IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNITED STEEL WORKERS OF AMERICA, Local 5890

(Hereinafter referred to as the "Union")

AND:

IPSCO SASKATCHEWAN INC.

(Hereinafter referred to as the "Company")

SUPPLEMENTARY AWARD

SOLE ARBITRATOR:	Kenneth A. Stevenson, Q.C.
COUNSEL:	Bill Craik On behalf of the Union
	Larry LeBlanc, Q.C. On behalf of the Company

SUPPLEMENTARY AWARD

This Arbitrator issued an Interim Award on November 27, 1998 and a grievance Award on March 19, 1999. The Interim Award addressed the Company's preliminary objections and determined that the grievance was arbitrable on its merits. The parties were unable to resolve the compensation and remedial aspects of the Award. The Hearing was accordingly reconvened at the request of the parties in Regina, Saskatchewan on June 21, 1999.

Background

The background circumstances and facts are fully set forth in the Interim Award and Award. The Grievor was terminated on August 1, 1996, and pursuant to the Award, was returned to work on April 1, 1999. The circumstances which gave rise to the extended length of time between the dismissal and the commencement of the Hearing are detailed in the Interim Award.

Issues

The parties have been unable to agree as to the compensation to which the Grievor is entitled as a result of his unjust discharge. Article 5.04 reads as follows:

> "Article 5.04 — Employee Reinstatement
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> If it is determined or agreed at any steps in the grievance procedure or decided by an arbitrator that an employee has been discharged unjustly, management shall reinstate the employee without loss of seniority or regular wages or make other arrangements as to compensation which is just and equitable in the opinion of the parties."

This Board must determine the compensation which is "just and equitable" in all of the circumstances having regard to the application of the appropriate legal and arbitral principles. It has been determined that the Grievor was unjustly discharged. Compensation for the loss is normally the pecuniary loss flowing from the breach subject to the Grievor's duty of taking all reasonable steps to mitigate the loss consequent on the Company's breach. In this case, the Company argues that a determination of the just and equitable compensation must reflect

mitigation principles and the failure of the Union and the Grievor to pursue the grievance in an expeditious manner with the result that Mr. Gushel was absent from work for a period of thirty-two months before he was reinstated.

Evidence

The parties filed an agreed wage claim covering the period of Mr. Gushel's absence from employment. The agreed calculations include Mr. Gushel's base pay of greater than $20.00 per hour, COLA payments, premium pay for shift work and weekend work and a signing bonus. The wage loss claim is as follows:

1996	Wage loss	$ 12,117.36
1997	Wage loss	$ 37,987.09
1998	Wage loss	$ 48,755.12
1999	Wage loss	$ 12,509.00
Total Wage loss		$111,368.57

These figures do not include any overtime rates which were potentially applicable in respect of a "14th shift" in every 28-day rotation; these shifts are included at the base rate plus COLA and any premiums. The evidence is that some of these "14th shifts" are worked, others are not worked; if worked, 8 hours would be paid at overtime rates. The loss figures do not include any allowance for vacation pay nor reflect any absences for vacation.

IPSCO employees receive profit sharing entitlements on a quarterly basis. The profit share of each employee is applied toward the purchase of IPSCO shares. The parties have agreed that the applicable profit sharing plan entitlements of Mr. Gushel are as follows:

Quarter	Profit Share	Share Price	# of Shares
3RD QTR. 96	231.17	30.25	7.64
4TH QTR. 96	529.92	37.50	14.13
1ST QTR. 97	113.76	37.20	3.05
2ND QTR. 97	838.44	41.90	20.01
3RD QTR. 97	877.32	66.85	13.12
4TH QTR. 97	1,001.10	55.45	18.05
1ST QTR. 98	797.04	46.45	17.159
2ND QTR. 98	609.66	39.80	15.318

3RD QTR. 98	571.32	28.10	20.33
4TH QTR. 98	496.88	26.65	18.64
1ST QTR. 99	471.50	28.45	16.57
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TOTALS	$6,538.11	$39.87 (average)	164.017

At the time of his termination, Mr. Gushel was in receipt of Employment Insurance benefits which he continued to receive until September 7, 1996. Since July, 1994 Mr. Gushel has been involved in the ownership of Dancers, a strip club in Regina; since approximately mid-1996, he has been the sole owner of the club. While employed with IPSCO, Mr. Gushel continued to own, operate and work part-time at the club. Prior to September 1996, the strip club employed two doormen at $8.00 per hour and one disc jockey at $10.00 per hour. These employees provided the staff coverage at the club.

Following his discharge, Mr. Gushel made no attempt to obtain Employment Insurance benefits, nor to register or seek employment through Canada Manpower. He never checked newspaper ads in search of alternative employment. Mr. Gushel's only attempt to obtain alternative employment was to approach two individuals who worked for customers at the IPSCO plant. These were individuals who were known to Mr. Gushel from his prior employment as a customer inspector. Mr. Gushel was advised that there was no employment opportunity at that time; further, the prospective employers advised that there would appear to be a potential for a conflict of interest having regard to the fact that Mr. Gushel had been terminated at IPSCO. Mr. Gushel made the decision to devote his full-time efforts to running Dancers. His hope was that he could keep the club operational in anticipation that it could eventually acquire a liquor license. Mr. Gushel dismissed one doorman, and reduced the wages of the other doorman and the disc jockey. Mr. Gushel says that he worked for and on behalf of the club between 6-10 hours per day, six days per week during his absence from employment at IPSCO.

Mr. Gushel is forty-eight years of age and has worked at IPSCO since 1991. In the 1970's, Mr. Gushel had taken a welding course and been employed as a trailer welder/mechanic; he has also worked as a bouncer, on a seismic crew and as a general labourer. Prior to obtaining employment at IPSCO, Mr. Gushel worked as a customer inspector at the IPSCO plant between 1987 and 1991 with duties to ensure that pipe met the customer's specifications. While employed at IPSCO, he has performed labour-type duties and worked as a pipe-grinder, burner and as an inspector. Mr. Gushel has a significant twenty-year old criminal record involving narcotics. At the commencement of his employment with IPSCO in 1991, the Grievor was classified as suited for any type of work with no limitations. In his application for employment as a labourer at

IPSCO, the Grievor claimed that he did not have any physical disabilities and advised that he was able to perform heavy physical work. Mr. Gushel's evidence is that he now has a bad back and takes medication for his high-cholesterol. Prior to May, 1996, Mr. Gushel was on light duty as a result of a work-related incident where he slipped, broke his wrist and tore muscles in his chest and back. As a result of the injuries, Mr. Gushel was off work for a few days and then placed on light duty until May 1996 when, after having seen the medical specialist and the IPSCO doctor, he was removed from light duties and then laid off from his employment. Mr. Gushel's work at IPSCO does not involve extensive bending or heavy lifting.

In preparation for the Hearing, the Grievor's accountant prepared a statement of income and expenses for Dancers club in 1994 and tax returns for Mr. Gushel for the years 1995 through 1998 inclusive which reflected the financial aspects of the strip club's operations. The tax returns have not been filed with Revenue Canada. According to the financial information, Dancers had losses in 1994, 1996 and 1998 of $27,855.00, $24,001.00 and $11,060.00 respectively. The financial records show that the club made a profit of $4,827.00 in 1995 and $1,170.00 in 1997. Revenues for the club in 1996, 1997 and 1998 were $112,986.00, $140,180.00 and $132,605.00 respectively. The cost of the talent was reduced significantly from $64,616.00 in 1996 to $46,930.00 in 1997 and $31,049.00 in 1998. Expenses for staff were $15,042.00 in 1996, $21,032.00 in 1997 and $19,029.00 in 1998. In 1997, the Grievor purchased a residence in Regina. Some landscaping and other repairs appear to have been charged as expenses through the club. Mr. Gushel claims that these expenses are justifiable on the basis that occasionally some of the dancers will stay at the residence. The statements do not reflect any income from Mr. Gushel's efforts to work as a booking agent to provide dancers for beverage rooms in smaller centers.

Kathy Belter, the Company's internal audit manager, conducted a review of the club's financial records and prepared a summary to compare year-to-year operations to show a breakdown of the income received from the door and concessions. Ms. Belter's evidence is that if adjustments are made to the financial information to reflect an adjustment for rental, utilities, vehicle, personal expenses and what appear to be excessive meal and accommodation claims, the result would be that the club lost $28,795.00 in 1996, had income of $5,638.00 in 1997 and income in 1998 of $2,419.00 rather than a loss of $11,060.00. Ms. Belter's opinion is that the adjustments she proposed were more likely to reflect expenses acceptable to Revenue Canada. If the adjustments suggested by Ms. Belter are made, the club had a significant turn around from a loss of $28,795.00 in 1996 to a profit of $5,638.00 in 1997. Ms. Belter acknowledged that some expenses claimed by the Grievor may be justifiable and that all of the adjustments she suggested

may not be required, however, she was satisfied that the adjustment for the increase in rent in 1996 by $5,356.00 was appropriate. Ms. Belter noted that all expenses had to be examined on a reasonable expectation of profit analysis.

Michael Carr, a Vice-President of IPSCO testified as to employment and job opportunities in Saskatchewan during the period of 1996 to 1998. Mr. Carr is the Past-President of Saskatchewan Human Resources Association, a member of the Human Resources Management Association of Regina and Vice-Chair of the Saskatchewan Chamber of Commerce, Labour Committee, as well as sitting as a member of the Saskatchewan Labour Relations Board. Mr. Carr testified that there was a growth in the job market in Saskatchewan in 1996 and 1997 followed by a decline in the third and fourth quarters of 1998. Mr. Carr noted a number of employers had expanded in Saskatchewan and there was a growth in employment opportunities; Brandt Industries effectively doubled its employees from 200 to 400 between 1995 and 1998. Mr. Carr referred to other employment opportunities with Sask. Housing and Thyssen Mining Construction, however, he was not in a position to give evidence concerning the particular types of jobs available and whether or not Mr. Gushel's qualifications would have been suitable for employment. He acknowledged that employment with Thyssen Mining Construction would not have been in the City of Regina. According to Mr. Carr, IPSCO typically has a list of approximately 50 to 60 people seeking employment; ISPCO employees are among the highest paid industrial employees in Saskatchewan and IPSCO is considered to be a desired place to work.

Position of the Parties

(a) Union Position

Mr. Craik says that the Grievor is entitled to be made whole, to be fully compensated for the loss which he has sustained as a result of the Employer's breach of the Collective Agreement, including payment of interest on amounts found to be owing as well as payment for vacation pay and overtime pay for the "14th shifts". Mr. Craik says that the Grievor's loss has been proven and the Company has not established that the Grievor failed to take any reasonable steps in mitigation of his loss. Mr. Craik submits that Mr. Gushel's decision to work for Dancers and to thereby protect his investment was a reasonable step in mitigation. Mr. Craik asserts that this is so, particularly having regard to Mr. Gushel's age, physical condition and lack of transferable skills which could have been applied in obtaining alternate employment in or about the City of

Regina without a very substantial decrease in pay. It is the Grievor's position that the Company has not established that there was a job or work available for Mr. Gushel which a reasonable and prudent man would have taken to mitigate his losses. Mr. Craik argues that Mr. Gushel's decision to protect the value of his club was reasonable in all of the circumstances and that Mr. Gushel did not have an initial obligation to pursue paid employment. Mr. Craik acknowledges that Mr. Gushel's extensive contribution of time to the club has some monetary advantage to him and there are some personal expenses of Mr. Gushel that have been paid through the club. Mr. Craik submits that the value of the contribution of Mr. Gushel to the club should be no more than $6.00 per hour and that no consideration should be given to this value until January 1, 1998, seventeen months after Mr. Gushel's discharge. Mr. Craik refers this Board to the decision of the Supreme Court of Canada in *Red Deer College v. Michaels et al,* 57 D.L.R. (3rd) 386. Mr. Craik also urges the Board to consider the decision of the Supreme Court of Canada in *Cohnstaedt v. University of Regina* 131 D.L.R. (4th) 605 as a guide in the application of the duty to mitigate and the nature of mitigation efforts required. Mr. Craik acknowledges that there has been delay in the processing of the grievance to arbitration, however, it is the Union's position that there is no unavoidable delay which should be attributed to the Union or in any event, a substantial portion of the delay ought to be attributed to the Company.

(b) Company Position

Mr. LeBlanc submits that the Company's onus to establish that the Grievor failed to take reasonable steps in the mitigation of his loss is easily established where the employee stands idly by and makes minimal efforts in mitigation. In support of his submission, Mr. LeBlanc relies on the following arbitral decisions: *Re Carling O'Keefe Breweries of Canada Ltd. and Western Union of Brewery, Beverage, Winery & Distillery Workers, Local 287* (1984), 20 L.A.C. (3rd) 67 (Beattie); *Re Construction Aggregates Ltd. and International Union of Operating Engineers, Local 115* (1991), 21 L.A.C. (4th) 370 (McPhillips); *Oxman v. Dustbane Enterprises Ltd.* (1986), 13 C.C.E.L. 209; *Re Canada Post Corp. and Canadian Union of Postal Workers (Beale)* (1989), 6 L.A.C. (4th) 232 (Jolliffe); *Re McDonnell Douglas Canada Ltd. and Canadian Automobile Workers, Local 1967* (1989), 9 L.A.C. (4th) 387. Mr. LeBlanc argues that the Board should determine that the Grievor did not establish that he had made reasonable efforts to mitigate his losses by seeking reasonable alternative employment and that by reason of the Grievor standing idly by, not applying for Employment Insurance benefits, not registering with Canada Manpower, not searching newspaper ads or making any other reasonable efforts, the Grievor ought to be denied any recovery.

The Company submits that the Grievor's decision to work for Dancers fails to satisfy the onus that the Grievor took steps that a reasonable and prudent man would take to mitigate his loss. The Company says that given the financial performance of the club, it is not reasonable to consider that Mr. Gushel's efforts would provide a reasonable wage or return to offset his claimed losses. Mr. LeBlanc says that if it should be determined that Mr. Gushel's efforts with the club were acts of mitigation, this Board should then provide a dollar for dollar credit against the claimed loss in respect of increased economic performance by the club. He says that in making this determination, the Board should make adjustments to the financial information in respect of rental payments, personal expenses and to reflect the fact that there was some unclaimed income in respect of the booking agency. As a last resort position, Mr. LeBlanc says that the minimum mitigation allowance must be the reasonable hourly wage which Mr. Gushel would have been paid through the club or the hourly wage which was saved by Mr. Gushel when he dismissed an employee and worked at the club. The Company argues that the evidence establishes that there were employment opportunities available for Mr. Gushel in and about the City of Regina for which he was qualified. The Company says that the reason Mr. Gushel did not obtain alternative employment was that he chose to stand idly by rather than to make reasonable efforts to obtain alternative employment. It is the Company's position that the damages should not include an allowance for vacation entitlement. In this regard, the Board is referred to the decision of the Saskatchewan Court of Appeal in *Herbison v. Intercontinental Packers Ltd.* (1983), 29 Sask. R. 296 (Sask. C.A.).

Mr. LeBlanc asserts that there should be a substantial reduction in the damages claimed to reflect the failure of the Grievor and the Union to pursue the grievance in an expeditious and timely manner. Mr. LeBlanc says that the very substantial delay in bringing the matter to a hearing should not result in the entire burden of the delay being imposed upon the Company where there is a joint obligation on the Company and the Union to have the matter proceed to arbitration. The Company says that there is no past practice to let termination cases sit. Mr. LeBlanc asserts that the Company should not, in the present circumstances, be responsible for damages beyond a period of one year. In this regard, Mr. LeBlanc refers the Board to the following authorities: *United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry and Fraser-Brace Engineering Co. Ltd.* (1968), 19 L.A.C. 312; *Retail Store Employees Union, Local 832 and Canada Safeway Ltd.* (1973), 41 D.L.R. (3rd) 449 (Man. C.A.); *Re Halton County Board of Education and Canadian Union of Public Employees, Local 1011* (1976), 13 L.A.C. (2nd) 113 (Shime); *Re Canada Brick Co. Ltd. and United Glass and*

Ceramic Workers, Local 225 (1982), 4 L.A.C. (3rd) 182; *Re C & C Lath Ltd. and International Woodworkers — Canada, Local 1-80* (1982), 28 L.A.C. (4th) 111 (Vickers).

Decision

The onus on the Grievor is to establish the damages the Grievor claims to have suffered by reason of his wrongful dismissal; the Company's burden is to establish its claim that the Grievor could reasonably have avoided some part of the loss claimed. In *Red Deer College and Michaels et al* (supra), Chief Justice Laskin provided a review of the law in this area and commencing at page 390, concluded:

> "In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. In Payzu, Ltd. v. Saunders, [1919] 2 K.B. 581 at p. 589, Scrutton, L.J., explained the matter in this way:
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> > Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same.
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> In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be **[page 391]** disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences. This is the way I read what is said on the matter in such leading textbooks on the subject as Cheshire and Fifoot's Law of Conflict, 8th ed (1972), at p.599, and Corbin, Contracts, vol. 5 (1964), at p. 248. The matter is put as follows in two passages from Williston on Contracts, 3rd ed., vol. 11 (1968), at pp. 302 and 312.
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> > The rule of avoidable consequences here finds frequent application. The consequence of this injury is the failure of the employee to receive the pay which he was promised but, on the other hand, his time is left at his own disposal. If the employee

> unavoidably remains idle, the loss of his pay is actually suffered without deduction. If, however, the employee can obtain other employment, he can avoid part at least of these damages. Therefore, in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned, or what he might reasonably have earned in the other employment of like nature, from what he would have received had there been no breach, furnishes the ordinary measure of damages.
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> It seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract.

Cheshire and Fifoot, supra, expressed the position more tersely as follows:

> But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."

Mr. LeBlanc argues that Mr. Gushel "stood idly by or unreasonably by", and he has not satisfied the onus of establishing that the losses claimed were reasonably sustained; the Company submits that Mr. Gushel has not shown that there were not employment opportunities available for which he was qualified. Mr. LeBlanc urges this arbitrator to follow the reasoning in the *Carling O'Keefe Breweries* (supra) wherein arbitrator Beattie concluded that because the grievor failed in his duty to mitigate, he was not entitled to any compensation arising from his unjust dismissal. Arbitrator Beattie was of the opinion that as a minimum, the grievor must establish that he registered with Canada Manpower, checked the employment board on a reasonably regular basis, made inquiries of specific employers that he was reasonably qualified to work for, as well as checking and responding to newspaper ads. Arbitrator Beattie concluded that it was unreasonable and unacceptable for an employee who lost his job, grieved and must wait an extended time to learn the results, to not make efforts to secure employment. Mr. LeBlanc also relies on the decision in *Construction Aggregates Ltd.* (supra) in support of his submission that the evidentiary onus on the employer to show that the employee failed to mitigate his loss by reasonable efforts increases in proportion to the effort put forth by the employee. The Company asserts that because there were no efforts by Mr. Gushel, the Company has satisfied its onus to show that there were job opportunities available that Mr. Gushel could have found if he had

acted reasonably. Mr. Craik submits that the Greivor's work at and his efforts in the operation of Dancers, are reasonable steps to avoid the accumulation of his losses while at the same time protecting his investment.

The evidence is that Mr. Gushel made a decision to dedicate his time and efforts in employment through his club. Mr. Gushel's only attempt to obtain alternative employment was inquiries concerning the possibility of employment as a customer inspector at the IPSCO plant; he made no attempts to register at Manpower, check newspaper ads or to explore other opportunities for employment, either himself or through other available resources. Mr. Gushel made a decision not to seek any alternative employment, other than to work in his club. It must be determined if, in all of the circumstances, Mr. Gushel acted reasonably or took such steps as a reasonable person would to avoid part of the losses he claims as a result of the wrongful dismissal.

Having regard to Mr. Gushel's age, work background and experience and his hourly rate at IPSCO, and taking into account the evidence concerning employment opportunities, I am satisfied that Mr. Gushel's decision to dedicate his work labours and efforts in the management and operations of Dancers was a reasonable step. I accept Mr. Gushel's evidence that his efforts at the club helped to control costs and make the club more financially successful. As a result of Mr. Gushel's extensive involvement at the club after his termination, Mr. Gushel was able to eliminate the services of a doorman and to get a better control on the club's expenses, its management and day-to-day operation. While Mr. Gushel did not specifically pay himself a wage, it is clear that his labour contribution had a monetary benefit to the business and to Mr. Gushel. The contribution was both that of a manager and an employee involved in the day-to-day operations of the club. In my opinion, it is reasonable to value Mr. Gushel's time contribution to the club at $8.00 per hour. Mr. Gushel's evidence is that following his dismissal, he worked between 40 and 60 hours per week at the club or engaged in club business. Prior to his termination, Mr. Gushel had also worked for the club. I conclude that 40 of the hours which Mr. Gushel worked at the club should be attributed to mitigation efforts; this amounts to weekly mitigation of $320.00. Having due regard to the evidence, I am not satisfied that Mr. Gushel could reasonably have secured alternative employment which, on a continuous basis, would have mitigated his loss at an amount higher than $320.00 per week.

But for his termination, Mr. Gushel would have been recalled to active employment near the end of September 1996.The Grievor claims damages covering the thirty-two month period from his dismissal on August 1, 1996 to his reinstatement on April 1, 1999. The total wage loss

during this period is $111,368.57; the Grievor also claims the loss of profit share of $6,538.11. Finally, the Grievor also asks for compensation for an amount equivalent to the vacation pay on the wages lost, and overtime in respect of some of the "14th shifts".

It is the Company's position that because of the delay in pursuing the grievance to arbitration of the Union and the Grievor, that the Union and/or Grievor should bear responsibility for a portion of the losses claimed by the Grievor. The Company says that the Union and Grievor have an obligation to pursue the grievance in a diligent manner and that because of the delay, the Company should not be solely responsible for the financial consequences or costs of the delay. The Company asks that I conclude that without the delay on the part of the Greivor and/or Union, the grievance should have been processed and finalized within one year and the company asks that the damages be limited to that period. The Company relies upon the decision in *Re Canada Brick Co. Ltd. and United Glass and Ceramic Workers, Local 225* (supra), where arbitrator Kennedy concluded that the grievance ought to have been processed to arbitration well within one year and in those circumstances limited the claim for damages for wrongful termination to a period of one year.

The Union has an obligation along with the Grievor to take reasonable steps to mitigate any loss claimed. In the decision in *United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry and Fraser-Brace Engineering Co. Ltd.* (supra), arbitrator Christie acknowledged that unjustified delay in bringing a grievance to arbitration may result in a determination that this is a failure to mitigate which would disentitle the claimant to the losses claimed. Relying on the decision of arbitrator Vickers in *Re C & C Lath Ltd. and International Woodworkers — Canada Ltd., Local 1-80* (supra), the Company says that it would be unfair to impose upon IPSCO the whole of the burden for the delay in the processing of the grievance through to arbitration.

I conclude that the Company, the Union and the Grievor, each has an obligation to ensure that a grievance is processed to arbitration without excessive delay. It is not sufficient for either the Union or the Grievor to take no steps to have a grievance of this nature ultimately determined by arbitration in the expectation that the final determination would fully compensate the loss no matter the length of time from dismissal until reinstatement. If there is a lengthy delay which may be attributable to both the Company and the Union/Grievor, there is no logical reason why the Company should solely bear the burden of such delay. In these circumstances, I conclude that the grievance ought to have been processed to arbitration in a more expeditious manner. The grievance was filed on August 2, 1996 and moved through Step 3 of the grievance procedure

by September 12 on which date the Union advised that it wished the matter to move to arbitration. The Union requested expedited arbitration; on September 13 the Company advised that it would not consent to this process.

In the Interim Award issued by this Arbitrator on November 27, 1998, the proceedings and the circumstances of the delay are detailed. No steps were taken to advance the grievance until March 19, 1997 when the Union asked the Company to contact it with regard to setting a hearing date. The Company response from Mr. Clark was that he was not aware that the matter had been previously referred to arbitration and advised the Union to direct inquiries to Mr. Shortridge. The issue was next discussed between the parties in September and October 1997 when the Union advanced its position that the grievance was outstanding and the Company took the position that the grievance had been dropped since there had been no request for arbitration other than expedited arbitration to which the Company did not agree. The position of the Union was unchanged from March through September/October, 1997. The Union's position was again advanced formally in May 1998. From the time the Company was first advised of the Union's position that this matter had been referred to arbitration, a period of fifteen months elapsed before the Company acknowledged the request for arbitration and agreed to take steps in the process subject to its objection to arbitrability. The result is that twenty-one months elapsed between the referral to arbitration and the Company's advice that it would take steps in the process to move the matter to arbitration.

I conclude that in all of the circumstances, this matter could reasonably have been referred to and determined at arbitration within a period of twelve months after the referral in September 1996. My decision, in part, reflects the fact that after the referral in June 1998, the matter of the preliminary objection, the arbitration hearing and the Award were dealt with and determined within a period of nine to ten months. This matter ought reasonably to have been brought on by the parties and determined by the end of September 1997; if this had occurred, the Grievor would have been reinstated not later than October 1, 1997. Had this occurred, the Company would have been responsible for any losses suffered by the Grievor during this period. The actual determination and reinstatement did not occur until eighteen months later. Having regard to the conduct of each party in relation to moving the arbitration forward, I conclude that financial consequences of the delay in the final determination should be borne two-thirds by the Company and one-third by the Union/Grievor. In reaching this conclusion, I have had regard to the initial six month period following referral until the Union requested that this matter proceed and further delay before pressing the Company to advance the matter to arbitration; I have also fully considered that following the Union's request that the matter proceed in March 1997, there

was a further period of fifteen months before the Company responded to the Union request for arbitration and steps were taken by the Company to refer this matter to arbitration.

The result is that in the ordinary course of processing without delay, the parties could reasonably have expected a determination by the end of September 1997, fourteen months after the grievance was filed. The Company is responsible for the Grievor's losses during this period of time. Two-thirds of the Grievor's losses during the eighteen month period between October 1, 1997 and March 31, 1999, are to be borne by the Company. The Grievor's loss of wages and profit share to the end of September 1997 is $42,700.00 (rounded). After the attribution of the Grievor's mitigation of $320.00 per week, the loss during this period is $26,000.00 (rounded). The Grievor's loss of wages and profit share between October 1, 1997 and March 31, 1999 is $74,700.00 (rounded). After the application of the Greivor's mitigation income, the loss during this period is approximately $49,800.00. I find that the Company is responsible for $33,200.00 of this loss. In determining the loss, I have not made any allowance for overtime payable in respect of any "14th shifts". Remuneration for these shifts is included in the loss calculations at base rate plus COLA and shift premiums. The evidence does not establish that these shifts would necessarily have been worked so as to attract overtime pay.

Mr. Craik asks that, as part of the damages, this Board award to the Grievor an amount of money which would be equal to the vacation pay which the Company would be obligated to pay to Mr. Gushel had he not been wrongfully terminated from his employment. The premise of the claim is that Mr. Gushel would not have actually taken his vacation, but would have become entitled to a pay out in lieu of vacation in accordance with the vacation entitlements of the Collective Agreement. For the reasons enunciated by Cameron, J.A. in *Herbison v. Intercontinental Packers Ltd.* (supra) , I am of the opinion that the Grievor is not entitled to these damages. There is no evidence that if the Grievor had remained at his employment, that he would not have asked for and been entitled to take his annual vacation. The evidence is that Mr. Gushel had taken an annual vacation in the past. I can see no reason to conclude why this practice would not have continued. I see no reason in law, nor any obligation under the Collective Agreement, to add to his recovery an additional entitlement which is predicated on the assumption that he would not have been permitted to take his annual vacation to which he was, in law, entitled. Subject to mitigation and reduction of damages for delay, Mr. Gushel will be compensated for his monetary losses.

The Grievor has asked that this Board make an award of pre-judgment interest on the damages awarded. It is my understanding of the general arbitral practice in Saskatchewan that

an award of pre-judgment interest is not normally made. I was not referred to any arbitral authorities between these parties, or other parties, which provided for an award of pre-judgment interest in addition to the damages awarded. Having regard to all of the circumstances of this matter, I conclude that the compensation awarded is just and equitable without the inclusion of any interest; accordingly, I decline to award any interest.

It is my award that the Company do pay to the Grievor, on or before September 15, 1999, the sum of $59,200.00 in satisfaction of the Grievor's claim for damages as a result of his wrongful termination on August 1, 1996. This payment is subject to such necessary and proper deductions as may be required to be made by the Company.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 31st day of August, 1999.

Kenneth A. Stevenson,
Acting as a Single Arbitrator.