Case Name:

Lehigh Inland Cement Ltd. v. United Cement, Lime and Gypsum Workers (Kuzminski Grievance)

IN THE MATTER OF a Grievance Arbitration
Between
Lehigh Inland Cement Ltd. ("the employer"), and
United Cement, Lime and Gypsum Workers ("the union")
Grievance filed by Robert Kuzminski

[2004] A.G.A.A. No. 98

File No. Alta. G.A.A. 2004-095

Alberta
Grievance Arbitration

F. Price (Arbitrator), G. Johanson (Nominee for the Employer) and J. Haunholter (Nominee for the Union)

Heard: Edmonton, Alberta, October 29, 2004.
Award: December 14, 2004.

(139 paras.)

Absenteeism - Grievor disciplined for failing to report for work and failing to notify the Employer - allegation by Union that Employer discriminated against Grievor because he was President of the Union Local.

Were there grounds for discipline (of some kind)? Did the Employer's General Discipline Policy Guideline apply?

Held (by a majority, Employer's Nominee dissenting) - There was no evidence of prior misconduct by Grievor - on the basis on which the case was put to the Board and the progressive discipline process mandated by the Discipline Policy (part of Collective Agreement), a verbal warning was the appropriate response by the Employer - verbal warning a "pre-discipline" response, not discipline - Grievance allowed. Grievor reinstated.

Appearances:

Counsel for the Employer - Sean Day

Counsel for the Union - Vern Bartee

The decision of the board was rendered by F. Price, Arbitrator, and J. Haunholter, Nominee of Union. Dissenting reasons were rendered by G. Johanson, Nominee of Employer.

AWARD

1 INTRODUCTION

1 The hearing of this grievance took place in Edmonton, Alberta on 29 October 2004. The parties agreed to the composition of the Arbitration Board and agreed that the Board had jurisdiction to deal with the issues arising out of the grievance.

2 Evidence was taken under oath. Five exhibits were filed at the hearing:

1 Collective Agreement - 1 December 2002 - 30 November 2005;
2 Grievance Report, dated 30 June 2004;
3 Letter of termination, dated 30 June 2004;
4 Overtime refusal/call out refusal reporting form;
5 Production Supervisor's Telephone Log, dated 23 June 2004.

3 Exhibits 1, 2 and 3 were filed by agreement between the parties. Exhibits 4 and 5 were introduced into evidence through witnesses presented by the Employer.

4 Towards the end of argument on 29 October, the parties agreed that the General Discipline Policy, executed by the Employer and the Union as an addition to the Collective Agreement on 11 March, 2003, should be entered as an exhibit. Counsel agreed that they would present any further argument they wished on the Discipline Policy by the end of 5 November 2004. By agreement, the General Discipline Policy was filed as exhibit 6, and Counsel presented further (written) argument on the General Discipline Policy, on 4 and 10 November 2004.

1 ISSUE

5 On 30 June 2004, the Grievor was terminated from his employment by the Employer. The basis for the discipline, according to the Employer, was that on 23 June 2004 the Grievor had failed to report for work (overtime) and had failed to notify the Employer, contrary to s. 10.03 of the Collective Agreement, which reads as follows:

> Notice if Unable to Report
>
> Whenever possible, an employee shall give the Company twenty (20) hours notice that he will be unable to report for work. When twenty (20) hours notice cannot be given, the employee must notify the Company

as soon as possible. Failure to comply with the foregoing regulation constitutes absenteeism and subjects the employee to discipline.

6 Both parties asked the Board to restrict its review of the grievance and limit its decision in this Award to whether or not the actions of the Grievor had provided grounds for discipline of some nature. The parties agreed that, if the Board found there were no grounds for discipline, then the grievance would be allowed, and the Grievor would be reinstated. If there were grounds for some discipline, then the parties agreed the matter should be adjourned to allow the parties an opportunity to settle the grievance in light of the Board's decision.

7 The parties agreed that, if the Board determined that there were grounds for discipline, the Board would retain jurisdiction to continue to deal with the matter, in the event the parties were unable to reach a settlement. Counsel for the Employer acknowledged that, as this was a termination, the Employer had the burden of proof to show (in this stage of the hearing) that there was cause for discipline.

8 Counsel for the Employer stated that the matter was straight forward. The Grievor had a duty to report for work on 23 June, but he failed to do so. Under s.10.03 of the Collective Agreement, there is a obligation on an employee to notify his supervisor if he is not able to report to work. In this case, the Grievor had failed to notify the Employer or his supervisor that he would not be coming into work overtime that he had accepted a couple of days before. Counsel for the Employer argued that the matter was deserving of some form of discipline, even though counsel acknowledged that, by itself, this failure to report for work would not warrant termination. All the Board is to address in this decision is whether there was just cause for some form of discipline against the Grievor.

9 The Union submitted that the Grievor had been discriminated against because he had been the Union President for a number of years prior to his termination. If he had not been the Union President, this discipline and termination would not have happened. There should have been no discipline at all.

1 WITNESSES

The following witnesses presented evidence on behalf of the Employer:

1 Darwin Hill

10 Mr. Hill is one of the Production Shift Supervisors at the plant. He has worked for the Employer for the last 27 years. In his first 10 years he was a member of the bargaining unit, and in the last 17 years he has been a member of management.

1 Shane Rocque

11 Mr. Rocque has been a Production Shift Supervisor with the Employer for the last 2 years. Before joining the Employer, Mr. Rocque worked at Sherritt Gordon in Fort Saskatchewan. With Sherritt Gordon he spent 18 years in operations and then moved into a supervisory position. With Sherritt Gordon, he had been sent to various locations around the world to assist in project start-ups.

1 Kent Stuehmer

12 Mr. Stuehmer graduated from the University of Alberta in 1993 with an engineering degree. He is a professional engineer. In 2000, he became the Kiln Superintendent, in charge of all cement production processes at the Employer's plant. He has 6 or 7 supervisors reporting to him and 40 to 60 employees reporting through those supervisors.

The following witnesses presented evidence on behalf of the Union:

1 Bob Kuzminski, the Grievor

13 Mr. Kuzminski started working for the Employer on 14 October 1980. He became the Union President somewhere between 1992 and 1994, and remained Union President until the date of his termination.

1 Gordon Nero

14 Mr. Nero has worked for the Employer for the last 18 years. He occasionally picks the Grievor up to drive him to work when the Grievor is taking an overtime shift.

1 Oksana (Sandy) Nero

15 Mrs. Nero works for the Alberta Human Rights Commission. She was only involved by way of telephone calls on 21 and 23 June 2004.

1 Stuart Bilodeau

16 Mr. Bilodeau is currently the acting President of the Union (since the Grievor's termination). He started with the Employer on 15 October 1991, and has held a number of positions: holiday relief (crusher area), maintenance helper and labourer, vacuum truck. He has been working in the laboratory for the past 2 years. Prior to the Grievor's termination, Mr. Bilodeau had been the Vice President of the Union for between 6 and 12 months.

1 EVIDENCE

17 At the Employer's cement plant there are two production shift times each day: shift one, from 6:00 p.m. to 6:00 a.m. and shift two, from 6:00 a.m. to 6:00 p.m. Mr. Rocque indicated that there are 10 or 11 people on each shift, and these employees do everything from unloading the raw materials through to the finished product. Some 65 railcars a day of limestone arrive to be unloaded and processed and the kiln target is 3,250 tons of clinker per day.

1 21 June 2004

18 On 21 June 2004, Shane Rocque, the Shift Supervisor, was asked to find people to work overtime on 23 June. The primary reason for additional workers was for clean-up purposes, required for safety and maintenance reasons. As well, the blades in the cooler required adjusting, and Maintenance needed one employee to assist with that job. In

assigning overtime to the employees, those available employees who work in the area where overtime is required are called first. Then employees are asked to work overtime based on the amount of overtime they have already worked. Those people who have worked the lowest amount of overtime are given the first opportunity to work overtime.

19 Mr. Rocque reviewed exhibit 4, the overtime reporting form that he had signed for the overtime required on 23 June. This form showed the date on which individuals were requested to work overtime and noted whether or not they accepted or refused the overtime request. Mr. Rocque had signed this reporting form and, following its completion, had returned it to Human Resources (Carol Schweitzer).

20 Three employees were needed for overtime on the 23 June shift two, and 19 employees were listed on the reporting form. Some of these were sick or injured, and others refused the opportunity to work overtime. Three employees were shown as having accepted the overtime: Robert Kuzminski (the Grievor), Glen R. and Tim Jamieson.

21 Mr. Rocque initially testified that he had spoken to the Grievor on 21 June. On cross-examination, however, he testified that he did not remember talking to the Grievor and was not sure that he was the one who had asked the Grievor to work overtime. It could well have been one of the other supervisors, Brett Abrams or Sheldon Brain, who had contacted the Grievor on 21 June 2004.

22 The Grievor testified that the overtime had been arranged at the tailgate meeting at the start of his shift one on 21 June. Sheldon Brain, the supervisor, had told the employees that clean-up was required on 23 June. The Grievor had asked Mr. Brain if he could get back to him. If he was able to get a ride to work, he would be okay to work overtime.

23 Between 7:00 and 7:30 p.m., the Grievor telephoned a co-worker, Gord Nero, who told him that there was no problem, and that he would pick him up on the morning of 23 June. The Grievor thanked Mr. Nero and said he would tell his supervisor. He told Mr. Brain that he had a ride and that Mr. Brain could pencil him in to work overtime. Although the "accepted" time written on the reporting form (exhibit 4) was 18:20, it appears from the Grievor's evidence that it was about an hour later than that, after he had spoken with Mr. Nero, that he actually accepted the overtime.

1 23 June 2004

24 On 23 June 2004, Mr. Rocque arrived at work about an hour before the start of his shift two at 6:00 a.m. With Darwin Hill, the previous shift supervisor, he talked over what happened on Mr. Hill's shift. The two of them were about to drive Mr. Hill to his car in the parking lot, when the telephone rang at 5:50 a.m. in the production supervisor's office. Mr. Hill answered the telephone, and Mr. Rocque was across the desk from him. Mr. Hill explained that all the employees have the telephone number of the shift supervisor's office. That telephone in fact has two lines into it. If the telephone is busy, or if no one answers, the call will switch to voicemail to allow the person calling to leave a message.

25 At 5:50 a.m., the caller was the Grievor, who said he had missed his ride. Gord Nero was suppose to have picked him up. The Grievor asked whether Mr. Nero was at

work. Mr. Hill said he did not know whether Mr. Nero had yet arrived. Mr. Hill testified that the Grievor said that it was okay - he would find a ride in and would keep in touch with Shane Rocque, the next shift's supervisor. The Grievor's evidence was that he told Mr. Hill that he would check with Mr. Nero and get back to Mr. Rocque, but he would obviously be late.

26 The Grievor had no car, and both supervisors knew that he was reliant on other employees to provide him transport to and from work. A fellow employee, Gord Hosak, was his regular ride, as the two of them usually worked on the same shift. It was only when he was working overtime that the Grievor needed transportation from somebody else. Gord Nero had given him a ride to and from work on a number of occasions, when they were both working on the same shift.

27 When Mr. Rocque and Mr. Hill dropped Mr. Hill at the parking lot, they noticed that Mr. Nero's car was in the parking lot.

28 At 6:00 a.m. the shift started with the usual tailgate meeting between the supervisor and the employees, where the supervisor would outline the plans for the day. Mr. Rocque asked Mr. Nero if he had forgotten anything. When Mr. Nero asked what he meant, Mr. Rocque asked him if he had forgotten to pick up the Grievor. Mr. Nero said he did not believe he was meant to have picked up the Grievor.

29 The Grievor gave evidence of making another phone call at around 6:20 a.m. He testified that he had phoned back to see if Gord Nero had phoned in sick, or whether he had arrived at work and forgotten to pick the Grievor up. He believed he phoned the shift supervisor's office. Mr. Rocque denied receiving this phone call.

30 After the tailgate meeting, Mr. Rocque deployed the two other overtime workers to their clean-up jobs. As he knew the Grievor was on his way, but would be late, he assigned him to the maintenance work (helping adjust the blades in the cooler), because the maintenance shift did not start until 7:00 a.m. At 6:30 a.m., Mr. Rocque met with the maintenance personnel about what was scheduled for that day and told them that the Grievor would be their man once he arrived.

31 After the meeting with maintenance, Mr. Rocque telephoned the Grievor at 7:30 a.m. The Grievor answered and said that he was still trying to get to work. Mr. Rocque told him that he had spoken with maintenance and that, as soon as the Grievor arrived, he would be working with maintenance. The Grievor testified that he told Mr. Rocque that it did not look good, but that, if he did find a way to get in, he would call him. Mr. Rocque testified that the Grievor said that he was still trying to get a ride from his 29-year old daughter, and that he would check with an electrical supervisor who lived nearby to see if he had yet left for work. Mr. Rocque suggested that he take a cab to work, but the Grievor said that he did not have the $40 he would need to pay for it.

32 There was a disagreement between Mr. Rocque and the Grievor as to where this 7:30 a.m. phone call came from. Mr. Rocque said that he had used the phone in the shift supervisor's office, because that phone had a speed dial system on it, which included the Grievor's telephone number. Mr. Rocque testified that he did not have the Grievor's telephone number programmed into his cell phone or memorized. The Grievor believed

Mr. Rocque had used a cell phone, but Mr. Rocque testified that he had not used a cell phone. Indeed, he very rarely used the cell phone around the worksite. Because of the noise of the worksite, it is very difficult to hear the cell phone ringing. Mr. Rocque said that because he is a large man, it is difficult for him to feel the cell phone vibrate.

33 The Grievor continued that there had been no answer at his daughter's house, and, when he went to check the supervisor's house, the supervisor had left.

34 In cross-examination, the Grievor testified that he did not contact the Edmonton Transit System until after the 7:30 a.m. phone call, as he never took the bus to or from work. He did not know about the bus time table until he contacted ETS, but said there were no buses which would take him close to the Plant outside peak hours.

35 In the morning meeting that Mr. Rocque had with Mr. Stuehmer, starting at 7:45 a.m., Mr. Rocque reported that the Grievor had not yet shown up to work, but was on his way. Both of them were aware that the Grievor had to get a ride to and from work. Mr. Rocque testified that the Grievor never gave him the indication that he was not going to be able to get in to work at all.

36 Mr. Stuehmer testified that, at the investigation meeting on 25 June, the Grievor had said that he had telephoned back to the shift office around 8:30 a.m., but had not left a message. Mr. Rocque testified that he had not received a call, and no call showed on the log (exhibit 5).

37 At the arbitration hearing, the Grievor said he believed Mr. Rocque had phoned him at 7:30 a.m. using a cell phone. When the Grievor phoned at 8:30 a.m., he had simply pressed "Redial" on his own cell phone. This resulted in his calling back to a number that he believed was Mr. Rocque's cell phone, where there was no answer and no voice mail, so he had not left a message.

38 At 1:15 p.m. on 23 June, Mr. Nero met with Mr. Rocque and Mr. Stuehmer. Mr. Nero had been uncertain as to whether he might have promised to pick up the Grievor. So he had phoned home and checked with his wife. She had told him that he had indeed promised to pick up the Grievor. At the meeting at 1:15 p.m., Mr. Nero told Mr. Rocque and Mr. Stuehmer that he had forgotten. He apologized and said it was his fault that he had not picked up the Grievor. Unfortunately, when the Grievor had originally contacted him on 21 June, Mr. Nero had had a friend over and had forgotten his promise to pick up the Grievor.

39 Mr. Rocque testified that he heard nothing further from the Grievor. Later that day, at around 1:45 p.m., he tried to reach the Grievor by phone. A person answered the phone who Mr. Rocque thought might have been the Grievor's son. He said that the Grievor was at work. Mr. Rocque double-checked to make sure he had not missed the arrival of the Grievor, but he had not arrived at work. No voice mail messages were left on the production shift supervisor's office telephone. Mr. Rocque checked the telephone throughout the day, and no calls came in from the Grievor, and no voice mail had been left. The maintenance work continued without the Grievor, but was slower as a result of his absence. Mr. Rocque testified that it took an extra day to complete the maintenance work with which the Grievor had been going to help.

40 In his evidence, Mr. Stuehmer testified that, after the Grievor did not show up at all on 23 June, he checked the logged calls on the production shift supervisor's telephone. This is the telephone number that all the employees call to contact the shift supervisor or leave voice mail. On 24 June, Mr. Stuehmer made up a log from the records on the telephone itself, and this log was filed as exhibit 5. Shown at 5:51 a.m. was a telephone call that was made by the Grievor. There was no other call by the Grievor shown on the log for 23 June. Mr. Stuehmer testified that he had recorded every telephone call that came into the production supervisor's office from the first call made on 23 June by Stuart Bilodeau at 1:34 a.m. to the call made at 7:03 p.m. Mr. Stuehmer explained that the various 4-digit numbers, beginning with a 2, were all internal plant numbers. The 49011 number shown in the telephone number column in the log was the Grievor's telephone call at 5:51 a.m. The number shown at 7:55 a.m. (780-951-4615) was not the Grievor's contact cell phone number. Mr. Stuehmer confirmed that all the calls received on the production supervisor's telephone between 1:34 a.m. and 7:03 p.m. on 23 June had been recorded on exhibit 5.

1 25 June 2004

41 On 25 June 2004, there was a meeting in Mr. Stuehmer's office with the Grievor, Marvin Steve (a Union representative), Ken Bushko (from Human Resources), Mr. Rocque and Mr. Stuehmer. Mr. Stuehmer testified that this meeting was stated to be an investigation meeting, and the Grievor had explained that his ride had failed to pick him up, and he had telephoned the supervisor (Mr. Hill) around 5:50 a.m. Mr. Rocque had telephoned him at 7:30 a.m. Mr. Stuehmer continued that the Grievor had said that he had telephoned back to the shift office around 8:30 a.m., but did not leave a message. He had been home all day, except for one brief period, when he went out to buy some cell phone minutes from the local convenience store. He agreed that he had accepted overtime for 23 June and told the meeting that he was sorry that he had not got to work. He felt that he was being targeted by management. He had a family and was "a damn hard worker".

1 28 - 30 June 2004

42 After further discussions and internal investigation and a meeting with Human Resources on 28 June, it was agreed that discipline was warranted. The Grievor and Mr. Bilodeau were contacted on 29 June to come to a meeting on 30 June. At the meeting on 30 June, the Grievor was terminated (letter - exhibit 3).

1 Relationship between Management and the Grievor

43 Evidence was adduced by the Union about the continuing bad relationship between Management and the Grievor. The Grievor explained that he was being targeted by Management and he cited some instances that he said showed the attitude of Management towards him.

44 In the first of these instances, in November 2003, the Grievor was called in to work overtime, when an emergency shut down required additional help. Having worked his days off on the weekend as overtime, he was slated to have vacation days on the Monday

and Tuesday. Up early (at 3:30 a.m.) on the Monday morning, he spoke to the shift supervisor, Carl Sumka, to ask if they were expecting him in, as he was slated for vacation days. Mr. Sumka had responded that he needed him in, and the Grievor said that he just phoned to make sure. His ride picked him up, and he was at work before 6:00 a.m. At 11:10 a.m., his shift supervisor, Brett Abram, asked why he was in working overtime, and told him there would be a meeting after lunch. Shortly after lunch, he was called in by the day-shift supervisor for a meeting with Mr. Stuehmer. The Grievor testified that he brought the shop steward along to the meeting "just in case". In the meeting Mr. Stuehmer said it had come to his attention that the Grievor was there on a vacation day. The Grievor explained the telephone call he had had with the supervisor at 3:30 a.m. Mr. Stuehmer apparently said that Mr. Sumka was not going to be in again until Thursday, so that he could not "collaborate" the story with him. Mr. Stuehmer told the Grievor to leave and to "have a nice vacation". The Grievor asked if he could stay for the rest of the shift. He explained that he had no way of getting home without a vehicle and without a fellow employee able to drive him at the end of the shift. Mr. Stuehmer told him he could not stay and that the company did not supply transportation.

45 The second incident involved an alleged security breach. The Grievor had been telephoned at home at 1:30 a.m. One of his co-workers, Fred Hahn, had come into the men's changing room at work, to find a strange woman in there who allegedly was able to obtain cigarettes for resale at $10 per carton. This was an extremely attractive price. When Fred Hahn had asked her how she got into the change room, the woman had told him that Bob had given her the code to the door. Fred Hahn had telephoned the Grievor and put the woman on the phone. The Grievor testified that he had explained his address to the stranger on the other end of the phone. He was hoping, from what she was saying, that she might deliver the cigarettes to his home address. The Grievor acknowledged in cross examination that, priced at only $10 per carton, the cigarettes were probably stolen. The phone was then suddenly hung up at the woman's end of the line.

46 The Grievor was called again between 3:00 and 3:30 a.m. This time it was another colleague, Richard Larson, who telephoned him sounding pretty upset. Apparently, Mr. Larson had taken the woman to a nearby gas station, so that he could get cash from an ATM. While he was in the gas station getting cash, the woman stole his truck.

47 A few days later, the Grievor came back to work from his days off and was warned by colleagues that management was trying to "pin it on him". The shift supervisor, Brett Abram, told him that the company President, Bob Rimes, wanted to meet with him. He went to Mr. Rimes' office and was told by Mr. Rimes to sit down in a chair and to keep his mouth shut. At the meeting, as well as Mr. Abram and Mr. Rimes, was Stuart Bilodeau, as a Union representative. Mr. Rimes told Mr. Kuzminski that he was directly involved in a breach of security. The Grievor testified that Mr. Rimes would not allow him to explain his side of the story. Mr. Rimes told Mr. Abram that he wanted the Grievor off the plant property immediately, and the Grievor was escorted from the plant in plain and humiliating view of many of his colleagues.

48 He was called back to the plant a couple of days later, to a meeting in the boardroom. He explained that, in connection with the security breach, he did not know who this woman was. After the meeting, he was told to go home. He heard nothing

further until a few days later, when he was telephoned by the person who usually gave him a ride to work, telling him that he was picking him up the following day, and that the Grievor was now back to work. The Grievor spoke with Mr. Bilodeau, who spoke in turn to Management. Sometime later the Grievor got paid for the work time that he had missed.

49 In fact, with respect to the men's changing room, the security door was never properly locked and it was propped open a large percentage of the time. Since the Grievor's termination, the door has been changed, and a security "swipe" card is now used. The change room is now a little more secure.

50 The Grievor explained that he and Mr. Stuehmer do not see eye-to-eye, and that there is conflict in their relationship. Further, he has had some very bad experiences with Bob Rimes, that have become very personal, involving name calling and throwing him out of Mr. Rimes' office.

1 General Discipline Policy Guideline

51 The Policy Guideline was entered by agreement as exhibit 6, along with a Memorandum of Agreement, dated 11 March 2003, apparently incorporating it into the Collective Agreement.

52 This Discipline Policy provided as follows:

> Purpose:
>
> The Company and the Union recognize the importance of adhering to appropriate codes of conduct set for all Lehigh Inland employees and adopting a fair, consistent, and progressive approach to the administration of disciplinary action when it becomes necessary. The purpose of this policy guideline is intended to assist both Union and Company representatives in recognizing and appropriately addressing situations in which discipline is required.
>
> General Principles of Discipline:
>
> 1 Communication - Supervisors are expected to communicate their expectations regarding appropriate conduct and standards of performance to employees. This policy guideline is intended to foster open communication between employees and their supervisors in the interest of limiting the need for formal disciplinary proceedings.
> 2 Opportunity to Improve - Employees need to be provided with feedback when their work performance or conduct is unsatisfactory and be given the opportunity and assistance to make improvements to their behaviour, assuming the circumstances around the incident are not too severe.

Types of Disciplinary Action:

1 Verbal Warning
2 Facts Sheet
3 Warning Letter
4 Suspension
5 Dismissal

Verbal Warning:

This is generally a pre-disciplinary step and is intended as a way for supervisors and employees to discuss and resolve performance issues before they become serious enough to warrant formal discipline.

Facts Sheets:

Should the problem(s) continue to exist beyond the verbal warning stage, a facts sheet can be used to outline the nature of the problem(s) and the possibility of further disciplinary action i[f] the problem(s) continue. The facts sheet is similar in purpose to the verbal warning where the supervisor and the employee attempt to resolve the issue.

An employee should be given an opportunity to discuss his/her side of the story with their supervisor prior to receiving a facts sheet. Where there is a potential for conflict or confrontation, a "cooling off" period of 24 hours will assist in facilitating a more constructive discussion and may avoid the issue progressing to the facts sheet stage.

A copy of the facts sheet template is attached to this document. Facts sheets will not be placed on employee files. Copies of all facts sheets will be provided to the affected employee and the Union.

Warning Letter:

A warning letter is typically the first step of formal discipline and is normally applied in situations where an employee had failed to respond to a verbal warning or facts sheet. Where an offence is sufficiently serious, a warning letter may be issued in the absence of any previous disciplinary discussion. Warning letters clearly will outline the nature of the infraction and the expectation for improvement.

Prior to issuing a warning letter, the department Superintendent and the Human Resources Manager will be advised of the situation. Where the facts around an incident appear inconsistent or more information is required, the Superintendent will conduct an investigation into the

incident which will include interviews with the affected employee(s) and the relevant Supervisor. Where the consistency of these facts are in dispute, Article 11 of the collective agreement will govern.

53 The Policy also described the conditions for suspension and dismissal. However, these items are not relevant to the decision that we have to make. The parties have asked us to determine whether any form of discipline was appropriate in these circumstances, so that discussion of the higher levels of discipline, suspension and dismissal, is not necessary.

54 The final section of the Policy provided:

> General:
>
> With the exception of the verbal warning discussion, employees have the right to request and be granted Union representation for any disciplinary [action] taken by the Company.
>
> All disciplinary actions will be evaluated on a case-by-case basis and the application of discipline will be appropriate to the circumstances involved.
>
> A copy of the Lehigh Guide to Good Conduct and the template for the Lehigh Labour Relations Fact Sheet are attached to this document.

55 The Guide to Good Conduct for Lehigh Inland Employees provides examples of acts of misconduct that employees should avoid. Counsel for the Employer suggested that the Grievor had breached paragraphs 11 and 15:

> 1 Reporting late or failing to be in position to commence work when the work period begins.
> 2 Absence without reasonable cause or an unacceptable attendance and/or tardiness record.

1 ARGUMENT

1 Employer

56 The issue before this Board was whether the actions of the Grievor on 23 June 2004 had provided grounds for some level of discipline.

57 Once the Grievor accepted the overtime shift, as he had on 21 June, he no longer had an option not to come to work. In the short telephone call at 5:51 a.m., the Grievor was concerned that his ride had not shown up. The supervisor could not tell him if Mr. Nero had arrived at work yet. The Grievor testified that he had told the supervisor, Darwin Hill, that he would check with Mr. Nero. However, he did not try to telephone Mr. Nero.

58 There was no evidence of the phone call the Grievor claims to have made to the

supervisor's office at 6:20 a.m. Exhibit 5 (the shift office telephone log) showed the 5:51 a.m. call, but no other calls from the Grievor that day. At the investigation meeting on 25 June 2004, the Grievor made no mention of making a telephone call around 6:20 a.m. or any call between 5:50 a.m. and 7:30 a.m., when Mr. Rocque called him.

59 The alleged 8:30 a.m. telephone call had not been made. If, the Grievor had told the supervisor that it did not look like he could get in, but that he would call if he did find a way, why would he have telephoned again, when he still had not found a way to get to work?

60 The Grievor had agreed to work overtime and the Employer was relying on him. He made no reasonable effort to come to work. He failed to show up at work without a reasonable excuse.

1 Union

61 The Board should not rely on the evidence of Shane Rocque. Initially, he had testified that it was he who, on 21 June, had called the Grievor to confirm he would come on 23 June for overtime. Then on cross-examination, Mr. Rocque had conceded that he had not called the Grievor. His credibility was affected and the rest of his testimony should be rejected.

62 The Employer's treatment of the Grievor amounted to discrimination. If this had happened to another employee, no discipline would have resulted.

63 The first time the Grievor saw the telephone log, exhibit 5, was at the arbitration. It should be disregarded or given little weight. So few calls on the telephone in one day did not ring true.

64 At 5:50 a.m., the Grievor notified the Employer that there was a problem. That phone call was notice under article 10.03 of the Collective Agreement.

1 DECISION

1 Factors

65 The relevant factors in this case are the following:

1 Grievor's obligation to report to work

66 The Grievor agreed and was obligated to report to work on the morning of 23 June 2004.

67 As the Grievor acknowledged, once he confirmed that he did have a ride to work and would take the overtime shift, he had an obligation to report to work, on time, for that shift.

68 The fact that he depends on others to give him a ride to work, and that the Employer knows of his transport difficulties, does not diminish the Grievor's obligation to be at work on time. Equally, the fact, that the shift on 23 June 2004 was an overtime one, did not affect the Grievor's obligation to be at work. Once he agreed to work that day, his

obligation to be at work for the shift on 23 June was the same as his obligation to be at work (and on time) for any of his regular, scheduled shifts.

1 The 5:51 a.m. call

69 At 5:51 a.m. the Grievor properly notified the Employer of his problem. The person who was picking him up had not yet arrived.

70 The Union suggested that this telephone call was the "notice" under s. 10.03, so that the Grievor's obligations were ended by that phone call. We do not agree.

71 Section 10.03 of the Collective Agreement reads:

> Notice if Unable to Report
>
> Whenever possible, an employee shall give the Company twenty (20) hours notice that he will be unable to report for work. When twenty (20) hours notice cannot be given, the employee must notify the Company as soon as possible. Failure to comply with the foregoing regulation constitutes absenteeism and subjects the employee to discipline.

72 There was no suggestion made that this section was of general application or that it gave employees the ability to give notice when they "felt like it", or if they experienced some difficulty in getting to work. We are satisfied that s. 10.03 still requires the employee to make all reasonable efforts to report to work despite difficult circumstances. The applicable example was one given by the Employer's nominee - an employee's car fails to start as he tries to leave for work. The employee will obviously alert the Employer at once of the problem. Before notice under s. 10.03 is given, however, the employee must have taken all reasonable steps or tried reasonable alternatives to get to work. Only when these reasonable steps and alternatives have failed, does s. 10.03 come into play, and the employee gives notice that he or she will be unable to report to work.

73 We find the 5:51 a.m. telephone call was not "notice" under s. 10.03 for two reasons:

1 The Grievor had not yet done anything to find other ways of getting to work. Indeed, he told the supervisor, Mr. Hill, that he would check with Mr. Nero to see what has happening, and that he would look at other alternatives.
2 The 5:51 a.m. call was followed by a further telephone discussion at 7:30 a.m., and a 6:20 a.m. call claimed by the Grievor. Either (or both) call(s) superseded the 5:51 a.m. call, which amounted to no more than a preliminary alert that the Grievor was having trouble getting to work.

(iii) Initial Problem not the Grievor's Fault

74 The start of the Grievor's problem in getting to work was not the Grievor's fault. He was waiting on time, ready to be picked up. It was Mr. Nero, who agreed that he had

forgotten to pick up the Grievor as he had promised.

1 Lack of Follow-Up with Mr. Nero

75 The Grievor, however, did not attempt to contact the Neros to see if Mr. Nero was running late or had forgotten. We now know that it would not have done any good, as Mr. Nero was already at the plant. It would, however, have shown that the Grievor was taking all reasonable steps to see if he could find a way to get to work. It would also have told him at once that Mr. Nero was not going to pick him up, thereby giving the Grievor a better chance of catching the supervisor who lived nearby, before the supervisor left for work.

1 Was there a 6:20 a.m. call?

76 The Grievor believed that around 6:20 a.m. he telephoned the Shift Supervisor's office and spoke to the supervisor, Shane Rocque. Mr. Rocque, on the other hand, denied receiving a phone call from the Grievor at that time, or indeed at any time after the initial call at 5:51 a.m. Mr. Rocque's evidence is supported by the shift office telephone log (exhibit 5), which shows no call from the Grievor at 6:20 a.m. or at any time other than 5:51 a.m.

77 Finally, the evidence of both Mr. Rocque and Mr. Stuehmer was that the Grievor made no mention of a 6:20 a.m. telephone call at the investigation meeting of 25 June. The Grievor in his evidence did not challenge or contradict that testimony. We find that, at the investigation meeting on 25 June, the Grievor did not say anything about a 6:20 a.m. telephone call.

78 Based on the evidence before us, we find that the Grievor is mistaken in his belief that he made a phone call to the supervisor's shift office at 6:20 a.m. We find there was no such phone call.

1 The 7:30 a.m. telephone call

79 Both parties agree that the 7:30 a.m. telephone call did take place. The problem is that the witnesses' recall of that telephone call differs.

80 The Grievor's memory is that Mr. Rocque called him using a cell phone and told him he would be working with maintenance. The Grievor said he told Mr. Rocque that it "didn't look good" and that he would call him, if he did find a way in.

81 Mr. Rocque's evidence, however, was that he had telephoned the Grievor at 7:30 a.m. from the shift office telephone. He knew this, he said, as all the employees' contact telephone numbers were on the speed-dial system on the office telephone, to save time in reaching them. Although he had a cell phone, he very rarely used it at the plant site because it was difficult to hear. In any event, he did not have the Grievor's telephone number memorized on or saved to his cell phone.

82 Mr. Rocque's memory of the telephone conversation was that the Grievor said that he was still trying to get in to work, with his daughter or in some other way. There was the discussion over the use of the bus or a cab. Mr. Rocque told the Grievor what he

would be doing when he arrived, that he was needed to assist maintenance.

83 The letter of termination (exhibit 3) stated:

> "In a follow-up phone call to you at 7:30 a.m. that morning, your supervisor instructed you to stay in contact with him regarding your efforts to report into work."

84 The termination letter was written by Kent Stuehmer who was not involved in contacting the Grievor on 23 June 2004. The contents of the letter are, of course, evidence of the Employer's written explanation to the Grievor of the reasons for terminating his employment. The contents of the letter, however, are not evidence of the facts alleged in the letter. For that purpose they are hearsay, and no weight can be given to them.

85 It was up the Employer to prove such an instruction, if it had occurred. We heard no evidence of any such instruction from Mr. Rocque, nor was such an instruction put to the Grievor when he gave evidence. We find, on the evidence before us, that the termination letter overstated the contents of the 7:30 a.m. telephone call. We are satisfied, however, that the result of that call was that the Grievor had told Mr. Rocque that he was still trying to get in to work. This was confirmed by the Grievor's evidence of his attempts after 7:30 a.m. to get a ride from his daughter and his contacting the Edmonton Transit System. It was never explained why he did not take the bus, other than to say it was a long bus ride. It seems to have been possible to take a bus going close to the plant, since it was peak hour at the relevant time. Mr. Rocque, for his part, was still expecting the Grievor to report to work and then go to assist with maintenance.

1 Did the Grievor call again at 8:30 a.m.?

86 The Grievor's claim that he called back at 8:30 a.m. is not borne out by the evidence:

1. If the Grievor had told Mr. Rocque at 7:30 a.m. that he was likely not coming in, why did he phone at 8:30 a.m. when he still had not found a way to get in?
2. The Grievor's initial evidence that he had pressed "redial" on his cell phone (which would then have dialled the shift office number) changed on questioning to an explanation that he had actually found and automatically dialled the number from which he had received the call at 7:30 a.m. He believed this call had been from the supervisor's cell phone. For reasons given above, we are satisfied that the 7:30 a.m. call was made from the Shift Office telephone.
3. The Grievor knew that employees phoning in are meant to contact their supervisor or leave a voice-mail message. The Grievor's suggestion that, when he received no answer and no voice-mail, he just hung up is unbelievable or, worse, makes him appear irresponsible.
4. The production supervisor's telephone log (exhibit 5) had no

telephone call at 8:30 a.m. from the Grievor or his number, nor any call from the Grievor after the one at 5:51 a.m.

(viii) Discrimination against the Grievor

87 Counsel for the Union argued forcefully that the Employer was targeting the Grievor. The Union led evidence of one previous incident, where the Grievor appeared to have been wrongly disciplined, and of one situation where the Grievor was sent home early from work, having come in on his day off. The allegation was that these events showed discrimination against, or "targeting" of the Grievor by management. The evidence before us on this issue was not sufficient to prove discrimination, targeting or improper motives by the Employer. The evidence did show that the Grievor is outspoken in his dealings with management - not surprising for a Union Local president. The evidence of the Grievor and Mr. Stuehmer confirmed that there were disagreements in Union/Management meetings, voices might be raised and tone of voice might vary. Mr. Stuehmer denied any targeting of the Grievor, but just said that "business is business" in Union/Management affairs.

88 Differences and confrontations between a Union Local President and Senior Management are not uncommon in labour relations. Of themselves, they do not amount to discrimination or targeting. The Union has not proved, as it must, that the Employer was discriminating against the Grievor or targeting him for discipline. The evidence showed that in both instances about which we heard, the Grievor was ultimately vindicated and paid as he should have been. No discipline ended up on the Grievor's record from either incident.

1 General Discipline Policy Guideline

89 In light of the factors set out above and the issue placed before us, we must consider the application of the General Discipline Policy Guideline (exhibit 6).

90 The parties prescribed the issue they wanted us to determine. We are to restrict our review of the evidence and limit our decision to whether or not the actions of the Grievor provided grounds for discipline of some nature.

91 When Counsel were questioned by the Board in argument, it turned out there was a General Discipline Policy that had been executed by the parties. By agreement of Counsel, the Policy was then entered as exhibit 6, and the parties filed written argument on it on 4th (Union) and 10th (Employer) November 2004. The Policy was not a unilateral one imposed by the Employer. It was agreed to by both the Union and the Employer and had been added as part of the Collective Agreement on 11 March 2003.

92 The Purpose of the Policy and the General Principles of Discipline, once again, are:

> Purpose:
>
> The Company and the Union recognize the importance of adhering to appropriate codes of conduct set for all Lehigh Inland employees and adopting a fair, consistent, and progressive approach to the

administration of disciplinary action when it becomes necessary. The purpose of this policy guideline is intended to assist both Union and Company representatives in recognizing and appropriately addressing situations in which discipline is required.

General Principles of Discipline:

1 Communication - Supervisors are expected to communicate their expectations regarding appropriate conduct and standards of performance to employees. This policy guideline is intended to foster open communication between employees and their supervisors in the interest of limiting the need for formal disciplinary proceedings.
2 Opportunity to Improve - Employees need to be provided with feedback when their work performance or conduct is unsatisfactory and be given the opportunity and assistance to make improvements to their behaviour, assuming the circumstances around the incident are not too severe.

(x) Agreement putting the grievance before the Board

93 In this case, we are constrained by the agreement of Counsel, to review the incident of 23 June without any reference to the Grievor's prior behaviour problems or disciplinary record (if any). The termination letter (exhibit 3) included the sentence:

> "This latest incident demonstrates that no improvements in your attendance habits are forthcoming and as such a decision has been reached to terminate your employment."

94 As already discussed (above p. 25), the contents of the letter are evidence of the Employer's written explanation to the Grievor of the reasons for terminating his employment. The contents of the letter, however, are not evidence of the prior attendance problems alleged in the letter. For that purpose, the sentence above is hearsay, and no weight can be given to it, especially since no evidence was provided of any prior attendance or behaviour problems, in keeping with the assertion of both Counsel during the hearing. In the written argument filed with the Board after the hearing, Counsel for the Union noted that there had been no evidence of any verbal warning. Counsel for the Employer, in his written response of 10 November 2004, indicated that he was troubled by this indication of Counsel for the Union, and continued:

> "If you recall, at the commencement of this hearing, the parties agreed that the record of the grievor was not to be put before you and indeed portions of the termination letter were blanked out prior to being submitted to the panel."

95 No further evidence or details of the Grievor's prior conduct was offered or suggested, but Counsel argued that the language of the Discipline Policy was permissive and still granted disciplinary discretion to Management.

96 So, for our decision, we have to assume, based on the manner in which the parties have put the issues before us, that (a) there has not been prior communication to the Grievor of supervisors' expectations of the Grievor's conduct in a situation where he is not able to get to work as a result of someone else's mistake, and (b) the Grievor has not previously been given feedback or an opportunity or assistance to improve his behaviour (assuming the circumstances around the incident were not too severe).

97 The parties have not asked us to review the penalty, to see if a different penalty should be substituted. On the contrary, the question of the level of penalty (if any) was expressly adjourned until we have determined whether some level of discipline was warranted. Accordingly, Counsel for the Employer did not refer to the cases, which discourage arbitrators from substituting a different penalty unless the original penalty imposed was manifestly unjust or unreasonable. That was not the issue the parties put before us. What they asked us to decide was whether the Grievor's actions in this case, viewed without any reference to prior discipline or behaviour problems (if any), warranted some measure of discipline.

1 Result of Review of the Factors

1 Verbal Warning

98 Looked at as a single incident, the circumstances surrounding it were not too severe. The incident was an absenteeism problem, caused in the first instance by the forgetfulness of another employee, who failed to pick up the Grievor, who was waiting in the agreed-upon spot, ready to go. If Mr. Nero had arrived at the right time, we have no doubt the Grievor would have gone with him to the plant and worked the overtime shift.

99 Faced with the Grievor's absenteeism on 23 June, we presume the Employer, following the General Policy, would wish to give the Grievor feedback on his obligation to report to work and on time, and on the importance of having "back-up" plans, including other methods of getting to work in the event his ride fails to show up. Assuming, as we have been asked to do, that there is no previous incident of absenteeism (or other disciplinary record), then we are satisfied that the Employer, under the progressive discipline process set out in the General Principles, would, in the circumstances of this case, only give the Grievor a verbal warning, the first step in the progressive process.

100 The General Disciplinary Policy addition to the Collective Agreement (exhibit 6) provides:

> Verbal Warning:
>
> This is generally a pre-disciplinary step and is intended as a way for supervisors and employees to discuss and resolve performance issues before they become serious enough to warrant formal discipline.

101 Although the "Verbal Warning" is listed under the "Types of Disciplinary Action", it is clearly something that occurs before discipline.

102 Dictionary definitions of the prefix "pre" include:

> earlier than, prior, before (examples: "prehistoric", "pre-game")
>
> preparatory or prerequisite to ("premedical", "preprofessional")
>
> in advance, beforehand ("precut", "prejudge")

103 Furthermore, later in the Policy, the verbal warning is referred to as a "discussion". It is not a step for which the employee has a right to Union representation. This absence of such a right confirms that the verbal warning is not a matter of discipline.

1 Higher Levels of Discipline Not Appropriate

104 Other (higher) levels of discipline are not appropriate in light of the agreed format in which the grievance has been put before us.

105 The Facts Sheet can be used if "the problem(s) continue to exist beyond the verbal warning stage". As indicated, the parties have asked us to assess the Grievor's conduct in this case without any evidence of previous problems. With no evidence of previous problems, there obviously can be no problems that "continue to exist beyond the verbal warning stage". There was no evidence of any previous verbal warning.

106 The Warning Letter is "normally applied in situations where an employee has failed to respond to a verbal warning or facts sheet". Once again, we have no evidence of a previous verbal warning or facts sheet.

107 The Warning Letter paragraph continues:

> "Where an offence is sufficiently serious, a warning letter may be issued in the absence of any previous disciplinary discussion."

The Policy also states:

> All disciplinary actions will be evaluated on a case-by-case basis and the application of discipline will be appropriate to the circumstances involved.

108 Disciplinary action in this case is to be evaluated on a "case-by-case" basis. In this case the parties have expressly directed us, to review the incident on 23 June without reference to the Grievor's prior disciplinary history (if any). When we do that, an immediate written warning would be contrary to the General Discipline Policy. Nothing in the evidence, as it was put before us, would make the offence in this case "sufficiently serious" to warrant an immediate warning letter.

109 Having reviewed the evidence in this case, and considering the factors set out above, in the context of the General Discipline Policy, we are satisfied that the Grievor's conduct in this case was not sufficiently serious to warrant discipline.

1 CONCLUSION

110 Accordingly, answering the question put to us by the parties, we find that there were no grounds for discipline of the Grievor in this case. There were grounds only for the "pre-disciplinary step" of a verbal warning.

111 Based on the parties' agreement, therefore, the grievance is allowed, and the Grievor shall be reinstated, effective the date of his termination, 30 June 2004.

112 If the parties are unable to agree on the other relief claimed in the Grievance (exhibit 2) to which the Grievor may be entitled as a result of the reinstatement, we continue to have jurisdiction to deal with any other issues arising out of the grievance. Either party may approach the Board to reconvene to hear evidence on and deal with the balance of the claims in the Grievance which the parties requested that we not deal with in this Award.

113 We are grateful to the parties, their witnesses and counsel for the courtesy they showed in presenting their sides of this difficult matter.

114 Gary Johanson, Employer Nominee, dissents, and his written dissent accompanies this Award.

DISSENTING AWARD - GARY JOHANSON

G. JOHANSON, NOMINEE FOR THE EMPLOYER:--

Basis for dissent

115 I dissent from the majority award for the following reasons:

1. The Board has exceeded its jurisdiction by deciding the Grievor's past conduct was not relevant.
2. The Employer had just cause for discipline.
3. The Board has dealt incorrectly with evidentiary matters.

Jurisdiction of the Board

116 The majority award summarizes their view of the Board's jurisdiction as follows:

> What they asked us to decide was whether the Grievor's actions in this case, viewed without any reference to prior discipline or behaviour problems (if any), warranted some measure of discipline.

117 In fact the issue submitted to the Board was:

1. Was the Grievor involved in a disciplinable offense on June 23, 2004?
2. If there were no grounds for discipline, then the parties agree to reinstatement.
3. If the matter was worthy of discipline, then final resolution should be remitted back to the parties with the Board retaining jurisdiction.

118 At no time did the Employer or the Union express that the Board was to deal with the issue in a manner unrelated to facts put in evidence surrounding the grievor's past conduct. Both parties acknowledged the grievor has a past disciplinary record with outstanding arbitrations to be heard.

119 Evidence submitted to the Board through Exhibit 3, the termination letter, contained reference to past conduct issues:

> This latest incident demonstrates that no improvements in your attendance habits are forthcoming and as such a decision has been reached to terminate your employment.

120 Prior incidents have occurred with Mr. Kuzimski on related conduct. Our Board also knows that this case was a culminating incident with certain areas of the termination letter blanked out on prior issues not yet resolved through grievance and arbitration.

121 Neither party in these proceedings submitted that the Board was to ignore evidence presented that the Employer has dealt with the Grievor on past conduct issues, some of which certainly are related in nature. The Board exceeded its jurisdiction in its decision to exclude consideration of evidence related to past events since the parties did not request any such limitation.

Just cause for discipline

122 In any event, would it have been unreasonable to give Mr. Kuzminski a written warning based on his conduct? I submit the Employer would have had just cause for these reasons:

1. As outlined in the majority award, the Grievor clearly had a duty to report to work and he did not do so - a relatively serious matter.
2. Again as outlined in the majority award, he failed to properly advise his employer he would not be reporting for work as required - also a relatively serious matter.
3. The Grievor's conduct resulted in notable extra costs, delays, and inconvenience to the Employer to complete maintenance work on the coolers.
4. During the investigation of the matter and still at the date of our hearing, the Grievor does not recognize that his performance was unacceptable. He believes that when his ride did not arrive, this ended his obligation to be at work. Knowing this, the Employer has the right to communicate the need for change in some stronger manner than a verbal warning. The Grievor is not apologetic, indeed he thinks he was treated unfairly.
5. The Grievor was not candid during the investigation with the Employer nor was he candid before our Board. He has attempted through misrepresentation in both instances to avoid consequences for his behaviour. As the majority found, the 8:30 a.m. call he claimed during the investigation stage was not

> made. The majority award comes to the same conclusion about the 6:20 a.m. call he claimed to have made for the first time in evidence before our Board. Lack of candor is a factor in relation to discipline. Arbitrators have consistently found that honesty in these proceedings is a factor to be weighed by the Board with respect to a disciplinary penalty. If the grievor is not candid as in this case, arbitrators conclude this conduct undermines the grievor's position of seeking relief from an arbitration board.

123 Given the combination of all these conduct issues, a written warning would be a very reasonable response by the Employer. The Employer would have acted properly within the range of its discretion in applying at least a written warning to have the Grievor understand the need to change behavior.

124 I terms of arbitral review of discipline, the general principal is expressed in the Re Galt Metal Industries Ltd. and a long line of consistent cases:

> The power conferred on an arbitrator by this section of the Labour Relations Act, 1995 is wide and consequently it ought to be used cautiously and judiciously. It is hardly necessary to say that honest opinions do vary on the question of what is precisely just and reasonable in any given set of circumstances. The section ought not to be construed as an acknowledgement of an overriding omniscience on the part of arbitrators in matters of discipline. It would seem to me that unless the penalty imposed is, viewed objectively, manifestly unjust or unreasonable in all the circumstances, no substitution of penalty out to be made.

125 The role of arbitrators is not to step into the shoes of the employer, substituting their opinion and standards for the employer's decision unless the employer acted outside the range of reason.

126 I submit the majority opinion is incorrect in their finding:

> The parties have not asked us to review the penalty, to see if a different penalty should be substituted. On the contrary, the question of the level of penalty (if any) was expressly adjourned until we have determined whether some level of discipline was warranted. Accordingly, Counsel for the Employer did not refer to the cases, which discourage arbitrators from substituting a different penalty unless the original penalty imposed was manifestly unjust or unreasonable.

127 The question put the Board was the Grievor involved in a disciplinable offense on June 23, 2004? i.e. would discipline of at least a written warning have been within the range of reason? The Board was not asked what level of discipline to apply.

128 Experienced arbitrators recognize their role in disciplinary matters and the good judgment expressed through arbitration jurisprudence. It should not be necessary to place this law before qualified professionals. Counsel for the Employer did not request the

Board to ignore this fundamental, commonly understood case law.

129 The Discipline Policy does not require the Employer to abandon judgment and apply discipline steps by rote. The Policy states:

> All disciplinary actions will be evaluated on a case-by-case basis and the application of discipline will be appropriate to the circumstances involved.

130 If the Employer, in the context of Mr. Kuzminski's conduct, applies at least a written warning, the Employer would act very reasonably within the scope of its responsibilities. The Board is also aware through Exhibit 3 and other submissions that the Employer has attempted on prior occasions to deal with Mr. Kuzminski's attendance. A verbal warning becomes all the more inappropriate.

131 The majority decision rests very significantly on the Discipline Policy and its application to the specifics of this case. Improper application of this Policy was not disputed in the grievance nor in anything that came before the Board. The document, submitted in response to an inquiry from the Board chair at the end of the hearing and later forwarded to the Board, demonstrates neither party considered it of importance in these circumstances.

132 Considering the Discipline Policy was not introduced or argued by the parties during the hearing, the Board has given inappropriate weight to this document in its decision.

Application of evidence

1.

> 1 The majority opinion contains a number of surprising and, in my respectful submission, erroneous conclusions about the evidence we received. The majority find:
> 2 The termination letter was written by Kent Stuehmer who was not involved in contacting the Grievor on 23 June 2004. The contents of the letter are, of course, evidence of the Employer's written explanation to the Grievor of the reasons for terminating his employment. The contents of the letter, however, are not evidence of the facts alleged in the letter. For that purpose they are hearsay, and no weight can be given to them.
> 3 It was up the Employer to prove such an instruction, if it had occurred. We heard no evidence of any such instruction from Mr. Rocque, nor was such an instruction put to the Grievor when he gave evidence. We find, on the evidence before us, that the termination letter overstated the contents of the 7:30 a.m. telephone call.

133 Exhibit 3 forms part of the evidentiary record. It is the best evidence on this specific point. Mr. Rocque, Mr. Stuehmer and the Greivor were all witnesses and this

statement was not disputed during their evidence in chief nor in cross-examination. A tribunal trying facts cannot properly draw a conclusion that since there was no verbal evidence on this point, the statement in Exhibit 3 is not correct. It is an error of logic to conclude no verbal evidence is positive proof the statement is wrong. There is simply no evidence to support this finding.

134 This same unfounded logic is expressed in the majority's opinion on the termination letter:

> 1 In this case, we are constrained by the agreement of Counsel, to review the incident of 23 June without any reference to the Grievor's prior behaviour problems or disciplinary record (if any). The termination letter (exhibit 3) included the sentence:
>
> > 1 "This latest incident demonstrates that no improvements in your attendance habits are forthcoming and as such a decision has been reached to terminate your employment."
>
> As already discussed (above p. 25), the contents of the letter are evidence of the Employer's written explanation to the Grievor of the reasons for terminating his employment. The contents of the letter, however, are not evidence of the prior attendance problems alleged in the letter. For that purpose, the sentence above is hearsay, and no weight can be given to it, especially since no evidence was provided of any prior attendance or behaviour problems, in keeping with the assertion of both Counsel during the hearing.

135 Firstly, as outlined above, their was no agreement of Counsel to exclude any reference to prior behaviour problems. Exhibit 3 was tendered as evidence to our Board. Ken Stuehmer, the author of Exhibit 3 was a witness. The fact that he was not examined or cross-examined on each sentence in the letter does not make its contents hearsay or no evidence.

136 I submit the majority award incorrectly sets aside evidence received in order to support their conclusion.

Summary

137 The majority award exceeds the jurisdiction granted by the parties by excluding evidence of past behaviour issues with the Grievor and in their conclusion the case was submitted to the Board with this limitation. The majority have also applied the evidence selectively to bolster their conclusion.

138 The Employer would have acted within the scope of its authority through applying at least a written warning in these circumstances. As expressed in case law, a written warning by the Employer would clearly not be "manifestly unjust or unreasonable in all the circumstances." The majority of the Board may accept low standards of performance

and conduct. People responsible for the actual operation of a business would do a disserve to all stakeholders in the enterprise if they applied the majority view.

139 I would have decided the Employer had reasonable grounds for discipline.

G. JOHANSON (NOMINEE FOR THE EMPLOYER)

qp/e/qlpha