

**IN THE MATTER OF ARBITRATION BETWEEN**

**International Brotherhood of Electrical  
Workers, Local 949 [Michael Voss]**

**And**

**Opinion and Award  
FMCS Case No. 1451242**

**Xcel Energy, Inc.**

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**ARBITRATOR**

Joseph L. Daly

**APPEARANCES**

On behalf of IBEW, Local 949

M. William O'Brien, Esq.  
Miller, O'Brien, Jensen, PA  
Minneapolis, Minnesota

On behalf of Xcel Energy

Michael J. Moberg  
Briggs and Morgan, P.A.  
Minneapolis, Minnesota

**JURISDICTION**

In accordance with the Labor Agreement between Xcel Energy and International Brotherhood of Electrical Workers, Local 949; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, DC, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on April 18, 2014, in Minneapolis, MN. Post

hearing briefs were submitted by the union on June 18, 2014, and by Xcel Energy on July 31, 2014. The decision was rendered by the arbitrator on August 25, 2014.

**ISSUE AT IMPASSE**

The parties agree that the issues are:

1. Did Xcel Energy have just cause to terminate the grievant, Michael Voss?
2. If not, what remedy is appropriate?

**RELEVANT CONTRACT LANGUAGE AND POLICY LANGUAGE**

**Labor Agreement:**

ARTICLE I

*METHOD OF NEGOTIATION*

**Section 2.** The right, in accordance with the provisions of the Agreement, to employ, promote, discipline and discharge employees and the management of the property are reserved by and shall be vested in the Company. The Company shall have the right to exercise discipline in the interest of good service and the proper conduct of its business. It is agreed, however, that promotion shall be based on seniority, ability and qualifications. Ability and qualifications being sufficient, seniority as defined in Article VIII shall prevail.

**Section 5.** In the matter of suspension, demotion, or discharge, if after hearing witnesses, the charges are not sustained, the employee shall have his/her record cleared of such charges and the arbitration board may rule that the employee shall or shall not receive full or partial wages from the Company. No discipline by suspension shall be administered to any member of the Local Union which shall impair his/her seniority rights. [Joint exhibit #1]

**Policy Language:**

**Including Code of Conduct, Section 9.20 Appropriate Use of Company Assets (Uniform Policy); Section 9.2 Discipline Guidelines/Positive Discipline (Uniform Policy); letter of November 11, 2008, from Dennis L. Koehl, Vice President and Chief Nuclear Officer**

**Code of Conduct**

Conduct all our business in an honest and ethical manner. [page 4]

Do What's Right...to Each Other

### **Legal and Ethical Standard**

You must be honest, fair and trustworthy in all company activities and relationships. You must know and comply with this Code of Conduct, other company policies, laws and regulations. We will not tolerate any unlawful or unethical activity or any activity that may appear unlawful or unethical. [page 8]

### **Security**

Xcel Energy is committed to compliance with requirements for security regulations and protecting company assets; including people, property, products and information.

Employees are required to take appropriate steps to 1) protect assets, people, property and products from injury, loss and damage...[page 11]

### **Other Company Assets**

Employees are expected to return all company assets not used on the job to the appropriate warehouse, storage facility or other place of origin, using appropriate procedures.

Taking or using company assets for unauthorized personal use is strictly prohibited. [page 14]

### **Consequences of Violating the Code of Conduct**

Employees who violate the law, Xcel Energy's Code of Conduct or any other company policy will be subject to disciplinary action or termination. Additional actions may include reassignment of work duties and limitation in future job opportunities. Violation of law may be referred to law enforcement authorities for prosecution. [page 23] [Company Exhibit #1]

## **9.20 Appropriate Use of Company Assets (Uniform Policy)**

### **Prohibited Uses of Company Assets**

- Employees must not recover or reclaim Company Assets that are being disposed of for personal use. [page 3]

### **Exceptions for Personal Use**

Incidental access to and/or use of certain Company Assets for personal use may be granted on an exception basis by your Leader who is accountable for approving, communicating and confirming expectations surrounding personal use. [page 4]

- Recovering or claiming Company Assets being disposed of for personal use is not permitted. Disposal of Company Assets is governed by corporate policy 4.11. Company Assets: Sales Donations and Disposal. [page 5] [Company exhibit #2].

## **9.2 Discipline Guidelines/Positive Discipline (Uniform Policy)**

Positive Discipline is a means by which management may seek to correct problems and build commitment, not merely compliance, for all employees. [page 1]

Termination also may occur in those instances where a single offense is so severe or where performance shortcomings are of such a nature that the application of the Positive Discipline System is unwarranted or inappropriate in the judgment of management. The following examples (this list is not all inclusive) illustrate some situations that may result in immediate termination of employment:

- Stealing either from fellow employees, customers, vendors or contractors or the company
- Unauthorized use of company resources, including time, for personal benefit [page 5] [Company exhibit #3].

### **Letter of November 11, 2008, from Dennis L. Koehl, Vice President & Chief Nuclear Officer**

The Code of Conduct also provides that no company resource will be used for personal benefit. Unauthorized use of Xcel Energy resources, property, tools, or equipment for non-company purposes is not permitted.

No employee may remove company property or equipment from company premises if the property has continuing value to the company. Employees may only remove company property or equipment designated as scrap by fully complying with the site scrap removal process and using a properly approved scrap removal pass. [Company exhibit #4].

## **FINDINGS OF FACT**

1. By letter dated March 3, 2013, Michael Voss, a journeyman station electrician at the Prairie Island Nuclear Power Plant from May 2008 to March 3, 2013, was terminated. The letter stated in applicable part:

Dear Mr. Voss:

On February 5, 2013, without authorization you attempted to remove a large number of Dremel tools (including new, used tools) from the work site by placing the tools inside your lunch box as you left work. Removing any Material from site (including scrap) for personal use is a clear violation of the Xcel Energy Code of Conduct. Because of this Code of Conduct Violation and in accordance with the Positive Discipline Guidelines, your employment is immediately terminated.

The letter was signed by John Boesch, maintenance manager, for Xcel Energy.

2. IBEW, Local 949, is a labor organization which represents electrical workers in the upper Midwest region, including Minnesota.

Xcel Energy is an employer, which provides utility services to an eight-state region of the Midwest. The employer and the union currently are parties to the Brainerd Lakes, North Dakota, North West, South Dakota and South East Regions Labor Agreement.

The facts relevant to this arbitration occurred at the Prairie Island Nuclear Generating Plant, which is owned by Northern States Power Company, and is operated by Xcel Energy. The Plant is located in Red Wing, Minnesota.

3. Mr. Voss's typical duties consisted of installing, repairing, trouble-shooting, and assisting other Xcel Energy workgroups in maintaining the electrical components of the Prairie Island Nuclear Generating Plant. Prior to his termination on March 5, 2013, he did not have any prior disciplines; nor had his supervisors ever criticized his work. His immediate supervisors knew him to be a "good worker, who had come to Xcel Energy with 'really good sets of skills,'" and often volunteered for long hours. [Testimony of Electrical Department supervisor Chad Vande Hei]. Mr. Voss had worked for Ford Motor Company for 20 years until the St. Paul, Minnesota, Assembly Plant closed in 2008.

4. In the Fall of 2012, Xcel Energy decided to clean out the storage area above the electrical department. It was filled with consumable materials and some larger equipment that the electric shop employees use in their work. Material had been stored there for many years, apart from Xcel Energy's central warehousing system. The previous maintenance manager and the NOS ("Nuclear Oversight People") had concluded that this "clean-out" project was necessary.

The “clean-out” project took a substantial amount of time and manpower to complete. Over the course of several months, a variety of workers were involved in removing materials from the electrical storage area. During the “clean-out” process, much material was thrown into dumpsters and recycling bins near and around the electrical shop. According to one individual who participated in the “clean-out” project, “whole shelves of things” and drawers full of materials were thrown out. Materials included several large motors and actuators of considerable value.

Many of the electricians had valued their “easy access” to these materials and were upset when it became apparent that they would have to reorder them. Many of the electric shop employees were frustrated with the “clean-out project”, which they saw as a waste of useful materials. Some employees voiced their considerable frustration. Michael Voss was one of the frustrated electricians. He understood that valuable and useful materials were being thrown away and he, and other electricians, occasionally checked to see what had been placed in the dumpster. At one point he noticed some small sanding disks in the dumpster outside the electric shop. Another 14-year lead station electrician “told [me] just bring some of that stuff back” and directed him to “hold on to it” for use at a future time when needed. Mr. Voss removed : 1) several hands-full of the sanding disks and 2) an unopened package of 409 Dremel wheels from the dumpster and carried them back to his locker one floor below the electrical shop. Those materials remained in his locker for several months until February 5, 2013, when the events that led up Mr. Voss’ termination occurred.

5. The “clean-out” process occurred because many of the materials had no “traceability.” “Traceability” means the maintenance of records and paperwork showing when, where and by whom the parts were manufactured, and other relevant information. The Nuclear Regulatory Commission (NRC) regulations require that machinery, equipment and other parts that might be affixed to nuclear plant property must have “traceability.” Without specific “traceability”, parts are not allowed to be affixed to a nuclear power plant. That is why many parts that had been left in the electrical shop storage were being thrown away. Dremel tools and other consumables (materials or tools that are not going to be affixed permanently to the nuclear plant property) do not have “traceability” requirements with the NRC. Such consumable materials are to be

returned to the “green warehouse” so that warehouse personnel can decide what to do with them. Mr. Vande Hei testified that any unused tools or equipment found when the employees are cleaning out the electric shop that do not have traceability issues are to be returned to the “green warehouse.”

Mr. Vande Hei also explained that he had given Mr. Voss a “Material Removal Pass” on one occasion to remove a small metal box that the plant no longer had any use for. A “Material Removal Pass” gives permission to the employee to remove the material from the plant for his own use

6. Mr. Voss, like many Prairie Island Nuclear Plan electricians, uses more than one locker in the locker room. The electricians store work clothes and personal effects in their lockers. Because storage space is at a premium in the electric shop, many electricians also keep some company tools in their lockers. Mr. Voss had less storage space in the electric shop than a number of other electricians, so he stored more materials in his several lockers. Several other electricians testified that they had 2-3 lockers to store things such as hand tools because of lack of space in the electric shop.

7. On the morning of February 5, 2013, Mr. Voss ended his night shift. He testified he was “exhausted.” Mr. Voss had just finished working a long night shift and had recently repeatedly switched from night to day shifts back to night shifts in the past week. He entered the second floor locker room, opened his locker and sat down on the bench in front of his locker. As he sat there, he decided he was too tired to take a shower. He noticed the sanding disks and the package of Dremel wheels in the locker that he had placed there several months earlier. He looked at the box and decided “I was tired of them being in there,” and “I was tired, I just wanted to get one thing done.” It occurred to Mr. Voss that he could not recall whether he had signed shift sign-out sheet, a routine task which he is supposed to perform every day. Since both the sign-out sheet and the electric shop are located on the third floor, he thought, he “could kill two birds with one stone and [he] could get the box out of there and [he] could check [his] sheet and then go home.” Since he was intending to go home, he grabbed his lunch box. Mr. Voss testified it would be easier to carry the sanding disks and the box of Dremel wheels inside his lunch box. Before going upstairs, Mr. Voss used the restroom. He talked to a few coworkers who were

coming and going in the locker room. After a few minutes, he left the locker room, walked around the corner and hit the elevator button to go upstairs. Mr. Ross testified he waited for several minutes, but the elevator never came. So, according to Mr. Voss's testimony, rather than walking up the stairs because he was so tired, he decided to just go home.

Mr. Voss walked through the building towards the exit with his lunch box in hand. Mr. Voss testified he had completely forgotten that the box of sanding disks and the Dremel wheels were inside the lunch box. When he walked out of the facility by the guard shack, the scanner alarm when went off. It went off because the scanner recognized the barcode on the box of sanding disks. As the security guard came out of his office, Mr. Voss set his lunch box on the shelf and opened it up. The guard asked him if he had a property removal pass and Mr. Voss replied, "no." He told the guard "No I'm not supposed to have them here." Mr. Voss told the guard it was an accident and that he had forgotten that they were in his lunch box. Mr. Voss asked the guard if he could just put them back. But the guard said he would have to call Mr. Voss's supervisor. The guard called Mr. Vande Hei, who came down and confirmed that Mr. Voss was not supposed to have the Dremel wheels. The security guard then looked through Mr. Voss's lunch box, with Mr. Voss's permission, and found the sanding disks. Mr. Vande Hei told Mr. Voss to go home.

8. On February 6, 2013, Mr. Voss was interviewed by Mr. Gary Minlschmidt, Lead Workforce Relations Consultant for the company, Mr. Chris Childras, Assistant Maintenance Manger at Prairie Island, and an Paul Huettl, an electoral shop supervisor. During the interview, Mr. Voss admitted that the portal monitor alarm went off the previous day as he exited the security building. He admitted that while he waited for the security officer he put his lunch box on the counter and opened it. He admitted that he removed two Dremel wheels that were in their original packaging and that he showed them to the security officer. He admitted that he did not have a "Materials Removal Pass" permitting removal of the items from the site. He admitted that it was a mistake and that he had asked the security officer if he should return the tools. Further, he admitted that he had granted permission for the search of his lunch box and that in the lunch box there were sanding discs and Dremel tools that were unused and in good working condition. He stated that he forgot that he had put the material in his lunch box. Mr. Voss stated

that he had the box of Dremel tools in his personal locker at work and they had been in his personal locker for somewhere between two to five months because some tools and materials in the electric shop were being thrown away in an effort to clean up the department. Mr. Voss stated he took the Dremel tools out of a metal recycling dumpster in the mechanical shop. The company contends that the only dumpster in the mechanical workshop that fit the description that Mr. Voss gave was a 3x3x5' dumpster that was used for metal recyclables, not discarded materials or tools like Dremel wheels. The company also contends that the 3x5 dumpster sat next to the milling machine in the mechanical shop, adjacent to the electric shop. Mr. Voss claimed he took the Dremel tools out of the recycling dumpster and put them in his locker because he thought that if he put them back in the electric shop the tools would get thrown out again. Mr. Voss further stated that on February 5, he was very tired coming off a night shift at work. He stated that during the 10-15 minutes that elapsed between the time that he put the tools in his lunch box and when he entered the security building to exit the plant, he forgot that the Dremel tools were in his lunch box. He said he was very tired and wasn't thinking. [Post-hearing brief of company at 9].

Mr. Voss was asked whether he was restoring a car at home and whether the Dremel tools would be useful in restoring that car. The company contends that Mr. Voss claims that he was not restoring the car at home, but rather that he was restoring the car in another shop and that the tools would not be useful to him. He was asked if the tools would be useful to someone else. Mr. Voss claimed he had never used the tools. Mr. Childras contended that he was watching Mr. Voss closely during the interview. Mr. Childras testified that from the look on Mr. Voss's face Mr. Childras thought he reacted like he had been doing something wrong. Mr. Voss apologized and claimed that he would not have removed the tools from the site, but just forgot that they were in his lunch box. During the interview, Mr. Voss pointed out that approximately a 1-1/2 years before Mr. Vande Hei had given Mr. Voss a "Materials Removal Pass" to take an old metal box out that was not being used out of the plant. Mr. Voss claimed he had received a blank removal pass from Mr. Vande Hei. Mr. Voss was then put on paid crisis suspension and was told he must be available during normal business hours while the company continued its investigation.

9. “Ultimately, [Mr.] Minlschmidt concluded with management that [Mr.] Voss’[s] explanation for what happened was not credible and that Voss intended to remove company property from the site without permission.” [Post-hearing brief of company at 13.]. Mr. Minlschmidt made a recommendation to terminate. His recommendation went before the Material Employment Action Review (MEAR) process. This process occurs to ensure that an adverse employment action for a nuclear employee has no connection with an employee raising any kind of safety-related concern. The decision was made to terminate Mr. Voss’s employment and a meeting was scheduled on March 4, 2013, to inform Mr. Voss of the decision.

10. At the March 4, 2013, meeting, Mr. Voss detailed a series of personal events that have affected his family, including his own cancer treatment, his mother being put into a memory care unit due to Alzheimer’s, a sister-in-law who had committed suicide, and his wife’s attempted suicide. All of these situations occurred in 2012. He further explained he had a cousin he was very close to who died in a head-on collision in early January 2013. Mr. Voss stated he made a serious mistake by taking the sanding discs and Dremel tools out of the plant because he was not thinking clearly. He further explained that in January 2013 he had participated in a sleep study and had been diagnosed with sleep-apnea disorder and received a CPAP machine to assist with his tiredness. Further, he explained that he understood that he did wrong and expected to punishment, but he felt termination was unfair. Ultimately the company chose to proceed with termination and issued Mr. Voss a termination notice on March 4, 2013. 11. The company contends that there are many “critical facts that are fatal to the union’s grievance.” [Post-hearing brief of company at 16].

11. The company contends that Mr. Voss admitted to the following:

He received training on the Code of Conduct and Company policies in both 2011 and 2012. (Tr. 290.)

- He knew from his training that he was expected to “do what’s right and report what seems wrong.” (Tr. 290.)
- He knew that it was wrong to take Company property without permission and understood that Company property was not supposed to leave the plant premises. (Tr. 290.)
- He knew that he was supposed to request a material removal pass if he wanted something from the plant, and had done so in the past. (Tr. 291.)

- He did not have permission to remove the Dremel tools from the plant. (Tr. 293, 295.)
- Voss waited until he knew he was going to be fired to provide the additional information about his personal life tragedies and his sleep-apnea, even though he could have told the Company about these issues four weeks earlier during the February interview, before the decision to terminate was made. (Tr. 316.)
- Voss gave conflicting explanations about how long the Dremel tools had been in his personal locker, claiming they were in his locker between two and five months during the investigation, and then claiming they were in his locker between four and six months at the arbitration hearing. (Tr. 296.)
- Voss claimed he was extremely tired on February 5, but admitted he had volunteered to work the night shift that day. Even though Voss was tired and dealing with personal tragedy, he also volunteered to work an outage in Monticello in the upcoming weeks which would have required an incredible number of hours of work which would have kept him away from home and his spouse even though he claimed he was emotionally and physically drained. (Tr. 298-299.)
- Performing shift work, including the change over from nights to days or days to nights, and working long hours are common in the nuclear industry and common during an outage. (Tr. 300.)
- Even though Voss claimed he was close to not being able to function on the morning of February 5, he knew that if he was not fit for duty he was required to tell a supervisor that he was not fit for duty, yet he failed to do so. (Tr. 300-301.)
- Voss claimed that what he should have done instead of putting the box of Dremel tools in his lunch box was to simply throw the unused tools in the garbage so that no one would have known about the issue. (Tr. 302-303.)
- Voss acknowledged that he would have taken the Dremel tools back to the electric shop on any other day when he first arrived at work and wasn't exhausted and ready to go home, yet claimed that he decided that it was important to do so at the end of his shift on February 5 when he claimed he was too tired to even take a shower. (Tr. 304-305.)
- Voss acknowledged that he had a tool box as well as a desk and a cabinet where he could have kept the Dremel tools, and that the tool box, desk, and cabinet were close to his work area in the electric shop. His personal locker was on a different floor, much farther away from the electric shop. (Tr. 309-312.)
- He admitted that he knew during the interview on February 6, 2013 that he was facing a very serious issue for being caught with the Dremel tools in his lunch box as he tried to take them out of the plant. Even though he knew he was facing a very serious issue, he waited until almost a month

later after he knew he was going to be fired to write the March 4 letter to the Company and provide the information about his sleep apnea and the personal tragedy in his life. (Tr. 316-318.)

- Voss admitted at the end of the interview on February 6 that Mr. Minschmidt asked him whether there was any additional information that the Company needed to know or consider and that Voss responded no, even though Voss knew about the sleep apnea issue at that time and the personal tragedy in his family. Voss could have brought that information up during the February 6 interview and failed to do so. (Tr. 319-320.)
- He admitted that he knew his actions were wrong, violated Company policy, and that he expected to be punished for his actions. (Tr. 320.)
- He acknowledged that it didn't matter whether an item cost \$5 or \$500, but if the item did not belong to him that he should not have taken it no matter the cost, and he should be punished for his actions. (Tr. 320-321.) [Post-hearing brief of company at 16-18].

12. Essentially, the company contends:

The Company followed its policies in terminating Mr. Voss. He acknowledged he attempted to take the Dremel tools out of the plant without permission. He knew it was wrong and he should be punished. The company's investigation was conducted in a fair and objective manner. The degree of discipline was reasonably related to the seriousness of the offense. Taking someone else's property without permission, particularly in violation of a rule on which Mr. Voss had been trained repeatedly, merits severe punishment. There are no extenuating circumstances that warrant leniency. Mr. Voss's explanation makes no sense and is incredible. Mr. Voss never told anyone that he was too tired or emotionally upset to perform his job or that he was unfit for duty. Mr. Voss claimed he found perfectly good Dremel tools in a metal recycling dumpster and took them out of the dumpster and put them in his locker even though there was no dumpster located in the area he says he found them. Even more unbelievable is Mr. Voss's claim that he put the Dremel tools in his lunch box and then forgot them all in 10-15 minutes later as he exited the plant. "[Mr. Voss]'s story after the fact is simply an attempt to tap dance his way out of termination and save his job." [Post-hearing brief of company at 22]. "These acts of misconduct are clear violations of the Code and company policy. Given the deceptive nature of his actions, and Voss'[s] relatively short tenure as an employee, it was appropriate to terminate his employment. There is no basis to reduce the severity of the discipline as the union requests. The

company had just cause to discharge Mr. Voss and the union's grievance should be denied." [Id. at 23].

13. Essentially, the union contends:

A. The termination must be overturned because the employer lacks just cause. Since the matter involves an allegation of attempted theft, a crime of moral turpitude, the employer bears a heightened burden of proof. The employer bears the heightened "beyond a reasonable doubt" burden; or, at least, the "clear and convincing evidence" burden of proof, since discharge rested on allegations of theft, which constitute criminal or stigmatizing behavior. The employer has failed to present sufficient facts to prove wrongdoing under a heightened evidentiary standard. "Mr. Childras testified that his conclusion was based largely on his perception of Mr. Voss's body language during what he perceived as a key moment of their interview." But neither Mr. Minschmidt nor Mr. Childras are trained in interrogation techniques or clinical interrogation observations.

B. The employer's case is built on unsubstantiated suspicions based on misunderstanding of key facts. There is no doubt that consumable and non-consumable materials were thrown away in a dumpster near and around the electric shop in the fall of 2012. Mr. Voss's testimony that he found two Dremel wheels and sanding disks in the dumpsters is entirely consistent with the facts that multiple employees testified to their first-hand knowledge that the "clean-out" project resulted in haphazard disposal of valuable and useful materials and that some of these materials had been retrieved from dumpsters and that the employees had hidden them for future use. The company during its investigation neglected to inquire about the "clean-up" project. If the employer had performed even a cursory investigation on this point, it would have determined that there were no factual basis to doubt Mr. Voss's assertion that he found the Dremel wheels and sanding disks in the dumpster. Similarly, Mr. Childras non-expert observations of body language related to Mr. Voss's car repair project are irrelevant. It was no secret that Mr. Voss was having a car restored. He and Mr. Vande Hei had talked about it numerous times. The car was on his screen saver at his work computer. Without conducting a fact investigation on this point, the company wrongfully inferred that because Mr. Voss was interested in car restoration, he must be putting the Dremel wheels to use on that project.

However, another electrician who has used and purchased these exact Dremel wheels and sanding tools understood that they cannot be used for such a project because they are “very small”; “you need a 4 ½ inch disk at minimum to work on anything else”; “That is too light for a car.” Mr. Voss had no reason to use these Dremel wheels and sanding discs. Mr. Minlschmidt testified that he also found incriminating that Mr. Voss had two personal lockers in which he had been storing tools. This reveals Mr. Minlschmidt’s fundamental misunderstanding of important facts. Mr. Minlschmidt testified he did not ask Mr. Voss’s coworkers whether they had more than one locker in which they stored tools. Had the company performed even perfunctory investigation on this point, they would have learned that multiple lockers is simply par for the course in this particular workplace.

C. The employer’s remaining inferences regarding Mr. Voss’s actions are illogical and cannot support the conclusion that he intended to misappropriate the disks. Mr. Voss knew about the “Materials Removal Pass” system and had used it in the past. This fact strongly suggests that he never formed a conscious intent to take the materials out of the plant for personal use. It would have been easy and risk free for him to request authorization to do so. His actions and statements are not a man attempting to hide anything. There was no intent of theft or attempted theft. The switching of shifts, the personal stressors he faced and his tiredness lead to a reasonable and rational inference that he simply had forgotten that the materials were in his lunch box. For examples, people forget to remove pocketknives before going to airport security; “Yo-Yo Ma famously left a \$ [sic] \$2.5 million, 266-year-old cello in the trunk of a taxi after an exhausting performance at Carnegie Hall.” [Post-hearing brief of union at 26].

D. The union has created reasonable doubt by presenting a far more likely and logical scenario, and that doubt must be resolved in favor of Mr. Voss. Mr. Voss’s subjective mental state is critical to understand the extent of his physical and mental exhaustion. As he explained to the company at the March 4 MEAR hearing, he had experienced a “devastating bout of personal tragedies and hardships in the past year. His wife’s suicide attempt and ongoing need for care, his sister-in-law’s suicide, his mother’s declining health, and the unexpected death of his close cousin all weighed on him. And Mr. Voss’s own medical issues, his cancer treatment and particularly his recently diagnosed, but still untreated sleep apnea, contributed to his stress and

his lack of restorative sleep.” [Id. at 27]. Further, Mr. Voss took on a grueling work scheduling, flip-flopping from day-shift to night-shift to day-shift to night-shift within the course of a week. This would have exhausted even a healthy and trouble-free worker. Mr. Voss had a compromised mental focus. Finally, Mr. Voss’s character and work history show him to be an honest man and a dedicated employee. Mr. Voss’s supervisor, Mr. Vande Hei, testified that Mr. Voss was a good worker, who came to Xcel with a “really good set of skills,” and “didn’t duck the hard jobs, and often volunteered for long hours.” [Id. at 28].

The union requests a make-whole remedy including, but not limited to, reinstatement, full back pay and benefits, together with restoration of all rights under the collective bargaining agreement.

### **DECISION AND RATIONALE**

The burden of proof in a termination case must be carried by the employer. The union argues that the burden of proof in this matter is “heightened” because it involves allegations of criminality, i.e. theft. The union contends that the burden should be “beyond a reasonable doubt,” the same burden carried by a prosecutor in a criminal case. Some arbitrators do in fact impose the “beyond a reasonable doubt” standard in cases involving alleged criminal conduct or stigmatizing behavior. See Elkouri and Elkouri, **How Arbitration Works**, Chapter 15.3.D.ii.a (Kenneth, May 7 ed. 2012); (See also Yellow Freight Systems YS., 103 L.A. 731 (Stix, 1994); Greyhound Food Mgmt., 89 L.A. 1138 (Grinstad, 1987). However, the “beyond a reasonable doubt standard has been expressly rejected by the vast majority of arbitrators in any type of discharge case. [See Elkouri and Elkouri, **How Arbitration Works**, 2008 supplement, at 345-347 (6<sup>th</sup> ed. 2008)]. On the other hand, in a case involving theft, many arbitrators use the “clear and convincing” burden of proof, rather than the traditional “preponderance of the evidence” burden of proof to show just cause for termination of this type. Mr. Voss has been an almost five-year employee with no disciplinary history. He has been a very good worker, willing to take on difficult assignments. He came into the job very well prepared and experienced. Consequently, the clear and convincing standard will be used in this case.

The issue, then, in this case is: Did the employer prove by clear and convincing evidence just cause for the termination of Mr. Voss? The answer is “no”. Why? The employer did not present sufficient facts to prove wrongdoing under the heightened evidentiary standard of clear and convincing evidence. Mr. Voss’s body language proves only that he was stressed during the interview. The case is built on unsubstantiated suspicions, exacerbated by the employer’s misunderstanding of key facts. The employer was skeptical that consumables and non-consumable materials were being thrown into a dumpster near and around the electric shop in the fall of 2012. The body of evidence developed at the hearing, however, supports the fact that many valuable parts and materials were part of the “clean-out” project. Materials were being thrown away because they lacked traceability. Multiple employees testified to their first-hand knowledge that the “clean-out” project resulted in disposal of valuable and useful materials and that some of them had been retrieved from dumpsters and hidden for future use. Mr. Voss’s testimony that he found Dremel wheels and sanding disks in the dumpsters is consistent with these facts. Similarly, Mr. Voss’s expression and body language do not show an “intent” to steal. The record established at the hearing shows that it was no secret that Mr. Voss was having a car restored. He talked with Mr. Vande Hei numerous times and the car was on his screensaver at work. The company inferred that because Mr. Voss was interested in car restoration, he must be putting the Dremel wheels to use on that project. Yet another electrician who has used and purchased the exact Dremel wheels and sanding tools testified that these Dremel wheels and sanding tools were simply “too light” “very small” and “too light for a car”. Mr. Voss had no reason to use these Dremel wheels and sanding items for the car restoration project.

The fact that Mr. Voss had two personal lockers was nothing unusual in this particular workplace. Many electricians testified they have more than one locker because there is no storage space in the electric shop. The “Materials Removal Pass” system that Mr. Voss had used in the past shows it is logical to conclude that he would not have risked his career by not using that system. The “Materials Removal Pass” system was known to him and there was not reason for him to believe it would not work again.

The employer incorrectly concluded that Mr. Voss had subjective “intent to steal” the materials. But the employer did not prove by facts introduced at the hearing by clear and

convincing evidence an intent to steal. The opposite is true. The facts presented at the hearing prove by clear and convincing evidence that Mr. Voss simply forgot about the Dremel wheels and sanding disks in his lunch box. Why did he forget in ten minutes? The devastating bouts of personal tragedies and hardships Mr Voss had faced in the past year and the continuous change from day to night, night to day, day to night all within a week, show both physical and mental exhaustion. Faced with such stresses and exhaustion it understandable that Mr. Voss in 10 minutes could forget he had placed the Dremel wheels and the sanding discs in his lunch box. The employer did not by clear and convincing evidence show that Mr. Voss intended to steal and remove without permission the Dremel wheels and sanding discs from the plant.

Based on the above reasoning it is held that the company has not shown by clear and convincing evidence just cause to terminate Mr. Voss. He shall be made whole, including but not limited to, reinstatement, full back pay and benefits, together with restoration of all rights under the collective bargaining agreement. There shall be a set off for any unemployment compensation he has received and other employment pay and benefits he has received from March 3, 2013, until his return to work for Xcel Energy.

\_\_\_\_\_  
August 25, 2014  
Date

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Joseph L. Daly  
Arbitrator