

IN THE MATTER OF AN ARBITRATION BETWEEN:

IPSCO SASKATCHEWAN INC.

Employer  
Respondent

- and -

UNITED STEELWORKERS OF AMERICA, LOCAL 5890  
(OREST GREBINSKI AND ANDY ROMANOW)

Union  
Grievors

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AWARD

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before

Daniel Ish, Q.C.

Arbitrator

Heard in Regina Saskatchewan on June 1 & 2, 2000  
and June 27 & 28, 2000.

For the Union:

Rob Kilbride  
Jeff Kallichuk

For the Employer:

Larry LeBlanc  
Michael Carr

## INTRODUCTION

This arbitration arises as a result of the termination from employment of the two grievors, Mr. Orest Grebinski and Mr. Andy Romanow. Mr. Grebinski and Mr. Romanow were dismissed from employment on February 4<sup>th</sup>, 2000 by the employer, IPSCO, for allegedly smoking marijuana while on shift at the employer's steel mill in Regina. The evidence and arguments in the case present two competing versions of events. If the employer's version is accepted, the dismissal is justified. If the union's version is accepted, the grievors are entitled to be reinstated fully. Because the determination to be made must accept one of the contradictory version of the events and because the alleged breach is perceived as a serious infraction, neither party substantially addressed the issue of mitigation of penalty should the employer's version of the events be accepted.

At the outset of the hearing the parties agreed that I had jurisdiction to hear the matter and that the case was properly before me in all respects.

## THE EVIDENCE

The evidence of the various witnesses will be set out in some considerable detail. It is my normal practice not to review the evidence of each witness, rather I usually construct a narrative of the events that occurred. However, in this case a detailed review of the evidence given by the principle witnesses will be outlined because the outcome of the case revolves around primary findings of fact, taking into account the credibility of the witnesses and the accuracy of their perceptions.

The two grievors at the time of their termination were crane operators in the Company's spiral mill at its Regina location. Both grievors are long-term employees; Mr. Grebinski and Mr. Romanow have eleven years and twelve years seniority, respectively, with the Company. Each has a discipline record, that of Mr. Romanow's being somewhat more lengthy than Mr. Grebinski's.

### (a) The Testimony of Lorne Graham

The pertinent events took place during a 12 hour shift that began at 7:00 p.m. on the evening of Wednesday, February 2<sup>nd</sup>, 2000 and ended at 7:00 a.m. on the morning of Thursday, February 3<sup>rd</sup>, 2000. At approximately 1:30 a.m. on February 3<sup>rd</sup> Mr. Lorne Graham, a security guard employed by Vision Security and Investigations, entered a building on the Company's premises known as the "24" mill". The 24" mill is a building separate from the spiral mill, the latter is where the grievors were

working their shift. The 24" mill was not in production; it was shut down because of production demands but was scheduled to resume producing 24" pipe on the following Monday, February 7<sup>th</sup>, 2000. Vision Security and Investigations is a private security firm contracted to IPSCO.

As a security guard, Mr. Graham performed surveillance rounds on the Company's premises. Among other things, it was his job to check for fires and any other untoward conditions that might exist. To confirm that the appropriate checks have been made, there exists throughout the buildings at the IPSCO plant several electronic checkpoints where the security guards record their visits with a magnetic strip card. In carrying out his routine duties, Mr. Graham entered the 24" mill. Shortly thereafter he saw that someone else was in the building. Because he was not expecting that other personnel would be around, he was not wearing the jacket from his uniform. He went back to his car to get his jacket, re-entered the building, and did a "punch in" at one of the electronic stations. He then entered a room known as the electrical room and, according to his evidence, immediately noticed a smell that he identified as marijuana smoke. He noticed that someone, later identified as Mr. Grebinski, was standing near a double door that led outside. The door was open and another person was standing just outside of the door. At the time he did not know who the other person was, however, later it was identified to be Mr. Romanow. He did not see Mr. Romanow smoking anything. Mr. Graham testified that Mr. Grebinski, had what appeared to be a marijuana cigarette in his hand. He described it as a hand-rolled cigarette that was too small to be tailor made. He also testified that Mr. Grebinski was holding the cigarette with his thumb and forefinger underneath his hand. He indicated that, in his experience, this was the manner in which most marijuana cigarettes, or "joints", are smoked.

Mr. Graham testified that he did not actually see Mr. Grebinski smoking the cigarette, but merely saw him holding it in his hand close to his mouth. This was somewhat different from the information in a written "Incident Statement" submitted by Mr. Graham shortly after the incident wherein he wrote that he came across a person in the electrical room who was "smoking" what appeared to be a marijuana cigarette. When asked about this discrepancy, Mr. Graham conceded that he had not actually seen Mr. Grebinski taking a drag on the cigarette but had assumed that he was smoking it because of the manner in which he was holding it close to his mouth.

Mr. Graham said nothing to the two grievors and, in his recollection, they said nothing to him. He then left the electrical room and attended at three more punch stations. When he was out of hearing range of the electrical room, he telephoned his supervisor, Mr. Mike Hrutka, another employee of Vision Security and Investigations. He did not speak to Mr. Hrutka directly but spoke to another employee who took a message. Approximately 5-10 minutes later Mike Hrutka arrived

in the 24" mill to meet Mr. Graham. When Mr. Graham left the electrical room to punch into the three other stations and when he telephoned for Mr. Hrutka, the grievors were not within sight.

When Mr. Hrutka arrived, Mr. Graham explained what he had seen. The two of them walked back toward the electrical room where they saw the two grievors in the lunchroom. The lunchroom is immediately adjacent to the electrical room. They entered the lunchroom where Mr. Hrutka pretended to do a security check on the door. The grievors were not confronted directly in any respect and, aside from perhaps a "hello", there was no communication between the security guards and the grievors. The security guards then entered the electrical room where Mr. Hrutka commented to Mr. Graham that he too smelled lingering marijuana smoke.

In Mr. Graham's presence, Mr. Hrutka telephoned Mr. Dale Huber who was the foreman on shift and the supervisor of the grievors. The two security guards waited for Mr. Huber to arrive. On his arrival, Mr. Graham noticed that Mr. Romanow walked toward Mr. Huber and that some words were exchanged. He noticed that Mr. Grebinski had gone back into the electrical room. Shortly after Mr. Romanow and Mr. Grebinski appeared to leave the area and the two security guards, along with Mr. Huber, went into the electrical room. It was Mr. Graham's evidence that the room was very cold. While the three of them were standing in the electrical room, Mr. Grebinski and Mr. Romanow came into the room. Although the grievors were not spoken to directly, they were close enough to hear the three men speaking. According to Mr. Graham, one of the grievors said words to the effect that they were not smoking marijuana or doing anything wrong.

Later during the shift, after Mr. Graham had returned to the security office, he received a telephone call from Mr. Huber. Mr. Huber asked whether what Mr. Graham had smelled in the electrical room could have been an American cigarette. Mr. Graham's response at the time, a position he maintained at the hearing, was that what he smelled definitely was not an American cigarette. He testified that he smokes Winston cigarettes, an American brand, and he knows very well what they smell like. He also testified that he was very cognizant of the smell of marijuana. In addition to having used marijuana in the past, he had relatively recently worked as a security guard in a downtown Regina building known as the Gallery. He testified that it was common to come across people smoking marijuana and it was often his responsibility to deal with them. In his testimony Mr. Graham was very confident that what he smelled in the electrical room on the morning of February 3<sup>rd</sup>, when he first walked into the room and later when he entered it with Mr. Hrutka, was the smell of marijuana smoke.

Mr. Graham also testified that while he, Mr. Hrutka and Mr. Huber were in the electrical room, they searched the area around the door for evidence of a marijuana cigarette but found none. They saw several other cigarette butts near the door but he did not specifically look for a Winston cigarette butt.

Mr. Graham's involvement with the incident continued later during the shift when Mr. Steve Getzlaff, the general foreman of the spiral pipe mill, arrived in Mr. Huber's office. Mr. Graham was in the office shortly after Mr. Getzlaff had advised the grievors that they must leave the property under escort. Mr. Grebinski, in the presence of Mr. Graham, said he had to go back into the mill area to get his jacket. Mr. Graham and the others waited for the return of Mr. Grebinski but after some period of time were telephoned by someone in the security office (in the main operations building known as the "Hilton") telling them that Mr. Grebinski had arrived there. Mr. Graham returned to the main security area and escorted Mr. Grebinski to his locker. The lock was changed and Mr. Grebinski then left the premises. Mr. Graham had no further involvement except a later interview by representatives of the Company.

**(b) The Testimony of Michael Hrutka**

Mike Hrutka, another security guard employed by Vision Security and Investigations, and Mr. Graham's supervisor, testified that he was summoned to the 24" mill at approximately 1:30 a.m. on February 3<sup>rd</sup>. When he arrived, he was told by Mr. Graham that he had "caught" two employees smoking marijuana. He accompanied Mr. Graham to the lunchroom, where they saw the two employees sitting. At the time he did not know who the employers were, but he subsequently identified them as Mr. Grebinski and Mr. Romanow. Mr. Hrutka went through the motions of checking the door of the lunchroom; this was simply a diversion to provide him an opportunity to view the two grievors. Mr. Hrutka and Mr. Graham then walked to the electrical room where he testified that, "I smelled marijuana; I recognized it as marijuana."

Mr. Hrutka maintained that he knew the smell of marijuana as a distinctive smell. He has had past experience with smoking marijuana himself and being in the presence of others when it was smoked. When asked whether the smell could have been that of American cigarettes, he responded "I know both - there is no confusion in my mind".

Mr. Hrutka telephoned Mr. Huber who arrived about five minutes later. Mr. Hrutka saw Mr. Huber speak to Mr. Romanow and he heard him tell the grievors to go back to the spiral mill. Mr. Huber told Mr. Hrutka that he could smell marijuana on Mr. Romanow.

Mr. Huber told Mr. Hrutka and Mr. Graham to write out a report. He also asked Mr. Graham to look for evidence of marijuana smoking. Mr. Hrutka testified that he returned to his office and had no further contact with Mr. Grebinski, Mr. Romanow or Mr. Huber until they joined him in the security office just prior to the grievors leaving the premises.

On cross-examination Mr. Hrutka was challenged as to whether he could tell the difference in smell between American cigarettes and marijuana. He was quite certain that he knew the difference in the smell of smoke from American cigarettes, marijuana and Canadian cigarettes.

**(c) The Testimony of Dale Huber**

Mr. Dale Huber is a twelve year employee of the Company. On February 2<sup>nd</sup> and 3<sup>rd</sup>, 2000, he was temporarily performing the duties of production foreman. At the time of the hearing, he had returned to his normal duties.

Early in the morning of February 3<sup>rd</sup> he received a call from a security guard asking whether anyone was supposed to be working in the 24" mill since it was in "shut down" mode. He told the security guard that no one was supposed to be in the mill. He then was told that two employees were found "smoking drugs" there. He immediately went to the 24" mill where he found the two security guards, Mr. Graham and Mr. Hrutka. As he was standing talking to them, Andy Romanow walked by quite close to Mr. Huber. Mr. Huber asked, "What's going on?"; to which Mr. Romanow simply shrugged. Mr. Huber testified that at that time Mr. Romanow was about one foot away from him.

Mr. Huber testified that he noticed a distinct smell of marijuana smoke on Mr. Romanow's person. He was confident that it was the smell of marijuana since he testified that he has used a lot of marijuana in the past. He also testified that the lingering smell of marijuana smoke is detectable on clothes. He did not smell any marijuana odour on Mr. Grebinski but testified that he did not get close to him.

Mr. Huber and the two security guards went into the electrical room. While in there Mr. Grebinski and Mr. Romanow re-entered the room. After apparently overhearing a discussion about possible marijuana smoking, Mr. Huber recalls that one or both of the grievors said that they had been doing nothing wrong. He simply told them to return to work in the spiral mill. He did not tell them to refrain from working.

When Mr. Huber returned to the foreman's office, he called his supervisor, Steve Getzlaff. Shortly after Mr. Grebinski and Mr. Romanow spoke to Mr. Huber suggesting that odour that was noticed was Mr. Romanow's American cigarette. They asked Mr. Huber to call the security guard to determine whether this might have been the case. Mr. Huber complied and called Mr. Graham. Mr. Graham's response was that it clearly was not tobacco smoke odour from an American cigarette that he noticed.

Mr. Huber testified that Mr. Getzlaff arrived about one hour after he called him. When he arrived he met with Mr. Huber, the grievors and a shop steward, Mr. Al Gibbons. Mr. Getzlaff told the grievors they would be escorted from the premises and sent home. He called the security guards to carry out the escort. At this point Mr. Grebinski said he was going back to get his jacket. In the interim the security guards arrived, and the group, including Mr. Romanow, waited for the return of Mr. Grebinski. After some considerable time, Mr. Getzlaff called the security office and was told that Mr. Grebinski had gone directly there. It was Mr. Huber's testimony that he, and the others in the group, were expecting Mr. Grebinski to return to the foreman's office to be escorted to the security room and then completely off the premises.

In cross-examination, Mr. Huber agreed that the first time the grievors knew they were being accused of smoking marijuana was when they overheard his conversation with the two security guards in the electrical room. He conceded that they immediately denied it. He also indicated that when he and the two security guards walked into the electrical room, the room was very cold as if the door had been left open.

On being questioned as to precisely what information was relayed to him by the security guards, he indicated that Mr. Graham told him that he saw Mr. Grebinski with a marijuana cigarette near his mouth and he saw "something go out the door".

Mr. Huber was cross-examined carefully with respect to a written statement he made on the morning of February 3<sup>rd</sup>. In this statement he wrote "I could smell something on his clothes. I don't know what it was. I then told them to go back to the spiral and do their jobs. I talked to Lorne and Mike some more and asked, "are you sure what you saw?" Lorne said, "yes," I then told them to make out a report. They said, "okay."

Mr. Huber was asked why on February 3<sup>rd</sup> he wrote that he smelled "something" on Mr. Romanow's clothes and now he was testifying that what he smelled was definitely marijuana. Mr.

Huber's response was that he did not want to implicate his co-workers therefore he "softened" his written statement.

Mr. Michael Carr, Vice-President and Director of Personnel, later testified that in his interview with Mr. Huber he impressed upon Mr. Huber the importance of telling the truth as to what had occurred. He testified that only after he had done so, did Mr. Huber, somewhat reluctantly, say that what he smelled on Mr. Romanow was, in his opinion, marijuana smoke.

Also in cross-examination it became clear Mr. Graham had told Mr. Huber that he saw Mr. Grebinski either "puffing" or "smoking" what he believed to be a marijuana cigarette. In response, Mr. Huber asked Mr. Graham whether he was sure of what he saw. He responded positively. In his testimony at the hearing, as has been outlined, Mr. Graham indicated that he actually did not see Mr. Grebinski puffing on a cigarette but he believed he saw a marijuana cigarette in the hands of Mr. Grebinski and it was close to his mouth.

Mr. Huber, and other employer witnesses, testified that the grievors were not supposed to be in the closed down mill. Indeed, there is a specific regulation about employees leaving their work area.

Finally, Mr. Huber outlined his experience with drugs including marijuana. It was his evidence that he used drugs from the age of 16 up until 1996 when he went through an extensive rehabilitations program. He does not now use any drugs.

**(d) The Testimony of Steve Getzlaff**

Steve Getzlaff, the General Foreman in the spiral mill, testified that he received a call from Dale Huber early in the morning of February 3<sup>rd</sup>. Mr. Huber reported to him that security guards had "caught" Mr. Grebinski and Mr. Romanow smoking marijuana on the premises. Mr. Getzlaff called his superior, Mr. Jim Clark, the Works Manager of the Pipe Division. Mr. Clark advised him to attend at the mill, immediately remove the grievors from the premises and suspend them pending investigation.

Mr. Getzlaff arrived at the mill at approximately 2:40 a.m. Upon arrival he spoke to Mr. Graham and Mr. Hrutka who reported their findings to him. He then met with Mr. Grebinski, Mr. Romanow, Mr. Huber and Mr. Al Gibbons, the shop steward. Mr. Getzlaff testified that he questioned the grievors as to why they were in the 24" mill when they were not supposed to be there



when it was shut down. He was told that they went to the 24" mill for lunch. He was also told that Mr. Grebinski was interested in seeing the computers in the mill. Mr. Romanow, who usually works in the 24" mill when in operation, was going to show him the computers there. He advised the grievors that they would be suspended from employment and immediately escorted from the premises by the security guards.

Mr. Getzlaff testified his intention, that the security guards would escort Mr. Grebinski and Mr. Romanow from the mill area to the security office, then off the premises was made clear to the grievors. Mr. Grebinski then said he had to get his jacket from the mill. Mr. Getzlaff said that would be okay. When Mr. Grebinski did not return after about ten minutes, Mr. Getzlaff called the security office and was told that Mr. Grebinski was in fact there.

While the security guards escorted Mr. Romanow to the security room, Mr. Getzlaff and Mr. Huber went to the electrical room. There they looked inside and outside the double doors for any evidence of fresh cigarette butts. They found no fresh butts of either marijuana cigarettes or regular tobacco cigarettes. Mr. Getzlaff's evidence was that there were a few old cigarette butts around the back door of the electrical room. This varied somewhat from Mr. Graham's testimony which was that there were several cigarette butts near the door.

On cross-examination Mr. Getzlaff was questioned closely as to precisely what the security guards told him. He responded that the security guards did not go into detail, just simply that they "had caught two guys smoking dope". He was told they saw one of the employees flick a butt out the door and that they smelled marijuana in the room. Mr. Getzlaff inquired as to whether they were sure of what they saw and smelled, they responded in the affirmative. He told them to make good notes of the incident. We now know that Mr. Graham did not see Mr. Grebinski, or anyone else, flick a butt out the door or anyone actually taking a drag on a cigarette.

#### **(e) The Testimony of Michael Carr**

Mike Carr, the Vice-President and Director of Personnel, was not present at the mill during the shift when the incidents took place. However, Mr. Carr investigated the situation beginning on the morning of February 3<sup>rd</sup> and ultimately made the determination to dismiss the grievors.

After meeting with Mr. Clark and another member of the management team, (Mr. Ron Armstrong), a meeting was convened with the grievors, the local union president (Mr. Bill Topp) and several others. In all nine people were involved in the meeting. Prior arrangements had been

made for a drug screening test for the grievors and their lockers had been searched. The only things found in the search of particular relevance to the present case were a package of cigarette papers and a package of Winston cigarettes in Mr. Romanow's locker.

In the meeting a total of five people were interviewed: the two grievors, Lorne Graham, Mike Hrutka and Dale Huber. Mr. Carr chaired the meeting and asked most of the questions.

The grievors apparently were interviewed together. They explained that they went to the 24" mill for lunch. Mr. Romanow wanted to see improvements that he had heard were made in the mill since it was shut down the previous September. He was scheduled to return to work there on the following Monday when production would resume. Mr. Romanow stated that as he was on the way to the mill, he met Mr. Grebinski expressed an interest in seeing the computer in the 24" mill.

The two employees walked to the 24" mill building, entered it, proceeded to the lunchroom and made coffee. Mr. Romanow ate his lunch there while Mr. Grebinski had coffee, having consumed his lunch earlier.

The grievors related to Mr. Carr, and the others at the meeting, that they walked to the electrical room where Mr. Romanow began smoking an American cigarette. Mr. Grebinski complained about the smoke so Mr. Romanow stepped outside to smoke the cigarette while Mr. Grebinski stayed inside, leaving the door partly open. They witnessed a security guard come into the electrical room and do his punch in. Both denied that they were smoking marijuana at work. Also they knew that they were not supposed to be in the 24" mill.

At one point in recounting the events, Mr. Romanow said that he had flicked away (presumably outside) the butt of the cigarette that he was smoking. Mr. Grebinski interjected and corrected him saying that Mr. Romanow had flushed the cigarette butt down the toilet in the lunch room.

In the meeting the grievors mentioned that they were casual marijuana smokers. Mr. Carr asked them when they had last smoked marijuana off the work premises and he was told, or understood to be told, that each had smoked marijuana within the last 48 hours. As a result of this information, the drug screening test was cancelled since a positive test would be meaningless in assisting to determine whether the grievors had smoked marijuana at work on the morning of February 3<sup>rd</sup>. Mr. Carr understood from the grievors' response that each had smoked marijuana on

their last day off prior to the shift in question, which would have been Tuesday, February 1<sup>st</sup>. The cancellation of the screening test was mentioned in the meeting.

Messrs. Graham, Hrutka and Huber were each interviewed independently. According to Mr. Carr, he and the others were concerned with the lack of physical evidence thus they wanted to be certain that the smoking of marijuana by the grievors had actually occurred. The impression that Mr. Carr received from Mr. Graham and Mr. Hrutka was that they were certain of the smell of marijuana in the electrical room. They shared with the meeting their reasons for their certainty: primarily their own experience with marijuana smoking in the past as well as experience with the smell of American cigarettes. Mr. Graham also spoke of Mr. Grebinski having in his hand what appeared to be a marijuana cigarette.

In the interview Mr. Huber was less than clear with respect to what he thought he had smelled on the clothes of Mr. Romanow. It was at this point that Mr. Carr in effect lectured him about his obligation to tell the truth. After indicating his reluctance to do so, Mr. Huber told the meeting that the smell he noticed on Mr. Romanow when he met him was, in his opinion, the odour of marijuana smoke.

After the meeting, Mr. Carr discussed the situation with his management colleagues. In addition to the information they had from Mr. Huber and the two security guards, they discussed the fact that Mr. Grebinski had left to get his jacket but did not return to the foreman's office to be escorted off the premises. Negative inferences were drawn from Mr. Grebinski's conduct; mainly, that he had plenty of opportunity to remove any evidence of marijuana that may have been in his jacket or in his locker or even possibly in the locker of Mr. Romanow. After some discussion, it was concluded that the parties were, according to the testimony of Mr. Carr, "more likely than not smoking marijuana on the work premises". As a result the decision was taken to discharge them.

The following day (February 4<sup>th</sup>) another meeting was held at 3:00 p.m. In this meeting the grievors were advised that their employment had been terminated. Mr. Grebinski took the news quietly simply indicating that it was unfair because he had not been smoking marijuana. Mr. Romanow became very angry and verbalized his anger through the use of some relatively injudicious language. In his anger, he left the room slamming the door causing \$500.00 damage. Mr. Romanow has subsequently apologized to Mr. Carr and others in writing.

At the outset of his testimony, Mr. Carr spoke generally about drugs in the workplace. He said the major concern is safety since large powerful machines are being operated moving about

heavy equipment and product. The use of alcohol and drugs in the workplace has been a common topic of business in the joint management/union Occupational Health and Safety Committee. Also Mr. Carr outlined some marijuana remnants or paraphernalia have been found on the premises in the past. In service workshops have been carried out for employees and spouses with respect to drug abuse with the co-operation of the employer, the union and the involvement of the Occupational Health and Safety Committee.

In cross-examination of Mr. Carr a number of areas were covered. One concern was the differences in Mr. Huber's story from his written statement compared to what Mr. Carr reported was said in the February 3<sup>rd</sup> meeting and what was testified to by Mr. Huber. Mr. Carr explained this as being a "false sense of loyalty on behalf of Mr. Huber's part for his fellow workers and fellow union members". Only when pressed, did Mr. Huber become forthright to what he actually believed he smelled on Mr. Romanow. In response to a suggestion by Mr. Kilbride that Mr. Carr pressured Mr. Huber into changing his story, Mr. Carr denied that he did so and made a repeated reference to the false sense of loyalty that he believed Mr. Huber possessed initially.

Also Mr. Carr was questioned as to why the security guards, primarily Mr. Graham, would not have confronted the grievors immediately upon smelling the smoke. The suggestion in cross-examination was that had he done so they would have had an opportunity to clarify matters immediately. Mr. Carr explained that the role of security personnel is not to confront employees unless a safety issue is concerned. Rather, their job is to report such incidents to be dealt with by managers or other supervisors. Mr. Carr conceded that it was wrong for Mr. Huber to allow the grievors to go back to work after he believed they had been smoking marijuana.

Finally, Mr. Carr was questioned with regard to the importance that he, and other management personnel, placed on the fact that they believed that Mr. Graham had seen Mr. Grebinski puffing on a cigarette in the electrical room. As outlined above, Mr. Graham did leave that impression initially but later indicated that he did not actually see Grebinski smoking the cigarette but only holding it near his mouth. Mr. Carr responded that that information was definitely a contributing factor in determining his response at the time. Nevertheless, he maintained that even without direct evidence that Mr. Grebinski was puffing on the cigarette he was of the view that Mr. Graham, Mr. Hrutka and Mr. Huber were telling the truth, and what they saw and smelled was accurate and consistent with marijuana cigarette smoking.

**(f) The Testimony of David Grant, Al Machuik and Jeff Bruch**

The union called three witnesses in addition to the grievors. None of the three were direct witnesses to the alleged incident, but one of them worked with Mr. Romanow immediately after the alleged incident. Mr. Jeff Bruch, a nine year employee with the Company, worked with Mr. Romanow later during the work shift in question. He testified that he noticed no impairment or peculiar behaviour on the part of Mr. Romanow nor did he smell marijuana smoke on his clothes or person. He also testified that Company Rule No. 16, (which will be reproduced later), concerning leaving one's work area, is commonly breached.

Mr. Al Machuik, a 32 year employee with the Company, now retired, also testified that Rule No. 16 was commonly breached and rarely enforced. He said that employees often roamed from department to department. He conceded, however, that such movement was usually for work reasons but that permission was rarely sought. He elaborated that if one wanted to go see someone in another work area it was easy to find a work reason to do so.

Mr. Machuik has worked with Mr. Grebinski and Mr. Romanow. He observed that Mr. Romanow often smoked American cigarettes but that he has never seen either of the grievors in the possession of drugs or alcohol, or being under the influence of drugs or alcohol. He offered that on one occasion he in fact reported a fellow worker for being under the influence of alcohol at work.

Mr. David Grant, the Chief Shop Steward at the mill, gave evidence with respect to practices in the mill. He testified that it was common for people to smoke everywhere in the mill except the lunch room. He also indicated that it was a common practice for employees to move around to other departments at the work site particularly to get coffee or to have lunch. There are some places where it was more pleasant to have lunch than others.

Mr. Grant spoke about Mr. Romanow's smoking of American cigarettes. Mr. Romanow has a part interest in an outfitting business which caters to American hunters and fisherman. As a result, he is often given U.S. cigarettes which he smoked.

On cross-examination, Mr. Grant was asked by Mr. LeBlanc whether he had ever entered the 24" mill when it was closed. His response was that he had never done so.

**(g) The Testimony of Orest Grebinski**

Mr. Grebinski is an eleven year employee of IPSCO who has been unemployed for most of the time since his termination. He has a spouse and three children. His dismissal has had a profound effect on his life as well as the life of his family. Mr. Romanow was not in the hearing room when Mr. Grebinski testified.

Mr. Grebinski recalls that at about 12:50 or 12:55 a.m. on February 3<sup>rd</sup> he took his lunch break. He had already eaten his lunch on the job but was taking a break to have coffee. He met Mr. Romanow who was also just beginning his lunch break. Mr. Romanow was carrying a "take out" lunch bag from a local restaurant. He told Mr. Grebinski that he was "going to the 24" mill to look around because he was scheduled to go back to work there on the following Monday". Mr. Grebinski said that he was going for coffee to which Mr. Romanow responded, "Come with me and we'll make coffee there".

The two grievors walked from the spiral mill to the 24" mill, entered the mill and went straight to the lunch room where they made a pot of coffee. While Mr. Romanow ate his lunch, Mr. Grebinski drank coffee. Mr. Grebinski testified that they talked about Mr. Romanow's outfitting business. At about 1:15 a.m. Mr. Romanow lit a cigarette. It was Mr. Grebinski's evidence that he complained about the smoke because he had quit smoking two years before. He found the cigarette smoke to be somewhat annoying and possibly tempting. Mr. Romanow said, "Well, let's go for a walk." They left the lunch room to proceed toward the electrical room which was next door. Mr. Grebinski said something to the following effect, "It's kind of nice that a mill can run without a computer." Mr. Romanow responded, "There is a computer here too". They then went into the electrical room where Mr. Romanow showed Mr. Grebinski one or more computers that were in the room behind a glass case.

As Mr. Romanow continued to smoke his cigarette he opened the door of the electrical room which led outside. Mr. Romanow stepped outside and commented on how nice the weather was. As Mr. Grebinski was nearing the door on his way out he heard and saw a security guard come in. He says that he was startled because he did not expect to see anyone there.

Mr. Grebinski said to the security guard, Lorne Graham, "Hello". Mr. Graham mumbled something back to Mr. Grebinski and continued on his way to do his punch in. Mr. Graham was in the room approximately 10-15 seconds and then left. Mr. Grebinski stayed near the door talking to Mr. Romanow.

In examination in chief, Mr. Grebinski was asked about notes made by Mr. Graham which read, "I was patrolling the 24" mill when I came across two men in the electric room. One had something in his hand what looked to be marijuana from the smell in the room. The other man was outside the door with a cup." Mr. Grebinski testified that he may have had something in his mouth, like a coffee stir stick or a pen, because he often chewed on things. He offered that what Mr. Graham might have thought was a cigarette was in fact something else although he could not recollect precisely what that might have been.

On cross-examination Mr. Grebinski was asked why he did not mention anything being in his mouth when he was interviewed on February 3<sup>rd</sup>. His response was that he did say something about, perhaps, "picking [his] nose or chewing [his] mustache". he conceded, however, that he said nothing about a pen in his mouth or a stir stick in his mouth.

When the grievors left the electrical room, they returned to the lunch room for another coffee. It was at this point, according to Mr. Grebinski and Mr. Romanow, that Mr. Romanow used the toilet and flushed down the butt of the American cigarette that he was smoking. As they were having another coffee, two security guards entered the room. We now know this was Mr. Hrutka and Mr. Graham. Mr. Grebinski recalled Mr. Hrutka saying to Mr. Romanow, "How's it going?" and then he left. The security guards were in the room only 5-10 seconds.

A few minutes later, Mr. Romanow said, "Let's go back to the spiral mill. First I will clean the coffee pot. You go check the door in the electric room to be sure it is locked properly". According to Mr. Romanow, he asked Mr. Grebinski to check the electrical room outside door because often it did not latch even though it had a spring closer. Mr. Grebinski went to check the door which took approximately 30 seconds.

As Mr. Grebinski was walking back to the lunch room he saw Mr. Huber with the two security guards. Also, he saw Mr. Romanow near Mr. Huber and he saw him "shrugging" in response to something Mr. Huber said.

Mr. Huber asked Mr. Grebinski what he was doing and he simply responded that he was closing the door. Mr. Huber then said, "Were you smoking?" To which Mr. Grebinski responded, "I don't smoke", then continued on to join Mr. Romanow.

When he rejoined Andy Romanow he asked him if he knew what was going on. Mr. Romanow said he was not sure but "let's go and find out". They then returned to the electrical room.

where they overheard one of the security guards say the word "pot" or "marijuana". Mr. Grebinski asked Mr. Huber, "What's going on?". Mr. Huber responded, "Go back to work".

Mr. Grebinski testified it was at that time that he understood they were being accused of smoking marijuana. Mr. Romanow appeared to have the same belief; he then told Mr. Huber something to the effect that they had been doing nothing wrong. Mr. Grebinski returned to work and received work instructions from his foreman, Ken Syth. He indicated that he spoke to Mr. Syth for a few minutes and was very close to him. Mr. Syth mentioned nothing to him about a odour on him or about he (Grebinski) being impaired.

Later in the shift Mr. Grebinski went to the foreman's office for coffee. In the office with Mr. Huber was Mr. Romanow. Mr. Huber told them that the security guards had smelled something and were going to write out a report. Mr. Romanow said he had been smoking an American cigarette and asked Mr. Huber to call security. Mr. Huber did call Mr. Graham to ask if it was possible that what Mr. Graham smelled was an American cigarette. Apparently he received a negative response to that inquiry.

A short while later Steve Getzlaff arrived as did Al Gibbons, a shop steward. Mr. Getzlaff advised Mr. Grebinski and Mr. Romanow that they would be escorted off the property. Mr. Grebinski testified, "I went to get my jacket and since I was half way to the Hilton I just walked over to the Hilton". The Hilton is the operations building in which the security office and the employees' lockers are located.

Mr. Grebinski testified that he picked up his jacket and went straight to the locker room to change. He did not remove any marijuana or any evidence incriminating him in the use of marijuana from either his jacket or his locker. Once he got to the operations building he changed his clothes and went to the security office where he was asked to empty his pockets by one of the security officers.

In his recollection of the meeting which occurred at 11:00 a.m. on the morning of February 3<sup>rd</sup>, Mr. Grebinski testified that he had told Mr. Carr that he had smoked marijuana recently on his days off. As previously outlined, Mr. Carr understood this to have occurred within the previous 24 hours. Mr. Grebinski, however, in his testimony at the arbitration hearing said that he had smoked marijuana two weekends previously, the weekend of January 22<sup>nd</sup>. A full nine days prior to February 3<sup>rd</sup>. Clearly, at the very least there was a miscommunication between Mr. Carr and Mr. Grebinski.



Another possibility is that Mr. Grebinski stated two different things in the meeting of February 3<sup>rd</sup> and in his testimony at this hearing.

Mr. Grebinski testified that he and Mr. Romanow were not social friends whatever. He was not aware that Mr. Romanow was a casual marijuana smoker until he heard it from him in the February 3<sup>rd</sup> meeting.

In his testimony Mr. Grebinski challenged the evidence with respect to what Mr. Graham claims he saw in his hand and what he smelled. He agreed that the testimony of Mr. Hrutka was accurate except that Mr. Hrutka was mistaken with respect to what he smelled. Mr. Grebinski was adamant that neither he nor Mr. Romanow were smoking marijuana on the work shift and that he feels a strong injustice has been done. Also, he took the position that he was not given an adequate opportunity to explain or to tell his side of the story. This was challenged on cross-examination. Mr. Grebinski was reminded that the meeting on February 3<sup>rd</sup> lasted one hour during which time he had ample opportunity to tell his side of the story. Mr. Grebinski's response was that the meeting was more of an interrogation by Mr. Carr and that he was not given an opportunity to fully explain his version of events. It will be remembered, that the local president, Mr. Topp was in attendance at that meeting. Although an issue arose between Mr. Topp and Mr. Carr with respect to Mr. Topp's questioning of the security guards, there was no evidence to suggest that Mr. Topp, Mr. Grebinski or Mr. Romanow expressed any concern about not being given an opportunity to explain the events of the early morning of February 3<sup>rd</sup> at the meeting.

Mr. Grebinski testified that he only saw Mr. Romanow light up one cigarette in the lunch room which he carried with him to the electrical room and then back to the lunch room. In his estimation, they were in the electrical room only about 3-4 minutes before returning to the lunch room which was only about a 30 second walk.

When cross-examined as to why they went to the mill, Mr. Grebinski said that Mr. Romanow wanted to have a look at the mill to see if any improvements had been made since its shutdown. Mr. Grebinski was asked about a reference in notes taken at the February 3<sup>rd</sup> meeting by Mr. Ron Armstrong, to the effect that Mr. Grebinski wanted to see the computers in the mill. Mr. Grebinski responded both responses were correct. According to Mr. Grebinski, later his statement about there being no computers was made in the 24" mill not when they were leaving the spiral mill.

In cross-examination Mr. Grebinski testified that when he went back to the electrical room to check the door that it was ajar. He then closed the door fully.

Mr. Romanow invited him along. Consistent with Mr. Grebinski's evidence, Mr. Romanow stated that he and Mr. Grebinski have not socialized at all outside of the workplace.

At the 24" mill the two grievors went to the lunch room, made coffee and Mr. Romanow ate his lunch. He recalls that the conversation turned to a discussion of a web page for the outfitting business of which he is part owner.

After he finished eating his lunch, Mr. Romanow recalled that he poured a coffee and lit up a cigarette. Mr. Grebinski then said to him, "Does that thing ever stink". Mr. Romanow responded, "Let's go out", and the two left the lunch room walking toward the electrical room. When they arrived in the electrical room, Mr. Romanow showed Mr. Grebinski the computer in the room. As they stood there talking, Mr. Grebinski once again said, "Does that thing ever reek". At that point Mr. Romanow opened the door leading outside so as to diminish the smoke that Mr. Grebinski was complaining about. Mr. Romanow walked out of the door and noticed that it was a very warm winter evening, which he commented upon. As Mr. Grebinski was walking toward the door, Mr. Romanow noticed a security guard enter the electrical room. Mr. Romanow said, "Hi" to him, but heard nothing in response. The security guard, who we now know was Mr. Graham, was in the room for 20-30 seconds.

Mr. Romanow said to Mr. Grebinski, "Let's have another coffee". They then went back to the lunch room where Mr. Romanow recalled using the toilet and flushing down the remnant of the cigarette he had just finished smoking.

The two grievors sat down to have coffee. Shortly after, two security guards walked into the room. We now know these guards were Mr. Graham and Mr. Hrutka. Mr. Hrutka said to the grievors, "How's it going", to which Mr. Romanow replied, "Fine". He recalled that Mr. Hrutka walked very close by him and then the two security guards left the room.

When the grievors finished drinking their coffee Mr. Romanow cleaned up. As he did so he asked Mr. Grebinski to go back to the electrical room to check the door because he knew that it did not always latch properly although it was spring loaded. After cleaning up, Mr. Romanow left the lunch room and walked toward the conveyor line of the 24" mill intending to return to the spiral mill. There he saw the two security guards with Mr. Dale Huber, his supervisor. Mr. Romanow's evidence was that Mr. Huber stopped and said to him, "What the hell is going on," to which Romanow responded, "I don't know". Mr. Huber then said, "Go back to work".

Mr. Romanow waited for Mr. Grebinski to catch up with him. He recalls that either he or Mr. Grebinski said, "What's going on?" Since neither of them knew, they decided to go back to the electrical room. When they arrived at the electrical room, they saw Mr. Huber, Mr. Graham and Mr. Hrutka. Mr. Grebinski asked what was going on. They got no response other than a command from Mr. Huber to go back to work.

Mr. Romanow testified that Mr. Grebinski said that he had heard the three mention the word "pot". When told this, Mr. Romanow said to Mr. Huber and the two security guards, "We were not doing anything wrong". Again Mr. Huber simply said, "Just get back to work".

Mr. Romanow went back to the spiral mill and returned to work. During this time, he met Mr. Jeff Bruch and had a conversation with him. After about 30 minutes work, he went into the foreman's office where Mr. Huber was located. Mr. Huber told Mr. Romanow that he and the security guards were going to do a report on the grievors. According to Mr. Romanow, this was the first time he realized that he was being accused of something. Mr. Huber and Mr. Romanow were then joined by Mr. Grebinski in the foreman's office.

When he realized that he was being accused of smoking pot, Mr. Romanow told Mr. Huber that he had been smoking an American cigarette. Mr. Grebinski then said to Mr. Huber, "Call them and tell them it was an American cigarette". Mr. Huber told them that he had already called Steve Getzlaff but nevertheless, he did call Mr. Graham and asked if what he had smelled could have been an American cigarette. Apparently he got a negative response from Mr. Graham.

Mr. Romanow recalled that Mr. Getzlaff arrived and that Mr. Al Gibbons, a shop steward, was called into the foreman's office. Mr. Getzlaff advised the grievors that he had been instructed by Mr. Clark to suspend them indefinitely and that they would be escorted off the property immediately. No explanation was asked for from the grievors. Mr. Romanow's recollection is that Mr. Getzlaff simply said, "Security is going to escort you off the property". At that time Mr. Grebinski said, "I'm going to get my coat". Mr. Romanow recalled that they waited 5-10 minutes for security guards to arrive and then he was escorted to the operations building. There he changed his clothes under escort of one of the security guards. Also he gave the guard one cigarette from a package of Winston cigarettes, an American brand.

Mr. Romanow's recollection of the February 3<sup>rd</sup> meeting was very vague. This he attributed to the fact that when he left the IPSCO site he was very upset and did not sleep at all that night. He did recall however the February 4<sup>th</sup> meeting in which he and Mr. Grebinski were told that they were

terminated. He recalled losing his temper and slamming the door. He said by that time he had gone two full nights without sleep because he was very distraught about the events of the previous two days. He later apologized in writing to Mr. Carr and the others in attendance at the February 4<sup>th</sup> meeting.

Mr. Romanow testified that he is a casual marijuana user and he had smoke marijuana on Tuesday, February 1<sup>st</sup>, the day before the beginning of the shift in which the incident occurred.

On cross-examination, Mr. Romanow indicated that he had been in the 24" mill the previous Sunday. The mill was in shutdown mode at that time. He also clarified that he had had two cigarettes during the lunch break in the early morning of February 3<sup>rd</sup>. The first cigarette he had immediately after lunch in the lunch room. The second cigarette he lit up in the lunch room, carried it with him to the electrical room and then back to the lunch room where he disposed of it in the toilet.

Mr. Romanow also acknowledged that he was aware that employees were not supposed to go to work sites other than the one to which they were assigned to work. This had been told to them at a toolbox talk relatively close to the time of the incident. With respect to the fact that he had taken longer than a 30 minute lunch break on this occasion, he admitted that he had often done so. He also stated that he was not aware that other employees had been disciplined for doing so.

Mr. LeBlanc carefully questioned Mr. Romanow with respect to what happened to the cigarette that he smoked in the electrical room. It will be recalled that in the February 3<sup>rd</sup> meeting Mr. Romanow said that he had flicked it away but he was corrected when Mr. Grebinski reminded him that he had flushed it down the toilet. In his evidence in chief, Mr. Romanow testified that he did flush it down the toilet in the lunch room. In pursuing this matter in cross-examination, the following exchange occurred:

LeBlanc: In February 3<sup>rd</sup> meeting you said you flicked away the cigarette.

Romanow: Yes.

LeBlanc: Then Mr. Grebinski corrected you.

Romanow: Yes. I simply did not remember.

LeBlanc: But because of what you were accused of you should have been careful with your answer.

Romanow: I was very tired.

LeBlanc: It was an obvious question. A natural question.

Romanow: I did not think that it was important, or an obvious question. My first response was to say I flicked it.

Mr. Grebinski, in response to Mr. LeBlanc's questions, testified that he did not understand that he was to return to the foreman's office to be escorted out of the mill. It was his understanding that he, and Mr. Romanow, would be escorted off the premises from the security office. Mr. LeBlanc challenged this statement indicating that the security office is on the perimeter of the premises, and the area of concern for the employer was between the mill and the security office which included the lockers. Mr. Grebinski's response was simply that he had not understood that he was required to go back to the foreman's office to be escorted from there.

Finally, when asked once again about how close to February 3<sup>rd</sup> he had smoked marijuana, Mr. Grebinski indicated that he would have had no problem going for a marijuana scanning test. It is unfortunate that this offer was not made clear at the February 3<sup>rd</sup> meeting by either Mr. Grebinski or someone on his behalf.

**(g) The Testimony of Andy Romanow**

Mr. Andy Romanow, one of the two grievors in this case, has been employed with the Company for twelve years. At the time of his dismissal he was a crane operator working in the spiral mill. His usual work assignment was in the 24" mill when it was in operation. Mr. Romanow is a single father of two children. Mr. Grebinski was not in the hearing room when Mr. Romanow testified.

Mr. Romanow recalled that in the early hours of February 3<sup>rd</sup>, during the 7:00 p.m. to 7:00 a.m. shift, he took a lunch break at the usual time between 1:00 and 1:30 a.m. He indicated, however, that it was common to take a lunch break longer than the allowed one half hour. On this occasion he had ordered food from Houston Pizza.

Mr. Romanow testified that he had decided to go to the 24" mill to eat his lunch which he had often done before when the 24" mill was in shutdown. Because he was scheduled to begin working there again the following Monday, he wanted to see some of the changes that he had been told were made in the mill. The changes he had heard about included an upgraded coil lifter, the installation of a long boom and some improvement work in the west end of the mill. Also, Mr. Romanow stated that he liked to go to the 24" mill for peace and quiet to get away from the noise of the operating spiral mill.

As he was leaving the spiral mill, Mr. Romanow met Mr. Grebinski. Although he was intending to go to lunch by himself, when asked by Mr. Grebinski if he (Grebinski) could join him,

Mr. Romanow was also asked why he and Mr. Grebinski decided to return to the electrical room after they had been told by Mr. Huber to return to work. Mr. Romanow's response was that he was curious since something appeared to be of concern to Mr. Huber and the two security guards.

And finally, when questioned about his understanding with respect to being escorted off the property, Mr. Romanow seems to have understood that he and Mr. Grebinski were to have been escorted from the mill area. He recalls waiting for Mr. Grebinski to return.

## **WORK RULES**

The Company has an Employee Conduct Guide which contains numerous work rules and regulations. The pertinent provisions are the following:

7. The possession and/or use of alcohol and/or narcotics on company property, or reporting to work under the influence of alcohol and/or narcotics, is strictly prohibited.
16. Employees must obtain permission from their supervisors to leave their work area. They must also receive permission from the supervisors in those departments to talk to employees in other departments.

## **DISCIPLINE PROCEDURE**

Employee violations of IPSCO work rules jeopardize the company's and other employee's performance and productivity. In many cases failure to comply with the work rules may endanger the safety and welfare of other employees. The company therefore intends that violations will be dealt with through disciplinary action.

The responsibility for discipline lies with the supervisory staff. Supervisors are expected to deal with most violations of work rules as employee performance problems, to be corrected through such means as clarifying employees' understanding of the work rules, orientation, training, and reprimands. Disciplinary action will only be taken if an employee persists in inappropriate behaviour, or, where the infraction of a work rule is deemed to be so serious in its actual or possible consequences that disciplinary measures must be applied immediately.

Employees should expect that disciplinary action will be applied consistently and progressively, that is, similar violations will be subject to similar disciplinary actions, and more severe disciplinary action will be issued for more serious and/or frequent rule infractions.

Disciplinary action at IPSCO consists (1) written warnings; (2) suspension from work, without pay, for various lengths of time; (3) dismissal.

In most instances of misconduct, disciplinary action will progress through these stages. Nevertheless, employees should be aware that certain acts of misconduct (such as, but not limited to, possession and/or consumption of alcohol and/or narcotics on company plant property, theft, or deliberate damage to property, falsification of company records and certain safety rule violations) are viewed by the company to be so serious as to demand the employee's termination of services. In such cases, the first offense will result in the employee's immediate indefinite suspension and recommendation for dismissal. Certain other acts of misconduct will be considered serious enough to warrant no less than a suspension from work, without benefit of a written warning, and perhaps dismissal depending on the circumstances. (Examples: fighting, insubordinate behaviour, reporting to work under the influence of alcohol and/or drugs, and safety rule violations).

## **THE ARGUMENTS**

### **(a) The Employer's Argument**

The burden of proof is upon the employer to establish that it had just cause to terminate the grievors. The employer's case turns on the interpretation of the evidence. As a result, the argument of the employer focused upon the evidence which pointed to a conclusion that the grievors were smoking marijuana while on duty.

Without repeating the entire sequence of events that occurred that evening, I will outline the salient facts relied upon by the employer. First, it was pointed out that the grievors were in an out-of-bounds area. It was argued there was no valid reason for them to be in the 24" mill other than the desire to be in an isolated place for the purposes of smoking marijuana undetected.

Mr. Graham smelled marijuana smoke when he first entered the electrical room and, according to his evidence, saw Mr. Grebinski holding what appeared to be a marijuana cigarette. Mr. Hrutka testified that the smell of marijuana in the electrical room was "moderately strong" when he entered the electrical room a few minutes after being called by Mr. Graham. And finally, Mr. Huber testified that he noticed a distinct smell of marijuana smoke on the clothes of Mr. Romanow when he briefly spoke to him shortly after being called to the scene by the security guards. The employer

argued that the three witnesses had no motive for not telling the truth and that the accuracy of their perceptions, which were consistent with each other, should be accepted. It was noted that the three witnesses were not strangers to the smell of marijuana smoke. All three admitted to smoking marijuana. In the case of Mr. Graham, he had previous work experience as a security guard dealing with people whom he caught smoking marijuana. It was pointed out that Mr. Huber had been a reluctant witness against his co-workers and had nothing to gain from the evidence that he gave. Indeed, there was evidence that Mr. Huber suffered some retribution from his co-workers for his willingness to be an, albeit reluctant, witness. Finally, on this point, it was argued that all of the three primary witnesses were firm in their evidence on cross-examination. While there may have been some inconsistencies with the earlier version of their evidence, in essence all were certain that what they smelled was marijuana smoke. Also all three, who are either smokers or ex-smokers, stated categorically that they could distinguish the smell of marijuana smoke from the also familiar smell of American cigarettes.

The Company also characterized the actions of Mr. Grebinski when he removed himself from the foreman's office to retrieve his jacket as very suspicious. The employer maintains this clearly gave Mr. Grebinski the opportunity to destroy any evidence of marijuana smoking. It was asserted that Mr. Grebinski clearly understood that he was expected to return to the foreman's office to be escorted to the operations building and the security office. Reference was made to notes taken by the shop steward that evening, which were read into the record at the arbitration hearing, to the following effect:

Steve said he had to get Security to take them to the Hilton and to their lockers. Orest said he had to go and get his coat so we waited for him to return. Soon thereafter a Security Guard came in and said Orest was at the change room (must have walked there). Security Guards then took Andy and left.

It was argued that Mr. Grebinski clearly ignored the directions of Steve Getzlaff in order to seize the opportunity to destroy evidence.



A number of other factors arising out of the evidence were referred to and relied upon by the employer. They included the following:

- The grievors told no one in the spiral mill where they were going to have lunch.
- The grievors had no work related reason to be in the 24" mill and had not sought permission to be there. This was in breach of Plant Rule No. 16 and a directive given at a tool box meeting.
- In the aftermath of the incident, the grievors advanced a story about Mr. Romanow wanting to go to the 24" mill to see improvements or changes there. Yet, there was no evidence that while in the mill the grievors looked for any improvements or changes. Also Mr. Romanow had been there the previous Sunday when he would have had an opportunity to see any improvements or changes.
- The grievors could provide no credible explanation for being in the electrical room. Reference was made to a number of statements made prior to the hearing, during the investigation stage, wherein the following explanations were given:
  - Company notes of the second meeting indicate that "Andy was showing him the computer room—Orest uses computers daily and just wanted to see them".
  - Union notes record "I told Orest the PLC was different here than it was on the spiral mill and I showed him" (statement of Mr. Romanow).
  - Mr. Grebinski stated in the February 2<sup>nd</sup> meeting "we were talking about computers and he said he will show me the computer room".
  - In a statement written February 3<sup>rd</sup>, and read into the record, Mr. Romanow stated "I told him that the PLC set-up was different over here. So I took him to the PLC room".

It was pointed out that in his testimony Mr. Grebinski displayed a distinct lack of knowledge about computers and did not know what the acronym PLC represents.

- In his evidence at the hearing, Mr. Grebinski suggested that Mr. Graham, Hrutka and Huber fabricated or exaggerated their evidence. No grounds were established to suggest that this was the case.
- The employer argued that the grievors' evidence with respect to the discarding of the butt of the cigarette smoked in the electrical room was very suspicious. First, at the investigation

meeting. Mr. Romanow stated that he had flicked the butt, however, this was contradicted by Mr. Grebinski who stated words to the effect "no, Andy, remember that you kept it in your hand, walked into the lunch room and flushed it down the toilet?" The suggestion by the grievors is that after smoking a cigarette nearly to completion in the electrical room, Mr. Romanow walked out of the electrical room door where there were cigarette butts in the vicinity and past a smoking area equipped with ashtrays in order to flush the butt down the toilet. The employer argued that the interjection by Mr. Grebinski about flushing the butt down the toilet was a fabrication because he knew that a fresh Winston cigarette butt would not have been found, hence the story of flushing the butt down the toilet had to be created.

- The grievors did not leave the 24" mill immediately after lunch. Rather, they hovered around the mill and re-entered the electrical room. It was argued that this was suspicious behaviour because at that point no one had suggested marijuana consumption.
- The grievors attempted to get Mr. Huber to support their story by requesting him to suggest to the security guards that Mr. Romanow was smoking an American cigarette.

In summary, the employer argued that all of the events in the early morning of February 3<sup>rd</sup> pointed to the grievors going to the shut down 24" mill for the purposes of smoking marijuana on their break. It was argued that the elaborate story told by the grievors, and is consistent with innocence was fabricated. Most importantly, it was argued, that the evidence of the three primary witnesses was indeed truthful and accurate with respect to what they saw and smelled.

Numerous arbitral authorities were referred to by Mr. LeBlanc which involved employees using marijuana at work. I will briefly review the cases relied upon by the employer and will make reference to some of them later in the award.

In *Re-Con Building Products Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Loc. D-400* (1997), 62 L.A.C. (4<sup>th</sup>) 20 (Taylor), two employees were dismissed for smoking marijuana in a parking lot during a shift break. A supervisor had noticed that the grievors were not in the plant and upon observing two figures in a vehicle in the parking lot, decided to approach the vehicle. As he did so, he recognized the grievors and observed them passing a lit object from one to the other. When the supervisor walked up to an open window of the vehicle, he described an odour of marijuana. A meeting was immediately convened in the

presence of the shop steward. At the meeting both the employees denied smoking marijuana. The employee who owned the vehicle denied a request to inspect it on the basis that marijuana butts would be found in the ashtray because he smoked marijuana on the weekends. In the absence of physical evidence, the arbitrator nevertheless found on a preponderance of evidence that the grievors had been smoking marijuana. The arbitrator upheld the discharge referring to an employer policy that provided for termination for alcohol and drug use during the course of employment.

The next case referred to by the employer was *Re Fraser Lake Sawmills and I.W.A.—Canada Loc. 1-424*, December 27, 1996 (Devine), summarized at 46 C.L.A.S. 317. In this case two employees were observed during a lunch break next to a lumber pile passing a cigarette like object back and forth. When confronted by two supervisors, the cigarette was flicked away by one of the grievors. According to the testimony of the supervisors, there was a smell of marijuana smoke in the area. Additional testimony of a police officer was that the employees appeared to be impaired from the use of a drug. A search of the area failed to turn up any physical evidence of a marijuana cigarette. The arbitrator upheld the termination. In addition to emphasizing the need for deterrence, the arbitrator also found that the grievors denial of wrongdoing made it extremely difficult to entertain any penalty other than dismissal despite the significant seniority of the employees and their good discipline records.

A case with some similarities to the present matter is *Ecco Heating Products Ltd. and Sheet Metal Workers' International Association Local Union No 280*, August 12, 1992 (Chertkow). Although the dismissed employees' conduct when caught smoking something was much more indicative of guilt than the present facts, the conduct nevertheless was circumstantial. Arbitrator Chertkow accepted that three witnesses who testified that they smelled marijuana smoke were accurate in their perceptions. Arbitrator Chertkow stated, "I accept, as he did, the lay test of 'the nose knows'. I disbelieve the grievor when he says he was only smoking an American brand cigarette".

The employer made reference to *Re McDonnell Douglas Canada Ltd. and Canadian Automobile Workers, Local 1967*, (1990) 14 L.A.C. (4<sup>th</sup>) 235 (Gorsky). In this case the only evidence

of smoking marijuana was a strong odour of marijuana smoke noticed by supervisors. The arbitrator accepted this evidence as proof that the employees were smoking marijuana. Also, the arbitrator found that both employees were equally culpable since neither of them came forward with evidence to exculpate himself. Ultimately, however, the arbitrator reinstated the grievors with a lengthy suspension.

The employer cited numerous other cases where arbitrators have upheld terminations for drug possession or use at work. Several of the cases elaborate upon the threat which is posed by the use of illegal drugs in safety sensitive industries. On this point arbitrator Picher in *Re Canadian Pacific Limited and United Transportation Union* (1987), 31 L.A.C. (3d) 179 (Picher), said the following:

There was a time, in the 1960's, when a substantial body of opinion held that "soft" drugs, and marijuana in particular, were relatively benign substances which posed no substantial threat. Those days are gone. Two decades of experience with accidents, both industrial and non-industrial, sometimes tragic in their proportions, caused by the use of prohibited drugs, have gradually affirmed the conclusion that involvement with illegal drugs, including marijuana, poses a dangerous threat to health and safety.

Several other cases were cited with respect to penalty primarily on the point of untruthfulness. Where arbitrators have found an offence has been committed and the employees have been untruthful in owning up to it, this militates against mitigation of penalty. Also numerous cases were cited by the employer with respect to the culpability of an employee who acquiesces in the misconduct of another employee.

#### **(b) The Union's Argument**

The essence of the union argument was that the employer failed to meet the standard of proof imposed upon it by arbitral authorities. Indeed, at the close of the employer's case, a non-suit motion was brought by Mr. Kilbride on behalf of the union. Although the motion was denied, many of the arguments put forward in support of the motion were reiterated in final argument.

The union referred to *Re City of Edmonton and Amalgamated Transit Union, Local 569* (1985), 23 L.A.C. (3d) 84 (Thomas), with respect to the required standard of proof. In that case reference was made to a decision in *Bater v. Bater*, [1950] 2 All E.R. 458, where Lord Denning said with respect to civil cases:

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which would require if considering whether negligence were established. It does not adopt so high degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

Arbitrator Thomas concluded that in cases of serious personal misconduct the standard of proof must be met by "clear and cogent evidence". Numerous other arbitral authorities have held employers to a similar standard where criminal or quasi criminal conduct is involved or even conduct of a serious nature falling short of criminal.

Mr. Kilbride, on behalf of the union, argued that there was no direct evidence of the grievors smoking pot. In making its determination to dismiss the grievors, the Company appeared to rely on Mr. Graham's statements that he saw Mr. Grebinski actually smoking what appeared to be a marijuana cigarette. In his testimony at the hearing, however, Mr. Graham said that he in fact did not see Mr. Grebinski actually smoking the cigarette. Rather, he only saw him holding what appeared to be a marijuana cigarette close to his mouth.

The union challenged the evidence of the three primary witnesses, not on the grounds of untruthfulness but on the basis that they were incorrect in their perceptions. Mr. Graham, who first saw the grievors, was only in the room 10-15 seconds. He did not confront the grievors but continued on his rounds before calling his supervisor. It was suggested that if Mr. Graham had thought a serious offence was being committed, he would not have taken the few extra minutes to continue his rounds before calling his supervisor. Furthermore, it was strongly suggested that Mr. Graham should have confronted the grievors when he first saw them because that would have given them a full opportunity to prove their innocence.

It was argued that the actions of the grievors were consistent with them not smoking marijuana. If they had been actually caught smoking marijuana by Mr. Graham, presumably they would have removed themselves from the electrical room and area immediately. However, they went back to the lunch room for another coffee. Also, the employer would suggest that they carried a marijuana cigarette with them to flush down the toilet. It was argued that this simply is not conduct that two reasonable people would engage in if they had been caught committing a serious workplace offence.

The union theory is that the case against the grievors is built on a rather "small and shaky foundation". When Mr. Graham called Mr. Hrutka, he told him that he had just "caught" two employees smoking marijuana. This, it was argued, predisposed Mr. Hrutka to supporting Mr. Graham's version of events. Mr. Graham had stated his findings in quite unambiguous terms, thus tainting Mr. Hrutka's version of events. Similarly, when Mr. Huber was called onto the scene he was of the belief that the grievors had been caught smoking marijuana. Precisely what was told to Mr. Hrutka and Mr. Huber by Mr. Graham is not known but, it was argued, it may have included statements about puffing on the cigarette and taking a drag. These statements were made by Mr. Graham earlier in the investigation but later recanted. If this was the case, the perception of Mr. Hrutka and Mr. Huber may have been affected because they were expecting to smell marijuana.

At the hearing Mr. Huber testified that he smelled marijuana smoke on the clothes of Mr. Romanow. The union challenged this statement because earlier, in a written statement, Mr. Huber had only stated he smelled "something" on Mr. Romanow's person. It was argued that if Mr. Huber had in fact smelled marijuana, he would not have told the two grievors to go back to work.

It was pointed out in argument that the decision to terminate the grievors by Mr. Carr, and other management personnel, was based on their belief that Mr. Graham had seen Mr. Grebinski actually smoking a marijuana cigarette. It was questioned in argument whether the decision to terminate would have taken place had that misinformation not been before Mr. Carr and the other

management personnel. Mr. Kilbride made several other points challenging the evidence of the employer. They included the following:

- Mr. Graham's evidence is not as strong as suggested by the employer. For instance, in cross-examination Mr. Graham did not appear to know that different types of marijuana have different smells.
- Mr. Graham originally said, and repeated it in the investigation, that he saw Mr. Grebinski bring something to his mouth and take a drag. Later he acknowledged that he did not see Mr. Grebinski take a drag.
- Mr. Huber was told by Mr. Graham that he saw Mr. Grebinski throw away the cigarette. In his testimony, however, Mr. Graham says he did not see Mr. Grebinski throwing anything away. Would Mr. Grebinski have stood there with a marijuana cigarette in his hand after being seen by a security guard?
- Mr. Carr in his evidence indicated that Mr. Graham was not authorized to confront employees except in exceptional circumstances. However, on cross-examination Mr. Graham indicated that he did not know why he did not confront the grievors.
- Mr. Huber's evidence "flip flopped badly". In his original written statement he stated he did not know what the smell was. Then, when pressed by Mr. Carr, he changed his story.
- When Mr. Grebinski asked Mr. Huber in the foreman's room to call security to determine if what they had smelled might have been an American cigarette, it was not an effort to subvert evidence. It was simply an effort to set the record straight because in fact Mr. Romanow had been smoking an American cigarette.
- The evidence characterized as suspicious when Mr. Grebinski went to get his jacket and did not return to the foreman's office is weak. Had Mr. Grebinski wanted to destroy evidence he would have had ample opportunity to do so prior to the time when he got his jacket. More than one hour had passed and he could have gone to his locker during his shift to engage in his supposedly evidence destroying activity.
- It is acknowledged that Plant Rule No.16 was breached, but the evidence was that it is not consistently enforced when breached in the past.
- The grievors' evidence was not successfully challenged on cross-examination. The grievors' version of events is consistent with two employees simply wanting to have lunch in a quiet place and to see the workplace of one of them.

- The grievors were denied an opportunity to demonstrate their innocence at the first opportunity and now they are placed in the position of trying to explain numerous trivial events upon which the employer is relying.
- The evidence concerning throwing the cigarette butt in the toilet is evidence of a very natural occurrence. Would Mr. Romanow walked back to the lunch room with a marijuana cigarette in his hand? The more accurate interpretation is that he carried back a regular cigarette, continued to smoke it and then flushed it down the toilet when he was using the toilet.

In addition to the *Re City of Edmonton* case referred to earlier, the union referred to numerous other cases. The first one, which was also relied upon in support of the motion of non-suit, is *Re General Tire Canada Inc. and United Rubber Workers, Local 536* (1991), 24 L.A.C. (4<sup>th</sup>) 234 (Blair). In that case, the facts of which are quite similar to the present ones, the arbitrator held that the evidence of the smell of marijuana was not by itself sufficient to establish guilt. As a result, it was held that a *prima facie* case had not been established and that a motion of non-suit was granted.

Another case relied upon by the union was *Re Cominco Ltd. and The United Steelworkers of America, Local 480* (Thayer) (unreported, October 20<sup>th</sup>, 1994). On facts similar to the present matter wherein two witnesses smelled marijuana, but there was neither physical evidence nor evidence of impairment, it was concluded that the Company had failed to prove that the grievor committed the alleged act. Of the 19 point findings of facts set out in the award by arbitrator Thayer, it was observed by Mr. Kilbride that the present case seems to share 15 of those 19 points. Again, further reference will be made to this case later.

The union also referred to *Re O.K. Economy Stores and U.F.C.W., Local 1400* (1982), 6 L.A.C. (3d) 79 (Ish), where an employee was reinstated after fraudulently changing price tags, for her benefit, on products in the store where she worked. Aside from this case, no argument was made that the employees should be reinstated if the finding is that they had in fact smoked marijuana.

Mr. Kilbride distinguished many of the previous arbitration cases relied upon by the employer. He pointed out that the evidence relied upon the arbitrator in the marijuana smoking cases



cited by the employer was much stronger than in the present case. In most of those cases the supervisors either immediately confronted the grievor, or there was physical evidence, or the conduct of the employees suggested wrongdoing on their part.

In short, Mr. Kilbride summarized his argument as being a case where the employer has contrived a theory of culpability out of a minutia of detail surrounding innocent events that occurred early in the morning of February 3<sup>rd</sup>. Part of the theory developed during the investigation was based upon a mistake with respect to what Mr. Graham had actually seen. Also, had Mr. Graham simply confronted the employees when he first saw them in the electrical room they would have had an opportunity to exonerate themselves. As a result of this failure, they are placed in the position of proving their innocence in response to purely circumstantial evidence.

#### **ANALYSIS OF LAW, ANALYSIS OF FACTS AND CONCLUSION**

There is considerable arbitral jurisprudence with respect to the use of drugs and alcohol in the workplace. Much of it has to do with the standard of proof and sufficiency of evidence questions. Similarly, these are the paramount issues in the present case.

With respect to the standard of proof that is applicable, reference previously was made to the *City of Edmonton* case, referred to by the union, which held that in a case involving an allegation of harassment of a fellow employee, the arbitrator took the view that the standard of proof must be met by "clear and cogent evidence". Arbitrator Thomas stated:

It is thus misleading to suggest that in cases where discharge or discipline is grounded in allegations of employee conduct that is criminal or quasi-criminal arbitrators have required the employer to establish its case according to a standard of proof that falls between the criminal and civil burdens of proof. Rather, like the Courts, arbitrators have applied the flexibility inherent in the civil burden in requiring that allegations of criminal or quasi-criminal misconduct must be proven by clear evidence or with reasonable probability commensurate with the gravity of the conduct with reasonable probability commensurate with the gravity of the conduct alleged and the seriousness of the consequences to follow if the allegations are proved: see, e.g., *Re Allen Industries Canada Ltd. and U.A.W. (1971)*,

23 L.A.C. 121 (Weatherill); *Re Air Terminal Transport Ltd. and Fuel, Bus, Limousine, Petroleum Drivers & Allied Employees, Local 352 (1970)*, 22 L.A.C. 143 (Brown).

The conduct alleged in the instant case is not criminal or quasi-criminal. It is, however, serious personal misconduct which might tend to establish a marital offence and could have serious repercussions for the reputations and lives of the employees concerned. This board is therefore of the view that the burden upon the employer to satisfy the board of the truth of its allegations upon the balance of probabilities must be discharged by clear and cogent evidence.

In this case the city makes allegations of serious personal misconduct against the grievor, namely, assault, intimidation by threatening words and actions and intentional damage to city property. We find that the principles stated above are applicable to the situation which we are faced with on the evidence in this case. In summary, in meeting the applicable standard of proof to a balance of probabilities, we are of the view that the standard must be met by "clear and cogent evidence".

This quotation makes clear that the arbitral jurisprudence does not require the criminal standard of proof beyond a reasonable doubt be met in cases where criminal misconduct is alleged. Rather, the civil burden of proof still applies but perhaps in a more exacting manner. Arbitrator Thomas did not apply the criminal burden, but, because of the serious consequences of the offence alleged, applied a standard that is more onerous than a mere "more likely than not" test (see Brown and Beatty, *Canadian Labour Arbitration* (3<sup>rd</sup> ed. (2000) at para. 7:2500). In essence the authorities (see *Bater v. Bater* quoted from above) acknowledge that there may be degrees of probability within the civil standard and that as the gravity of the conduct increases, together with the consequences to follow if the allegations are proved, so does the burden to prove the allegation increase.

In the present case the conduct alleged is serious particularly in terms of the consequences that have been visited upon the grievors. Also, a criminal offence is alleged, albeit a relatively minor one. In light of these consequences and the criminal nature of the conduct, the proof required must be convincing; the standard must be met by "clear and cogent evidence". In addition to the jurisprudence which has gone in this direction, it seems that this is a commendable common sense approach which I will adopt in the present case.

The evaluation of evidence is within the complete discretion of the arbitrator using his or her best judgment. Past arbitral jurisprudence may give some insight with respect to findings in similar fact situations, but it cannot displace the duty of the arbitrator to weigh the evidence in the instant case. Reference has already been made to numerous cases cited by the parties in argument in which, on facts similar to the present matter, arbitrators arrived at different conclusions with respect to culpability.

The union relied upon the *General Tire* case in its motion for non-suit and again in its final argument. There two supervisors noticed two employees in an area where their duties would not normally take them. However, there was nothing particularly unusual about the employees being in that area: it was not considered to be out-of-bounds. The area was outside of the building and it would not be unusual for employees to take a smoke break outside in the fresh air.

One of the supervisors smelled what he believed to be marijuana. His experience with marijuana was not as a smoker, but he had been in situations where others were smoking what he was told was marijuana. The supervisors confronted the employees but did not directly accuse them of smoking marijuana. After the employees left the area, a marijuana cigarette butt was found. There was no evidence that the grievors were impaired or were acting unusually in any manner. Also, in a subsequent interview one of the grievors in anger kicked a wall hard enough to leave a hole in it.

Arbitrator Blair ultimately found that the evidence adduced lacked the overall cogency and consistency to make out a *prima facie* case. In his opinion, the evidence did not establish with any real degree of probability that the marijuana cigarette was ever in the possession of the grievors. Also there was little reason to conclude that the cigarette had been dropped on the ground in the recent past. The arbitrator was of the view that other objects on the ground may have been overlooked because the search was rather cursory. It was found that the evidence was capable of more than one interpretation and did not only lead to the conclusion that the grievors were sharing a marijuana cigarette. With respect to the marijuana smell, it did not persist very long leading the arbitrator to conclude that the odor may have originated elsewhere. A final factor was that there was nothing

inherently suspicious about the conduct of the two grievors in leaving their work area and going outside. The arbitrator offered that had they acted in a surreptitious manner in leaving or "gone to a more hidden area, their conduct might have created an inference that they were up to no good". However this was not the case.

As is obvious, there are many similarities in the facts of the *General Tire* case with the present matter. However, there are some differences as well. The evidence of the smell of marijuana smoke by the supervisors was relatively weak. There was only one supervisor who had limited knowledge of the smell of marijuana. In the present case, we have three witnesses who gave testimony about the smell of marijuana all of whom have smoked marijuana in the past and all of whom were confident that they could distinguish the smell of marijuana smoke from American cigarette smoke. Also a distinguishing feature in the present case is that the grievors did go to an area on the IPSCO premises where they, by their own evidence, did not expect to see anyone else.

The cases cited by the employer in evidence were also quite similar to the factual situation before us. However, in most of the cases there were some differences such as evidence of impairment or clear evidence of grievors attempting to hide their behaviour, such as running away. In the *Ecco Heating* case (*supra*) the arbitrator accepted the smell of marijuana smoke as evidence that the grievor was smoking marijuana. However, in addition to the smell of the smoke there was suspicious conduct on his part when he was caught. He actually physically pushed the person who confronted him. In addition, the arbitrator found that marijuana discovered in a lunchroom belonged to the grievor, although it was not directly related to the incident in question.

A case very similar to the present one, perhaps the one most similar of those referred to by the parties, is the *McDonnell Douglas* case (*supra*). In that case arbitrator Gorsky found that a *prima facie* case had been made based on the evidence of employer witnesses who testified that they smelled marijuana. The area in which the grievors were thought to be smoking marijuana was an out-of-way area which led to suspicions about their reasons for being there. The arbitrator did not accept their explanation that they were smoking regular cigarettes. One additional factor was that the

grievors in the *McDonnell Douglas* case attempted to run away when discovered. With respect to the smell of marijuana smoke the arbitrator had the following to say concerning his findings:

In the circumstances, a *prima facie* case has been made that the odour noticed by the employer's witnesses was that of marijuana. I am satisfied that this aroma is not to be confused with cigarette smoke and no other reasonable explanation was furnished by either Mr. Levigne or Mr. Swalwell as to the nature of the substance which created the odour described by the employer's witnesses. As the grievors have not furnished a satisfactory explanation to refute the identification of the substance by Messrs. Johnston and Liebischer, I conclude, on a balance of probabilities, that the grievors were in possession, of habit-forming drugs on company premises contrary to plant rule No. 10. (at page 240)

The conclusion that the odour in the room was that of marijuana smoke was the most troubling aspect of the case. Mr. Noonan was frank in acknowledging that he was not relying on any scientific test that the substance was marijuana and based his assertion on a lay test of "the nose knows".

While none of the employer's witnesses were experts in the identification of marijuana, the giving of opinion evidence is not, in all cases, restricted to professionals with expertise in a field. The identification of handwriting, the detection of alcohol use and estimates of speed and distance can be made by non-experts, subject to the weight to be given to their evidence perhaps being less than in the case of similar evidence given by professional experts. (at page 242)

In the present case, there is a conflict between the evidence of the various witnesses who testified on behalf of the Company and that of the grievors. In attempting to weigh and assess the evidence of the various witnesses, I will follow the guidance of the British Columbia Court of Appeal in the often quoted case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354, where the late Mr. Justice O'Halloran observed at page 57:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a

trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half of the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

It is to an assessment and a weighing of the evidence that I will now turn.

The evidence relied upon by the employer to establish that the grievors were in possession of and smoking marijuana is circumstantial evidence. From the employer's perspective, it would be much preferable to have direct evidence to support its allegations. However, in many cases a fact finder must make findings based solely upon circumstantial evidence. This is not unusual. My task is to determine whether the circumstantial evidence is cogent, similar to what my task would be if the evidence was direct. In making this determination, not only must I assess the credibility of the witnesses but also the accuracy of their perceptions.

..

At the outset I must point out that there was no evidence to cause me to conclude that the grievors were impaired, or, in the words of rule No. 7 "under the influence of ... narcotics". Also, there were not untoward consequences that occurred in the plant on the morning of February 3<sup>rd</sup> which could be attributed to the conduct of which the grievors are being accused.

The strongest evidence pointing to the possession and use of marijuana by the grievors was the observations of Mr. Graham, Mr. Hrutka, and Mr. Huber. There is no doubt in my mind that these three witnesses were being truthful in their testimony. All three were very forthright on the stand and presented their evidence in a fair and balanced manner. I did not get the impression that any of them were exaggerating their testimony; on the contrary, rather than embellishing their testimony they stated what they believed their perceptions to be in a relatively minimalist fashion.

Mr. Graham, for instance, readily admitted that he did not actually see Mr. Grebinski puffing on a cigarette but that it was a conclusion he had arrived at when he saw what appeared to be a marijuana cigarette close to Mr. Grebinski's mouth. Also, there are no grounds whatever for suspecting that there was any *animus* toward the grievors. The two security guards, who are not employees of the Company, had no previous association with Mr. Grebinski or Mr. Romanow. Mr. Huber, their supervisor, obviously knew them reasonably well. However, Mr. Huber was reluctant to make statements that would implicate them in the wrongdoing of which they are now accused. I accept the evidence that Mr. Huber had to be coaxed into telling what he truthfully believed he perceived. Indeed, the fact that Mr. Huber has testified has caused problems for him at work. There was pictorial evidence of graffiti written on a wall at the plant aimed at Mr. Huber accusing him of being a "rat". The exact language used was a bit more colourful than portrayed here. It is important to note, however, there was no evidence whatever that the grievors were a party to the negative attention received by Mr. Huber.

As Mr. Justice O'Halloran stated in the *Faryna v. Chorny* case (*supra*), the mere conclusion by a fact finder that a witness is telling the truth is only one half the task. In addition, a fact finder must determine whether the evidence is correct, or possibly whether a witness has made a mistake. In this case it is possible that the odour smelled by Mr. Graham, and later by Mr. Hrutka and Mr. Huber, was not marijuana smoke. The grievors testified that Mr. Romanow was smoking an American brand cigarette which has a stronger smell than cigarettes made from Canadian grown tobacco.

All three witnesses were questioned carefully by both counsel with respect to the accuracy of their perceptions. None of the three are strangers to the smell of marijuana smoke or to the smell of American brand cigarettes. Mr. Graham openly admitted that he has smoked marijuana. In addition, in his job as a security guard he testified that he often had to deal with people who were smoking marijuana. This was when he was working in a downtown Regina retail mall. Based on this experience, he maintained throughout his testimony a certainty with respect to what he had smelled in the electrical room. In addition, he was certain about what he saw in the electrical room. He saw

Mr. Grebinski across the room, which is not a large room, holding what appeared to be "a roll your own" cigarette similar to a typical marijuana cigarette. In addition, he was holding it in a manner in which marijuana cigarettes are commonly held. This is where the cigarette is held with two fingers underneath the person's hand. Although Mr. Graham was in the electrical room for only about 10-15 seconds, he was clear in his testimony with respect to what he saw and smelled. Based on his past experience with marijuana and marijuana smokers, I place considerable weight upon his testimony. Also, Mr. Graham's demeanour was one of quiet confidence.

Mr. Hrutka was called to the lunchroom and electrical room by Mr. Graham. When he arrived, the grievors were in the lunchroom. When he later entered the electrical room with Mr. Graham, it was his testimony that he smelled marijuana smoke. In the investigation immediately following the hearing he stated that the smell was a "strong smell" of marijuana. In answers to questions put to him by Mr. Kilbride on cross-examination, he varied his observation to describing it as "moderately strong". Mr. Hrutka, like Mr. Graham, was certain that the pungent odour that he smelled was marijuana smoke. He testified that he has smoked marijuana and was familiar with the smell of American brand cigarettes. He was certain he could tell the difference and he was certain that what he smelled on the morning of February 3<sup>rd</sup> was marijuana smoke. Again, based upon the past experience with marijuana of Mr. Hrutka, and his credibility and demeanour as a witness, I am inclined to place some considerable weight in the accuracy of his testimony.

Mr. Huber testified that he smelled marijuana smoke on the clothing of Mr. Romanow when he briefly met him and spoke to him after he was called by the two security guards. Clearly, if this was the only evidence of marijuana smoking, it would be quite insubstantial. Even in the context of the evidence of Mr. Graham and Mr. Hrutka, in my view it cannot be given considerable weight. Nevertheless, given Mr. Huber's past history with marijuana and other drugs, and his clear reluctance to implicate the grievors in any wrongdoing, his evidence is corroborative of that of the two security guards. Another factor is important. It will be recalled that when the two security guards and Mr. Huber went into the electrical room, they found the room to be very cold. This would be consistent with the door being left open which would be consistent with actions of the part of the grievors to



clear the smoke out of the electrical room. When this is put together with the perceptions of the three primary witnesses, I come to the conclusion that a *prima facie* case has been established by the employer which points to Mr. Grebinski and Mr. Romanow being in possession of and using marijuana at the workplace. The question that I must now address is whether the explanations given by the grievors, and the evidence offered on their behalf, is sufficient to rebut this finding.

Of course an important factor in the circumstances which lead me to the conclusion that a *prima facie* case has been made out, is the location at which the grievors were perceived to be smoking marijuana. The fact that the grievors were in a building that was in "shut down" mode, contrary to Company rules, is somewhat suspicious. The breach of the Company rule in itself perhaps is not terribly telling. I accept the evidence of the union that it was not unusual for workers to move from one department to another for the purposes of having lunch or having coffee, especially when there were friends in the other department. It seems that the breach of Rule No. 16 occurred usually where employees move from one department to another where the department is operating. In the present case, the 24" mill was shut down and it was expected that no one would be on those premises. Indeed, Mr. Grebinski testified that when he saw Mr. Graham enter the electrical room he was surprised because he was not expecting anyone to be there.

In the investigation meeting the grievors were asked why they had gone to the 24" mill. Apparently the reason given by Mr. Romanow was that Mr. Grebinski wanted to see the computers that were there. In testimony at the hearing, the two grievors indicated that that was not the primary reason they were there. When Mr. Romanow met Mr. Grebinski at the beginning of the lunch break, he said that he was going over to the 24" mill to see what changes or improvements had been made there since it had been shut down. Both grievors were consistent in their testimony that the discussions about the computers only occurred once they were in the 24" mill. I am willing to accept that there was not an inconsistency in the grievor's statements in the investigation and their testimony at the hearing. It may be that there was simply a misunderstanding at the investigation stage. However, upon the grievors' version of the events that the primary reason to go to the 24" mill was to see the changes that had been made, some suspicions do arise. There was no evidence that

they actually looked at or for changes in the mill. According to their testimony, when they reached the 24" mill they went into the lunchroom for lunch and coffee, then went to the electrical room where Mr. Romanow smoked a cigarette and where they looked at the computers, they then cleaned up the lunchroom, closed the door in the electrical room and left. They did not testify that they had walked about the mill to see what changes may have been made in preparation for the mill start-up the following week. Also, Mr. Romanow who was the one who was interested in the changes in the mill, testified that he had been in the 24" mill the previous Sunday. It is unclear to me whether he meant two days prior to February 2<sup>nd</sup> or nine days prior to February 2<sup>nd</sup>. In any event, he would have had an opportunity to look around the mill on that occasion.

Another reason given by Mr. Romanow for wanting to go to the 24" mill for lunch was simply for the peace and quiet that it offered. This explanation is as persuasive as the others put forward. Nevertheless, the shut-down mill did offer an out-of-the-way place had the grievors wanted to smoke marijuana without detection. While not determinative in itself, placed alongside the testimony of the three primary employer witnesses, at the very least the grievors' explanations of why they were in the 24" mill do not rebut the conclusions I have arrived at concerning the accuracy and truthfulness of the testimony of Mr. Graham, Mr. Hrutka and Mr. Huber. What I am left with is evidence that there was a strong smell of marijuana in the electrical room and Mr. Grebinski was apparently smoking a cigarette which appeared to be a marijuana style cigarette. This occurred in an area where detection would not have been expected.

I have suspicions with respect to three other aspects of the grievor's version of events. The first is with respect to the disposal of the cigarette butt. In the investigation meeting on February 3<sup>rd</sup> Mr. Romanow indicated that he had flicked away the American cigarette that he was smoking. He was immediately corrected by Mr. Grebinski who reminded him that he had flushed the cigarette down the toilet after they had returned to the lunchroom. My suspicions concerning the grievor's testimony on this point are that Mr. Grebinski's correction of Mr. Romanow offers the only version of events that would preclude finding of an American cigarette (a Winston) butt around the electrical room door. Had in fact Mr. Romanow flicked away the butt, presumably it could have been

discovered with a search and that would have exonerated the grievors. If they in fact were smoking marijuana, it would have been most unwise to flick away the butt. Mr. Kilbride argued that it would have been highly unreasonable after being seen for Mr. Romanow to carry a marijuana cigarette butt back to the lunchroom to flush down the toilet. I agree, it would be unreasonable and not plausible. However, if the marijuana cigarette butt had been disposed of in another manner, such as swallowing, the grievors had to explain the failure to find a Winston cigarette butt. One explanation is that it was flushed down the toilet. Again, I am suspicious of this story and by itself is not determinative of all that much. But the suspicions with respect to this and other aspects of the grievor's versions of the events, together with the evidence of the primary witnesses, leads me in one direction.

It was argued by the union that had the grievors been in fact smoking marijuana they would not have stayed around the lunchroom or the electrical room after being detected. Another interpretation, which is consistent with their culpability, and as argued by the employer, was that they stayed around for the purposes of clearing out the smoke in the electrical room and possibly removing any remnants of marijuana cigarettes. Thus, I find that the remaining in the area is not necessarily consistent with innocence with respect to the allegations. The grievors' explanation of why the electrical room was cold is one that I am reluctant to accept. There was no evidence by anyone other than Mr. Romanow that the latch on the electrical room door was inadequate because of a weak door closer or spring. Without such evidence, I am left with self-serving testimony with respect to this matter.

Finally, I am also suspicious about Mr. Grebinski's testimony surrounding the drug scanning test. It was Mr. Carr's evidence that he clearly understood the grievors to tell him, and the others in the investigation meeting, that each of them had smoked marijuana one or two days prior to February 3<sup>rd</sup>. This caused Mr. Carr to cancel the drug screening test. The grievors knew that a test had been scheduled. In his testimony, Mr. Grebinski said that Mr. Carr was mistaken. Mr. Grebinski stated that he had smoked marijuana some ten days before February 3<sup>rd</sup>. If in fact Mr. Grebinski had smoked marijuana a full ten days prior to February 3<sup>rd</sup> would he not have made that clearly known

in an effort to exonerate himself? The results of a scanning test would be markedly different if a candidate had smoked marijuana ten days prior to the test as opposed to one or two days prior to the test. I find it incredible that Mr. Grebinski would not have made every effort to clear him of the allegations that resulted in the termination of his employment. As a result, I am suspicious about the information the grievors gave the investigation committee concerning the time at which each of them had smoked marijuana prior to February 3<sup>rd</sup>. The information given completely rendered redundant any drug screening test.

After weighing the evidence of all the witnesses including a careful analysis of the grievors' version of the events that occurred on February 3<sup>rd</sup>, I am satisfied that the grievors were in possession of marijuana and were smoking marijuana in the electrical room of the 24" mill February 3<sup>rd</sup>, 2000. The evidence, although circumstantial, clearly points to this conclusion. I accept that the perceptions of Mr. Graham particularly, but also Mr. Hrutka and Mr. Huber, were accurate and their testimony was truthful. I find that the explanations given by the grievors do not rebut the logical conclusions arrived at based on the evidence of the three primary witnesses.

There is some slight doubt that perhaps only one of the grievors was smoking marijuana at the time in question, although this was not strongly argued. In response it can be pointed out that it was open to the grievors to give evidence showing that only one of them was the person in possession of the drug. Each of them chose to make a denial of possession and smoking, and I have found against their assertions. I am reasonably satisfied that they were both either partaking in the smoking of marijuana or complicitous in its coverup.

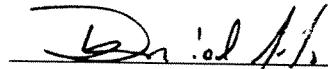
It is usual in dismissal cases for an arbitrator to be charged with making three determinations. Those determinations were set out in the very often quoted case of *William Scott and Co. Ltd.* [1977] 1 Can L.R.B.R. 1 (Weiler). In that case arbitrator Weiler indicated that an arbitrator's task is to first determine whether there are grounds for discipline, if the answer to that question is in the affirmative then to determine whether the discipline imposed was the correct discipline and finally, if it was not the correct discipline, what should be substituted therefore. In this case no argument was made by either counsel with respect to substitution of penalty although some references were made to the issue. It was clear that both the employer and the union view very seriously the consumption of

alcohol and/or illegal drugs in the workplace. Also, there is no doubt whatever that the grievors were aware of the Company's express prohibition in the Employee Conduct Guide against the possession and use of drugs and alcohol at work and the consequences of breaching the prohibition. Indeed, even without an express rule it can be assumed that employees would be aware of such a prohibition. Given the knowledge of the grievor and the express statement in the Employee Conduct Guide to the effect that use of narcotics is strictly prohibited and so serious as to demand the employee's termination of services, it is my conclusion that a substitution of penalty is not appropriate in this case.

The determination made in this case is a very difficult one. The impact upon the grievors and their families is extremely profound and there is no absolute certainty that the findings I have made are correct. However, absolute certainty is not required and the findings I have made I have done so on the basis of applying a clear and cogent test with respect to standard of proof. My conclusions are not based on a slightly "more likely than not test".

For all of the foregoing reasons, the grievance is denied.

Dated at Saskatoon, Saskatchewan, this 2nd day of October, 2000.

  
Daniel Ish, Q.C., Arbitrator