Date Issued: May 10, 2017

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *LABOUR RELATIONS CODE*
R.S.B.C. 1996, c. 244 (as amended)

B E T W E E N:

Warner Bros. Television (B.C.) Inc. (National City Films Inc. - "Supergirl")

(The Employer)

A N D:

Teamsters Union, Local 155

(Teamsters 155)

A N D:

British Columbia and Yukon Council of Film Unions

(The Council)

Re: Mark Johnston Grievance

Preliminary Issue: Industry Termination (Master Agreement, Article 10.07)

Arbitrator:	Robert B. Blasina
Counsel for the Employer:	Barry Dong and Kacey Krenn
Counsel for Teamsters 155:	Theodore Arsenault
Counsel for BCYC of Film Unions:	Bruce Laughton, Q.C.
Date of Hearing:	April 21, 2017

I INTRODUCTION

[1] Teamsters 155 advances a grievance against termination on behalf of Mark Johnston ("the Grievor"). The Grievor was discharged on October 27, 2016 from the television series, "Supergirl".

[2] National City Films Inc. is a subsidiary of Warner Bros. Television (B.C.), Inc. ("WBTV"), which WBTV established for the purpose of producing "Supergirl". I will for the sake of convenience refer to these companies collectively as the "Employer".

[3] The Grievor is a member of Teamsters 155; and, in July 2016, Teamsters 155 dispatched him to "Supergirl" for employment as a driver. Teamsters 155 is one of the three constituent unions of the British Columbia and Yukon Council of Film Unions (the "Council"). The Council is party to an industry-wide "Master Agreement" with the Canadian Affilliates of the Alliance of Motion Picture and Television Producers ("AMPTP") and the Canadian Media Production Association - B.C. Branch ("CMPA-BC").

[4] WBTV is one of the Canadian Affiliates of the AMPTP. By a process referred-to in the industry as a "letter of adherence", WBTV notified the Council, as the Employer (i.e. as a party to the Master Agreement), that National City Films Inc. will be bound by the Master Agreement.

[5] Articles 10.06 and 10.07 of the Master Agreement describe the consequences for an employee when the employee has been disciplinarily discharged:

> **10.06 Discharge:** No Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. ... An Employer will not be required to re-employ an Employee previously discharged by such Employer under this Article.
>
> **10.07 Industry Termination:** An Employer is not required to employ, and the Union will not dispatch a person previously discharged for any reason by the film and television industry Employers three (3) times provided that no Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. An agreed list of Industry Terminations will be maintained by the Council and CMPA-BC offices and updated on a regular basis.

[6] Article 10.06 would render a discharged employee ineligible for future employment with an Employer. If the person had been discharged three times, not without just and reasonable cause, Article 10.07 would render the person ineligible for future employment with any Employer in the film industry where the Master Agreement applied. Article 10.07 is sometimes referred-to as a "three strike rule".

[7] On October 17, 2016, WBTV provided the Grievor a letter headed "**Re: "SUPERGIRL" - Letter of No-Hire**". The letter informed the Grievor that he was no longer eligible for employment for WBTV or any related entity. It is as a result of this letter that the grievance was taken. However, the Employer recently became aware that the Grievor had been discharged three times, prior to his dispatch to "Supergirl". Therefore, it submits, he should never have been dispatched to "Supergirl", and there was no requirement to employ him; and, the present grievance should be summarily dismissed.

[8] Teamsters 155 and the Council take issue with whether a particular discharge alleged by the Employer, i.e. from the production of "Smallville" in 2011, which was not recorded on the "agreed list" mentioned in Article 10.07, should count as a strike against the Grievor.

II BACKGROUND

The Tysoe Report

[9] Television and film production is a unique industry in the employment and labour relations context. It is common for a company to be established for the single purpose of producing a television series. In this case, that would be National City Films Inc. for the purpose of producing "Supergirl" for WBTV. Below, I will also be referring to Smallville 9 Films Inc. which was established for the purpose of producing Season 9 of the television series, "Smallville", for WBTV.

[10] The constituent unions of the Council dispatch their members to that company established for the purpose of producing the television series. Ostensibly, the person becomes an employee of that company. However, the AMPTP Canadian Affiliate (i.e. WBTV in this case, both with respect to National City Films Inc. and Smallville 9 Films

Inc.), would provide representation and support with respect to employment and industrial relations issues which may arise.

[11] This system provides stability and efficiency to the industrial relations regime. The single-purpose production company obtains the experience, expertise, and resources possessed within the offices of the Canadian Affiliate. The member-union of the Council deals with its Master Agreement counterpart, the Canadian Affiliate, with which it is better able to conduct knowledge-based discussion.

[12] The present employment and labour relations regime in the industry stems from the council-of-trade-unions certification granted to the Council by the B.C. Labour Relations Board in 1995 in the decision, *British Columbia and Yukon Council of Film Unions (the "BCYCFU") and others -and- James Shavick Enterprises Ltd. ("James Shavick"), and Canadian Broadcasting Corporation ("the CBC")*, [1995] B.C.L.R.B.D. No. 431; BCLRB No. B448/95 ("*Shavick Enterprises*"). Later, the B.C. Government appointed Mr. Justice David Tysoe as an Inquiry Commissioner in regard to labour issues affecting the industry's competitiveness.

[13] Mr. Justice Tysoe published the *Industrial Inquiry Commission Report Regarding the British Columbia Film Industry* (the "*Tysoe Report*"), on March 4, 2004. He made five recommendations, all of which were later implemented. One of the concerns before him related to a need to regulate the dispatch system to prevent chronically "troublesome employees" from being dispatched to different productions indefinitely. Mr. Justice Tysoe stated:

> **"Three Strike" Rule**
>
> Section 10.06 of the Council's master agreement does provide that an employer is not required to re-employ an employee who was previously discharged by the employer. The problem is that it is the usual practice in the film industry for a production company to be incorporated for each production. The employer is the production company, not the producer. This means that a producer who has discharged an employee for cause on one production cannot refuse to employ the employee on his or her next production because the employer will be different. ...
>
> There is a difference of opinion within the industry as to whether management or the union bears the responsibility to discipline

> employees/union members. Management thinks that the unions should discipline union members, while the unions believe that it is the responsibility of the employer to discipline employees. On the one hand, there is an inherent conflict of interest in unions disciplining members who they are designed to represent. On the other hand, it is difficult for employers in the industry to effectively discipline employees because the workers frequently move around from employer to employer.
>
> This matter will become less important if my recommendation regarding a name request dispatch system is implemented. ... Nevertheless, it is my recommendation that a "three strike" rule be implemented in the industry. If nothing else, such a rule should assist in discouraging dishonest behavior (*sic*). Each of the three discharges would have to comply with the requirement that there must be just and reasonable cause for the discharge. CFTPA [now CMPA-BC] could be the repository of discharge information so that there would be a central source of such information. (*Tysoe Report*, pp. 38-9)

[14] It was as a result of Mr. Justice Tysoe's above recommendation that Article 10.07 was negotiated into the Master Agreement.

"Smallville"

[15] There is no dispute that the Grievor was discharged, on May 1, 2011, from the production of "Underworld", a Lakeshore Entertainment feature film production, and, on January 21, 2015 from the production of "Proof", a Turner Television production. These discharges are recorded in the agreed list of Industry Terminations referred-to in Article 10.07. There is no dispute that these discharges counted as two strikes under Article 10.07, preceding the dispatch of the Grievor to National City Films Inc. for the production of "Supergirl". However, the Employer says there was an additional discharge of the Grievor on September 2, 2011, four months after the discharge from "Underworld", which was not recorded on the agreed list, but should have been.

[16] Smallville 9 Films Inc. is a subsidiary of WBTV established to produce the ninth season of the television series, "Smallville". As a single purpose production company, Smallville 9 Films Inc. was served by WBTV Labor Relations with respect to employment and labour relations issues.

[17] On June 28, 2010, WBTV Labor Relations wrote the Council a letter entitled, "Letter of Adherence and Designation", stating:

> This is to inform you that pursuant to Section 1.02 of the British Columbia Council of Film Unions Master Agreement (hereinafter "Master Agreement") Warner Bros. Television (B.C.) Inc., which is the Employer associated with Smallville 9 Films Inc. agrees to be bound to the terms and conditions of the Master Agreement for the production "Smallville".

I find that, by identifying itself as the "Employer", WBTV stated that it is the employer party to the Master Agreement, with the authority to bind Smallville 9 Films Inc. to the Master Agreement. I do not find that WBTV was stating or admitting that it is the employer of the persons dispatched to and working at Smallville 9 Films Inc.

[18] According to the "start pack" documents signed by the Grievor, Smallville 9 Films Inc. is named as the "Company/Employer", and the Grievor as the "Employee". The Grievor's "start slip" indicates he was first dispatched to "Smallville" on September 3, 2009. Although this date precedes the letter of adherence cited above, the parties took no issue that the Master Agreement applied to the production of "Smallville" at all times. The start pack also contains a document entitled "Deal Memo For Loan-Out Corporation Employees" as the Grievor was employed on a "loan-out" from his own company. This is common in the industry, and is not material to the issues at present. This document again identifies Smallville 9 Films Inc. as the "Company/Employer" and the Grievor as the "Employee", and it provides in part:

> **CONDITIONS OF EMPLOYMENT**
>
> 1. Employment is conditioned upon satisfactory proof of Employee's identity and legal ability to work.
>
> 2. Services are for a limited period of one day if Employee is hired on a daily basis or one week/prorated for days beyond 1 week if Employee is hired on a weekly basis. There is no other guarantee of the period of services unless otherwise specified and nothing herein contained shall constitute a "run-of-the-show" guarantee. Oral understandings of any kind are not binding.
>
> 3. Employees shall comply with all rules and regulations of Company, including but not limited to those set forth below. Employees shall be subject to the direction and control of Company. ... (as written)

[19] On September 18, 2009, the Production Manager of Smallville 9 Films Inc. wrote the Grievor a letter headed, "Notice of Discipline", placing the Grievor on an indefinite suspension pending investigation. The letter was copied to WBTV Labor Relations and Teamsters 155. The letter concluded:

> ... By copy of this letter to Teamsters Local 155, this will request that you not be dispatched to Smallville until further notice. A representative of Warner Bros. Television (B.C.) Inc. will contact you in the near future regarding the foregoing. Please cooperate fully with their investigation.

[20] WBTV Labor Relations wrote the Grievor on December 22, 2009 asking him to contact them after multiple attempts to contact him by telephone had failed. Discussions followed between WBTV Labor Relations and Teamsters 155 on the Grievor's behalf. These resulted in a letter to the Grievor from WBTV Labor Relations, dated September 2, 2011, headed "**Final Warning**". Teamsters 155 was copied with the letter. WBTV Labour Relations stated:

> On behalf of Warner Bros. Television (B.C.), this is to memorialize the teleconference on September 1, 2011 between WBTV Labor Relations and your union representative, Ken Marsden, regarding your employment status with Warner Bros. Television (B.C.).
>
> As you are aware, during your employment as a Driver on the production, *Smallville*, you engaged in serious misconduct which included the use of profane, hostile, and inappropriate language, as well as insubordination. As a consequence, your indefinite suspension was converted to a discharge.
>
> Notwithstanding the foregoing and after successful advocacy by your union representative, the Company has agreed to reinstate your eligibility for employment as to other series produced by Warner Bros. Television (B.C.) or affiliated entities.
>
> In connection with the above, please be advised that due to the serious nature of the aforementioned misconduct, you have been placed on **final warning** status. Accordingly, any further infractions of the same or similar conduct or misconduct of any kind could result in disciplinary action up to and including termination. (as written)

[21] The conversion of the Grievor's indefinite suspension to a discharge at "Smallville" was not recorded on the list of Industry Terminations referred-to in Article 10.07 of the Master Agreement.

III ARGUMENT

For the Employer

[22] The Employer submits that the Grievor was discharged from "Smallville". It submits that the failure to record this discharge as a strike against the Grievor under Article 10.07 does not change the fact that he was discharged, and that he had a history of three disciplinary discharges prior to being dispatched to "Supergirl" in July 2016. The Employer submits that, according to a proper application of Article 10.07, the Grievor ought not to have been dispatched to "Supergirl".

[23] The Employer characterizes the September 2, 2011 **"Final Warning"** letter from WBTV Labor Relations as a settlement accommodation reached with Teamsters 155. The Grievor was allowed eligibility for future employment elsewhere with WBTV or another affiliated entity. However, he was discharged from "Smallville". The Employer submits that the discharge resolves the issue under Article 10.07.

[24] The Employer submits there is no need for a technical analysis as to who was "the" employer at the time. The Employer submits that the Grievor was terminated from "Smallville" according the practical realities of how employment issues are dealt with in the film industry in B.C. The Employer refers to *Warner Bros. Television (B.C.) Inc. (Supernatural 5 Films Inc.) -and- British Columbia and Yukon Council of Film Unions (Widas Grievance)*, [2012] B.C.C.A.A.A. No. 145 (M. Fleming) ("*Widas*") where the arbitrator declined to consider the issue of "true employer", stating:

> In my view, this issue would appear to have some potential significant implications for the industry and potentially for the law and policy of the Board under the Code as well. The parties are free to pursue this matter further; however, I would encourage them to consider attempting to fashion a solution themselves which reflects the unique characteristics of the industry. (para. 147)

[25] The Employer also refers to *Ridley Terminals Inc. v. International Longshore and Warehouse Union Canada, Local 523 (Payroll Grievance)*, [2015] C.L.A.D. No. 28 (M.J. Brown) for the proposition that some issues are best dealt with at the bargaining table. The Employer notes that the current Master Agreement expires on March 31, 2018, and collective bargaining for renewal should commence in November this year.

[26] In conclusion, the Employer submits that the grievance can be summarily dismissed on a preliminary basis.

For the Council

[27] The Council submits that the preliminary issue hangs on the interpretation to be given to Articles 10.06 and 10.07 in respect to identifying the employer. The Council submits that if WBTV was the Grievor's employer, then he was not discharged because he remained eligible for future employment on other series produced by WBTV.

[28] The Council notes that the June 28, 2010 "Letter of Adherence and Designation", which tied Smallville 9 Films Inc. to the Master Agreement, stated that WBTV "is the Employer associated with Smallville 9 Films Inc.", and the Council also notes that the start pack documents for the Grievor would indicate he is an employee of Smallville 9 Films Inc. However, submits the Council, the critical document in this case is the September 2, 2011 "**Final Warning**" letter. The Council contrasts this letter to the October 17, 2016 letter to the Grievor from WBTV Labor Relations, headed **"SUPERGIRL"- Letter of No-Hire** (as written). In that letter, the Grievor was advised:

> You were placed on Final Warning Status by letter dated September 2, 2011. In that letter you were warned that **any** further misconduct could result in termination. The above-described incidents of inappropriate behavior, whether taken collectively or individually, would be grounds for termination. Based on the entire record and your prior final warning status, you are being placed on **No-Hire Status** for any Warner Bros. Television (B.C.) Inc. or related entity production. Persons ineligible for employment by Warner Bros. Television (B.C. Inc.) are not permitted on the Company's premises, work locations or other allied Company events without prior approval from Warner Bros. Television (B.C.) Inc. Labor Relations.

[29] The Council submits that the October 17, 2016 **"SUPERGIRL" -Letter of No-Hire,** makes it clear that WBTV had imposed an industry termination, and, it protested the appropriateness of such a termination in a letter to WBTV Labor Relations, dated November 16, 2016.

[30] The Council cites *Shavick Enterprises, supra*, and the *Tysoe Report*, and submits that I am obliged to decide who was the Grievor's actual Employer; Smallville 9 Films

Inc. or WBTV. The Council refers to the Preamble and other provisions of the Master Agreement referring to the "Producers", and says that the party that signs the letter of adherence is the true employer. The Council submits therefore, if WBTV was the Grievor's employer, WBTV did not terminate him from further employment by its September 2, 2011 **"Final Warning"** letter, and did not discharge him according to Article 10.07, but only suspended him from "Smallville".

For Teamsters 155

[31] Teamsters 155 reviewed the Grievor's work history in the film industry in B.C., noting that he started in April 1997, and it says that he continues to be dispatched in the industry to the present. Teamsters 155 submits that the serious consequence of a finding of three strikes against the Grievor, under Article 10.07, will be that he is no longer employable in the unionized film industry in the Province.

[32] Teamsters 155 submits that the focus of inquiry under Article 10.07 should be on the penalty meted to the employee, rather than on identifying who is "the" employer, which it says is a complex issue in the context of this industry.

[33] Teamsters 155 cites *Fraser Burrard Hospital Society -and- H.S.A.*, [1988] B.C.C.A.A.A. No. 25 (D.R. Munroe, Q.C.) for the principle that the "true" employer may vary with the purpose for which the employment relationship is advanced. This arbitration award also reviews the various tests that may be used to discern whether an employer-employee relationship exists. Teamsters 155 also cites *Widas*, *supra*, where the arbitrator deferred consideration of the "true" employer issue, out of concern for otherwise potential implications in this industry.

[34] Teamsters 155 notes that the Grievor was indefinitely suspended from "Smallville" in September 2009; that the September 2, 2011 letter was written "on behalf of Warner Bros. Television (B.C.)" which is the company which signed the letter of adherence; that the September 2, 2011 letter was expressed as a "**Final Warning**" letter; and that it refers to the Grievor being "reinstated" to eligibility for employment. Teamsters 155 notes that this letter made no reference to Article 10.07 of the Master Agreement, nor did it advise the Grievor that he now had a strike against him.

[35] Teamsters 155 submits that the Grievor was reinstated with a final warning and in effect was suspended from "Smallville". It submits this was a matter of progressive discipline, which did not count as a strike under Article 10.07; and this was mutually understood by the parties at the time. It says the September 2, 2011 letter was not filed under Article 10.07. It submits that the Employer had the discretion to file it. Teamsters 155 also refers to the Council's November 16, 2016 letter, indicating a clear understanding of an "industry termination" in the case of the Grievor's termination from "Supergirl".

[36] Teamsters 155 submits that the September 2, 2011 termination from "Smallville" ought not to be applied now, after five years, because to do so would be unfair and unjust. It cites s. 89(f) of the *Labour Relations Code*:

> **89** For the purposes set out in Section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
> ...
> (f) dismiss or reject an application or grievance or refuse to settle a difference, if in the arbitration board's opinion, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference.

[37] Teamsters 155 also submits that, having regard to the real substance of the dispute, I should dismiss the Employer's preliminary application. It cites s. 82(2) of the *Labour Relations Code*:

> **82** (1) It is the purpose of the Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
>
> (2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

[38] Teamsters 155 submits that a new employment relationship was created with the Grievor's employment at "Supergirl", and the real issue to be arbitrated is the discharge

from that employment. It submits the grievance should proceed to arbitration and be adjudicated according to the three-step analysis provided by the B.C. Labour Relations Board in *Wm. Scott*, [1977] 1. C.L.R.B.R. 1.

IV ANALYSIS AND DECISION

[39] On November 17, 2016, the Grievor was terminated from the production of "Supergirl", and WBTV placed him on "No-Hire Status for any Warner Bros. Television (B.C.) Inc. or related entity production." When the Grievor had been dispatched by Teamsters 155 to "Supergirl" in July, there were two previous discharges recorded on the "agreed list of Industry Terminations" as maintained by the Council and CMPA-BC. For easy reference, I again cite Article 10.07 of the Master Agreement:

> **10.07 Industry Termination:** An Employer is not required to employ, and the Union will not dispatch a person previously discharged for any reason by the film and television industry Employers three (3) times provided that no Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. An agreed list of Industry Terminations will be maintained by the Council and CMPA-BC offices and updated on a regular basis.

[40] The Employer argues that there was another discharge which should have been included, such that there were in fact three strikes already against the Grievor prior to his dispatch to "Supergirl". The Employer relies on the September 2, 2011 "**Final Warning**" letter to the Grievor from WBTV Labor Relations. There, the Grievor was advised that his "indefinite suspension [from "Smallville"] was converted to a discharge."

[41] The Employer submits the present grievance against discharge, from "Supergirl", ought to be summarily dismissed. It says the Grievor should never have been dispatched to this production in the first place. In other words, the Employer's position is that the dispatch to "Supergirl" was in fact a breach of Article 10.07 of the Master Agreement, and the Grievor cannot claim to have had legitimate employment at "Supergirl" based on this breach. There was no dispute that the Employer learned of this alleged breach only after the "Supergirl" termination. So, there is no issue of consent, waiver or estoppel to consider.

[42] The circumstances call for an interpretation of Article 10.07 - at least so far as is required to resolve the issue of whether the "discharge" from "Smallville" counts as a strike against the Grievor. The 2011 *Tysoe Report* provides a cogent aid to interpretation.

[43] Mindful of "the usual practice in the film industry for a production company to be incorporated for each production," Mr. Justice Tysoe contemplated the problem that "a producer who has discharged an employee for cause on one production cannot refuse to employ the employee on his or her next production because the employer will be different." He concluded:

> ... [It] is my recommendation that a "three strike" rule be implemented in the industry. If nothing else, such a rule should assist in discouraging dishonest behavior. Each of the three discharges would have to comply with the requirement that there must be just and reasonable cause for the discharge.

[44] Article 10.07 amounts to a codification under the Master Agreement of the "'Three Strike' Rule" recommended by Mr. Justice Tysoe. Article 10.07 provides a safeguard to the industry at large, inclusive of all employers in the industry. There is no wording in Article 10.07 which would distinguish one employer from another, allowing its protection in one case and not another. In other words, if an Employer permitted a person who had been discharged at one affiliate, to work elsewhere at another affiliate despite Article 10.06, that would not deprive another Employer in the industry from the protection of Article 10.07; nor would the Employer which allowed the person eligibility to work elsewhere be deprived from the protection of Article 10.07, after the person had been discharged three times for just and reasonable cause.

[45] What we have in Article 10.07 is a recognition of the union, and its role managing the dispatch of its members to a production site; but, where such authority in respect to the individual member would terminate if the person was discharged three times for just and reasonable cause. In addition, an "Employer" is exempted from any requirement to employ a person previously discharged three times for just and reasonable cause. The "three strike rule", as described in Article 10.07, would seem to serve the collective interest of the constituent unions of the Council, of the union

membership collectively, and the employers in the film industry in B.C. insofar as they share a mutual interest in supporting employment in the industry in this Province. Also, the person himself/herself is accommodated - fairly and reasonably, in my opinion - by the condition that Article 10.07 is not engaged until there have been three discharges, each of which must not have been without just and reasonable cause.

[46] Article 10.07 speaks of an employee having been "discharged", "as distinguished from replacements or layoffs". Within Article 10.07, the word "Employer" is used to refer to a specific and immediate employer of the person, and to any other employer in the industry either party-to or attached to the Master Agreement. However, the critical concern, which founds the spirit and intent of Article 10.07 is not who is the "true" employer, but that the person has been "discharged" three times, and that each discharge must have been for just and reasonable cause; i.e. each discharge must have been deserved based on the person's culpable conduct.

[47] I find that the Grievor was discharged for just and reasonable cause from the production of "Smallville". On the record, the September 2, 2011 letter, notwithstanding that it is headed "**Final Warning**", expressly asserts that the Grievor's previously indefinite suspension "was converted to a discharge", and that this was based on the Grievor's "serious misconduct which included the use of profane, hostile, and inappropriate language, as well as insubordination." This letter represents a settlement achieved between Teamsters 155, on behalf of the Grievor, and WBTV Labor Relations on behalf of Smallville 9 Films Inc. and WBTV itself. It represents a conclusion that the Grievor was discharged with just and proper cause from one production, i.e. "Smallville", and not laid-off or replaced. With respect to other productions by WBTV or affiliated entities, the Grievor was reinstated to eligibility for employment, albeit on final-warning status. However, this does not negate the fact he was discharged from "Smallville". I find that this was a discharge within the contemplation of Article 10.07 of the Master Agreement.

[48] WBTV's agreement with Teamsters 155, in effect partly a concession allowing the Grievor to be eligible for employment elsewhere with WBTV or an affiliate, was an agreement made at a time when the Grievor had only one discharge recorded against

him under Article 10.07. I find nothing in the September 2, 2011 "**Final Warning**" letter from which to conclude that WBTV, or National City Films Inc., waived their rights or would be estopped from later exercising their rights under Article 10.07.

[49] As I read the "Letter of Adherence and Designation", when WBTV identified itself as "the Employer associated with Smallville 9 Films Inc.," WBTV merely identified itself as the Employer party to the Master Agreement with the authority to bind Smallville 9 Films Inc. to the Master Agreement. I find in the said letter no express or implied assertion that WBTV was or would be the employer of the persons dispatched to that production.

[50] Although I would conclude that Smallville 9 Films Inc. was the Grievor's employer, and that WBTV, as the parent company, was merely providing its subsidiary with labour relations expertise and representation, I do not consider the issue of "true" employer as cogent to the application of Article 10.07. In the "Smallville" circumstances, even if WBTV were the "true" employer, the terms of settlement still included a discharge. The Grievor's employment at "Smallville" was fully severed. Although the word "reinstate" was used in the September 2, 2011 "**Final Warning**" letter, WBTV did not actually reinstate the Grievor, but only agreed to consider him as eligible for hire elsewhere, and on condition he would be on "final warning" status. In sum, I do not find the Council's argument helpful.

[51] Equally, I do not find Teamsters 155's arguments helpful. While I agree "the" issue under Article 10.07 is whether the person was discharged, not the identity of the employer, I find as a fact that the Grievor was discharged, and not without just and reasonable cause. Although eligible to be rehired elsewhere, the employment relationship at one production, "Smallville", was severed based on culpable conduct. I do not find in Article 10.07 any obligation on an employer to mention Article 10.07 in its discharge letter, or to state that the discharge counts as a strike toward industry termination, or to file the discharge letter with the Council and CMPA-BC. I do not find the fact the Grievor continued to work after his third discharge, i.e. from "Proof", probative of his discharge from "Smallville" not counting as a strike against him under Article 10.07. The fact it was not counted at the time does not mean it should not have

been. That the Grievor continued to work after "Proof", and that he continued to work after his discharge from "Supergirl" (which was grieved), I do not find probative of anything more than that Teamsters 155 continues to dispatch him. In fairness, based on the information before me, I would not conclude that Teamsters 155 is dispatching him in bad faith.

[52] I do not find this to be an appropriate case for exercising my discretion under s. 89(f) of the *Labour Relations Code*. The Grievor was discharged from "Proof" on January 21, 2015. Yet he continued to be dispatched afterwards. The failure to have counted his discharge from "Smallville" as a discharge under Article 10.07 beneficially allowed him further dispatches in the industry. The Grievor cannot claim detriment because of the passage of time. Also, based on the information before me, I cannot find unreasonable delay by the Employer in bringing its present application for summary dismissal of the grievance.

[53] Under s. 82(2) of the *Labour Relations Code*, an arbitrator must have regard to the real substance of the matters in dispute, and apply principles consistent with the industrial relations policy of the *Code*. Article 10.07 of the Master Agreement stems from one of the five recommendations in the *Tysoe Report*. It provides a significant control with respect to the future dispatch and employment of persons who have demonstrated repeated culpable conduct deserving of discharge. I believe, in the circumstances of this case, that Article 10.07 of the Master Agreement applies, and that s. 82(2) is satisfied by upholding this provision.

V CONCLUSION

[54] I have come to the following conclusions:

1. The Grievor was discharged from "Smallville" on September 2, 2011.
2. The discharge was a culpable discharge, not without just and reasonable cause.
3. The discharge counts as a discharge under Article 10.07 of the Master Agreement. Although the discharge from "Smallville" was not recorded according to Article 10.07, it should have been.

4. Teamsters 155 ought not to have dispatched the Grievor to the production of "Supergirl", and, unbeknownst to the Employer, there was no requirement on National Films Inc. or WBTV to employ the Grievor.

5. The Grievor was dispatched to "Supergirl" in effective contravention of Article 10.07 of the Master Agreement, and his employment there constituted an effective breach of Article 10.07.

6. Based on the above, the present grievance is summarily dismissed.

[55] Finally, I make two observations. Firstly, I have made no decision on the facts pertaining to the Grievor's discharge from "Supergirl". The grievance is dismissed, but not based on a finding of culpable conduct meriting that discharge. However, the Grievor's discharge from "Supergirl" is presently recorded under Article 10.07. I leave that for the Council and CMPA-BC to consider. Secondly, collective bargaining for renewal of the Master Agreement will commence this fall. That would provide an opportunity to deal with any concerns industry-wide regarding the wording or application of Article 10.07.

Robert B. Blasina, Arbitrator