IN THE MATTER OF AN ARBITRATION CONCERNING THE GRIEVANCE OF LEN FEHR (the "Grievor")

BETWEEN:

UNITED STEELWORKERS OF AMERICA LOCAL 5890
(the "Union")

- and -

IPSCO SASKATCHEWAN INC.
(the "Employer")

ARBITRATOR:

Gary G.W. Semenchuck, Q.C.

ARBITRATION HEARING DATES:

August 8, September 4, 5 and 29, 2003

COUNSEL AND REPRESENTATIVES

Michael J. Park for the Union and the Grievor
Larry B. LeBlanc, Q.C. for the Employer

DATE OF AWARD: November 26, 2003

ARBITRATION AWARD

INTRODUCTION AND PRELIMINARY MATTERS

This arbitration relates to a grievance by Len Fehr (the "Grievor") against IPSCO Saskatchewan Inc. (the "Employer") relating to the termination of the Grievor's employment.

The parties agreed that I was properly constituted as the Arbitrator to determine this grievance. The parties also agreed to extend the time for giving a decision under Section 25(3.3) of *The Trade Union Act*, Statutes of Saskatchewan Chapter T-17.

At the commencement of the hearing on August 8, 2003, the Representative for the Grievor and the United Steelworkers of America Local 5890 ("the Union") raised a preliminary issue about the terms of the Safety Compliance Policy signed on November 19, 1996 by the Union and the Employer which, in the submission of the Union, had the potential to nullify the termination of the Grievor and this arbitration. Since notice of this preliminary issue had not been given to the Employer, counsel for the Employer requested an adjournment to be able to consider and respond to this issue. As a result, this arbitration hearing was adjourned by consent to September 4 and 5, 2003.

On September 4, 2003, the parties presented argument about this preliminary issue. The Representative for the Union and Grievor altered his earlier position and argued that the issue relating to the Safety Compliance Policy was not a preliminary matter relating to jurisdiction but a matter which would be dealt with during the presentation of evidence in the arbitration hearing. Counsel for the Employer disputed the change of position by the Union and argued that the matter needed to be addressed or removed as an issue. After hearing arguments from both sides and reviewing the documentation, I ruled that this issue could not be dealt with on a preliminary basis and I would deal with it after hearing all of the evidence. This issue is addressed later in this Award.

FACTS

Three key documents must be referenced in detail, namely, the Grievance Report Form, the Letter of Termination and the Last Chance Conditional Reinstatement Agreement.

The Grievor filed a grievance dated February 3, 2003 (Exhibit E-1 Tab 10(h)) stating the following particulars:

"Particulars of Grievance

Nature of Grievance: I grieve under the current CBA that I (Len Fehr) have been unreasonably discharged-(disciplined)-from my position at IPSCO Regina.

Article Numbers: 5.01-5.03 of the current CBA - but not excluding any other article or applicable legislation.

Settlement Requested: I request that I (Len Fehr) be reinstated and made whole in all areas - wages - benefits - shares - pension Hrs - and seniority."

The Termination Letter dated February 3, 2003 (Exhibit E-1 Tab 10(g)) reads as follows:

"Dear Mr. Fehr

Re: Termination of Employment

The company has reviewed the circumstances under which you were indefinitely suspended on January 29th, 2003. We have concluded that your actions were a substantial violation of the terms of your Last Chance Conditional Reinstatement Agreement signed by you on April 14th, 2001.

Therefore, the company has followed the only course of action which is to terminate your employment immediately.

Please make arrangements to have all IPSCO property returned to Security and your locker cleared of any personal possessions.

Sincerely,

IPSCO Saskatchewan Inc.

Grant Shortridge"

The Last Chance Conditional Reinstatement Agreement dated April 14, 2001 (Exhibit E-1 Tab 8(g)) reads as follows:

"Dear Len:

RE: LAST CHANCE CONDITIONAL REINSTATEMENT AGREEMENT

This Letter constitutes a Last Chance Agreement which sets out the terms and conditions which will govern your continued employment with IPSCO Saskatchewan Inc. (the Company) following the meeting on April 12, 2001.

Len, you have been disciplined up to the point of discharge and, in keeping with the principles of progressive discipline, you could have been terminated for just cause.

You asked to be given one last and final chance to return to being a productive employee.

Len, having given due consideration to your request for one last and final chance to correct your behavior and become a reliable and dependable employee, the Company is prepared to continue your employment in accordance with the following terms and conditions:-

1. Len Fehr will not engage in unproductive, excessive discussion with co-workers.
2. Len Fehr will be responsible to complete tasks assigned in a reasonable period of time and if instructions are unclear must ask for clarification. Len Fehr will ensure that he will write legibly and report the required information in the daily logs.
3. Len Fehr will follow all of the work and safety rules and abide by all Company policies for as long a (sic) he remains an employee of the Company.
4. Len Fehr must be co-operative and respectful of all supervisors and co-workers at IPSCO in carrying out the daily routines of his job.
5. This Agreement will expire 24 months following the date it is executed by the parties.

The parties to this Agreement agree that should Len Fehr breach any of these conditions, he will be immediately terminated for just cause. The parties also agree that should Len Fehr file a grievance as a result of being terminated for a breach of this Last Chance Conditional Reinstatement agreement, the jurisdiction of any arbitrator hearing such grievance shall be limited to a determination of whether the terms and conditions of this Agreement were breached.

I, Len Fehr, have read and fully understand the terms and conditions of this Last Chance Conditional Reinstatement Agreement and agree to be bound by them for a twenty-four (24) month period commencing from the date I sign this Agreement.

signed Len Fehr

Signed, this 14th day of April, A.D., 2001, in the City of Regina, in the Province of Saskatchewan, on behalf of:

signed Local 5890 USWA signed IPSCO Saskatchewan Inc."

The Grievor has been a journeyman welder since 1976 or 1977. He commenced employment with the Employer in December, 1988. He is employed in the maintenance department of the pipe division of the Employer. As a welder in the maintenance department of the pipe division, the Grievor may perform work in various areas of the pipe division but most of the work is usually done at a welding bench in the maintenance area in the spiral building of the Employer. As a welder, one of the tasks performed by the Grievor is to use a torch to cut metal.

The incident which gave rise to the termination of the Grievor occurred on January 29, 2003. At approximately 9:30 a.m. on that date, Sam Hadi, the general foreman in the spiral finishing mill of the Employer, was walking from his office to the two inch mill. That path took him by the welding bench of the maintenance department and Hadi noticed the Grievor using a cutting torch to cut steel while the Grievor was wearing only safety glasses. Hadi went over to the Grievor and, after a number of attempts to get the attention of the Grievor, the Grievor did realize that Hadi was there. Hadi told the Grievor to put his face shield on and then Hadi continued on his way to the two inch mill. Hadi did look back and saw the Grievor get a face shield and put it on.

Hadi obtained the Grievor's employment file shortly thereafter for the purpose of providing a warning letter and then found the Last Chance Conditional Reinstatement Agreement. Hadi then referred the matter to his supervisor. Later that same day (January 29, 2003) a meeting was held with the Grievor to review the incident. The Grievor was accompanied by a Union Vice-President, David Grant, and the Employer was represented by Grant Shortridge, Director of Employee Relations for the Tubular Division, Jim Tregenza and Cindy Hinger. After reviewing the incident, Shortridge suspended the Grievor and

scheduled another meeting with the Grievor on Monday, February 3, 2003 to make a final decision about this matter.

On February 3, 2003, the Grievor and David Grant met with Grant Shortridge, Cindy Hinger and Jim Clarke. Clarke was a replacement for Tregenza who had resigned from the Tubular Division of the Employer on January 31, 2003. At this meeting, there was an extensive review of the incident and the history of the Grievor's employment. The Grievor acknowledged that he understood the rule requiring a face shield but he did have safety glasses on. The Grievor stated that he had not worn a face shield for more than a year but then changed that time frame to a few months. When asked why he didn't wear a face shield, the Grievor did not have a reason. Shortridge then indicated that he had no option but to terminate the Grievor under the terms of the Last Chance Conditional Reinstatement Agreement. Grant asked for a short break to confer privately with the Grievor. Grant and the Grievor returned and Grant stated that the Grievor understood the gravity of the situation and that the Grievor had something to say. The Grievor stated that he did not like to admit defeat. The Grievor said that, if Shortridge reconsidered the Grievor's employment, the Grievor would never do anything to cross Shortridge's desk again.

Shortridge asked for short break to have a private discussion with the other representatives of the Employer. Shortridge returned and terminated the Grievor for violation of a safety rule which was a breach of the Last Chance Conditional Reinstatement Agreement. Grant indicated that a grievance would filed.

The Employer has established safety rules and regulations for all employees which are set out in an orange booklet titled "Accident Prevention Manual" (Exhibit U-1). Those safety rules include Personal Protection under Article VI and Torch Handling Procedure under Article IX, section D). Subsection 4) of Article IX D) covers Torch Use and the first entry states:

"Wear protective gloves and goggles or shields while lighting or using a torch."

The Employer also provided a course on the use of a cutting torch. Between 1997 and 2000, Dave Decterow, a welder employed by the Employer until his retirement on September 1, 2003, taught that course. Decterow used a written guideline (Exhibit E-1 Tab 11(d)) for that torch training course which included the following wording:

"Operating a torch

Before lighting a torch, make sure that you are wearing a dark face shield or cutting goggles. This is a safety rule and must be followed. If it isn't, you will face discipline."

The Grievor took that course and Decterow signed a certificate dated April 13, 2000 that the Grievor had passed that course.

The Employer and the Union cooperate to produce Job Safety Analysis sheets for various departments and positions at the Employer's operation in Regina. The Job Safety Analysis (JSA) refers to basic job functions, potential hazards and recommended actions or procedures. JSA 9 dated June 1, 1997 (Exhibit E-1 Tab 11(c)), for maintenance personnel in Regina Tubular/Maintenance, referred in item 7 on page 3 to torch handling and indicated various potential hazards with the recommended action being "Refer to Accident Prevention Manual, Section IX, Part D (attached)". The attachment contains the same reference quoted above.

Each JSA is posted in the department or area covered by that JSA. Each employee is to review the JSA for his department. The Employer also provides monthly toolbox talks to review and discuss various job situations and safety requirements. Employees sign attendance sheets for those toolbox talks. The Grievor signed the toolbox talk (Exhibit E-1 Tab 11(e)) dated February 16, 2001 covering the wearing of face shields when cutting and grinding as one of the topics.

Safety glasses are different from goggles or face shields. Every employee is required to wear safety glasses on the job as part of personal protection equipment. Goggles or face shields are required to be worn when using a torch. Goggles or face shields may be tinted or clear.

Another document requiring detailed reference is the Safety Compliance Policy (Exhibit U-3) which is a two page document signed on November 19, 1996 by the Union and the Employer. That Safety Compliance Policy reads as follows:

"SAFETY COMPLIANCE POLICY

Continued protection of the health and safety of all employees should be the paramount concern to management and employees at every level in the Company.

Management has the responsibility of ensuring, as defined by the Occupational Health and Safety Act, that a healthy and safe workplace is provided for all and that a continuous surveillance of the effects of working conditions on health and safety is carried out with the required corrective actions implemented. If safety and health hazards cannot be entirely eliminated, all reasonable protective measures must be provided and constantly used.

Each IPSCO employee has a personal responsibility for their own safety and health and must accept that the strictest adherence to the Occupational Health and Safety Act and Regulations and the Company's health and safety practices is a condition of employment. Any violation of a safety rule or practice will not be tolerated and will be dealt with accordingly.

If an employee fails to comply with the Occupational Health and Safety Act and Regulations or IPSCO's Safety Program, then the appropriate management individual will assess the situation and apply the appropriate level of discipline as follows:

First Step:	Written Warning
Second Step:	1 day suspension
Third Step:	3 day suspension, followed by a letter sent to the employee's last address of record
Fourth Step:	Indefinite suspension with a recommendation for termination

The above is a basic guideline for the sequence of discipline in safety matters. However, certain safety violations may be viewed serious enough to warrant more severe discipline up to and including immediate termination.

Management will not issue discipline under the Safety Compliance Policy immediately, but rather postpone any decision regarding discipline until such time as a complete investigation of the facts is conducted by the Supervisor and Safety Steward in the area of the alleged infraction. Investigation of the facts will be documented on the Accident/Incident Investigation Form. After consideration of the facts, management will determine the need and level of discipline if required. This process shall be in addition to the employees' grievance rights under the Collective Agreement.

The Union will make it known to the membership that grievances will not be filed on behalf of a member if that member has not complied with proper safety procedures and rules. Grievances will be filed only in cases where discipline is felt to be unfair or unreasonable.

In addition to each employee's personal responsibility for their own safety and health, the position of the Union will be that every person in a leadership role will work to ensure that fellow workers are working in a safe manner. This action in no way negates the primary responsibility of management for safety as defined by the Occupational Health and Safety Act but rather will work as a supplement by Union leaders to promote safety and enforcement.

A "Crew Safety Steward Program" will be adopted. The Company agrees to assist the Union in the training of the Crew Safety Stewards. Similar to the Shop Steward, the main function of the Crew Safety Steward, in addition to their regular duties, will be to assist in ensuring that workers on their respective crews are following safe work practices. Responsibilities of these stewards will be separate and apart from industrial relations issues and the duties of the Safety Representatives.

Signed this 19th day of November, 1996 at Regina, Saskatchewan.

For the Union:	For the Company:
signed W. Krushlucki	signed J. Mathieson
signed C. Selinger	signed D. Simon
signed P. Punga	signed G Shortridge"

THE EMPLOYER'S POSITION

The Employer argued that the Grievor knew that the safety rules required him to wear a face shield when cutting with a torch and the Grievor admits that he violated that rule. The Grievor understood or should have understood the consequences of his action in light of the Last Chance Conditional Reinstatement Agreement. The Grievor was terminated because he breached that Last Chance Conditional Reinstatement Agreement and the grievance should be dismissed.

The Employer argued that the Safety Compliance Policy was never operative because the Crew Safety Steward Program was never implemented. The Union failed to appoint Crew Safety Stewards which were required under that Policy and, as a result, the Policy has not been and cannot be implemented. The Employer also argued that , in any event, the Policy has no application to this type of incident, being a violation of a safety rule. It was intended to apply to serious situations involving an accident or a near miss. A further argument by the Employer was that the Union is estopped from raising the Safety Compliance Policy as a condition precedent to this termination because the Union has never taken that position previously and there was never any suggestion by the Union that an investigation under the Safety Compliance Policy was required.

The Employer also argued that the jurisdiction of the Arbitrator in this grievance is limited to determining whether or not there was a breach of the Last Chance Conditional Reinstatement Agreement according to the terms of the Last Chance Conditional Reinstatement Agreement.

THE UNION'S POSITION

The Union stated that it is not trying to back away from Last Chance Agreements and the Union supports the position that, generally, arbitrators should not

interfere with Last Chance Agreements. The Union also stated that it is committed to safety requirements and procedures and, in particular, the Union supports the use of goggles or face shields by welders using a cutting torch. The Representative for the Union stated that the Union is not denying that the Employer has a rule requiring the use of goggles or face shields when using a cutting torch.

The Union argued that this is an exceptional case requiring interference by the Arbitrator because the Employer has not consistently applied and enforced the safety rule. The Union argued that the Grievor had safety glasses on and the Grievor admitted that he had been using a cutting torch with safety glasses for a considerable time. The Union argued that this rule requiring the use of goggles or a face shield is not clear and is not unequivocal and has not been consistently applied by the Employer. Consequently, the Union argued that there was no violation of the Last Chance Conditional Reinstatement Agreement.

The Union argued that the Safety Compliance Policy does apply to this matter and, since there was no investigation under that Policy, the Employer is prohibited from disciplining the Grievor. As a result, the Union argued that the grievance should be allowed and the Grievor reinstated with full pay and benefits.

ANALYSIS AND DECISION

Both parties presented extensive *viva voce* evidence from several witnesses, entered a number of exhibits and made oral and written submissions. I have reviewed my notes of the evidence, the exhibits and written submissions and case authorities. All of the evidence has been carefully weighed and considered by me notwithstanding that there may not be a specific reference to every item of evidence and every submission.

The questions to be answered in this arbitration relate to the Last Chance

Conditional Reinstatement Agreement and the Safety Compliance Policy. Those questions are:

(a) Is the jurisdiction of the Arbitrator limited to determining whether or not there has been a breach of the Last Chance Conditional Reinstatement Agreement?

(b) Is there some exceptional reason requiring the Arbitrator to interfere with the terms of the Last Chance Conditional Reinstatement Agreement?

(c) Does the Safety Compliance Policy apply to this situation?

I will deal with each of these questions.

LAST CHANCE CONDITIONAL REINSTATEMENT AGREEMENT

On January 29, 2003, the Grievor was using a cutting torch without wearing goggles or a face shield as required by the safety rules (Exhibit U-1, Accident Prevention Manual, Article IX, D), 4)). The Grievor admitted that he violated this rule and even admitted that he had been using a cutting torch without wearing goggles or a face shield for some months or even longer. The Grievor knew that he was subject to the terms of the Last Chance Conditional Reinstatement Agreement because he had signed that Agreement. One of the terms of the Last Chance Conditional Reinstatement Agreement required the Grievor to follow all of the work and safety rules and abide by all policies of the Employer. That requirement is clear and unequivocal and the Grievor acknowledged in that Last Chance Conditional Reinstatement Agreement that he had read and fully understood the terms and conditions and agreed to be bound by them for a twenty-four (24) month period commencing with the date of his signature on April 14, 2001.

Last Chance Agreements have been the subject of comments in several arbitration decisions. The significance of Last Chance Agreements cannot be overstated. Such agreements give another option to employers and employees in difficult situations

which might otherwise end in an immediate termination of an employee. The sanctity of such agreements must be paramount or they will be stripped of their usefulness. I adopt and support the following statements from other arbitration decisions.

> " The general arbitral approach to such agreements, often referred to as "last chance" agreements is to require strong and compelling reasons in order to vary the result which flows from a breach of the agreement. The reason behind such an approach is quite evident. If the arbitrator used his power to mitigate the penalty flowing from the breach of the agreement without regard to the terms of the agreement, the likely long-term effect would be that such agreements would not be used to settle disciplinary disputes. Employers would simply refuse to give employees a "last chance" [page 244]
>
> if, at the end of the day, the agreement has little or no effect in the arbitrator's deliberations when considering whether to mitigate a penalty. It is obvious that it is desirable to encourage parties to enter settlement agreements such as the one in question. The employee receives another chance to retain his job and the parties know what standard of conduct is required in the future. The expense of arbitration proceedings may be avoided."[1]
>
> "...There is a further factor, however, that reinforces these observations in my view. The acceptance by the union and the grievor in last chance agreements that any further breach will lead to discharge is the quid pro quo for the reinstatement in employment. Where the employer, relying on the agreement, has reinstated the grievor in employment, it should only be in exceptional circumstances, it seems to me, that an arbitrator decides to substitute some penalty other than the agreed one if the grievor later violates the agreement. The union and the grievor, having obtained the benefit for which they contracted, are on very shaky ground when they try to extricate themselves from the promise they made. However one characterizes the last chance agreement, the employer's reliance on it deserves to be respected."[2]
>
> "Arbitrators generally agree that there are compelling policy reasons for upholding last chance agreements. It has often been stated that last chance agreements are in themselves a significant accommodation for employees handicapped by substance abuse, and that for arbitrators to give those employees a "second last chance" would render such agreements meaningless and would discourage companies from entering into them in the future. [citations omitted]

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1 *Re Crestbrook Forest Industries Ltd. and I.W.A.-Canada, Loc. 1-405* (1996), 59 L.A.C. (4th) 237 at 243-244

2 *Re Camco Inc. and U.S.W.A., Loc. 3129* (2000), 91 L.A.C. (4th) 346 at 355

> It is also settled case law that the parties to a last chance agreement can legitimately oust the arbitrator's jurisdiction to modify the prescribed penalty. [citations omitted]"[3]

Has the Union demonstrated any compelling exceptional reason for interfering with the Last Chance Conditional Reinstatement Agreement entered into between the Employer and the Grievor? The Union submits that the Employer should not be allowed to rely upon the violation of the safety rule by the Grievor using a cutting torch without wearing goggles or a face shield because the Employer has failed to consistently apply and enforce that safety rule. The Union relies upon the decision by the arbitration board in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* (1965), 16 L.A.C. 73. At page 85 of the KVP decision, the board stated:

> "A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
>
> 2. It must not be unreasonable.
>
> 3. It must be clear and unequivocal.
>
> 4. It must be brought to the attention of the employee affected before the company can act on it.
>
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
>
> 6. Such rule should have been consistently enforced by the company from the time it was introduced."

The Union argued that the Employer has not satisfied requisite number 6 and, therefore, the Employer cannot rely upon the violation of that safety rule to terminate the Grievor.

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3 *Labatt Breweries Ontario and B.G.P.W.U., Loc. 304* (2002), 107 L.A.C. (4th) 126 at 134

I do not accept the argument by the Union for several reasons. First, the safety rule is not a rule unilaterally introduced by the Employer. The Employer and the Union have a common interest in safety rules and procedures at work. The Union did not present any evidence that the requirement for a face shield or goggles while using a cutting torch was excessive or unreasonable. Indeed, the evidence of Dave Decterow confirmed that safety in the handling of a cutting torch was paramount and the use of a face shield or goggles is necessary when using a torch for cutting. As a lay person, I would have been shocked if it had been otherwise. Second, the evidence indicated that the Employer expected that safety rule to be followed and reinforced the safety rule through the torch training course and toolbox talks. There was no evidence that the Employer deliberately ignored any violation of that safety rule. The evidence of the Grievor that he used a torch for cutting without wearing goggles or a face shield simply indicates that he was lucky to have avoided being caught by the Employer. He must accept responsibility for his own actions in failing to comply with the safety rule. The Union presented some evidence that welders in the steel division do not always wear face shields when using a torch for cutting. However, there was no such evidence relating to the pipe division in which the Grievor worked and there was no evidence that the Employer condoned any such practice in the steel division. Moreover, the Union's witness, Cliff Selinger, testified that he explains to employees that, if they break the rules, they are subject to discipline.

There is simply no evidence to support the Union's argument that the *KVP* decision has any application to this safety rule or that the safety rule does not satisfy the requirements of the *KVP* decision even if it does apply.

The Last Chance Conditional Reinstatement Agreement places the following restriction on an arbitrator:

> "The parties also agree that should Len Fehr file a grievance as a result of being terminated for a breach of this Last Chance Conditional Reinstatement Agreement, the jurisdiction of any arbitrator hearing such grievance shall be limited to a determination of whether the terms and conditions of this Agreement were breached."

As stated in the *Labatt Breweries* decision, *supra*, parties are able to oust the arbitrator's jurisdiction to alter the penalty. It is only in the rarest of circumstances that arbitrators have not followed the jurisdictional restriction agreed to by the parties. Such was the case in *Parmalat Dairy and Bakery Inc. and Retail Wholesale Canada, Div. of C.A.W., Loc. 462* (2002),108 L.A.C. (4th) 438. In that decision, the arbitrator felt that it was not proper to hold the grievor to the terms of the Last Chance Agreement because the Agreement had required action by the Employer to assess and develop a treatment program for the grievor which was never done. As a result, the arbitrator held that the grievor did not obtain the benefit for which he had contracted in the Last Chance Agreement. In this arbitration, the Grievor did obtain the full benefit of the Last Chance Conditional Reinstatement Agreement. That Agreement clearly stated and the Grievor acknowledged that he was to follow all safety rules. The Grievor did not do that and admitted that he had not been wearing a face shield or goggles when using a torch for cutting for a number of months. He must take responsibility for his actions which were a clear violation of the Last Chance Conditional Reinstatement Agreement.

The Union has failed to demonstrate any reason, let alone a compelling exceptional reason, to interfere with the Last Chance Conditional Reinstatement Agreement. Since the parties agreed that the Arbitrator's jurisdiction would be limited to a determination of whether the terms and conditions of the Last Chance Conditional Reinstatement Agreement were breached, I consider myself bound by that restriction. The Grievor has admitted, and the evidence clearly demonstrates, that he breached the requirement to follow all safety rules.

SAFETY COMPLIANCE POLICY

The Safety Compliance Policy was signed by the Employer and the Union on November 19, 1996. That Policy contemplated the appointment of a Crew Safety Steward by the Union who would then carry out an investigation of an incident with the supervisor

and document the investigation on the Accident/Incident Investigation Form. The evidence clearly established that the Union never appointed Crew Safety Stewards and no investigations were ever performed under this Policy. In the absence of the appointment of Crew Safety Stewards, I do not know how an investigation could be performed under this Policy.

In the present arbitration, there was no request by the Union for an investigation under the Safety Compliance Policy relating to this incident and the first reference to this Safety Compliance Policy was at the commencement of this hearing on August 8, 2003. Since the Union signed the Policy on November 19, 1996, the Union obviously was aware of the Policy and, if the Union considered the Policy to be in effect, the Union ought to have raised it at the time of the Last Chance Conditional Reinstatement Agreement or at the meetings of January 29 and February 3, 2003 dealing with the Grievor.

I find that the Safety Compliance Policy was never implemented because of the failure by the Union to appoint Crew Safety Stewards. Even if the Safety Compliance Policy could be considered to be in force, the Union cannot now raise it as a prerequisite to the termination of the Grievor. By failing to raise the Policy at the time of the Last Chance Conditional Reinstatement Agreement or at the meetings of January 29 and February 3, 2003, the Union is now estopped from doing so. In addition, even if the Safety Compliance Policy could be considered to be in force, it provided as follows:

> "The Union will make in known to the membership that grievances will not be filed on behalf of a member if that member has not complied with proper safety procedures and rules. Grievances will be filed only in cases where discipline is felt to be unfair or unreasonable."

The Representative for the Union stated that the Union supports the use of goggles or face shields by welders using a cutting torch. Having made that admission, which is both reasonable and appropriate in my view, the Union would have an impossible task to show

that the discipline is unfair or unreasonable in light of the Last Chance Conditional Reinstatement Agreement.

CONCLUSION

I uphold the termination of the Grievor and dismiss the grievance dated February 3, 2003.

DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of November, 2003.

Gary G.W. Semenchuck, Q.C., Arbitrator

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