

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3004

Heard in Calgary, Thursday, 12 November 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

DISPUTE:

Appeal of the discharge of Mr. M. Zilkowsky of Saskatoon, Sask. for fraudulent claims of Canadian National Railway Benefit Plan "National Life" during the periods of September 5 to October 6, 1997, October 14 to 17, 1997, October 26 to November 2, 1997 and October 23, 1997 effective June 19, 1998.

JOINT STATEMENT OF ISSUE:

Mr. Zilkowsky received Weekly Indemnity benefits through CN's benefit carriers, National Life Assurance Company of Canada, from February 5, 1997 to November 18, 1997 as a result of a right knee strain sustained outside the workplace.

The Company subsequently became aware in January of 1998, that during the period that he received benefits, Mr. Zilkowsky received compensation for working as a truck driver outside of CN, during various dates in September, October and November of 1997, which had not been reported.

The Company initiated an investigation and as a result, conducted an employee investigation on June 4, 1998 and discharged Mr. Zilkowsky as stated above.

The Council submits that the investigation was not conducted in accordance with article 117 of agreement 4.3. The Council requests that the grievor be reinstated with compensation, without loss of seniority or benefits. In the alternative, the Council submits that discharge was excessive and requests the arbitrator reinstate the grievor under terms which he feels appropriate.

The Company disagrees.

FOR THE COUNCIL:

(SGD.) M. G. ELDRIDGE

FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) S. BLACKMORE

FOR: GENERAL MANAGER, GREAT PLAINS DISTRICT

There appeared on behalf of the Company:

S. M. Blackmore - Labour Relations Associate, Great Plains District,
Edmonton
A. E. Heft - Manager, Labour Relations, Toronto
J. Bauer - Human Resources Business Partner, Great Plains
District, Edmonton
L. Bronson - District Superintendent, Transportation, Great
Plains District, Edmonton
T. Cowieson - Superintendent, Transportation, Edmonton
S. Lintick - Assistant Superintendent, Transportation, Edmonton

And on behalf of the Council:

D. Ellickson - Counsel, Toronto
M. G. Eldridge - Vice-General Chairperson, Edmonton
M. Janssen - Vice-General Chairperson, Winnipeg
M. Zilkowsky - Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that Mr. Zilkowsky was in receipt of National Life Insurance benefits for the period of time in the autumn of 1997. During that same period of time, from September 5 to November 20, he was also employed elsewhere as a truck driver. While the Company does not take issue with the fact that Mr. Zilkowsky was not medically fit to perform his work as a running trades employee, it did conclude that he fraudulently received weekly indemnity benefits, to the extent that he was in receipt of outside income while receiving such benefits, without disclosing such income to his employer or to the insurer.

Needless to say, much of the instant grievance must turn on credibility. Mr. Zilkowsky submits that he was never made aware of the terms governing the receipt of the weekly indemnity benefits contained in the benefit plan for unionized train and engine service employees. The representation of the Company, not substantially disproved by the Council, is that all employees are provided with copies of the plan. At the outset the Arbitrator finds somewhat implausible the grievor's evidence to the effect that he never before saw the terms of the plan. Mr. Zilkowsky nevertheless maintains that he was at all material times aware of his obligation to advise the insurer of his outside earnings, and to repay the benefits received for any period in respect of which he was in receipt of wages in an equal or greater amount. The Arbitrator finds somewhat puzzling his explanation that he was aware of that obligation by reason of having signed a form which acknowledged the requirement to remit Workers' Compensation benefits which he might ultimately receive to reimburse overlapping indemnity benefits.

Two further factors do little to assist the grievor's credibility in this matter. Firstly, it is common ground that over a period of several months he took no initiative to advise the Company or the insurer that he did in fact have gainful outside employment while claiming weekly

indemnity benefits until he was interviewed by a member of CN Police on December 30, 1997. It appears that during that interview the police officer, acting on the strength of an anonymous phone call received indicating that Mr. Zilkowsky had been working as a truck driver while in receipt of National Life benefits, queried him on that matter. Further, the grievor's credibility is little assisted by the fact that he has not, to the present time, repaid the monies outstanding and owing to the insurer. That is apparently so notwithstanding that he has been criminally charged with fraud in respect of the receipt of those monies, a matter apparently scheduled to be heard in the criminal courts in January of 1999.

The Arbitrator has considered carefully the submissions of Counsel for the Council in this matter, the thrust of which are that the grievor has, at most, engaged in an error of judgement or carelessness, rather than a considered course prompted by a fraudulent intent. I do not consider that it is necessary, for the purposes of these proceedings, to find that there was any deliberate fraud on the part of the grievor. He would, in my view, be subject to a serious degree of discipline if he effectively abused weekly indemnity benefits, even if he did so out of wilful blindness or carelessness, acting in negligent disregard of his obligation both to his employer and to the insurer. At a minimum I am satisfied that he did so conduct himself. Given the doubtful quality of his credibility before the Arbitrator, I find it difficult to reject the position of the Company that in the circumstances disclosed he has broken the bond of trust between himself and his employer. In all of the circumstances I can see no basis upon which to reverse the decision taken by the Company.

The grievance is therefore dismissed.

November 17, 1998

MICHEL G. PICHER
ARBITRATOR