IN THE MATTER OF AN ARBITRATION CONCERNING THE GRIEVANCE OF CURTIS PILAT (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:

April 29, 30, May 1 and June 3, 2002

COUNSEL AND REPRESENTATIVES

Neil McLeod, Q.C. for the Union and the Grievor
Michael Tochor for the Employer

DATE OF AWARD: September 30, 2002

ARBITRATION AWARD

INTRODUCTION AND PRELIMINARY MATTERS

This arbitration relates to two grievances by Curtis Pilat (the "Grievor") against IPSCO Saskatchewan Inc. (the "Employer") covering a seven (7) day suspension and termination of the Grievor's employment.

Counsel for the Grievor and the United Steelworkers of America (the "Union") and counsel for the Employer agreed to the following matters at the commencement of the hearing:

1. I was properly constituted as a single arbitrator to determine these grievances.
2. There were no preliminary objections or jurisdictional matters to be considered.
3. The issue of damages is to be reserved and dealt with subsequently by me depending on my decision relating to these grievances.

At the request of each counsel, I granted an order excluding witnesses until they had completed their testimony with the exception of Michael Carr for the Employer and William Edwards for the Union who were allowed to be present throughout the hearing to instruct respective counsel.

FACTS

In a letter to the Union dated May 18, 2001, the Employer imposed a seven (7) working day suspension on the Grievor and disqualified the Grievor from the Heavy Plate Department. The wording of that letter is as follows:

> "In response to the above noted grievance the Company has decided to impose a seven (7) working day suspension and disqualify Mr. Pilat from the Heavy Plate Department. The seven

> day suspension consists of a three day suspension for insubordination, a one day suspension for poor workmanship, and a three day suspension for holding management in disrepute.
>
> Mr. Pilat will be expected to report for duty with Danny Holliday at the Rolling Mill at 11:30 am on Wednesday, 30 May 2001. We look forward to your reply."

The Grievor filed a grievance dated May 29, 2001 relating to that seven (7) day suspension and disqualification. The particulars of the grievance are quoted below:

> "Nature of Grievance: I grieve that I was unjustly suspended (7 days) and my removeable (sic) from my job (Plate Dept) and moved to Rolling Mill.
>
> Article Numbers: 5.03 - 5.04 - 5.05 But not excluding any Articles in the current C.B.A. or applicable legeslation (sic).
>
> Settlement Requested: To be reinstated to my Dept (Heavy Plate) and to be made whole in all parts and all areas."

There was an earlier grievance dated May 15, 2001 filed by the Grievor relating to the initial indefinite suspension imposed by the Employer on May 15, 2001. However, both parties agreed that the grievance dated May 15, 2001 is subsumed in the grievance dated May 29, 2001.

The Employer terminated the Grievor on June 5, 2001. The letter of termination dated June 5, 2001 states:

> "**RE: Termination of Employment**
> Given your unexplained absence from work since May 30, 2001 and your refusal to attend a meeting with me to explain your absence on June 1, 2001 the Company has no choice but to consider you absent without leave. This, when combined with the excessive absenteeism you have displayed since being cautioned to correct your attendance on July 26, 2000 and your recent discipline for misconduct, brings into question the merit of your continued employment by the Company.
>
> In accordance with the principles of progressive discipline, your violation of the provisions of work rule 4c. of the IPSCO Employee

> Conduct Guide - Work Rules & Regulations, constitutes absence without leave, which the Company views as serious misconduct and a culminating incident for which the appropriate penalty is termination of your employment.
>
> Therefore, in accordance with Article 12.06 (b) of the Collective Bargaining Agreement your employment with IPSCO Saskatchewan Inc. is hereby terminated. Please ensure that all personal effects are removed from your locker by June 15, 2001 and that all company materials in your possession are returned to Security by that date."

The Grievor filed a grievance dated June 7, 2001 relating to his discharge. The particulars of that grievance are quoted below:

> "Nature of Grievance: That Curtis Pilat has been unjustly discharged.
>
> Article Numbers: 5.01 but not excluding any other articles of the current CBA. or applicable legislation.
>
> Settlement Requested: That Curtis be re-instated and made whole in all areas."

The Grievor is thirty-six (36) years old. His formal education consists of Grade 12. He commenced employment with the Employer on February 1, 1993. He commenced working in the Caster Department and, after about six years, he was successful in bidding into the Heavy Plate Department which is where he was employed at the time of these grievances.

In 1995, the Grievor established a business known as Great Plains Outfitters Ltd. which offered hunting and fishing packages. Prior to setting up this business, the Grievor had worked for other outfitters. In February 1999, the Grievor sold two-thirds of his business to two other partners.

The incident which gave rise to the seven day suspension occurred on May 15, 2001. The Grievor was working a twelve hour shift from 7:00 am to 7:00 pm as the

crane operator in the Heavy Plate Department. There are two cranes in that department. One is the shear crane and the other is the shipping/torch cut crane. The Grievor was operating the shear crane and had loaded a cooling bed. Around 9:00 am another employee in the Heavy Plate Department, Kevin Hicks, called the Grievor on the intercom and said that he needed a lift on the torch side of that department. The Grievor acknowledged the request from Hicks and indicated that he would do the lift after he went to get a quick bite. The Grievor then parked the crane, climbed out, and went to the canteen. He ordered soup, fries and a sandwich and took them to the lunchroom where he sat down and began eating his fries. Hicks came to the lunchroom and told the Grievor that he needed a lift to be done by the Grievor with the crane. About that same time, Bradley Forster, the foreman in the Finishing Department and the Grievor's supervisor, came into the lunchroom and asked the Grievor to go and make the lift with the crane for Hicks. The Grievor stated that he would but he needed a few minutes to finish his fries. Forster asked the Grievor again to make the lift and also asked a third time. On the third occasion, the Grievor said "I suppose you want me to throw my fries out" or words to that effect. Forster said "can I assume that's a refusal?" or words to that effect. The Grievor testified that he said nothing in response to Forster but he got up and threw out his fries and went back to his crane and made the lift for Hicks.

The Grievor estimates that he was gone ten to fifteen minutes in the canteen and the lunchroom. He acknowledged that it was not his lunchtime but he stated that there was an unwritten policy that an employee could take a short break to get a quick bite from the canteen.

The Employer's version of these events is somewhat different in certain respects. Forster testified that he walked past the torch cut area in the Heavy Plate Department about 9:20 am on May 15, 2001 and no work was being performed. He spoke to Kevin Hicks and asked if he had called the crane operator. Hicks said that he had and the

Grievor had gone to get something to eat. Forster then walked to the lunchroom where he found the Grievor sitting down and eating. He told the Grievor that the torch cut is down and told the Grievor to go and make the lift for Hicks. Forster testified that the Grievor said no. Forster asked a second time and the Grievor said no, my fries will get cold. Forster asked a third time and the Grievor shrugged but made no response. Forster testified that he then said "I'll have to treat this as a refusal to work" or words to that effect. Forster testified that Hicks had followed him into the lunchroom but left again during the exchange between Forster and the Grievor. Forster testified that, after telling the Grievor that he would have to treat the incident as a refusal to work, Forster went to get a drink of water and the Grievor said to him "you're just a fucking asshole". Forster testified that he did not respond to that comment and he went into his office and called his immediate supervisor, Erwin Selinger.

Forster testified that Selinger came to his office in a few minutes and they had a discussion about the events which had taken place with Forster and the Grievor. They decided to talk to the shop steward and to the Grievor at lunchtime.

The evidence of the Employer's witnesses was that an employee is entitled go to the canteen during his lunch break or at other times if it can be done without hindering production. Generally, there have been no problems with employees abusing this canteen policy.

At about 11:30 am on May 15, 2001, Forster and Selinger met with the shop steward, Ken Mair, and related to Mair the incident between Forster and the Grievor. Mair then spoke to the Grievor and, subsequently, all four of them met in Forster's office. Selinger testified that he asked the Grievor about the incident with Forster. According to Selinger, the Grievor said "that's news to me" or words to that effect. When Selinger asked him again about the incident, there was no answer from the Grievor. Selinger then told the Grievor that he was suspended indefinitely and told him to go home.

The Grievor's version of the events with Selinger agrees with Selinger's testimony. The Grievor testified that Selinger laid out the sequence of events to him and the Grievor stated "it was news to me" or words to that effect. Selinger then suspended him indefinitely for insubordination. The Grievor testified that he walked out in disbelief because he couldn't believe that he was suspended for nothing. The evidence of the Grievor was that he felt Forster had been picking on him a great deal since January, 2001.

In cross examination of Selinger, counsel for the Union entered as an exhibit a Memorandum dated May 16, 2001 by Selinger. That Memorandum is set out below:

> " A meeting was held on May 16th with Erwin Selinger and Kevin Hicks. Brad Forster and a union shop steward (Dave Mann) were present. The purpose of this meeting was to ask Kevin some specific questions about the incident involving Curtis Pilat and Brad Forster.
>
> Q: Did you ask Curtis Pilat for a lift at torch cut?
> A: Yes first I asked shipping but they were busy and then I asked Curtis
> Q: Where was Curtis when you asked him for this lift?
> A: On the shear crane
> Q: What was his reply?
> A: Yes I have to run to the canteen but I will be right there.
> Q: Was torch cut down and you needed a lift to proceed?
> A: Yes
> Q: Were you present in the lunchroom when Brad asked Curtis to make the lift for you?
> A: Yes
> Q: Was Brad polite when he asked Curtis to make this lift?
> A: Yes he never raised his voice or anything.
> Q: What was Curtis's response?
> A: Yes in a few minutes.
> Q: How many times was Curtis asked to make this lift?
> A: Three times I think I wasn't here (sic) the whole time.
> Q: Was Brad polite each and every time he asked him?
> A: Yes.
> Q: Did you incur any down time waiting for Curtis to make a lift?
> A: Yes about 15-20 minutes."

Hicks was not called as a witness by either side at the arbitration hearing.

On May 18, 2001 a meeting was held with the Employer and the Union and the Grievor in attendance. At that meeting, the Grievor denied that he called Forster a fucking asshole. At the conclusion of that meeting, the Grievor was told that he was suspended for seven working days and he was being reassigned to the Rolling Mill and he was to report for work on May 30, 2001. That decision of the Employer was documented in the letter dated May 18, 2001 which has been quoted above.

The Grievor did not report for work to the Rolling Mill on May 30, 2001. At approximately 8:40 am on May 30, 2001, the Grievor called the security office indicating that he would be absent for personal reasons. Selinger testified that, when he was notified that the Grievor would be absent on May 30, 2001, he attempted to contact the Grievor by telephone but got no answer.

Laurie Collins, the superintendent for the Rolling Mill and Finishing Area, testified that, on May 31, 2001, he received a note dated May 30, 2001 from Dr. Keith Anstead indicating that the Grievor was off work due to sickness May 28 to June 13, 2001 and will be re-evaluated on June 12, 2001. After receiving that note, Collins testified that he called the Grievor to arrange a meeting on June 1, 2001 to find out why he wasn't at work. He left a message on an answering machine for the Grievor to meet with him at 11:00 am on June 1, 2001. Collins also called Ron Wolbaum, a shop steward, to attend the meeting on June 1, 2001. The Grievor did not appear at 11:00 am on June 1, 2001 and Collins called the Grievor again and left a message for him at approximately 11:35 am. At approximately 11:50 am on June 1, 2001, Ron Wolbaum called Collins and indicated that the Grievor would not be attending a meeting because the Grievor's doctor told him not to meet with the Employer. At 12:10 pm, Collins called the Grievor and left a message that he wanted the

Grievor to see the company doctor. The Grievor called Collins later on June 1, 2001 to indicate that he could not meet because of work related stress.

On June 4 and 5, 2001, the Employer reviewed matters relating to the employment of the Grievor and determined to terminate his employment on June 5, 2001. The termination of the Grievor's employment was done by letter dated June 5, 2001 which has been quoted above.

Michael Carr, the vice president and director of personnel for the Employer, testified that the Employer met with the Union and the Grievor on July 3 and September 4, 2001 to give the Grievor an opportunity to provide any information which might influence the Employer to reconsider its decision to terminate the employment of the Grievor. At one of those meetings, the Grievor complained that he was being harassed by Forster. Carr asked the Grievor to put his harassment complaint into writing so that it could be investigated by the Employer under the existing Harassment Policy. No written harassment complaint was made by the Grievor.

In a letter dated September 4, 2001 to David Grant, president of the Union, Carr requested information from the Grievor about his illness which prevented the Grievor from attending work on May 30, information about travel that the Grievor undertook from May 30, 2001 onwards and full disclosure of all business activities of the Grievor from May 30, 2001 to the present. Carr testified that the Grievor did not provide that information.

In a letter dated September 13, 2001 to David Grant, Carr stated, in part:

> "Indeed, Mr. Pilat's behaviour and conduct throughout the past year has been indicative of an individual who no longer wishes to continue his employment. Violations of work rules, insolent behaviour in the workplace, absenteeism, lack of cooperation, insubordination, failure to attend meetings, evasiveness, and misrepresentation have demonstrated Mr. Pilat's unsuitability for continued employment.

> Mr. Pilat's decision not to comply with the company's request for information leaves us no choice but to deny his grievance, and advise you that the Company will be relying on Mr. Pilat's post termination conduct to support its case should this matter proceed to arbitration."

The Grievor testified that he reached a joint decision with the Union not to provide medical information which the Employer was requesting on July 3. He gave evidence that the Employer was asking for the same information at the meeting on September 4 and he felt the Employer was looking for an excuse to fire him. He testified that he felt that same way back in 2000.

Subsequent to June 5, 2001 when the Employer terminated the Grievor, the Employer determined that the Grievor had booked a trip on May 23, 2001 with Northwest Airlines to travel to Raleigh, North Carolina on June 6 and return on June 20. The departure date was subsequently changed by the Grievor from June 6 to June 9. A letter from Northwest Airlines dated April 29, 2002 with a copy of the ticket and other travel information was entered as an exhibit by the Employer and counsel for the Grievor and the Union agreed that it would not be necessary to call a witness from Northwest Airlines.

The Grievor testified that he booked that trip with Northwest Airlines on May 23 and paid for it on May 25 to travel to North Carolina. He stated that he had no compelling reason to be in North Carolina but he was very upset and very disturbed over his suspension by the Employer. The Grievor testified that he booked that trip because he thought he would be on stress leave and he wanted to get away. He stated that he was going to see Dr. Anstead to get the stress leave and that he saw Dr. Anstead on May 16 and May 28. He also went back to see Dr. Anstead on May 30. Dr. Anstead arranged an appointment for the Grievor to see a psychiatrist, Dr. Beattie, on June 12, 2001. When he found out that he had been terminated on June 5, the Grievor testified that he was pretty messed up and changed his departure date to June 9. He tried to get to see Dr. Beattie on June 6 but was unable to do

so. He tried again on June 7 and was able to get to see her for ten minutes. The Grievor testified that he changed his appointment with Dr. Beattie from June 12 to August 22. He then left on his trip on June 9. He claimed that Dr. Anstead knew that he gone on that trip.

The evidence of Dr. Anstead does not agree with the evidence of the Grievor. Dr. Anstead testified under subpoena from the Employer and was obviously annoyed about having to appear as a witness. Dr. Anstead testified that the Grievor had been his patient since December 20, 1993. Dr. Anstead saw the Grievor on May 16, 2001 and the Grievor informed Dr. Anstead that he had been suspended on May 15, 2001 and he requested Dr. Anstead to give him stress leave. Dr. Anstead testified that he was a general practitioner and unable to grant stress leave. For that Dr. Anstead indicated he would have to refer the Grievor to a psychiatrist. Dr. Anstead indicated that he would refer the Grievor to Dr. Beattie, a psychiatrist, who had treated the Grievor about one year previously. Dr. Anstead saw the Grievor again on May 28 and the Grievor was anxious to get an appointment with Dr. Beattie. As a result, Dr. Anstead arranged an appointment with Dr. Beattie on an urgent basis on June 12, 2001 and notified the Grievor of that appointment. He saw the Grievor again on May 30 and arranged another appointment on June 13 to see the Grievor. Dr. Anstead testified that the Grievor did not keep his appointment on June 13 and the Grievor had not called to cancel or reschedule that appointment. Dr. Anstead testified that he did not tell the Grievor that the Grievor was not to meet with his employer or was not to talk to his employer. Dr. Anstead testified that he did not tell the Grievor to take a vacation and the Grievor had never told him that the Grievor had booked a trip into the United States from June 6 to 20, 2001. Under cross examination, Dr. Anstead remained resolute about his evidence that he never told the Grievor that the Grievor was not able to meet or talk to his employer. Dr. Anstead testified that he told the Grievor that he would not reply to the request for information from the Grievor's lawyer because it would not do the Grievor any good.

THE EMPLOYER'S POSITION

The Employer argued that the evidence supported the Employer's decisions relating to the seven day suspension and reassignment and relating to the termination of the Grievor's employment. In the view of the Employer, the Grievor refused to obey a work directive on May 15 and the Grievor was abusive towards his foreman. As a result of the actions of the Grievor, production in the Heavy Plate Department was delayed for approximately twenty minutes. As a result of these events, the suspension for seven working days and the reassignment of the Grievor to the Rolling Mill was reasonable and appropriate. The subsequent conduct of the Grievor in failing to report for work on May 30 and failing to provide a satisfactory explanation for his absence, the previous employment record of the Grievor and the Grievor's conduct in booking a holiday in North Carolina justified the termination of the Grievor's employment.

THE UNION'S POSITION

The Union argued that the onus was on the Employer to prove that there was just and reasonable cause for the suspension and for the termination of the Grievor's employment and the evidence failed to meet that onus. In that regard, the Union relied upon Article 3.02 of the *Collective Agreement* which states, in part:

> **"Article 3.02**
>
> **Such management function shall be:**
>
> . . .
>
> (a) To discharge, suspend or discipline employees for just and reasonable cause, and also hire, transfer, promote, demote and to assign employees to shifts with due regard to seniority in Article 12 of this contract."

The Union also relied on Article 5.03 which states:

"Article 5.03 - Reasonable Discipline

The Company and the Union agree that disciplinary penalties shall not be imposed unreasonably or unjustly. Any warning and/or penalty (excluding dismissals) shall be cleared from the employee's record after a period of twelve months.

In the event of a reinstatement, the employee's record will be cleared after 12 months from the date of return to work."

The Union argued that the Employer had failed to follow its own system of progressive disciplinary action with respect to the Grievor and that the Employer had proceeded in a wrongful and inconsistent way to reach its decision to terminate the Grievor. The Union argued that the evidence did not demonstrate that the Employer had just and reasonable grounds either to suspend and reassign the Grievor or to terminate the Grievor. The Union also argued that the Employer could not expand its grounds for termination beyond what it relied on at the date of termination. The Union requested that the grievances be upheld and the Grievor be reinstated.

ANALYSIS AND DECISION

During the four days of hearings for this arbitration, both parties presented *viva voce* evidence from several witnesses, entered several exhibits and submitted detailed submissions including case authorities. The presentations were very thorough and well prepared and greatly assisted this arbitrator. Both parties are to be commended for their effort and the manner in which the presentations were made. I have reviewed all of the exhibits, written submissions and case authorities as well as my own notes. Although a specific reference may not be made in this decision, all of the evidence has been carefully weighed and considered by me.

My role as arbitrator is to determine the following questions:

1. Has the Employer established just and reasonable cause for:
   (a) suspending the Grievor for seven working days and reassigning the Grievor to the Rolling Mill; and
   (b) terminating the employment of the Grievor on June 5, 2001.

2. Is the discipline decision in each of these grievances excessive in relation to the conduct when all of the circumstances are considered?

I will deal with each of the two grievances separately.

SUSPENSION AND REASSIGNMENT

The evidence of the events on May 15, 2001 are clear and uncontroverted. The Grievor decided to take a break to get something to eat when he had been asked to make a lift for the torch cut area. Instead of going to make that lift so that work could continue, the Grievor chose to go to the canteen, ordered soup, fries and a sandwich and proceeded to the lunchroom to sit down and eat the fries. When Forster requested the Grievor to go and make the lift, the Grievor did not immediately leave to do that but indicated that he would do it after he finished eating his fries. The actions of the Grievor clearly amounted to a refusal to comply with the request of his supervisor. The Grievor was not on a scheduled break and his failure to immediately comply with the instructions of his supervisor amounts to insubordination.

That insubordination is just and reasonable cause for disciplinary action by the Employer has been stated in Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed. (1988), para. 7:3610:

> " One of the most basic and widely accepted rules of arbitral jurisprudence holds that employees who dispute the propriety of their employer's orders must, subject to the considerations which follow, comply with those orders and only subsequently, through

> the grievance procedure, challenge their validity. This general principle of arbitral jurisprudence, has been applied in industrial, educational, and hospital settings, and to professional employees . . .
>
> The rationale for this general principle is said to lie in the employer's need to be able to direct and control the productive process of his operations, to ensure that they continue uninterrupted and unimpeded even when controversy may arise, and in its concomitant authority to maintain such discipline as may be required to ensure the efficient operation of the plant."

The evidence that the actions of the Grievor resulted in a work stoppage or delay for approximately fifteen to twenty minutes is uncontroverted. The decision by the Grievor to go to get something to eat at that time affected the ongoing operation of the Heavy Plate Department. This disruption of the production process by the Grievor constitutes grounds for discipline.

The only event on May 15, 2001 which is disputed is whether or not the Grievor used abusive language by swearing at his supervisor. The supervisor testified that the Grievor called him "a fucking asshole" and the Grievor denies saying that. Only the supervisor and the Grievor were present in the lunchroom when this abusive language is alleged to have occurred. The supervisor testified that he did not say anything in response to the Grievor.

The Grievor testified that he never called Forster "a fucking asshole". The Grievor's version is that, when Forster asked him the third time to make the lift, the Grievor said "I suppose you want me to throw my fries out" or words to that effect. Shortly after that, the Grievor testified that he got up and threw out his fries. He also stated in his evidence that if it had been anybody else, it wouldn't have been an issue. He also stated that Forster was picking on him a great deal between January and May, 2001. In cross examination, the Grievor said he felt he was being picked on on May 15, 2001. He also stated that he did not

keep any notes about any of the incidents between January and May, 2001 in which he felt he was being picked on.

This allegation of abusive language boils down to a question of credibility. Based upon my review of the evidence and seeing the testimony of Forster and the Grievor, I accept the evidence of Forster as being more credible. The Grievor was obviously angry at Forster for confronting the Grievor in the lunchroom and felt that he was being singled out for different treatment. It seems more credible for the Grievor to react by swearing at Forster in the heat of the moment. There is no credible reason for Forster to have lied about this abusive language. There is no evidence that Forster was being abusive towards the Grievor. Furthermore, the Grievor was given the opportunity to make a complaint in writing about the harassment by Forster but the Grievor did not do that. It is difficult to accept the Grievor's version of this incident when the Grievor did not file a written harassment complaint or a written grievance about the actions of his supervisor.

The abusive language used by the Grievor towards his supervisor amounts to insubordination which requires disciplinary action. I am supported in this view by the following quote from Palmer, *Collective Agreement Arbitration in Canada*, 3rd ed., para. 7.39:

> "Abusive language towards superiors is regarded as insubordination and is considered a more serious offence than that directed against fellow workers. The latter, however, still constitutes a disciplinable offence."

In the arbitration decision, *Re: Sauder Industries Ltd. and International Woodworkers of America, Local 1217* (1985), 21 L.A.C. (3d) 245, suspension of the grievor for a single incident of swearing was upheld by the Arbitration Board, although the Board reduced the suspension from three and one-half days to one day. The incident in that decision related to a statement made by the plant chairman to the foreman while trying to process a grievance on the workshop floor. The words used were "look here, asshole, you

can't do that". The reduction in the length of the suspension was made because of the grievor's long, relatively unblemished service as plant chairman.

The conduct of the Grievor on May 15, 2001 constituted insubordination and resulted in a work stoppage of approximately fifteen to twenty minutes. The Employer was justified in disciplining the Grievor by suspending him. In my view, however, a penalty of five days suspension would have been more appropriate because all of the conduct related to the same incident. Accordingly, I uphold the suspension but reduce the length of the suspension to five days and order the Employer to pay the Grievor for the other two days.

TERMINATION

The Grievor's employment was terminated by the Employer on June 5, 2001. The letter of termination, quoted above, referred to the Grievor's unexplained absence from work since May 30, 2001 and the Grievor's recent discipline for misconduct, which related to the seven day suspension. On May 18, 2001, at the conclusion of the meeting involving the Employer, the Union and the Grievor, the Employer suspended the Grievor for seven working days and reassigned the Grievor to the Rolling Mill. The Grievor was to report for work to the Rolling Mill on May 30, 2001 at 11:30 a.m. The Grievor did not report for work on that date but called in to the security office at approximately 8:46 a.m. on May 30, 2001 to indicate that he would be absent for personal reasons. The Employer called the Grievor at approximately 9:24 a.m. on May 30, 2001 and left a message on the answering machine for the Grievor to call Selinger. Selinger did not receive a call from the Grievor on that day. On May 31, 2001, the Employer received a copy of a note from Dr. Keith Anstead dated May 30, 2001 stating that the Grievor was off work due to sickness from May 28 to June 13, 2001 and he would be re-evaluated on June 12, 2001.

The events from May 16, 2001 forward reveal a strange course of conduct by the Grievor. On May 16, 2001, the Grievor saw Dr. Anstead and requested Dr. Anstead to take him off work on stress leave. The Grievor testified that Dr. Anstead told him to take it easy since the Grievor had already been suspended. Dr. Anstead testified that he told the Grievor that he was a general practitioner and could not grant stress leave.

After being reassigned to the Rolling Mill on May 18, 2001, the Grievor testified that he booked a trip to North Carolina on May 23, 2001 to leave Regina on June 6, 2001 and return on June 20, 2001. The Grievor testified that he thought he would be on stress leave and he simply wanted to get away. The Grievor saw Dr. Anstead again on May 30, 2001 and obtained the note from Dr. Anstead stating that the Grievor was off work due to sickness. On May 30, 2001, Dr. Anstead's office made an appointment with Dr. Beattie for the Grievor to see Dr. Beattie on June 12, 2001. The Grievor found out that he had been terminated on June 5, 2001 and he stated that he was pretty messed up by that news. The Grievor did not leave on his trip on June 6, 2001 but changed the departure date to June 9, 2001. He tried to get to see Dr. Beattie on June 6, 2001 but was unable to do so. He went to Dr. Beattie's office on June 7, 2001 and got to see her for ten minutes to change his appointment from June 12 to August 22, 2001. The Grievor travelled to North Carolina on June 9, 2001 and returned to Regina on June 20, 2001. The Grievor did not tell Dr. Anstead about his planned trip to North Carolina and the Grievor did not keep his appointment with Dr. Anstead on June 13, 2001 nor did the Grievor reschedule that appointment.

The testimony of Dr. Anstead differs from the testimony of the Grievor in several instances. Dr. Anstead testified that he saw the Grievor on May 16, 2001. When the Grievor requested stress leave, Dr. Anstead responded that he was a general practitioner and unable to grant stress leave. He told the Grievor that he would have to refer the Grievor to a psychiatrist. Dr. Anstead saw the Grievor again on May 28, 2001 and the Grievor was anxious to get an appointment with Dr. Beattie. Dr. Anstead arranged that appointment on

an urgent basis for June 12, 2001. Dr. Anstead saw the Grievor again on May 30, 2001 and completed the note referred to earlier. The Grievor was to see Dr. Anstead on June 13, 2001 but did not keep that appointment and did not reschedule it. Dr. Anstead testified that the Grievor did not tell him that the Grievor had booked a trip in the United States from June 6 to 20, 2001. Dr. Anstead was emphatic in his testimony that he did not tell the Grievor that the Grievor should not meet with or talk to his employer. He also testified that he absolutely did not tell the Grievor to take a vacation. In cross examination, Dr. Anstead testified that on May 16, 2001 he did not feel that the Grievor needed to be away from work. The Grievor had been suspended at that time. During cross examination, Dr. Anstead testified that he told the Grievor that he would not confirm that the Grievor was not able to meet with or talk to his employer.

Ron Wolbaum, the Union Chairman of the Grievance Committee, was called as a witness on behalf of the Grievor. Wolbaum testified that the Grievor told him that the Grievor's doctor told the Grievor not to talk to the employer. In cross examination, Wolbaum testified that he had not been advised by the Grievor about any travel plans to the United States. Wolbaum did not find out about that travel information until this arbitration hearing.

The evidence is clear that the Grievor planned his holiday to North Carolina at a time when the Grievor knew he had been suspended for seven working days and was to report to work at the Rolling Mill on May 30, 2001. The Grievor also knew that the grievance had been filed with respect to his suspension and reassignment. However, instead of reporting for work on May 30, 2001 and waiting for the grievance to be determined, the Grievor made deliberate choices to try to arrange stress leave and to take his planned holiday. Wherever the evidence of the Grievor conflicts with the evidence of Dr. Anstead, I accept the evidence of Dr. Anstead as being more credible. The Grievor never disclosed his travel plans to Dr. Anstead or to the Union. Instead, the Grievor made a special effort to change

his appointment with Dr. Beattie from June 12 to August 22, 2001. If the Grievor had been truly concerned about his level of stress, he would have kept that appointment on June 12, 2001. His actions indicate that he was more interested in being able to take his holiday to North Carolina. My views are reinforced by the evidence that on August 22, 2001 Dr. Beattie cleared the Grievor to return to work.

When the Employer terminated the employment of the Grievor on June 5, 2001, the Employer did not know about the Grievor's trip to North Carolina. That evidence came to light after the actual termination but prior to this arbitration. The Employer had no way of knowing about that information at the time of the termination because the Grievor never told anyone about it. The Employer was suspicious about the Grievor's absence from work on May 30, 2001 and afterwards. Subsequent events proved that suspicion to be well founded.

In the letter of termination dated June 5, 2001, the Employer referred to the Grievor's violation of the provisions of Work Rule 4c of the IPSCO Employee Conduct Guide, Work Rules and Regulations. Rule 4c provides as follows:

> "4. Employees late or absent must comply with the call-in-procedure pertaining to their individual department. In addition, the following will apply:
>
> . . .
>
> c. All absences must be justified and a reasonable explanation provided to the Employee's supervisor."

The Employer relied on that Rule to support its many requests for an explanation by the Grievor as to his absence on May 30, 2001 and afterwards. The Union and the Grievor argued that the Grievor had satisfied Rule 4c by virtue of the Grievor's call to the security department on May 30 and the provision of the note from Dr. Anstead dated May 30, 2001. In my view, the Employer's request for additional information to explain the Grievor's absence from work was reasonable. The Grievor did not provide any explanation because there was none. Instead, the Grievor was using every means at his disposal, including

deception, to try to get a medical justification for his absence in order to take his planned trip to North Carolina.

The Grievor and the Union argued that the Employer cannot expand the grounds for termination beyond what the Employer relied on at the time of termination. The Union and the Grievor relied on the decision in *Aerocide* to support their position. However, the *Aerocide* principle has been held not to apply when the employee concealed evidence from the employer. That distinction was made by the arbitrator in *Petro-Canada Lubricants Centre and C.E.P., Local 593* (2000), 86 L.A.C. (4th) 36. In that decision, the arbitrator stated at page 39:

> "It would appear, then, that the approach taken in the *Aerocide* case, i.e., holding the employer 'fairly strictly to the grounds upon which it has chosen to act against the employee', ought not to be so stringently applied in circumstances where no harm is done to the requirement for a fair hearing or no prejudice results if an employer is allowed, at arbitration, to establish the appropriateness of its decision on grounds other than those 'upon which it has chosen to act against an employee', Re *Aerocide*, *supra*. Nonetheless, there are limits to the extent an employer may do so."

At pages 40 and 41, the arbitrator goes on to say:

> "In *Re Loblaw Groceterias*, *supra*, arbitrator Adams allowed the employer to introduce evidence in support of its discharge decision that it had obtained subsequent to the discharge for reason that the [page41] employee had concealed that evidence from the employer and that to prohibit the employer from doing so would be an 'overly technical' application of the *Aerocide* approach. Similarly, in *Re Phillips Cables Ltd. and I.B.E.W., Loc. 625* (1993), 32 L.A.C. (4th) 153 (Outhouse), and *Re Canadian Airlines*, *supra*, the employer was permitted to introduce evidence in support of its position for reason that the evidence was concealed by the grievor and not known to the employer at the time of its decision. In contrast, where the employer had evidence or knowledge of misconduct on the part of the grievor prior to its decision to discipline, but did not rely on that evidence in making its decision, it was not permitted to rely on that evidence at arbitration *Re Phillips and Alberta* (1982), 6 L.A.C. (3d) 93 (T.A.B. Jolliffe)."

In my view, the Employer is not changing the grounds upon which it relied to terminate the Grievor. In the termination letter of June 5, 2001, the Employer referred to and relied upon the unexplained absence from work of the Grievor since May 30, 2001. The evidence about the Grievor's conduct in planning and taking a trip to the United States is merely an extension of the grounds of unexplained absence from work. The Grievor's travel plans were unknown to the Employer when the Employer terminated the Grievor. The Grievor had carefully hidden his plans from the Employer and the Union and his own doctor. The Grievor deceived Dr. Anstead into providing a note to excuse the Grievor from work without telling Dr. Anstead that he was going to take a trip to the United States. If the Employer had known about the Grievor's travel plans on June 5, 2001, the Employer would have undoubtedly relied on that conduct as grounds for dismissal. The Grievor cannot hide his conduct and then complain about the Employer's reliance on that conduct when it finally comes to light.

The law is clear that the Employer must prove that it had just cause to discharge the Grievor. The Employer has satisfied that onus in this arbitration. Under all of the circumstances, the termination of the Grievor was just and reasonable. The Grievor has demonstrated by his conduct that he was not willing to accept direction from the Employer. The Grievor has put his own interests ahead of the Employer and an employment relationship could not continue in those circumstances. The conduct of the Grievor cannot be condoned. I uphold the termination of the Grievor and dismiss the grievance dated June 7, 2001.

CONCLUSION

1. I uphold the suspension of the Grievor but I reduce the length of the suspension to five days from seven days. The grievance dated May 29, 2001 is allowed only to the

extent of reducing the length of the suspension from seven days to five days and the Employer is directed to pay the Grievor for two days.

2. I uphold the termination of the Grievor and dismiss the grievance dated June 7, 2001.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of September, 2002.

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

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