IN THE MATTER OF AN ARBITRATION

BETWEEN

RIO TINTO ALCAN INC.

(the “Employer”)

AND

UNIFOR, LOCAL 2301

RE: JEFF WILCOX GRIEVANCE

APPEARANCES:	Stephanie Gutierrez, for the Employer
	William Clements, for the Union
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	November 21 and 22, 2022
DATE OF AWARD:	December 5, 2022

I. ISSUE

In a letter dated November 3, 2020, the Grievor, Jeff Wilcox was suspended for three days. The letter stated in part:

Negligent or Careless behaviour resulting in property damage or injury

As you know, Rio Tinto, BC Works (the "Company") has been conducting a factual investigation on October 21, 2020 into a situation regarding the incident you were involved in.

That investigation has now been completed and it has been determined that your careless actions directly led to damage to the windscreen of a buggy. During that investigation you failed to show any remorse or acknowledge the inappropriate behaviour.

The Company has concluded that your actions have warranted discipline to correct the behaviour. Factors that have been considered include, but not limited to, the nature of the incident, your length of service and any previous discipline. Please be advised that this letter will document that you have been issued a **Three (3) Day Suspension**. You will be advised of your return to work date. Furthermore, any violation of Company Rules moving forward could result in further disciplinary action up to and including termination. Please take this situation seriously.

It is expected that going forward you address the concerns outlined herein and comply with policies, procedures and our reasonable expectations of you as an employee. Should you have any questions regarding this letter or concerns related to this discipline, please do not hesitate to contact me.

The Employer argues that it had just cause to discipline Wilcox and that the grievance should be dismissed. The Union argues that there was no cause for discipline and that the suspension should be removed from Wilcox's file and he should be made whole. In the alternative, the Union argues that the discipline was excessive and that a written warning should be substituted.

II. BACKGROUND

The material facts are not generally in dispute and can be set out briefly below.

Wilcox commenced employment with the Employer in November of 2009. He became a regular employee in July of 2012.

Wilcox's discipline record is as follows:

- January 3, 2015 a written warning for being absent without authorization
- March 4, 2015 a one day suspension for unacceptable behaviour
- July 23, 2015 a one day suspension for being absent without authorization
- December 16, 2016 a one day suspension for failure to achieve or maintain a reasonable level of work performance and unacceptable behaviour
- March 11, 2020 a one day suspension for leaving work without authorization

Although the Collective Agreement between the parties does not contain a sunset clause for discipline, the parties have agreed that the following is to be applied, as set out in the Employer's Recommended Discipline Guide:

An employee's discipline record must always be considered. Discipline applied for offences must always be equal to or greater than the discipline applied for the previous offence.

An employee discipline record will remain with the employee for the entire time that they are employed by the Company. However, whenever an 18 month period occurs between two instances of applied discipline the employee's level will begin a new.

The Employer also maintains a Master File where supervisors and management can enter notes about interactions with employees. The employees are not aware of the contents of the Master File and therefore are not in a position to comment on or challenge the entry.

One such entry regarding Wilcox that the Employer referred to at the hearing is dated July 4, 2020. It was entered by Jason Pacheco, Reduction Supervisor at the time in question, and now Operations Superintendent. The entry stated:

I sat down with the employee about the rash of incidents he has had recently. I said that a trend was developing and that his name was appearing on multiple incident reports. I spoke to him about being aware of his surroundings for his own safety and the safety of his co-workers and the reliability of the equipment. The employee was understanding and made a commitment to improve going forward.

The incident in question occurred on October 16, 2020. Wilcox was working in the 4000 North area of the plant. Another employee, Komlan Nayo, was in the area. Brendan Chesterman was operating a buggy in the area.

Pacheco testified on behalf of the Employer. He stated that on October 16th he was investigating a workflow issue in 4000 South. Wilcox was working in 4000 North. Pacheco approached the centre line in the plant and Wilcox immediately approached him from 10 to 12 car lengths away. Wilcox stated that he threw a block of wood and it hit the windshield of a buggy. The block of wood is used to make a hole in the crust in a pot when the plunger cannot do so. Pacheco estimated the size of the wood to be approximately 12 inches long, 6 inches in circumference and 1 to 2 pounds. In later testimony Wilcox estimated the size of the block to be approximately 9 inches long and 4 pounds.

Pacheco took pictures of the buggy and the damaged windshield, which had been removed by Wilcox and Chesterman. The windshield was also damaged before the incident. When the block hit the windshield, the windshield shattered and the buggy was not safe to drive. Pacheco testified that Wilcox stated "I did it - I take responsibility for it". He never stated why he threw the block or what the intention was for throwing it. Pacheco returned to his office and later that same day asked the employees for written statements.

Nayo's written statement is follows:

I was beam raising with Jeff in 4000 North. After our 2 break waiting for the gantry, I was with the big remote (ABF) machine, Jeff and process guy [Chesterman] was playing with a bloque (sic) of wood. I was facing the ABF and I heard a moc [?] and I turn and I saw the bloque (sic) on the window

I note at this juncture that Nayo was not interviewed later and he did not testify at the hearing.

Chesterman's written statement is follows:

Damage to 244 Buggy Front window. Already pre-existing window damage. Jeff W. Tossed a wood chunk to me - toss was off hit window producing another crack. We removed glass to prevent mess. Window still one piece.

Chesterman was interviewed later, which will be discussed below. He did not testify at the hearing

Wilcox's written statement is as follows:

Around 12.30 pm I was in 4000N around pot 4063 I was passing Brendan a wooden block and I missed his hand and hit the window. I called Steve to report the matter right away. The window was previously shattered prior to the block hitting it.

On October 21, 2020, Pacheco conducted investigation interviews. The questions were prepared before the interviews. The first employee interviewed was Chesterman. Also in attendance was another management person, Troy Mallette, and Paul Plante, Shop Steward.

The following is taken from Pacheco's notes. In one question Pacheco asked how the window was broken on the buggy. In Pacheco's notes the answer was "one of the wood chunks were tossed and it struck the window". When asked "who was playing with you?", Chesterman responded "I don't think I said playing". Chesterman stated that Wilcox threw the block and that additional damage was caused by the block. When asked whether he thinks "it is acceptable and safe to be throwing a block of wood in the pot lines?" he responded "I would say no". Chesterman acknowledged that property damage is not acceptable and that throwing a block of wood in the line could lead to an unsafe work environment.

Given that Chesterman did not cause the damage, he acknowledged the actions were inappropriate and unsafe, his discipline file was clear and the Master File had no interactions, the Employer decided to coach Chesterman.

Pacheco interviewed Wilcox second. The interview was also attended by Mallette and Plante. Pacheco's notes reflect that when Wilcox was asked how the buggy window was broken he responded "While we were sitting there for a gantry move, we were sitting around pot 56-57, me Komlan and Brendan Chesterman. I threw the block done

(sic), preceded (sic) to retrieve it. I threw it to him (Brendan Chesterman), it hit the window that was already smashed". The question relating to "playing" that was asked of Chesterman was not asked of Wilcox.

When Wilcox was asked whether his actions caused additional damage to the buggy window he responded, "I don't know. Let me rephrase that. Yes. I guess it did. The buggy should not have been in service. But that's not why I did it. I was throwing it to Chesterman and I missed".

When asked whether his actions were acceptable and safe he responded, "Well, um, gez, let me think about that. I wasn't throwing to hurt anyone. I think having a good morale with the crew is not a bad thing". When asked whether property damage is acceptable, Wilcox responded "It was already damaged. You guys had a buggy that was in use with a smashed out window". In a question about whether the actions can lead to an unsafe work environment, he responded " If the other employee didn't know it was being thrown at him, absolutely. But he knew".

Pacheco reviewed the July 4, 2020 coaching session mentioned above. Wilcox said that he remembered the conversation but not the details. He did not remember what he committed to at the end of the session.

Pacheco testified that at no time during the interview did Wilcox say that he was housekeeping and assisting putting blocks into the buggy.

The Employer decided to suspend Wilcox for three days because Wilcox threw the block, caused the damage, did not acknowledge that his actions were inappropriate or unsafe, his discipline record was not clean in the last 18 months and he had a coaching session three months earlier relating to property damage.

At a meeting on November 3, 2020, Pacheco gave Wilcox the suspension letter. After the letter was read to Wilcox he said that he admitted it was a mistake, reported it immediately and that the window was already damaged. When Pacheco stated that Wilcox showed no remorse in his written statement or interview, Wilcox responded " that is "BS" that I showed no remorse. I said when I came into the office that I took full responsibility". He went on to reference other unrelated incidents at the workplace.

Pacheco acknowledged that he never asked why Wilcox had the block. He never asked how far apart they were and never probed further into the difference in the employees reference to "toss" or "throw".

Wilcox testified that on the day in question at around 12:30 pm he saw three blocks on the floor. The blocks should have been in the buggy. Chesterman was about 10 feet away. He got Chesterman's attention. Chesterman leaned out of the cab of the buggy with one foot on the ground and his hand out of the buggy. Wilcox "threw" the block to him underhand. The block hit the window. Wilcox stated that he was surprised the buggy was being used because of the previous damage.

Wilcox stated that he told Pacheco that he was responsible, it was a fluke accident and he never meant to do it. With respect to the "good for morale" comment in the interview, he was helping put the blocks in the buggy. Instead of walking over to the buggy he threw it softly and it was about 10 feet.

In cross-examination, Wilcox referred "passing" the block not "throwing". He did not think there was a risk to Chesterman as he never threw the block hard and he was wearing full PPE. He would not have done it if he thought there was a risk to Chesterman. He acknowledged that he would do differently now.

In response to a question relating to throwing the block first down the section, Wilcox denied saying that at the interview but when pressed on the matter he said he could not remember saying it.

There was evidence relating to cameras. The Union asserted that there were cameras in the area that should have been reviewed and the video shared. Pacheco said that he could not remember reviewing the video but that he always does. If there had been relevant video he would have shared it.

III. ARGUMENT

The Employer argues that the three day suspension is justified. Wilcox caused the property damage, there was no remorse and no acknowledgement that his behaviour was inappropriate. Wilcox's only reason for throwing the block of wood was that it was good for morale, which the Employer argues is terrible due to the risk to safety and damage. Furthermore, the incident occurred only three months after Wilcox had been coached on being aware of his surroundings and he had already received discipline in the past 18 months.

To support its case the Employer cites: *Alcan Smelters & Chemicals Ltd. v. C.A.S.A.W., Local 1*, [1983] B.C.C.A.A.A. No. 363; *Pacific Inland Resources v. Northern Interior Woodworkers' Assn. (Ford Grievance)*, [2006] B.C.C.A.A.A. No. 37; *Agropur Division Natrel v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (Teamsters Local Union 847, Local Union No. 647*) 2008 CANLII 78353 (On LA); *Construction and General Workers Local Union No.180 v. Shaw Pipe Protection Limited*, 2000 CanLII 26909 (SK LA); *Teck Coal Ltd. (Elkview Operations) v. United Steelworkers, Local 9346 (McVeigh Greivance)*, [2011] B.C.C.A.A.A. No. 14; and, *Faryna v, Chorny*, [1952] 2 D.L.R. 354.

The Union argues that the Employer has not proven on the balance of probabilities that Wilcox was reckless. The Employer assumed that he was playing. He made a mistake but there was no employment misconduct. Wilcox was never asked about the purpose of tossing the block of wood to Chesterman and there was no attempt to clarify the details of what happened. The camera video is uniquely in the possession of the

Employer and there is no proof that Pacheco checked it. The Union urges that I draw an adverse inference.

The Union acknowledges that there was an error in judgement and a mistake but Wilcox's actions do not amount to carelessness or negligence.

The Union cites *Prince George School District No. 57 v. C.J.A., Local 2106*, 1988 CarswellBC 1911, [1988] B.C.A.A.A. No. 169 to support its case.

IV. AWARD

The parties do not dispute that an arbitrator's approach with respect to discipline and discharge cases is set out in *Wm. Scott and Co. Ltd. And Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can L.R.B.R. 1 ("*Wm. Scott*"). The arbitrator asks three questions.

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the discharge an excessive response in all the circumstances of the case?
3. Finally, if the discharge is considered excessive, what alternative measure should be substituted as just and equitable?

In assessing the appropriateness of the penalty, the arbitrator considers several factors:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.

9. The seriousness of the offence in terms of company policy and company obligations.

10. Any other circumstances which the board should properly take into consideration.

There is some conflict in some of the testimony. In order to reconcile this conflict, I must determine the version of events that I accept based on the principles set out in *Faryna v. Chorny*, [1951] 4 W.W.R. (NS) 171, 2 DLR 354 (B.C.C.A.). My task is to piece together a version of events based on the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (page 357). That does not mean that I must accept a person's testimony in its totality in preference to that of another witness. Certain aspects of various witness' testimony may in fact reflect the probable sequence of events.

In my experience the vast majority of witnesses do not lie under oath. Their version of events may differ because of fading memories (which may be the case here as the incident occurred two years ago), miscommunication, different perceptions, cultural issues, or other factors that lead witnesses to different stories based on honestly held beliefs. In a small minority of cases some witnesses do lie under oath.

I note at this juncture that I agree with the line of cases that stand for the proposition that an arbitrator should not tweak or tinker with discipline as long as it is in the realm of the norm. Furthermore, I agree with comments made by the arbitrator in *Pacific Inland Resources v. Northern Interior Woodworkers' Assn. (Ford Grievance),* at paragraph 32:

> I take from the combination of all of this arbitral comment to stand for the proposition that arbitrators should not second guess management on questions of penalty, unless there is evidence of "extenuating or mitigating circumstances", which in turn must be "real and substantial, outweighing the gravity of the offense". A particularly crisp enunciation of the principle was provided by Professor Arthurs in *Levi Strauss Canada v. A.C.T.W.U.* (1980, 26 L.A.C. (2d) 91 (Ont. Arb.) (Arthurs at p. 93, (adopted by Arbitrator Munroe in *Simon Fraser University v. A.U.C.E., Local 2* (1990), 17 L.A.C. (4th) 129 (BC. Arb.), at p. 135):
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> The fact of the matter is that when an arbitrator selects a penalty different from that selected by an employer, he is really saying that the employer has ignored some relevant consideration, proceeded on some misunderstanding, acted from some illicit motive, or otherwise affronted the arbitrator's sense of what is "just".

Turning now to the merits of the case at hand, I do not draw an adverse inference regarding the alleged camera video evidence. I am not persuaded that the Employer viewed it and did not share it because it did not assist their case. Nor am I persuaded that the camera location would always produce video and that the Employer should have reviewed it.

I am not persuaded that Wilcox was "playing". Nayo used the word "playing" in his written statement. However, he was not interviewed in order to clarify his description of what he saw. The Employer used the word playing in one of its prepared interview

questions with Chesterman, even though the written statements of Chesterman and Wilcox never implied that they were playing. Due to the lack of direct evidence, I conclude that the Employer assumed that Wilcox and Chesterman were playing. The Employer never probed further with any of the three employees to clarify the employees' actions prior to the block of wood hitting the windshield.

Furthermore, Nayo and Chesterman were not called to testify. Although the written statements and interview notes were entered into evidence by agreement, that type of evidence should not be used to prove a crucial fact when the individuals could have given oral evidence and been subject to cross examination.

The Employer also assumed that Wicox's reference to his actions being "good for morale" were taken as meaning that the "playing" was good for morale.

I do not reach the same conclusion. Wilcox's testimony leads me to conclude that his actions of performing housekeeping and assisting Chsterman to put blocks of wood in the box of the buggy operated by Chesterman, was good for morale.

While Wilcox was assisting Chesterman, his method of assisting was inappropriate. Wilcox should have walked the blocks of wood to the buggy; not throw, pass or toss them.

This was not a mistake where an individual did not understand a task and caused a preventable accident. It was an error in judgement; one that was clearly wrong and should have been avoided by Wilcox.

Because of the above, I conclude that the first *Wm. Scott* question must be answered in the affirmative. There was cause for discipline. Wilcox acted in an inappropriate and unsafe manner and should have known better.

Was the discipline excessive?

Wilcox has been employed since 2009. His discipline record is not clear as he has a one day suspension in the 18 months prior to the date of the incident in question. The incident is serious as it created a risk to safety and caused property damage.

While Wilcox did not apologize *per se*, he did take immediate responsibility. However, he did deflect some comments back to the Employer asserting that the buggy should not have been in service due to previous damage. The comments made by Wilcox are irrelevant as there is no doubt that his actions caused further damage and were unsafe. He also did not clearly agree that his actions were unsafe.

However, in deciding on the discipline, the Employer assumed that Wilcox was playing and that he was doing so because it was good for morale. By not clarifying these assumptions with the parties involved, the Employer misunderstood parts of the situation.

While I concur with the case law that arbitrators should not second guess management's discipline decision when it falls within the realm of the norm, I conclude

that this is a unique case where, given the Employer's erroneous assumptions, I conclude that the three day suspension is excessive.

Given the seriousness of the incident, Wilcox's past record and his lack of foresight into how his actions were unsafe, I am not persuaded that a written warning as argued by the Union is appropriate.

Given all the circumstances of the case, I substitute a one day suspension. Wilcox's personnel file should be amended to reflect a one day suspension. He should be compensated for two days.

I remain seized of the implementation of this Award.

"Mark J. Brown"

Dated this 5th day December, 2022.