted on the site by ASC Security, a contractor independent from TSI. Written statements were taken by security officers

from the Grievor and the Complainant. The Grievor was sent home from the site on September 20, 2007, one week before the end of his regularly scheduled two week rotation.

The Grievor, Henry Saunders, testified about the incident on September 19th. He stated that he met the Complainant, NN, at the camp site. He did not have any prior contact with her off the site. He offered to show NN around the site in the fuel truck and she agreed to go with him. He said they left the camp site at about 10:00 p.m. as it was getting dark outside. They drove to the port where they viewed the ship loading facility. They drove to the A-frame building where Mr. Saunders checked whether equipment needed to be refuelled. Mr. Saunders testified that he parked the fuel truck at the rear of the building, they engaged in conversation and he had a cigarette. He testified that he gave NN a kiss. She asked him if he had a girl friend, to which he replied that he did, and she told him he was “not nice to his girl friend”. She asked to be taken back to the camp site and they drove back.

The Grievor testified that he was interviewed on the site by security officers about the incident. He was told that NN made a complaint of assault against him. He was told by Wayne Young, Site Services Superintendent, that there was a complaint of sexual assault and that he had to be sent off site. At the time he was sent off site he did not know if he would be paid for his scheduled work days or be allowed to return to the site. He expected to lose pay if his pay was not reinstated. He was given a letter by Wayne Young stating that he was sent off site pending an investigation.

The Union filed a grievance dated September 30, 2007 stating that the nature of the grievance was “suspended without just cause”. Darren Cove, Local Union President, stated that the Union filed the

grievance based on the Grievor being removed from the mine site. He said the Employer did not indicate whether or not the Grievor would be paid at the time he was sent off site. Nelson Brown, shop steward, testified that he was present on the site at the time the Grievor was sent home. He was told by Wayne Young that the Grievor was being sent off site for an investigation.

Rick Young, Operations Manager, testified that the Employer considered a report from ASC Security about the incident together with the statements signed by the Grievor and the Complainant. The Employer was satisfied with the extent of the investigation. Mr. Young testified that the Employer concluded there was insufficient evidence of sexual harassment. It was concluded there was no evidence of asking for sexual favours. The Employer felt the complaint could have arisen from cultural differences. Mr. Young stated that the fact the Complainant left with the Grievor in the truck at about 10:00 p.m. gave the incident the appearance of a "date". The Employer considered that there was a kiss, the Complainant then wanted to return to the camp site and the Grievor drove her back. Mr. Young testified that the Employer concluded that the Grievor was in breach of the vehicle use rules because he used the truck for other than business purposes and transported an unauthorized person in the truck. Mr. Young prepared a letter of discipline to the Grievor dated October 3, 2007, following receipt of legal advice about the wording of the three conditions in the letter. The letter stated as follows:

Dear Mr. Saunders:

RE: Site Incident - Allegation of Sexual Harassment

We wish to advise that we have concluded our investigation and, although we are satisfied that you are in breach of our vehicle use rules, there is insufficient evidence

that you engaged in sexual harassment of another contractor's employee. The circumstances demonstrate extremely poor judgment on your part and we direct you as follows:

1. You are to refrain from fraternizing with any of the female employees at the site.
2. In particular, you are to have no further "private" meetings with your accuser and that any contact with your accuser be limited to such contact as may be necessary in the carrying out of your respective duties.
3. You are not to approach or discuss this matter with the accuser, nor any other employees, except your Union representative.

We are placing an oral reprimand on your file for use of the Company vehicle for other than business purposes and for transporting an unauthorized individual in a Company vehicle.

Only by reason of your forthrightness in confirming your improper use of the vehicle and describing the circumstances of your "private" encounter, when questioned, has led us to provide the lowest form of discipline, but, any repeat contrary to our direction herein, or any further breach of our vehicle use policies, will result in severe discipline, including termination.

As the accusation of sexual harassment was not proven to our satisfaction, you are to report for your normal rotation. Your normal pay respecting the period you were removed from the site for your last rotation will be reinstated so that you will not suffer any loss of regular hourly pay.

Based upon this, we anticipate you will request your Union to withdraw the grievance filed on your behalf.

Yours truly,
Rick Young
Operations Manager

Rick Young, Operations Manager, gave the letter to the Grievor at a meeting on October 3, 2007 at the Happy Valley-Goose Bay office. The shop steward, Nelson Brown, also attended the meeting. The Grievor testified it was his understanding from the meeting that the Company had decided that

sexual harassment was not proven. Rick Young testified that the three conditions in the letter were intended to protect the Grievor. The Grievor had no difficulty accepting the conditions. Nelson Brown testified that the effect of the October 3, 2007 letter was that the Grievor would return to work and not lose any pay. The Union accepted the letter as a settlement and withdrew the grievance dated September 30, 2007. The Union considered the matter to be closed. The Grievor returned to work on his scheduled return date and did not lose any pay.

Rick Young testified that the Employer received further information and decided to refer the matter to an outside sexual harassment investigator. Mr. Young testified that the reasons for reopening the investigation were (1) Vale Inco, the company for which TSI is a contractor, were questioning the thoroughness of the initial investigation, (2) the event seemed to be more serious and traumatic for the Complainant than it first seemed, as the Complainant was refusing to return to the work site unless other action was taken, (3) the Company was receiving pressure from the Innu Nation, of which the Complainant was a member (the Grievor was a member of the Labrador Inuit Association), (4) there were other allegations of similar complaints. The independent investigator interviewed the Grievor, the Complainant, the security officers and the supervisor of the Complainant. The Employer considered the report and finding of the investigator, concluded that the conduct constituted sexual harassment and decided that a two week suspension was justified. The Grievor was given a letter dated November 28, 2007 imposing the two week suspension, which stated as follows:

Dear Mr. Saunders:

Re: Allegations of Sexual Harassment - Policy Violation

We wish to report that the Company received the report of Investigator Isobel M. O'Shea, M.P.A., LL.B., on Friday, November 23, 2007.

The Investigator concluded that your conduct towards the Complainant, NN, constituted sexual harassment under our Policy and has recommended the following:

1. In the event you were not disciplined previously, that a two-week suspension be imposed with a final warning that a further breach of the Policy would result in termination of employment.
2. You provide an apology to the Complainant.
3. You be required to attend whatever training and counselling measures pertaining to sexual harassment we deem appropriate.
4. We work with the Complainant's employer to create a work schedule such that you and the Complainant are not on site at the same time.

We have reviewed the original suspension from site and note that you received your pay for the period off. We are, therefore, treating that as suspension pending investigation wherein you received pay, and not as discipline.

After careful review of the detailed report of Ms. O'Shea, we are independently satisfied that her recommendations are reasonable and, therefore, have decided to:

1. Disciplinarily suspend you for one on-site rotation which represents a 14-day suspension (168 hours) without pay. Your disciplinary suspension will be your first site rotation for the calendar year 2008.
2. We will schedule you for training and counselling to provide sensitivity to the issue raised in our Policy.
3. You must apologize to the Complainant.
4. You are hereby directed to have no further contact with NN, whether off-site or on-site and should it not be practicable or reasonable to maintain you on a different rotation from that of NN, you must avoid any and all contact with her, excepting only that which must be made to perform the duties of your job.

5. You are specifically and formally directed to re-read the Harassment and Sexual Harassment Policy attached and not engage in any activities that are prohibited by the Policy, or otherwise create a circumstance where you could be found in breach of the Policy. You are to conduct yourself, whether by statement or actions, so as not to breach the Harassment and Sexual Harassment Policy as any breach of the Policy will result in the immediate termination of your employment for cause.

We trust that you will, in future, conduct yourself accordingly.

Yours truly,
R.J. (Bob) Kieley, P. Eng.
General Manager
Torngait Services Inc.

Nelson Brown, shop steward, testified that he attended at the Happy Valley-Goose Bay offices of TSI with the Grievor when he received the suspension letter. He said they were told by Rick Young that the Employer reopened its investigation following pressure from the Innu Nation. The Union filed a grievance dated December 9, 2007 which stated the nature of the complaint was “Company has reopened a closed grievance” and the remedy requested was “this was already settled, that settlement must stand”. The Employer’s response to the grievance stated “investigation was required because of a breach in the VBNC no tolerance rule; also it was requested by the Complainant due to the dissatisfaction of the original investigation. Disciplinary action was warranted in all circumstances. Grievance denied”.

Union Submission

The Union submitted that the rule against double jeopardy applied. The Employer imposed discipline after it had the result of a complete investigation including statements taken by security officers and the report of the security company. The Employer concluded that the event had the appearance of a “date”, and concluded there was insufficient evidence of sexual harassment. The Grievor was disciplined for improper use of the Company vehicle and was not disciplined for sexual harassment. The Employer restored the Grievor’s pay for the week he was sent off site. Because it had the benefit of a complete investigation, the Employer could not reasonably argue that it did not appreciate the seriousness of the complaint. There was no evidence of any continuing harassment. By the October 3rd letter there were conditions placed on the Grievor that were not placed on anyone else at the workplace. This indicated that the Employer recognized the issue of sexual harassment and dealt with it in the letter. The Union referred to Brown & Beatty, *Canadian Labour Arbitration* at paragraph 7:4220, and to the case authorities of *Re: AGT Ltd. and IBEW, Local 348* (1996) 58 L.A.C. (4th) 330 (Lucas), *Re: Calgary Co-Operative Association and Calco Club* (1991) 23 L.A.C. (4th) 142 (McFetridge), and *Re: Calgary Co-Operative Association and Calco Club* (1992) 24 L.A.C. (4th) 308 (McFetridge). The Union submitted that the October 3rd letter was the only discipline that should apply, requested that the grievance be allowed and the Grievor be compensated for loss of pay.

Employer Submission

The Employer submitted that the breach of the rule against double jeopardy was not proven. The two week suspension imposed by the letter of November 28th was the first and only time the Grievor was disciplined for sexual harassment. Double jeopardy does not apply unless there is prior discipline for the same offence. Where two disciplinary penalties are imposed for two different offences arising from the same incident, the principle of double jeopardy does not apply. The Employer did not impose more than one penalty for the same offence. The October 3rd letter imposed discipline for improper use of the Company vehicle. The Employer's initial conclusion that there was insufficient evidence of sexual harassment was based on a misconception of the meaning of sexual harassment. The Operations Manager considered that there was no evidence of a supervisor trying to obtain a sexual favour from an employee, and did not consider that kissing an employee could amount to sexual harassment. The Operations Manager was relying on statements taken by the security officer, not on direct interviews. The October 3rd letter set out three conditions for the Grievor's protection, which amounted to counselling him to avoid future difficulties, and did not impose discipline for sexual harassment. Additional information later came to the attention of the Employer, in particular, that the Complainant would not return to the work site, the Complainant alleged other incidents, and there was pressure on the Employer from the Innu Nation. An independent investigation concluded that the incident amounted to sexual harassment. The Employer referred to the case authorities of *Samuel Manu-Tech Inc. v. USWA, Local 8782* [2004] O.L.A.A. No. 807 (Carrier), *Kitchener (City) v. Kitchener Professional Firefighters Association* [2008] O.L.A.A. No. 15 (Luborsky), and *Goodyear Canada Inc. v. Steelworkers Local 189L* [2008]

O.L.A.A. No. 22 (Marcotte). The Employer submitted that the disciplinary penalty was properly imposed.

Considerations

Is the Employer prohibited by the rule against double jeopardy from imposing a two week disciplinary suspension against the Grievor for sexual harassment? The Employer submits that the rule against double jeopardy does not apply because the Grievor was not disciplined previously for the offence of sexual harassment, but was disciplined for other offences arising from the same incident. It is necessary to examine the rule against double jeopardy and the policy reasons for the rule, and to consider whether the rule applies on the facts of this case.

The rule against double jeopardy is described in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 7:4240 under the heading “Multiple penalties” as follows:

It is a basic rule of arbitration law that an employer may not impose more than one penalty for the same offence. Arbitrators have taken the position that when a member of management with the requisite authority chooses a specific sanction for certain misconduct and conveys that decision to the employee, it is not proper for higher levels of management, on being apprised of the events, to substitute a more severe penalty. However, the rule is not offended if the initial decision taken by the employer was only an interim measure pending a final disposition of the matter, if an employee was removed from service for safety reasons and then disciplined, or if two penalties were assessed for two different types of misconduct arising out of the same incident.

The authors of the Brown & Beatty text cite *Natrel Inc. v. Bread and Milk Drivers, Local 647* (2005) 136 L.A.C. (4th) 284 (Surdykowski) (“*Natrel*”) as authority for the statement “the rule is not offended ... if two penalties were assessed for two different types of misconduct arising out of the same incident”. In the *Natrel* case, the grievor was deducted 2 hours wages for participation in an illegal strike, the same penalty that was imposed on other employees. He was also given a 5 day suspension for taking an active leadership role as a union official to encourage others to participate in the strike. The arbitrator ruled that the 5 day suspension was imposed for a different offence than the 2 hour wage deduction, and the rule against double jeopardy did not apply. The arbitrator ruled that leading an illegal strike as a union official was a different offence than mere participation in an illegal strike.

The *Natrel* case was a situation where the grievor’s leadership role in the strike was not given any consideration when the first penalty was imposed. In contrast to the situation in *Natrel*, there may be cases where an offence was not the subject of prior discipline, but was addressed by the employer in such a manner that the rule against double jeopardy ought to be applied as if prior discipline was imposed. It is necessary to examine the reasons for the rule, and the extent of the situations to which the rule ought to be applied, to determine whether to apply the rule in this case.

The reasons for the rule against double jeopardy are discussed in *Kitchener (City) v. Kitchener Professional Firefighters Assn.* [2008] O.L.A.A. No. 15 (Luborsky) (the “*Kitchener*” case), at paragraph 194 as follows:

- 194 This rule against “double jeopardy” is at its root a notion of fairness that an employee ought not to suffer multiple penalties for the same offence: see *Canada (Attorney General) v. Babineau* [(2005) 143 L.A.C. (4th) 129 (F.C.T.D.)] at p. 136 referring to the lower grievance adjudication decision, *Re Treasury Board (Correctional Service of Canada) and Babineau* (2004), 133 L.A.C. (4th) 442 (M.G. Cummings) at p. 448. It also promotes the finality of workplace disputes by prohibiting higher levels of management from revoking the decision respecting discipline by a lower level of management and imposing a harsher penalty for the same offence: see *Re U.E.W., Loc. 520 and A.H. Tallman Bronze Co. Ltd* [(1957) 7 L.A.C.. 253 (Laskin)] at pp. 255-256 and *Re Oxford Pendaflex Canada Ltd. and Printing Specialities & Paper Products Union, Loc. 466* [(1976) 14 L.A.C. (2d) 104 (Schiff)] at pp. 107-108.

In the *Kitchener* case, one of the issues considered by the arbitrator was whether the employer could impose discipline for a prior incident. In response to the prior incident, the employer spoke to the grievor in general terms about harassment policies, but did not address the specific allegation. The arbitrator decided that the employer’s handling of the incident undermined the employer’s ability to rely upon that particular incident as one of the grounds to discipline for sexual harassment. The employer’s reliance on that particular incident, without any new information, amounted to reconsideration of an earlier decision respecting the same incident and the double jeopardy rule applied. The arbitrator held that a decision not to issue discipline in the circumstances was a disposition of the matter that another level of management could not reopen. In support of that decision, the arbitrator in the *Kitchener* case referred to *Re UEW, Local 520 and A.H. Tallman Bronze Co. Ltd.* (1957) 7 L.A.C. 253 (Laskin) (the “*Tallman*” case).

The *Tallman* case is an early award that describes reasons for the rule against double jeopardy. Those reasons could be used as authority for the statement that a decision not to impose discipline

may have the same effect as prior discipline for the same offence, for the purpose of the double jeopardy rule. However, on its facts, the *Tallman* case was a case where prior discipline was imposed. In the *Tallman* case, the grievor rejected a request from the foreman to move some material, used profanity and “threatened to blacken the foreman’s eyes”. After further discussion with the chief steward, the grievor apologized and the foreman let the grievor off with a final warning and told him any recurrence would lead to his dismissal. When higher management heard about the incident the grievor was dismissed. The foreman’s warning was considered to be disciplinary and the grievance was allowed. Writing for the majority of the board, Arbitrator Laskin (as he then was) stated as follows:

In the brief recital of facts set out above the board has put the case against the grievor at its strongest by accepting the evidence of the company. In the board’s view, it is unnecessary to consider possible conflicts of evidence arising from union testimony because the disposition of the grievor’s grievance turns on a matter extraneous to any issue of conflicting evidence. The foreman, on the company’s evidence, is a management supervisor with authority to discipline and to discharge. He chose, in the exercise of his discretion, to limit his imposition of discipline to the sounding of a final warning, and communicated this disposition of the issues raised by the grievor’s conduct to both the grievor and to the chief steward. This disposition terminated the matter, and this board is unable to agree that a management official superior to the foreman was entitled, in the absence of any subsequent misconduct by the grievor, to withdraw the foreman’s disposition and deal afresh with the same incident in derogation thereof. The grievor accepted the final warning and, indeed, it was clear on the evidence that not only the chief steward but also the department steward told the grievor that he was wrong and to watch himself in the future. The situation would have been different if the foreman had merely recommended to or discussed with other officials of management his intended manner of dealing with the grievor’s misconduct. The matter would then have rested in management’s internal control. That, however is not this case.

Collective agreement administration rests on good faith by both responsible management officials and responsible union officials. In day to day dealings among men engaged, whether for management or for labour, in a common enterprise,

decisions have to be made and courses of action taken that cannot always await the sober reflection of second or third thoughts. This applies as much to union stewards as it does to employer foremen. Moreover, neither responsible management nor responsible labour need always feel that they must exact the full letter of a permissible law. Circumstances, or considerations of mercy, or purely personal instinct or reaction to any given situation may dictate a decision by one official which another would not make. The adequacy of a company decision on discipline is a matter for internal company consideration until it is communicated to the employee or to the union, just as the acceptability of a company's course of action or even measure of discipline is an internal union matter until it is manifested to the company. It is as desirable in labour relations as in other areas of social conflict that differences be settled finally as well as speedily. To allow accepted settlements made by one echelon of management or of labour to be re-opened by a higher echelon is a sure way to destroy responsibility at the very point where it should be nurtured, i.e. at the point of conflict. If either management or labour desires to deprive its respective representatives of authority to make decisions, and to postpone determinations of day-to-day conflicts to a more leisurely, even if more reflective consideration by top officialdom, there is a way in which this can be done but it may be at the sacrifice of necessary harmony in the front lines of production.

As stated in the above authorities, one of the policy reasons for the rule against double jeopardy is to provide for finality in matters of employer/employee relations. This purpose was also discussed in *Zehrs Markets Inc. and UFCW, Local 1977* [2000] O.L.A.A. No. 503 (Lynk) ("*Zehrs Markets*") at paragraph 46 as follows:

The purpose of this principle is manifest. It ensures that industrial relations differences are settled conclusively and as expeditiously as possible. To allow a settled decision or agreement on a matter as central to industrial relations practice as discipline to be re-opened through a subsequent reappraisal by a different level of managerial decision-makers would erode trust, abdicate supervisory responsibility, and ignite conflict at the very point in the management of workplace differences where consensus is to be encouraged. Arbitrators have commonly applied this principle to nullify a second disciplinary penalty that was found to have been based on the very same misconduct: *Re AGT Ltd.* (1996), 58 L.A.C. (4th) 330 (Lucas); and *Re Calgary Co-Operative Association Ltd.* (1991), 23 L.A.C. (4th) 142 (McFetridge).

The *Zehrs Markets* case refers to *AGT Limited and IBEW, Local 348* (1996) 58 L.A.C (4th) 330 (Lucas). In that case, the supervisor issued a warning letter to the grievor after reading a summary of a written statement signed by the grievor, but not the full text of the statement. The supervisor later read the full text and issued a second letter rescinding the warning and substituting dismissal. The supervisor said that if she had considered the complete information she would not have issued a warning letter. The arbitrator concluded that the supervisor knew the substance of the information concerning the Grievor's behaviour, if not all the details, and the employer could not increase the penalty. There was no indication that the grievor misled the employer about the incident. The arbitrator applied the rule against double jeopardy.

The arbitral case authorities support application of the rule against double jeopardy in certain situations where an employer has addressed a prior incident in a nondisciplinary manner, and the matter was considered settled. The finality of settlement of disciplinary matters is an important reason for the rule against double jeopardy. Does the rule apply to the facts of this case? There are no significant disputes of fact for the purpose of this award. An incident occurred at the Voisey's Bay site on September 19, 2007. The Grievor asked a female worker to go sightseeing with him in the fuel truck. They drove around the site and then the Grievor parked the vehicle. The Grievor stated that he kissed the female worker and after a brief conversation he brought her back to the camp site as she requested. She filed a complaint against the Grievor. The security company on the site conducted an investigation and interviewed the Grievor and the Complainant. The next day, the Grievor was sent home from the site, about one week before the end of his scheduled rotation. In effect, he was suspended without pay pending the decision of the Employer with respect to the

incident. When the Grievor was sent home from the site he did not know if he would be reinstated in his employment or paid for the days he did not work.

The Employer decided to discipline the Grievor for the incident and issued a letter to him dated October 3, 2007. The letter is headed "Allegation of Sexual Harassment". The Employer's Operations Manager considered the statements made by the Grievor and the Complainant and obtained legal advice on the wording of conditions in the letter. The Grievor was given an oral reprimand on his file for using a Company vehicle for other than business purposes and for transporting an unauthorized individual in a Company vehicle. The letter states there was insufficient evidence of sexual harassment, however, the Grievor was directed to comply with three conditions which were (1) not to fraternize with any female employee at the site, (2) not to have further contact with the Complainant except as necessary to carry out his duties, and (3) not to discuss the matter except with his union representative. The letter also stated that his pay for the period during which he was removed from the site would be reinstated and he would not suffer any loss of regular hourly pay. The letter stated that any further breach of the conditions in the letter, or breach of the Company's vehicle use policy, would result in severe discipline, including termination. The letter also stated that it was anticipated the Union would withdraw the grievance filed on his behalf. The Union had filed, on September 30, 2007, a grievance alleging "unjust suspension". Following a meeting on October 3, 2007 to issue the letter to the Grievor, the Union withdrew the grievance. The Union shop steward and local president both testified that, following the meeting and the withdrawal of the grievance, they considered the matter to be settled.

There was no suggestion that the Employer requested any additional time to complete the investigation before making the decision to impose discipline on October 3, 2007. The Employer acknowledged that the Grievor cooperated fully in the investigation by the security officers and gave a forthright statement about the incident. There was no suggestion that the Grievor misled the investigators or the Employer in any way.

The Grievor accepted the three conditions in the October 3rd letter that placed restrictions on his activities at the work site. These are restrictions that do not apply to other employees at the site. While the placement of the three conditions on the Grievor was not considered to be a disciplinary penalty for sexual harassment, the letter stated that breach of any one of the conditions could lead to severe discipline, including discharge. There was a connection between the three conditions and the allegation of sexual harassment. This conclusion is obvious from the wording of the conditions, such as not to fraternize with female employees, and the evidence that the conditions were placed on the Grievor, in part, for his own protection.

There was a settlement of the disciplinary matter. The matter that was settled included the allegation of sexual harassment. The matter was settled by reinstatement of the Grievor's pay, placing the Grievor on conditions that restricted his activities, and issuing a disciplinary warning for violation of vehicle use policies. The letter of October 3, 2007 dealt with the incident in its entirety.

Subsequent to the October 3, 2007 letter, the Employer reopened the investigation for several reasons, including pressure from the Innu Nation and the reaction of the Complainant. An

investigation was conducted by an independent sexual harassment investigator, which included further interviews with the Grievor, the Complainant, the security officers and the supervisor of the Complainant. There was no suggestion that there was any significant difference in the facts about the incident disclosed in the second investigation compared to the first investigation. The sexual harassment investigator concluded that there was sexual harassment. The Employer issued a letter to the Grievor dated November 28, 2007 that imposed a two week suspension. The letter was headed "Allegation of Sexual Harassment". The letter also imposed various conditions on the Grievor.

The Arbitrator has considered the Employer's submission that it could discipline the Grievor for the offence of sexual harassment because this was a different offence than violation of the vehicle use policy. The Employer submits that there was no prior finding of sexual harassment or prior discipline imposed for the offence of sexual harassment and therefore the rule against double jeopardy does not apply. However, prior to issuing the October 3, 2007 letter, the Employer examined the incident in its entirety, including the allegation of sexual harassment, considered that the offences related to improper vehicle use were proven, the offence related to sexual harassment was not proven, and that the Grievor would be placed under certain conditions related to the allegation of sexual harassment. The Grievor was reinstated and the Union's grievance of his suspension was withdrawn. The matter was dealt with in its entirety and settled as between the Union and the Employer. Having considered the arbitral authorities and the relevant facts, I find that the reason for the rule against double jeopardy applies to the October 3, 2007 letter and the surrounding circumstances to the same extent, as it would have applied, had the Employer imposed prior discipline for sexual harassment.

The Employer's decision to impose a two week suspension for sexual harassment offends the rule against double jeopardy. In the circumstances, imposing the suspension is inconsistent with one of the reasons for the rule, which is to encourage early and final resolution of workplace disputes. The letter dated November 28, 2007, which imposed the suspension, offends the rule against double jeopardy, and is therefore null and void.

Decision

The grievance is allowed. The letter dated November 28, 2007, which imposed a two week suspension for sexual harassment, is null and void. The Grievor shall receive full compensation.

DATED this 18th day of March, 2008.

James C. Oakley
Arbitrator