The Trade Union Act
Province of Saskatchewan

In the matter of the arbitration of the grievance of Ron Meier dated May 17, 2011 pursuant to a Collective Bargaining Agreement

Between:

EVRAZ INC. NA CANADA

- and -

UNITED STEELWORKERS, Local 5890

AWARD

Arbitrator:	Francine Chad Smith, Q.C.
For the Employer:	Larry LeBlanc, Q.C., Counsel Cindy Hinger, Labour Relations Specialist
For the Union and the Grievor:	Sonny Rioux, Union Representative Ian Gretchen, Union Vice President

Date of Hearing: October 3, 2011 REGINA, Saskatchewan
Date of Decision: November 4, 2011

Introduction:

[1] This is a case involving a dismissal pursuant to a last chance agreement. The Union and the Grievor acknowledged there was a breach of the Last Chance Agreement; however, they allege the breach occurred because the Grievor was acting under a mistake of fact. That being so, their position is the breach of the Last Chance Agreement was involuntary resulting from an action the Grievor did not intend.

[2] An interesting facet of the case is the Employer's position that the Last Chance Agreement forms part of the collective bargaining agreement. Accordingly, the Employer's submission was the arbitrator has no jurisdiction to substitute a lesser penalty for the dismissal pursuant to section 25(3) of *The Trade Union Act (SK).*

The Facts:

[3] The incident giving rise to the Grievor's dismissal occurred on April 16, 2011. At that time, he was employed under a Last Chance Agreement entered into on October 13, 2010. The Agreement was to remain in effect for a period of twenty-four (24) months. The first paragraph of the Last Chance Agreement recites the reasons it was entered in the following manner:

> On June 21, 2010 Mr. Meier was issued a five day suspension for insubordination. On July 23, 2010 Mr. Meier was issued an indefinite suspension which was progressive on the five day issued in July (*sic*). The above Parties met to discuss Mr. Meier's discipline record with the Company on July 28, 2010. We discussed the Company's concerns regarding Mr. Meier's discipline record, insubordination, poor work performance, attitude, and his attendance at work. On (*sic)* At this meeting Mr. Meier did not offer any justifiable reason for his behaviour and subsequently was terminated on July 29, 2010.

The Last Chance Agreement went on to list the conditions of the Grievor's reinstatement, which included the following:

> • Mr. Meier will make a sincere effort to improve his job initiative, attitude and work performance to an acceptable standard.
> • Mr. Meyer will follow all rules, policies and procedures for as long as he remains an employee of Evraz Inc. NA.

[4] The conduct that resulted in the Grievor's dismissal was his departure from the ID operator station on the Employer's number two spiral pipe mill, without having first arranged for a competent person to take over his operator job functions. This conduct was contrary to the Company's written policy for its ID operators. That policy (Exhibit E6) provides:

> 5.15 The ID operator shall continuously monitor the weld head position to ensure proper seam tracking.

The evidence demonstrated the ID operator was allowed to leave his station for short periods of time during production runs provided he secured a person who was competent to perform the ID operator functions.

[5] The Employer's business at its industrial site north of the city of Regina involves the manufacture of spiral steel pipes utilizing a number of continuous production mills. According to the evidence of Mr. Kelly Miller, the Spiral Mills Area Supervisor, the complement of employees at each of the spiral production mills is three. The first, and most important employee, is the ID operator. That person is located at the lead end of each new coil of pipe and is responsible for monitoring the gap control and the inside welds of the spiral seams. He is required to remain at his station at all times throughout the continuous milling process (except as otherwise noted above). The second employee on the spiral pipe mill is the OD operator, who is responsible for monitoring the exterior welds on the pipe, and for maintaining most of the mill equipment and welding supplies to ensure the mill keeps running. He is not required to remain at his station continuously because the outside weld is not as critical, and because the OD operator has a screen at his station to monitor the outside weld. The third person on the line is the uncoiler, who feeds new coil into the mill ensuring it is straight for welding, mans the plasma station which cuts the spiral pipe into required lengths, and applies pipe numbers for identification.

[6] On Saturday, April 16, 2011, the Grievor was working as the ID operator on spiral pipe mill number two. He had been assigned to that station since early February, 2011. He commenced his shift that day at

6:30 am, and began the production run in question around 9:30 am. Approximately one hour into the run he left his ID operator station for a period of approximately ten minutes. He had arranged for Mr. Jonathon Faye, the uncoiler on the mill, to take over the ID functions. During his absence the welding head became misaligned causing a continuous gap in the spiral pipe's seam. The significance of this occurrence was the malformation of 57.8 feet of pipe, and more importantly, a one hundred and ninety (190) minute shutdown of that spiral pipe production mill, both of which resulted in financial loss to the Employer. Based upon the shutdown alone, the Employer's estimated loss was $180,000. Because scrapping portions of pipeline can arise out of routine operations, no loss was affixed to the malformed 57.8 feet of pipe.

[7] The Employer's evidence regarding its financial loss was supported by documents filed that demonstrated immediately prior to the mill shut down and immediately thereafter, the number two mill was operating normally overall. (Exhibit E8 - Downtime Entry Screens).

[8] The evidence regarding the Grievor's arrangements with Mr. Faye to take over the ID operator functions was inconsistent and requires findings of fact to be made. Accordingly, it will be addressed under the heading of "The Decision".

[9] From the evidence, including that of the Grievor, it would appear that when he left the ID operator station, only Mr. Faye and a person Mr. Faye was training in the uncoiler position, remained at the number two spiral mill. The Grievor testified that he had previously asked the OD operator to fill in for him but the OD operator indicated he had to first attend to something away from the mill. The Grievor concluded the OD Operator, who was diabetic, had to take a blood reading and may then have had to eat to balance his blood sugar.

The Parties' Positions:

The Grievor and the Union:

[10] Mr. Rioux, relying upon the evidence of the Grievor, submitted that the breach of the Last Chance Agreement was based upon a mistake of fact. That is, the Grievor believed Mr. Faye was competent to perform the ID operator functions. Regarding the issue of mistake of fact, Mr. Rioux relied upon *Canada*

Post Corp. and C.U.E.W. (Cassidy 096-88-00547), [1991] C.L.A.D. No. 29, 23 L.A.C. (4th) 166 (Can - Arb. Outhouse). Mr. Rioux submitted the Grievor's mistake of fact provided a justifiable basis for his otherwise errant behaviour.

[11] Alternatively, relying upon *Pacific Elevators Ltd. v. Grain Workers Union, Local 333 (Semple Grievance)*, [1999] C.L.A.D. No. 655 (Can – Arb. Jackson), Mr. Rioux submitted the breach of the Last Chance Agreement was not of a sufficient nature to warrant dismissal. He submitted the Grievor had been making a sincere effort to improve his work performance. In this regard he underlined the Grievor's specific compliance with the requirement to do so, noting the Grievor had operated from October 13, 2010 through to the date of the incident in question, being some six months, without incurring any discipline whatsoever.

[12] Lastly, as a further alternative argument, Mr. Rioux submitted that in the event the Grievor's conduct did not amount to a mistake of fact, that it should be regarded as an exercise of bad judgment rather than a policy violation. In this regard Mr. Rioux submitted the principles in the *William Scott* case should be relied upon to substitute a lesser penalty than the dismissal imposed by the Employer. To support this position, he relied upon *National Automobile Aerospace Transportation and General Workers Union of Canada (C.A.W. – Canada), Local 27 v. Accuride Canada Inc. (Koyle Grievance),* [1998]. O.L.A.A. No. 682 (ON – Arb. Hunter).

The Employer:

[13] Mr. LeBlanc, Q.C. submitted the dismissal of the Grievor was supported on two grounds: first, as a breach of the Last Chance Agreement; and secondly, on the general principles of just cause and progressive discipline. Regarding the second basis, Mr. LeBlanc relied upon a series of cases where deficient work performance was found to be a basis for discipline.

[14] Mr. LeBlanc submitted the weight of the evidence demonstrated the Grievor knew Mr. Faye was not able to perform the ID operator functions, with the result that there was a clear breach of a policy contrary to the Last Chance Agreement.

[15] Mr. LeBlanc proceeded to rely upon the policy reason for enforcing the terms agreed to by the parties in the Last Chance Agreement and filed a series of cases to support this position. He submitted the Last

Chance Agreement was part of the collective bargaining agreement, and because it provides a specific discipline for a breach of its provisions, section 25(3) of *The Trade Union Act* precludes an arbitrator from substituting a lesser penalty.

[16] Lastly, Mr. LeBlanc submitted, that in any event, the facts of the case, even measured against the particular circumstances of the Grievor, do not warrant the substitution of a lesser penalty pursuant to *The Trade Union Act* and or the principles enunciated in *William Scott*.

The Issues:

[17] The issues raised by the evidence and arguments are:

1. Was the Grievor's breach of the ID operator policy a mistake:
    a) did the Grievor believe Jonathon Faye, the uncoiler assigned to mill number two, was competent to perform the ID operator functions?
        i) was the evidence of the Grievor on this issue credible?

2. If the responses to question one above are in the affirmative, can mistake of fact provide a justifiable explanation for a breach of a Last Chance Agreement?

3. In the event the breach of the Last Chance Agreement was without justification, does the agreement form part of the collective bargaining agreement thus precluding an arbitrator from substituting a lesser penalty pursuant to section 25 (3) of *The Trade Union Act*?

4. In the event the Last Chance Agreement does not form part of the collective bargaining agreement, should the arbitrator exercise her jurisdiction under section 25(3) of *The Trade Union Act* to substitute a lesser penalty than the dismissal imposed by the Employer?

The Decision:

1. *Was the Grievor's breach of the ID operator policy a mistake:*
    a) *did the Grievor believe Jonathon Faye, the uncoiler assigned to mill two, was competent to perform the ID operator functions?*
        i) was the evidence of the Grievor on this issue credible?

[18] I have concluded the Grievor's breach of the ID operator policy was not a mistake. The Grievor left the operator station thereby failing to continuously monitor the weld head position to ensure proper seam tracking. The Employer acknowledged an ID operator may leave his station for brief periods of time provided he arranges for the OD operator or another person competent to perform the ID functions to stand in, thus ensuring continuous monitoring of the weld head to ensure proper seam tracking. The Grievor knew that Jonathon Faye, the uncoiler, was not capable of performing the ID Operator functions. This conclusion is based upon the evidence of Mr. Faye, Mr. Kelly Miller and Mr. Myron Hill, and upon my conclusion that the Grievor's evidence was not reliable.

[19] Mr. Faye, the uncoiler, being a member of the Union, testified on behalf of the Employer pursuant to a *subpoena.* He has worked primarily as an assistant mill operator since October 2008. As of early February 2011 he had been working as the uncoiler on the number two spiral pipe mill. He testified his only experience in an operator's station in the spiral mill was in 2009 when he sat at the station on mill number four during a dead shift for four hours. This was so he could begin to learn the process; however, the control buttons on mill number four are different from those on mill two. Apparently he was to start training for an ID operator position but that did not occur. Mr. Faye went on to testify in chief that on April 16, 2011 the Grievor told him he had to go to the bathroom and needed him to sit at the ID station. Mr. Faye replied that he had never been there before and didn't know what he was doing. The Grievor responded "don't worry, everything is going good". Mr. Faye said he sat in the chair and was not even there five (5) to ten (10) minutes when the seam started to open up. Mr. Faye did not know what to do to fix it. He could not find the stop button at the ID operator station, so he ran to the one at the uncoiler and stopped the mill. In cross-examination Mr. Faye acknowledged that having heard the mill had been "running good", he thought it would be okay and nothing would happen if the Grievor went to the bathroom and came back. He stated he thought he should be able to just sit there. At the end of his cross-examination Mr. Faye stated he made the choice to sit in the ID operator chair, and that he was running the mill when the seam opened up.

[20] Mr. Kelly Miller, the Spiral Mills Area Supervisor, testified about meeting with the Grievor after mill number two was shut down. The discussion occurred in the presence of the shop steward and the step up supervisor; however, neither of those individuals testified. Mr. Miller testified that during the meeting he ascertained the Grievor left Mr. Faye in the ID operator position because he had to go to the bathroom and make a phone call. He also ascertained that Mr. Faye had been unable to track the seam, causing it to open up. Mr. Miller told the Grievor that leaving Mr. Faye in charge of the ID station was poor judgment and that had he not been able to secure appropriate relief, he should have stopped the mill. Mr. Miller also prepared a written account of the meeting which he e-mailed to his boss, Myron Hill, the general foreman office of spiral mills. The e-mail dated April 16 [Exhibit E7] reads as follows:

> . . . While Ron [Meier] was gone, John got mixed up with the controls and ended up opening up pretty bad. Once John knew things were getting bad, he stopped the mill but it was too late. . . .
>
> I pulled Ron [Meier] into the office, with Dion Loenz and Roy Chinski, and told him how bad of a decision that was and how irresponsible he was. . . .

[21] Mr. Myron Hill, the General Foreman for the spiral plants, testified. However, he did not have any conversations with the Grievor regarding the incident. He was familiar with the experience of Jonathon Faye and testified that Mr. Faye was not an experienced ID operator. Mr. Miller stated Mr. Faye's experience on mill number four was not applicable because mill number four was totally different from mill number two. He stated that to be sufficiently experienced to sit in the ID operator station under normal circumstances, a person needs at least 5 to 7 shifts, or 2 to 3 weeks, of training. He stated the learning curve is a long one because there are lots of things the ID operator has to be watching. He also stated the usual practice when the ID operator has to leave his station is to have the OD operator fill in, or when no other qualified person can be found, the mill should be shut down.

[22] The evidence-in-chief of Mr. Meier, the Grievor, was that on the day in question Mr. Faye was hanging around the ID operator station more than usual. He had been standing there chatting about work and ID operating for about twenty (20) minutes. He stated that Mr. Faye told him he had done some ID work and he then said he asked Mr. Faye if he was able to sit down for him because he needed to go to the

bathroom and make a phone call. He went on to state Mr. Faye, without hesitation, replied “no problem”. The Grievor testified Mr. Faye did not say anything about not being comfortable and gave all indications that he was able to stand in. The Grievor stated that Mr. Faye had given him the impression on previous occasions that he was able to manage the ID operation functions. During this portion of his evidence, in support of his belief that Mr. Faye was competent to perform the ID operator functions, the Grievor stated he would not have asked Mr. Faye to work the ID station if he did not believe he was able to. He then added he would not put the company in jeopardy, especially then, because he was under a last chance agreement.

[23] In cross-examination the Grievor was question about a number of issues. Firstly he was asked questions about what work he did, and what efforts he made to find work, between the date of his dismissal and the date of the hearing. Initially his response was that throughout that time he had been working, or spending his time finding employment. However, upon further questioning it was apparent that he earned very little income, that he spent a considerable amount of time caring for his young daughter, and that from mid-August on, he was not “in the best shape to work or look for work because he had a root canal done”. He also testified it was hard to find work because he did not know what to say to prospective employers regarding his status with the Employer and the pending arbitration hearing. I have concluded from his evidence that he did not work or look for work after mid August.

[24] When questioned about the requirement of the ID operator to remain at his station and continuously monitor the welding of the interior seam, the Grievor went to considerable lengths to indicate that there were numerous times he would have to leave his station to attend to operational needs, the main one being filling the flux hopper. According to the Grievor, he left his station on a regular basis to attend to filling the flux hopper because the OD operator was often not around. According to the Grievor, this was the case even though it was the OD operator’s duty to attend to the flux supply. The Grievor went on to state that he addressed the flux supply on a daily basis and if the OD operator was not around, he would ask Mr. Faye to monitor the heat line for welding the interior seam. When this occurred, the Grievor stated he felt comfortable allowing Mr. Faye to sit down at the ID station.

[25] Given his subsequent evidence to questions regarding how long a full flux hopper would last, the existence of a low indicator light in relation to the flux, the fact the low indicator light allows fifteen (15) to

twenty (20) minutes of operation before the hopper requires filling, and the other evidence regarding the responsibility of the OD operator (even allowing for the fact the particular OD operator usually on his crew had to intermittently check his blood sugar and possible eat to balance it), the frequency of the Grievor's absences from his station to attend to the flux and other operational issues appeared exaggerated.

[26] I also noted that Mr. Rioux asked Mr. Hill, during cross-examination, about replenishing of the flux and whether this could be done by the ID operator. Mr. Hill responded that the OD operator usually attended to the flux; and that while the ID operator might do so, it would only be if the OD operator was around to monitor the seam.

[27] During cross examination, the Grievor testified that he would also be away from the ID station to change the welding tips, and that when he did this, Mr. Faye would be at the controls for feeding the wire. However, subsequent questioning revealed that when this work was being done, the mill would not have been running.

[28] It was particularly noteworthy that questions were not directed to Mr. Faye in cross-examination, who testified before Mr. Hill (and of course before the Grievor), about the Grievor's subsequent allegations that he spent a considerable amount of time away from the ID station while attending to other operational needs, about Mr. Faye sitting in the ID station during those times and monitoring the seam welding, or about Mr. Faye having previously given the Grievor the impression he was competent to perform the functions of the ID operator. The failure to cross-examine Mr. Faye on these matters, of course, is contrary to the rule in *Dunn and Brown*. However, Mr. Rioux demonstrated he was aware of that rule when he cross-examined Mr. Hill.

[29] In cross-examination the Greivor was also asked when he found out that Mr. Faye did not know how to perform the OD operator functions. He responded it was not until after he spoke with Mr. Myron Hill and had left the company. He went on to say he "truly did not know what happened with the mill until one month later". This evidence was inconsistent with the evidence of Kelly Miller, who testified that he met with the Grievor in the presence of the shop steward and another supervisor following the incident. (That meeting occurred before Mr. Hill knew of, or had any involvement with, the incident.) Based upon Mr. Miller's evidence of the meeting and the e-mail he subsequently sent to Myron Hill, one would have

expected the Grievor to have either been told, or to have realized, that Mr. Faye was not capable of performing the OD operator functions, and particularly of not being able to track the seam with the welder and make the necessary adjustments. Kelly Miller specifically told the Grievor at the meeting that he had exercised poor judgment in allowing Mr. Faye to replace him at the ID station. Mr. Miller's e-mail to Mr. Hill (Exhibit E-7) was even more specific; however, I appreciate that it was prepared following the meeting with the Grievor and accordingly, it may have included some commentary that was more in the way of conclusions drawn from the meeting rather than strictly representational of what was said at the meeting.

[30] I have not overlooked the Grievor's explanation that many things may cause the interior seam to open. However, I find the seam opened because the weld head had failed to track the seam and Mr. Faye was unable to make the necessary adjustment because he lacked the ability to do so. In this regard I have relied upon the evidence of Mr. Faye, of Mr. Miller regarding what he learned following the shutdown, and of Mr. Hill that the operation charts for mill number two demonstrated the mill was functioning well immediately before and after the shut down.

[31] Lastly, the Grievor's assertion that he would never place the Employer's operations in jeopardy was also an area where his evidence was undermined through cross-examination. The Grievor was asked whether failing to phone in if he was going to miss a shift or be late would put the employer in jeopardy, and he replied absolutely it would. The Grievor was then asked if he was ever disciplined for not phoning in for missed shifts. His response was " never, never". Further questioning revealed the Grievor was disciplined for not calling in for being late for shifts, for smoking in the mill, and for sleeping on the job. Exhibits E 13 and 14, being disciplinary notices relating to infractions referred to above, were filed at the hearing in relation to the issue of the Grievor's credibility. The said exhibits otherwise not being admissible regarding the Grievor's disciplinary record because of article 5.03 of the collective agreement, which provides any warning or penalty, excepting a dismissal, will be cleared from an employee's record after twelve months, and that following a reinstatement the employee's record will be cleared after twelve months.

[32] Prior to excusing the Grievor from the witness stand, I directed a number of questions to him. In response, he testified that he had been working on mill number two, together with Mr. Faye and the OD operator named Phil, since early February, 2011. He said that during that time, Mr. Faye had never been assigned to operate the ID station; nor had he seen Mr. Faye operate the station for any period of time.

[33] Upon assessing the Grievor's evidence, particularly his responses to questions put to him in cross-examination, and his demeanor, and contrasting that with the evidence of Kelly Miller, Jonathon Faye and to a limited extent Myron Hill, I have simply not been persuaded, on a balance of probabilities, that the Grievor believed Mr. Faye was competent to assume the functions of the ID operator during the Grievor's brief absence. The weight of the evidence is to the contrary: that is, that the Grievor knew Mr. Faye was not competent to perform the ID operator functions. The Grievor may have believed nothing would go wrong during his brief absence; however, that is hardly the same as believing Mr. Faye knew how to attend to the responsibilities of the ID operator. I find the Grievor breached the ID operator policy (Exhibit E6), which states he "shall continuously monitor the weld head position to ensure proper seam tracking".

[34] I find that policy to be a significant one, the breach of which not only justifies discipline, but justifies a higher level of discipline. It is clear from the evidence of Myron Hill that even a breach for a very short period of time – five (5) to ten (10) minutes, as it was here, can result in a significant loss of operational time and a corresponding financial loss.

2. If the responses to number one above are in the affirmative, can mistake of fact provide a justifiable explanation for a breach of a Last Chance Agreement?

[35] Having concluded the Grievor and the Union have failed to establish the Grievor was operating under a mistake of fact, it is not necessary for me to decide whether or not that can provide a justifiable explanation for a breach of a last chance agreement. Nevertheless, having directed some attention to the issue and the enforcement of last chance agreements generally, it seems to me that there may be instances where mistake of fact could be accepted to exonerate an employee from a discipline charge and or the operation of a last chance agreement.

[36] The concept of mistake of fact arises in criminal law and contract law. Essentially, it operates to negate intention: the intent, or *mens rea*, that accompanies an action associated with criminal conduct; or the intention arising from a common factual basis and a true meeting of the minds in a contractual matter.

The difficulty in applying the concept of mistake of fact too readily in discipline cases arises because often the question of intent is intertwined with inattention, carelessness, neglect, and even negligence. Where such elements exist, the question of intent, and hence mistake of fact, may no longer be particularly relevant depending upon the significance of the conduct in issue. As with many issues in labour matters, context is everything.

[37] I have had regard to the *Canada Post (Cassidy)* case, relied upon by the Mr. Rioux of the Union. There, although the breach of the last chance agreement was found to involve some blame for lack of diligence, nevertheless, the fact the breach was not intentional and was of a minor nature resulted in the reinstatement of the grievor. Condition six of the agreement required the grievor to comply with the terms of a drug rehabilitation program. The grievor successfully completed the program; however, he failed to engage in a follow-up consultation as referred to in his letter of discharge from the program. The grievor was under the impression the follow-up consultation was an option, as opposed to a requirement, of the program. At no time was the grievor ever advised to the contrary. The grievor's failure to comply with condition six of the last chance agreement was presented as an unintentional breach arising from a mistake of fact. The union also submitted that the Grievor had met the fundamental obligation of the agreement of refraining from drug use. At paragraph 22, Arbitrator Outhouse concluded the grievor's failure to comply with the required follow-up consultation was the result of neglect rather than wilfulness. He then continued on to state:

> Hence, although the grievor can be faulted for showing a lack of diligence, his non-compliance with condition (6) can hardly be characterized as flagrant . . . .

Arbitrator Outhouse went on in paragraph 23 to observe that another significant consideration in the case was that the grievor had met the fundamental obligation of refraining from drug use. He stated:

> After all, condition (6) is clearly an ancillary provision designed to assist the grievor in abstaining from the use of drugs and if that central purpose has been realized, it would seem unduly harsh to terminate the grievor for not exercising greater initiative with respect to his after-care program.

[38] I have also considered *Gainers Inc. and U.F.C.W., Loc. 280-P*, [1996] A.G.A.A. No. 5; 53 L.A.C. (4th) 174 (AB – Arb. A.V.M. Beattie, Q.C.). There the grievor's belief that she was entitled to receive 24 hours' notice of overtime was raised by the union as a complete defence to insubordination arising from refusing to comply with a direct order. At paragraph 14, Arbitrator Beattie observed:

> In our view, the issue in this case has become simply whether a three-day suspension was the appropriate penalty for the grievor refusing a direct order. We agree with counsel for the company that whether or not the grievor honestly believed she was entitled to receive 24 hours' notice of the overtime goes only to mitigation and not to whether she has a complete defence to insubordination.

[39] In my view, the facts as found by the majority decision regarding the grievor's belief of her rights does not amount to a mistake of fact, but rather a mistake of law, or a mistake of her rights under the contract, which neither criminal law or contract law recognize. However, the subsequent discussion in the case is interesting for two reasons. Firstly, although it recognized the mistake in question did not exonerate the grievor from wrong doing, it nevertheless was a factor to be considered regarding mitigation and whether the penalty should be reduced. Secondly, Arbitrator Beattie discussed the rationale and applicability of the "work now, grieve later" rule in the *Lake Ontario Steel* case (1968), 19 L.A.C. 103, and the rationale therefore as described by Professor Shulman in the case of Ford *Motor Co.*, 3 L.A. 779, in his discussion that begins with the phrase "But an industrial plant is not a debating society." He goes on to refer to the reference by the majority award in *Re I.W.A., Loc. 2-500 and Stancor Central Ltd.(Peppier Division)* (1970), 22 L.A.C. 184 (ON - P.C. Weiler) at pages 186-187, to the following excerpt in the *Lake Ontario Steel case*:

> This rule [Work Now, Grieve Later] is not an absolute obligation and exceptions have been long-established where the order is illegal or dangerous. See *Re Int'l Electrical Workers, Local 1595, and Dominion Electric Protection Co.* (1963), 14 L.A.C. 127 (Reville); *Re U.A. W., Local 1285, and American Motors (Canada) Ltd.* (1966), 17 L.A.C. 210 (Krever). Moreover, such an order can be disobeyed where the assignment is in fact legal or safe, as long as the employee reasonably believes the contrary (see *American Motors (Canada) Ltd., supra). This supports our position that the true basis of the imposition of disciplinary penalties is not simply the objective facts of unjustified conduct but also the employee's awareness that he is doing something improper.*

[Emphasis added]

[40] The issue of mistake was also addressed in *Argo Road Maintenance v. British Columbia Government and Service Employees' Union (Doré Grievance)*, [2000] B.C.C.A.A.A. No. 399; 92 L.A.C. (4th) 416 (BC – R. S. Keras). There the grievor, a union steward, having been suspended and sent home by the operations manager, testified that he believed he had been locked out of the workplace. He then proceeded to use his influence to stop other employees from going to work. Arbitrator Keras considered the grievor's belief under the issue of mitigating circumstances and reduced the dismissal to a six month suspension. I note that this was another case where the grievor's belief related to a legal issue – whether the employer had locked out the employees. Instead of consulting with the union executive about whether or not a lock out was in effect, he proceeded to direct his coworkers to engage in illegal strike activity by not attending work.

[41] Accordingly, although the foregoing comments are not required for this decision and are therefore *obiter dicta*, and not binding upon the parties, it is my view that there may be circumstances where a mistake of fact, as opposed to a mistake of law or of ones' rights, could exonerate an employee from a discipline charge. However, such a mistake may not prove successful where the employee's conduct was otherwise careless, neglectful or negligent. Then, of course, as in this case, any allegation of mistake of fact must be supported by the evidentiary burden. So while the theory of mistake of fact exonerating an employee from discipline is likely to prove elusive in practice, nevertheless, I accept there may be circumstances where it may succeed and provide relief, independently, or in combination with another factor (as in *Canada Post*), under a last chance agreement. I also accept mistake of fact, and to a lesser extent, mistake of law, are relevant factors regarding mitigation of penalty.

3. Does the Last Chance Agreement form part of the collective bargaining agreement thus precluding an arbitrator from substituting a lesser penalty pursuant to section 25 (3) of The Trade Union Act?

[42] Having concluded the Union and the Grievor failed to establish the Grievor was operating under a mistake of fact regarding the ability of Mr. Faye to fulfill the ID operator functions, I now turn to whether the

agreement forms part of the collective bargaining agreement. Counsel for the Employer submitted the answer to the question is the affirmative, and that being so, an arbitrator is precluded by section 25(3) of *The Trade Union Act* from substituting a lesser penalty than the dismissal agreed to.

[43] In this particular case, the parties to the Last Chance Agreement were the Grievor, the Employer and the Union. Notwithstanding the fact the Union is a party to the Agreement, I accept Mr. Rioux's argument that it does not form part of the collective bargaining agreement. The Agreement can be distinguished from collective agreements in general, and from additional documents and agreements which traditionally form part of collective agreements, because it does not apply to the members of the union at large. It is an agreement specifically relating to, and for the benefit of, the Grievor only.

4. Should the arbitrator exercise her jurisdiction under section 25(3) of The Trade Union Act to substitute a lesser penalty than the dismissal imposed by the Employer pursuant to the Agreement or progressive discipline?

[44] Mr. Rioux, the Union Representative urged me to substitute a lesser penalty than the dismissal as specified in the Last Chance Agreement based upon the principles enunciated in the *William Scott* case. He also relied upon *Pacific Elevators Ltd. v. Grain Workers Union, Local 333 (Semple Grievance)*, [1999] C.L.A.D. No. 655 (Can – Arb. M. Jackson) and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W. – Canada), Local 27 v, Accuride Canada Inc. (Koyle Grievance),* [1998] O.L.A.A. No. 682 (ON – Arb. I.A. Hunter). Both cases being authority for the proposition that an arbitrator need not enforce a last chance agreement if there are strong and compelling reasons not to. (See para. 117 and para 64, respectively.) The *National Automobile and Aerospace* case is also authority for the proposition that circumstances beyond an employee's control preventing him from complying with a technical requirement - such as a time frame, of a last chance agreement, may exonerate the employee from the breach. However, we are not addressing a comparable technical breach or an employee's inability to comply with the terms of a last chance agreement in this case. Initially I shall address the substitution of a lesser penalty in the context of the *William Scott* case.

[45] In addition to the usually apparent economic hardships arising from dismissal, Mr. Rioux relied upon the Grievor's personal circumstances. The Grievor has a five-year-old daughter for whom he is required to pay maintenance on a monthly basis. As a result of his dismissal, he lost his vehicle. At the time of the hearing he was facing the prospect of being evicted from his apartment – a hearing being scheduled for the end of October to address the matter. The Grievor at the time of the arbitration was apparently unemployed; however, it appeared that his efforts to find employment were limited. It also appeared unlikely the Grievor will be successful in finding employment with a comparable remuneration to that which he earned with the Employer. His evidence was that he earned one hundred thousand (100,000) dollars per year. Nevertheless, the economic conditions in Saskatchewan are good and I conclude jobs are available.

[46] This is not a case where the Grievor had a previous good record. He was just six months into the two-year term of a last chance agreement when the incident occurred. There was no suggestion the policy requirement to maintain continuous monitoring of the well head welders tracking of the seam was not understood. This operational policy was a significant one in that failure to comply with it was likely to expose the employer to marked operational downtime and considerable financial loss. While the Grievor left his station partly to respond to a call of nature, there were other options available to him to address the situation by providing appropriate coverage, or alternatively, he could have shut down the number two production mill. While this was certainly not a case involving any premeditation, I do not accept that the decision was made on the spur of the moment so as to constitute a momentary aberration. The reason for the Grievor's departure from the station, combined with the fact that he had previously spoken with the OD operator about taking over, would indicate, in my view, that the Grievor had sufficient time to make a reasonable assessment of how to have properly resolved his dilemma.

[47] I have considerable sympathy for the position the Grievor is in. He certainly appears to have 'bottomed out'. His employment was terminated pursuant to a last chance agreement. Following his dismissal, the Grievor has lost his car and at the time of the hearing was facing eviction from his apartment. It would appear he has no financial reserves or resources available to him. It also appears that he has been unable to make the monthly maintenance payments for his young daughter. These circumstances have created disharmony in his familial relationships, and have obviously resulted in hardship to him personally.

[48] He first worked for the Employer from January 2004 until April 2004, when he was laid off. He then returned to work in May 2005.

[49] The *William Scott* principles are not limited solely to considerations pertaining to the Grievor's circumstances; they invite consideration of the conduct in issue, the employment history, and how the Grievor's conduct affected the employer and the workplace.

[50] There is no doubt the Grievor's circumstances, some six months following his dismissal, appear dismal. However, his employment record, illustrated by the fact he had been reinstated pursuant to a last chance agreement and the recitation of his misconduct therein, not to mention the breach of a fundamental operating policy with the resulting loss to the employer, all combine to present a material counterweight for the final balancing of the interests.

[51] Added to that, is the submission by Counsel for the Employer that the dismissal as agreed to by the parties in the Last Chance Agreement, should not be interfered with by the arbitrator. The primary justification advanced for this position by counsel was based in policy. That is, where the parties themselves have taken into account an individual's employment history, and the employer has nevertheless agreed to reinstate an employee on very specific terms and conditions, that agreement should be respected and therefore upheld. In the event arbitrators fail to uphold last chance agreements, employers will no longer be inclined to utilize them, with the result that employees, such as the Grievor, will face dismissal sooner. Counsel relied upon a number of authorities to support his position.

[52] Firstly, Counsel relied upon the discussion of last chance agreements and the effect thereof at paragraph 2:3232 of Brown and Beatty in *Canadian Labour Arbitration*, 4th ed., which notes, among other things, the following:

> . . . Thus, upon finding non-compliance with the conditions of continued employment, unless there is an agreed upon right to arbitral review in the settlement agreement, or such review is required by legislation, or the union had not been involved in developing and approving it, or there is a mutual mistake concerning the agreement, rendering it void *ad initio*, arbitrators have held that they have no choice but to affirm the agreed-upon discipline or termination by dismissing the grievance.

[53] Counsel for the Employer also relied upon a number of cases. In *Standard Products (Canada) and Canadian Auto Workers, Local 4451* (1996), 56 L.A.C. (4th) 88 (Davie), the board stated at page 96:

> . . . Here the parties, the employer, the union and the Grievor made a bargain and each should be held to it. If arbitrators do not uphold or enforce "last chance" agreements, parties would be discouraged from resolving matters and agreeing upon conditions which generally reflect prevailing arbitral jurisprudence and the specific circumstances of an individual case. Arbitrators are generally reluctant to subject "last chance" agreements to further arbitral review. This is particularly true in circumstances such as the present where the conditions upon which the Grievor was reinstated are both fair and reasonable.

[54] In *Weyerhaeuser Saskatchewan Ltd. and I.W.A. Canada, Local 1-184, (Sigfusson)*, November 7, 2004 (Hood), an incident of lateness was determined to provide sufficient grounds for dismissal based upon principles of progressive discipline and/or a breach of a last chance agreement. This was so even in circumstances where the arbitrator concluded the last chance agreement was sufficiently broad as to have allowed an arbitration board jurisdiction to substitute a lesser penalty . (See page 56).

[55] In *IPSCO Inc.* [this Employer's predecessor] *and USW, Local 5890 (Fehr),* November 26, 2003 (Semenchuk), the arbitrator upheld a dismissal under a last chance agreement where the Grievor was dismissed for using a cutting torch without wearing goggles or an eye shield contrary to the employer's accident prevention manual rules. At page 16 of the decision, Arbitrator Semenchuck stated:

> The Union 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 had admitted, and the evidence clearly demonstrates, that he breached the requirement to follow all safety rules.

[56] Lastly, Counsel for the Employer relied upon two cases where the arbitrators concluded they have jurisdiction to substitute a lesser penalty in last chance agreement cases, but declined to do so concluding there were not sufficiently strong and compelling reasons to mitigate the dismissals in the face of the last chance agreement. The first case is *Crestbrook Forest Industries Ltd and I.W.A.-Canada, Loc. I-405* (1996), 59 L.A.C. (4th) 237 (BC - Munroe). There, at pages 243- 44, Arbitrator Munroe, adopted the following passage from a previous award:

> 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' 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 proceeding may be avoided.

[57] The second is *Camco Inc. and U.S.W.A., Loc. 3129* (2000), 91 L.A.C. (4th) 346, wherein a similar view was expressed by Arbitrator Bendel at page 355:

> . . . 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 agreements, 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 a benefit for which they contracted, are on a very shaky ground when they tried to extricate themselves from the promises they made. However one characterizes the Last Chance Agreement the employer's reliance on it deserves to be respected.

[58] Having regard to all the mitigating circumstances, including the Employer's interests and existence of the Last Chance Agreement, I have been unable to conclude there are any compelling or exceptional reasons to substitute a lesser penalty. The Grievor violated a fundamental and significant operational policy. The violation occurred six months into the two year term of the Last Chance Agreement. It caused an immediate shut down of the number two spiral operating mill and resulted in financial loss to the Employer. Lastly, the Grievor has failed to demonstrate any remorse and presented a misleading version of the facts during the hearing.

[59] Given all the circumstances, I must dismiss the grievance.

DATED at Saskatoon, Saskatchewan this 4th day of November, 2011.

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Francine Chad Smith, Q.C.