In the Matter of an Arbitration Pursuant to Section 104 of the
Labour Relations Code R.S.B.C.1996 c.244 [the "Code"]

BETWEEN:

Lhoist North America of Canada Inc.
(formerly Chemical Lime Company of Canada)

(the "Employer")

AND

Cement, Lime and Gypsum Division of the
International Brotherhood of Boilermakers Lodge D486

(the "Union")

Danny Belanger Termination Grievance

Arbitrator:	Jessica Gregory
Counsel for the Union:	Tamara Ramusovic Natasha Edgar
Counsel for the Employer:	Andrea Ruso Catherine Repel Debbie Preston
Hearing Dates:	November 1, 4 and 12, 2019
Hearing Location:	Vancouver, British Columbia
Date of Decision:	December 14, 2019

Introduction

1. The Union and the Employer are parties to a collective agreement with a term from October 15, 2018 to September 30, 2023 [the "Collective Agreement"] and have agreed that I am properly constituted with jurisdiction to determine the issues in dispute. This matter involves the termination of the employment of the Grievor, Mr. Danny Belanger. Many of the relevant facts are not materially in dispute.

2. The Employer operates a limestone processing facility in Langley, B.C. It is a safety-sensitive environment. Mr. John Halliday is the General Manager. Mr. John Bartnik is the Production Manager. Article 9.02 (b) of the Collective Agreement permits 12 hour shifts on a four-on, four-off basis and encourages 100% attendance and employee cooperation to ensure shift coverage.

3. The Grievor was hired as a labourer right after high school in July 2005 and later was promoted to the position of Quicklime Helper. At the time of the incident giving rise to the termination, the Grievor had been promoted to a Kiln Process Operator ["KPO"]. The job description indicates the KPO is "responsible for operating multi-million dollars worth of machinery that if improperly operated could result in equipment damage, safety incidents, and environmental compliance issues…" There is no doubt that the KPO is an important job and the evidence revealed detailed duties including constant monitoring, sampling, testing, and recording of data in order to maintain operational efficiency and standards. The duties are based in and from the control room, with the KPO required to make timed rounds to engage in testing and monitoring of equipment particularly the kiln.

4. On December 16, 2010, while still working as a Quicklime Helper, he received a written warning (from Bartnik) for sleeping in the control room during his December 14, 2010 shift.

5. Effective November 1, 2015, the Employer implemented mandatory "Plant Rules and Regulations" [the "Policy"] that listed "intolerable offenses" and "major offenses". The Grievor was aware of the Policy. The Policy indicates that violation of the rules could result in discipline up to and including termination of employment. Sleeping on the job is included in the list of intolerable offenses. According to the Policy, intolerable offenses result in "Immediate discharge (pending investigation)". Major offenses follow a progressive disciplinary path. Refusal to comply with a company investigation into potential misconduct and violation of the Company policy are listed as major offenses. The Employer accused the Grievor of sleeping on the job on July 26, 2019 and also alleges that the Grievor committed a major offense by his dishonest or evasive conduct during the investigation into the infraction and failed to take responsibility.

6. July 26, 2019 was an important date for the Employer. There was an important corporate tour of the facility occurring. Halliday and Bartnik wanted to ensure that the tour went well. Employees including the Grievor were notified.

7. By July 26, 2019 the Grievor had worked a series of his own shifts and covered shifts for a colleague. At approximately 1:20 p.m. Bartnik discovered the Grievor sleeping in a chair with his feet up. The Grievor was wearing his personal protective equipment, had his radio in his pocket, and his cellular phone in his hand. The Grievor had not answered his radio so Bartnik originally believed the radio was not present but subsequent examination of the video revealed that the radio in the Grievor's pocket. Bartnik recorded a few minutes of video during which the Grievor awoke and was startled.

8. After the incident the Grievor and/or the Union requested Bartnik's photograph and video but the disclosure was delayed while Halliday sought advice from external Human Resources professionals about the disclosure and the discipline. While the advice was being sought the Grievor and Bartnik engaged in discussions (including their August 6, 2019 discussion). On August 7, 2018, the Employer provided Bartnik's photo and the Grievor admitted he was sleeping. At the end of his shift on August 9, 2019, the Grievor was suspended. His employment was terminated on August 19, 2019.

Positions of the Union

9. The Union accepts that the Grievor's actions gave rise to just cause for discipline but argues that termination was excessive. Counsel submits the termination letter is flawed; only one of the four grounds alleged has any merit. The Union further contends that the Employer failed to consider mitigating factors such that the dismissal was an excessive disciplinary response emanating from an improper investigation in which the Grievor did not receive a fair opportunity to respond and by the time any fulsome discussion occurred, the decision to terminate had already been made.

10. The Union argues the evidence establishes that the Grievor was a long term employee with a good work history. He was permitted to take a break outside the control room and on July 26th, while doing so he checked emails on his phone wearing all of his PPE and sitting in a chair (30 steps from the control room) where he could access the breeze while still able to hear any changes or alarms. He did not leave the control room unattended because the helper was there. If the helper left, he could access the Grievor by cellular phone; a common communications practice also utilized by management.

11. The Union submits that the Grievor was engaged in his duties and believed that if he had nodded off it was only briefly because, according to his testimony, his phone screen was still on and he could hear the fans. Although Bartnik encountered the Grievor, he did not have to awaken him. Moreover, no one besides Bartnik saw the Grievor so the Grievor's actions did not impact the scheduled corporate tour. No safety concerns arose and the Grievor was permitted to continue working for several subsequent shifts. Despite the flawed investigation, once the Grievor saw Bartnik's photo on August 7th he accepted responsibility and was humbled as evidenced by his apology to Bartnik and during the hearing. He offered to take a suspension not as a means to deflect responsibility but due to his ongoing working relationship with Bartnik and their ability to

discuss and resolve issues. The Union argues that the Grievor will take corrective actions, the employment relationship is restorable and therefore, he must be reinstated.

12. In support of its positions, the Union points to the following jurisprudence, each of which has been reviewed for the purpose of this decision: *ADM Milling Co. and UFCW Local 401 (Wheeler), (2017), 275 LAC (4th) 321(Beattie); Arrow Lakes School District No. 10 and CUPE, Local 2450 (Cruden Grievance), 2012CarswellBC 3404 (Sullivan); Arrow Lakes School District No. 10 and CUPE, Local 2450 BCLRB No. B241/2012; Brink's Canada Ltd. v IWA Canada Local 1-217 (1990), 13 LAC (4th) 427 (Vickers); B.C. Railway v CUTE, Local 6 (1982), 8 LAC (3d) 233 (Hope); Courtyard by Marriott and UFCW, Local 1006A (Ahmed Grievance) 2017CarswellOnt 4207 (Wilson); Delta and CUPE Local 454 (Hoffman Grievance), [2013] BCCAAA No. 113 (Doyle); Eva's Initiatives and CUPE Local 4358-02, 2015CarswellOnt 6317 (Gee); Evraz Inc. NA Canada and United Steelworkers, USW Local 5890 (Brodeur Grievance), 2013CarswellSask 298 (Stevenson); General Tire Canada Ltd. and United Rubber Workers, Local 536, (1990) 14 LAC (4th) 331 (Marcotte); Lecours Lumber Co. Limited and United Steelworkers, (2016) USW Local 1-2995, 150 LAC (4th) 357 (Marcotte); Levi Strauss Canada v Amalgamated Clothing and Textile Workers Union, (1980) 26 LAC (2d) 91 (Arthurs); Aerocide Dispensers Ltd. and United Steelworkers of America, (1965) 15 LAC 416 (Laskin); Vancouver General Hospital and B.C. Nurses Union, (1989) 7 LAC (4th) 106 (Munroe); Western Forest Products Ltd and United Steelworkers USW Local 1-1937, (2012) 222 LAC (4th) 173 (Brown); Weyerhaeuser Company Ltd. and United Steelworkers USW Local 1-2007, [2016] AGAA No 17 (McFetridge); and, Lifestyle Retirement Communities Ltd. and B.C. Government and Service Employees' Union, [2007] BCCAAA No. 120 (Hickling).* The Union submits that the grievance must be upheld.

Positions of the Employer

13. The Employer argues that the Grievor was working unsupervised in a critical role at the heart of the operation and despite the importance of his (KPO) role he purposely committed a serious offense in a safety-sensitive work environment. Counsel notes that sleeping on the job is a named intolerable offense in the Policy; a Policy posted in the workplace and of which the Grievor was aware. The Employer further submits that the Grievor was on notice of the intolerable nature of his offense due to his discipline for a prior December 14, 2010 sleeping incident.

14. The Employer submits that the investigation was proper and thorough such that the Grievor had full opportunity to respond to any allegations. The Employer challenges the Union's claim that the Grievor was humbled and submits that the Grievor consistently failed to take responsibility for his actions on numerous occasions; repeatedly tried to minimize the severity of his actions; and, tried to negotiate for a suspension and return to work. Despite his initial insistence that he was not asleep, he never produced his cellular phone records to demonstrate that he was sending emails or texts at the relevant time.

15. The Employer relies on the following jurisprudence, each of which has been reviewed for the purpose of this decision: *Burns Meats and UFCW Local 832, 1997 CarswellMan 711 (Kaminski);*

Calgary Women's Shelter Association and CUPE Local 38, 53 LAC (4th) 75 (Moreau); Aecom Maintenance Contractors Ltd. and Construction Workers Union 2019 CarswellAlta 1945 (Beattie); Hudson General Aviation Services Inc. and I.A.M.A.W Lodge 140 105 LAC (4th) 97 (Taylor); Tembec Enterprises Inc. and United Steelworkers, USW, Local 2010, 277 LAC (4th) 337 (Gee); and, *Winnipeg Regional Health Authority and CUPE, Local 2509 286 LAC (4th) 243 (Freedman).* Counsel points to parallels in *Aecom, supra,* where sleeping was serious misconduct that could result in immediate dismissal, the two employees were not contrite, denied sleeping and their act had reputational ramifications.

16. In conclusion, the Employer submits the dismissal must stand and grievance must be dismissed.

Decision

17. This is an expedited decision pursuant to section 104 of the Code. The parties must be commended for their efficient presentation of evidence through excellent witness preparation. They joined issue on the real substance in dispute – the issue of whether the dismissal was an excessive disciplinary response – and focused in their legal analysis accordingly with more than 80 pages of typewritten and oral argument. The seven pages allotted for this decision (under section 104(7)(b) of the Code) constitute an overview of that jurisprudence and analysis, all of which has been reviewed in reaching the following determinations. This decision is not a fulsome outline of the Employer's operations or a searching review of its safety or human resources practices. The real substance of the dispute before me is whether the Grievor's act of sleeping on the job on August 19, 2019 – an intolerable offense by the Employer's standards – was also a capital offense from a future employment perspective.

18. Disciplinary cases including terminations of employment are reviewed based on the well-established framework outlined in *Wm. Scott & Sons, [1976] BCLRB No. 98*. Although every case must turn on its own evidence, arbitrators often review the non-exhaustive factors listed in *United Steelworkers, Local 3257 and Steel Equipment Co. Ltd, [1964] OLAA No. 5,* when assessing the discipline selected. Section 89 of the Code provides arbitrators with statutory authority to substitute a lesser penalty if the discipline selected is found to be excessive.

19. The August 19, 2019 termination letter outlines the grounds for dismissal. However, it became apparent during the hearing that the termination was based primarily on the allegation that the Grievor was sleeping during his shift on July 26, 2019. In my view, the Grievor had a fair opportunity to respond to that allegation. Other grounds were either not proven or advanced.

20. On July 26, 2019 it was hot and the Grievor left the cool control room on his work duties. In contrast to the employees in *Aecom, supra,* who intended to avoid work and sleep for hours in a scheme similar to time theft, the Grievor was entitled to a break. He noticed a chair during his rounds then made an error in judgment when he sat down to check his email and put his feet up. At the time he had worked 6 straight shifts and was tired. Whether lightly dozing or in deeper slumber, he was sleeping at the time Bartnik found him. As a KPO the Grievor is responsible for operating multi-million dollar machinery (including a kiln that is the lifeblood of the operation)

and preventing damage or safety incidents. These critical duties cannot be carried out when asleep. Moreover, the Grievor was aware that a corporate tour was taking place on July 26th and the tour was important to the reputation of the operation. Additionally, there is no doubt that the Grievor was on notice (through his December 16, 2010 written warning) that sleeping was not permitted. The November 1, 2015 Policy also placed him on specific notice that sleeping was an intolerable offense that may lead to dismissal. These are significant aggravating factors.

21. Other potentially aggravating factors involve the Grievor's alleged choice to ensconce himself in a quiet are where he would not be disturbed and build a comfy setting (*Calgary Women's Shelter, supra*) and the question of whether sleep was premeditated and chosen instead of attending to required duties (*Tembec, supra*; *Aecom, supra*). However, I accept that the Grievor was entitled to a break and his choice of location was not premeditated for sleep purposes in order to avoid his duties; he simply saw the chair and sat down to check his emails in an area with wifi. The Employer asserts the Grievor's delay in or reluctance to admit he was sleeping is another aggravating factor. I have concluded he was not dishonest and his responses were based on his erroneous but honestly-held belief that he could not have been asleep because he still heard the fan and other operational noises. In fairness, his actions during the investigation must also be counterbalanced by the unusual circumstances and investigative delay stemming from the Employer's need to obtain Human Resources guidance on key questions such as whether the photograph could be shared with the Union and/or the Grievor. Halliday and Bartnik cannot be faulted for their actions or decisions during this confusing time and similarly I cannot attribute much weight to the Grievor's positioning or his discussions with Bartnik. All parties were acting in good faith. Ultimately, I accept that the Grievor was given a fair opportunity to respond, his response was properly considered by Halliday and, at a critical point when disclosure was provided, the Grievor admitted his act and accepted responsibility. In his view, offering to take a suspension was an indication of acceptance of responsibility and demonstrated his understanding of the seriousness of the infraction.

22. Turning to the mitigating factors, the Grievor has been employed for 14 years and has been twice promoted. He occupies a position of responsibility, suggesting the Employer has confidence in his abilities. The evidence suggested that the Grievor was knowledgeable and dedicated to timely performance of his duties. Additionally, there is no indication of any work performance issues; the fact he was a valuable employee prior to his lapse in judgment is demonstrated by the Employer's decision to continue to permit him to remain at work in the KPO position despite committing an intolerable offense on July 26th. He was permitted to continue to work for several shifts prior to being suspended at the end of his August 9th shift suggesting the Employer's trust was not irrevocably broken. Moreover, his evidence demonstrates that the Grievor sees himself as a member of the team and, unlike the employee in (*Hudson, supra*) the Grievor had a positive working relationship with management, particularly Bartnik. The Grievor showed his commitment to the Employer by attempting to adhere to its 100% attendance requirements and working extra shifts to cover for other employees. I have concluded that the evidence before me demonstrates that if the Grievor has learned and will make required correction in his decision-

making, the working relationship is restorable.

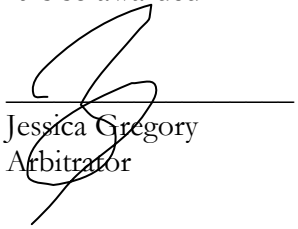
23. In determining whether the Grievor is likely to repeat the serious infraction a third time I am guided, in part, by his own evidence which I found to be honest and forthright. He explained that his lifestyle had changed since his 2010 written warning. He outlined his intentions and dedication to the Company, explaining that this job was the only one he has had since high school and is a major part of his life. It is important to him for people – management and coworkers – to be able to rely on him. An employee who regularly performs duties of a critical nature such as the KPO job must be consistently and regularly trustworthy (*Tembec, supra*). I am satisfied that the Grievor will be that employee. He sincerely reaffirmed his commitment to the Employer to do what is required of him in the future and be only the best. In my view, this is a testament to the fact that a lesser penalty would have the necessary effect on the Grievor such that he deserves an opportunity to return to his employment.

24. Having reached the decision that the termination was excessive in all of the circumstances, I must determine the appropriate discipline to be substituted. I agree with counsel for the Employer that it is necessary to deter sleeping on the job in a safety-sensitive workplace. Discipline is appropriate for employees who potentially put the enterprise at risk even if no actual harm was done (*Burns Meats, supra*). Therefore, although even intolerable offenses must be addressed on a case-by-case basis, it is also necessary for a strong message must be sent to the Grievor and others to discourage sleeping during shifts. While every case must turn on its own facts, in the current matter, the evidence demonstrates that the interim time period since the termination has served to solidify the Grievor's understanding of the seriousness of his actions and the need to refrain from ever engaging in them in the future. Therefore, I have determined that he should serve a significant suspension of four months and be reinstated to his KPO position effective December 19, 2019. Having reached the above conclusions, it is not necessary to address the balance of the arguments raised.

25. Finally, this decision should not be interpreted as a vindication of the Grievor's actions: it is not. In the absence of his lengthy service, relatively clean disciplinary history, solid understanding of and commitment to the Employer's operation, he would not be returning to his employment. Sleeping during a shift, particularly, given the responsibilities of his KPO position is serious culpable behaviour that must never be repeated.

26. The grievance is allowed. I will remain seized of any issues pertaining to the interpretation or implementation of this Award.

It is so awarded.



Jessica Gregory
Arbitrator