**CANADIAN RAILWAY OFFICE OF ARBITRATION**
**CASE NO. 3322**

**Heard in Montreal, Thursday, 16 January 2003**

**concerning**

**CANADIAN NATIONAL RAILWAY COMPANY**

**and**

**UNITED TRANSPORTATION UNION**

**DISPUTE:**
Dismissal of Mr. A. Weir for "Misrepresentation of an alleged injury".

**UNION'S STATEMENT OF ISSUE:**
On August 13, 2002, the grievor, Mr. A. Weir, was required to undergo a Company investigation in "connection with the circumstances surrounding misrepresentation of alleged personal injury sustained May 28th, 2002 while employed as Yard Operating Employee on the 00:01 Westbound Assignment in Sarnia, Ontario."

As a result of the investigation, Mr. Weir was discharged from the service of the Company effective August 14, 2002.

The Union appealed the dismissal as excessive and unwarranted and requested the reinstatement of Mr. Weir without loss of seniority and compensated loss wages and benefits.

The Company declined the Union's appeal.

FOR THE UNION: FOR THE COMPANY:
(SGD.) R. A. BEATTY (SGD.) B. HOGAN
GENERAL CHAIRPERSON MANAGER, WORK FORCE STRATEGIES
There appeared on behalf of the Company:
Wm. McMurray – Counsel, Montreal
B. Hogan – Manager, Work Force Strategies
K. Stewart – Manager, Risk Management
A. Marquis – General Manager
B. Olson – Director, Human Resources
And on behalf of the Union:
M. Church – Counsel, Toronto
R. A. Beatty – General Chairperson, Sault Ste. Marie
J. Robbins – Vice-General Chairman, Sarnia
G. Ethier – Secretary, GCA, Hornepayne
S. Pommet – Local Chairperson, Montreal
A. Weir – Grievor

**AWARD OF THE ARBITRATOR**

The grievor, Mr. A. Weir, was discharged for what the Company considered to be a fraudulent claim of injury. It is common ground that the grievor worked as a Yard Operations Employee

(YOE) at Sarnia, and that his claim of injury resulted from the sideswiping of his yard movement, the 0001 Westbound assignment. The grievor reported an injury to his left shoulder and lower back and was seen later that day at the emergency room of the Sarnia General Hospital. He was then diagnosed as being fit for modified duties May 28 until June 3, 2002, and directed to avoid climbing and lifting.

Almost immediately the Company decided to engage in surveillance of the grievor to verify his injury claim. On May 30, 2002 a private investigation company was hired to observe and videotape the activities of the grievor at his residence and elsewhere. The Company's representatives submit that the decision to conduct surveillance of the grievor was based on a number of factors, including the grievor's apparent ability to function during the shift after the sideswiping incident, certain inconsistencies in his description of his injuries made to separate supervisors, the plausibility of an injury to his left shoulder, as opposed to his right shoulder, given the direction of travel at the time of the collision, and the fact that the grievor had a record of thirteen prior on duty injuries over a period of twelve years, three of which occasioned compensable leaves of absence of some duration, in 1990, 1995 and 2001, respectively. The evidence further indicates that the grievor attended a Company investigation into the incident of May 28, 2002 at a hearing held on May 31, 2002. During the course of that investigation the Company emphasised the prior injuries incurred by the grievor and questioned whether the back and shoulder injury he experienced might not have been as a result of previous injuries to his left shoulder, lower back and neck. The grievor indicated that he was not qualified to make that assessment and responded affirmatively when asked whether he would be prepared to make himself available to the Company's medical provider, Medisys, for evaluation.

The evidence discloses that shortly thereafter the grievor provided the Company with further attending physician's reports which extended the period of his absence and, over time, appeared to expand the range of his physical limitations. Those reports were issued by his personal physician, as well as a chiropractor to whom he was referred by his physician. The reports would have kept him out of service from the day of the incident through August 22, 2002. It is common ground that during all of that period the grievor regularly attended physiotherapy sessions.

It appears that the grievor was placed under videotape surveillance for a substantial period of time in the period of May through July of 2002. The videotape evidence cannot be characterized as revealing Mr. Weir performing substantial activities comparable to the physical activity that would have been required of him working as a yard operations employee. Given the extensive period of time over which the surveillance was taken, spanning several weeks, the incidents of questionable activity are relatively limited. On one occasion the grievor is observed carrying a case of soft drinks from the front of his house to the back. That occurrence was apparently recorded on June 1, 2002. On the same day he was observed assisting his wife in carrying a folded table from his garage to the back yard of his residence, as well as a further load of what appears to be two cases of pop from his house to the back yard. Substantially later, on or about July 26, 2002 he is observed purchasing and carrying two bottles of chlorine, as well as two barbeque propane tanks, with an estimated weight of approximately thirty-five pounds each.

On the basis of the evidence gathered through the videotape surveillance of the grievor the Company formed the view that he was carrying out activities inconsistent with his physical limitations and that he was in fact defrauding the Company on the basis of a falsely claimed injury. Its conclusion in that regard appears to have been prompted in part by the opinion of a Company physician. On August 6, 2002 Dr. Ron Lindzon forwarded to Supervisor Anthony Marquis the following letter in the form of an email:

Good morning, Tony:

At your request, I have viewed the video surveillance tapes of June 1, 2002 and July 26, 2002 on the above employee. It is my medical opinion that Mr. Weir demonstrated full neck, back and shoulder range of motion with the ability to bend, twist, lift, carry, pull and throw without any restriction or limitation. Specifically, the videotape evidence on June 1, 2002 showed that he lifted and carried two full cases of soda pop weighing approximately 37.5 pounds, and that he pulled a large table and carried it with assistance without any limitation. On July 26, 2002, Mr. Weir demonstrated the ability to lift and carry two full propane tanks, one in each hand each weighing approximately 38.5 – 40 pounds each, and place them in the trunk of of vehicle and subsequently remove them by himself without musculoskeletal limitation or restriction. Based on this videotaped evidence, it appears that this individual should capable of performing at least at a medium level workload without any musculoskeletal limitation or restriction (on the dates in question), which would allow him to work at his position as a conductor.

Should you have any further questions, please contact me at your convenience.

Sincerely, Ron Lindzon, MD

The evidence of Mr. Marquis, which the Arbitrator accepts as truthful, is that he requested the opinion of Dr. Lindzon to assist him in deciding whether to conduct a second disciplinary investigation of Mr. Weir. He confirms that on the basis of the doctor's report he decided to do so. He also indicates, however, that a copy of Dr. Lindzon's opinion was provided to the investigating officer, Mr. Terry Lee, who conducted the investigation on August 13, 2002. It is not disputed that although Mr. Lee, who recommended the termination of Mr. Weir, and Mr. Marquis, who was ultimately responsible for the final decision in that regard, were both in possession of the letter of Dr. Lindzon at the time of the investigation, that letter was not provided to the grievor or to his union representative at any time prior to his discharge.

The evidence further indicates that on August 6, 2002 Company Risk Officer Paul Richings forwarded the letter of DR. Lindzon and copies of the two video surveillance tapes to the Workplace Safety and Insurance Board (WSIB), stating the Company's position that the Company considered his claim to be false and objecting to the allowance of any benefits under his claim. The letter further suggested that the Board might consider referring the case for prosecution.

The claims adjudicator of the WSIB, Mr. Shawn Spratt, was not impressed. In a decision dated October 31, 2002 he indicates that he closely considered the surveillance tapes taken between May 31, and July 28, 2002. His decision, which is obviously not binding on the Arbitrator for the purposes of this grievance, reflects, in part, the following findings:

I viewed the surveillance tapes on August 15, 2002, after confirmation that Mr. Weir had been provided his copies and corresponding documentation. I also conducted a comprehensive review of the investigator's report accompanying the videotapes. The following conclusions resulted from my observations.

The videotape surveillance was conducted from May 31, 2002 to July 28, 2002. There are incidents captured on tape such as Mr. Weir lifting cases of pop cans and propane tanks, bending over to pick up debris off the ground, as well as moving a large party table with the assistance of his wife. These incidents occurred over a two month time frame, and in my view

do not establish that fraudulent actions took place. Mr. Weir as the medical and video evidence supports was receiving active chiropractic treatments and was combating his left shoulder and lower back injury as well as a non-related dental injury with various painkillers and assorted medication. Moreover, the video surveillance does not depict a breach in lifting techniques as it appears Mr. Weir was observing proper mechanics in his lifting and bending movements.

In the narrative report of the surveillance tapes, as well as in Dr. Lindzon's assessment email dated August 6, 2002, the observations and opinions rendered would have to be considered as subjective in nature. Neither Dr. Lindzon nor the surveillance investigator have examined the worker, and their opinions do not have objective physical findings to substantiate them. Observations were noted in the investigation report that Mr. Weir did not display any signs of hesitation, pain, discomfort, or physical restrictions, however, people's pain thresholds vary and essentially, even though no signs of pain were demonstrated, it is unfair to assume there is no pain.

Mr. Weir received active medical treatment all throughout his period of disability which is well documented in the claim file. He was compliant with the employer in the early and safe return to work process, as the medical forms requested by the employer were completed by Dr. Waybrant who was the primary treating practitioner, and who opinion I would have to give the most credence to under this claim.

…
**DECISION:**

Based on the information on file, following a comprehensive review of the surveillance investigation and medical documentation, I feel that Mr. Weir did not misrepresent his level of disability under this claim or conduct fraudulent activities which would warrant a referral to the Special Investigations Branch. Evidence reviewed indicates that loss of earnings are in order to August 29, 2002 under this claim. Therefore, loss of earnings benefits will be restored from August 13, 2002 to August 29, 2002 under this claim.

The Arbitrator is advised that the Company has appealed the adjudicator's decision.

There are two issues to be addressed. The first concerns the procedure whereby the Company conducted the investigation leading to the grievor's discharge. The second relates to the merits of the Company's conclusion that the grievor was malingering.

I deal firstly with the procedural issue. Counsel for the Union submits that the Company violated the obligation to provide a fair and impartial investigation by withholding from the grievor and his Union the letter of Dr. Lindzon dated August 6, 2002, a letter which remained in the possession of the investigating officer as well as the Company officer who ultimately made the decision to discharge Mr. Weir. Article 82.2 of the collective agreement deals with disciplinary investigations and provides as follows:

**82.2** Employees may have an accredited representative to appear with them at investigations, will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation.

It is not disputed that the foregoing provision establishes the basis for what has generally been characterized as a "fair and impartial" investigation, a precondition to the assessment of discipline against any employee. Central to the issue in the case at hand is the right of the employee "… to hear all of the evidence submitted and … be given an opportunity through the presiding officer to asks questions of witnesses whose evidence may have a bearing on the employee's responsibility."

It is difficult for the Arbitrator to conclude other than that the professional opinion of Dr. Lindzon was evidence in the hands of the Company, indeed evidence having a substantial and prejudicial bearing on the employee's responsibility within the meaning of article 82.2 of the collective agreement. For reasons which the Company's officers best appreciate, however, that evidence was never shared with the grievor, nor with his Union representative, and prior to the employee's discharge no opportunity was provided for the grievor or his Union representative to question Dr. Lindzon on his opinion or to offer any rebuttal to it.

This Office has had a number of prior occasions to consider the principles which govern the application of provisions such as article 82.2 of the instant collective agreement. It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void *ab initio*, regardless of the merits of the case. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration. That reality is well reflected in the decision of this Office in **CROA 1734**, a case involving the instant Company and the Brotherhood of Maintenance of Way Employees. The following excerpt from that award reflects the governing principles:

The essential facts of this case are described in **CROA 1733**. It appears beyond dispute that Mr. Weafer violated Rule G both by returning to the Company's camp in an inebriated state, rendering himself unfit for duty, and continuing to consume alcohol in the form of beer through the better part of the night in the bunk car and elsewhere on Company premises. He was disruptive, insubordinate and plainly deserving of a serious measure of discipline.

Regrettably, however, the material discloses what the Arbitrator can only describe as a serious violation of Mr. Weafer's rights under Article 18.2(d) of the Collective Agreement. During the course of the investigation into Mr. Weafer's conduct, conducted by Program Supervisor Gino Masciarelli in Edmonton on August 8, 1986, Mr. Masciarelli had in his possession a statement obtained from another employee involved in the same incident, Mr. L.L. Finnigan. That statement was obtained the day previous, and neither Mr. Weafer nor his Union representative had a copy of it. During the course of Mr. Weafer's investigation Mr. Scott Dawson, Federation General Chairman, who was acting as the grievor's Union representative, observed Mr. Masciarelli, on more than one occasion, referring to the statement of Mr. Finnigan while formulating questions for the grievor. When Mr. Dawson asked to have a copy of the Finnigan statement Mr. Masciarelli denied his request, asserting that it was not evidence being used in respect of Mr. Weafer's case.

Article 18.2(d) of the Collective Agreement provides as follows:

Where an employee so wishes an accredited representative may appear with him at the hearing. **Prior to the commencement of the hearing, the employee will be provided with a copy of all the written evidence as well as any oral evidence which has been recorded and which has a bearing on his involvement.** The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an

opportunity through the presiding officer to ask questions of the witnesses (including Company officers where necessary) whose evidence may have a bearing on his involvement. The questions and the answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.
(emphasis added)

In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.

Documentary material being used by a Company officer conducting an investigation is, *prima facie*, "oral evidence which has been recorded and which has a bearing on the involvement" of the employee being investigated. Fairness must be seen to be done, in the most objective sense. It is simply not enough for the investigating officer to read such material while not disclosing its contents to the Union representative saying, "Trust me, this is not evidence on which the Company relies." If Article 18.2(d) is to have any meaning, it must be presumed that recorded statements of other employees being referred to during the course of a grievor's investigation are viewed by the investigating officer as pertinent to the inquiry, and must be disclosed forthwith. Given the critical reliance of this Office on documentary evidence, including the result of such investigations, that approach must be seen as clearly unacceptable. It is plainly inconsistent with the intention of an Article such as 18.2(d) of the Collective Agreement.

There is nothing unduly burdensome in the Company's obligation to conduct a fair and impartial investigation. Very simply, it is incumbent upon the investigating officer to provide to the employee and his union representative all of the evidence relevant to the employees' responsibility which is in the officer's own hands. In a case such as the grievance at hand, where the only issue was a question of medical opinion as to the *bona fides* of the grievor's injury, and the only medical opinion in the hands of the Company was the letter of Dr. Lindzon essentially accusing the grievor of faking his injuries, it is difficult to understand on what basis the Company could properly withhold such an obviously prejudicial document from the employee and his Union. While it is true, as Counsel for the Union suggests, that even Dr. Lindzon's opinion may be somewhat qualified, as he indicates that he views the grievor as able to perform "a medium level workload", which might be something less than the heavy physical burden performed by a YOE, the fact remains that the letter constitutes a professional medical opinion to the effect that the grievor is apparently able to perform tasks inconsistent with his stated limitations. By any account it must be viewed as a document which the Company was under an obligation to provide to the Union, to the extent that it would have a bearing on his responsibility, and to allow the grievor and his union the opportunity to ask questions of Dr. Lindzon, if they should deem it necessary to do so.

On what other basis can the securing of the letter of opinion from Dr. Lindzon be understood? I accept the evidence of Mr. Marquis that his intention was to verify with the Company's physician

the conclusions to be drawn from the videotape evidence, as a matter preliminary to his own decision to conduct a formal investigation. The fact remains, however, that if the Company's officer believed that the videotape was itself sufficient evidence to conclude that the grievor was malingering, there would presumably be no need to consult Dr. Lindzon. The inescapable conclusion, on the balance of probabilities, is that the physician's opinion was central to the Company officers' own judgement leading to the grievor's discharge.

These observations are not to suggest that Company officers conducting a disciplinary investigation need be legally trained and adhere to trial-like rules of evidence. The standard to be met is basic fairness. By any reckoning, withholding from an accused employee a piece of documentary evidence which effectively condemns him or her, and is arguably central to the Company's decision to terminate, is beyond the most basic standard of a fair and impartial proceeding, and beyond the express requirements of article 82.2. of the instant collective agreement. In this regard, the general principles governing investigative procedures were commented upon in the following terms in **CROA 2643**:

The Union raises an issue with respect to the regularity of the investigation conducted by Mr. Belanger. During the course of his testimony he related that, although he was in possession of the written complaints which were provided to Mr. Gilmore at each of the two investigation hearings, he also had conversations with certain of the persons who made written complaints. According to his evidence, for example, he spoke briefly with Ms. Lachance, as well as with Mr. Rochette and Mr. Machado, essentially to confirm the accuracy of the written documents which they had submitted by way of complaint. The Union's representative argues, in part, that such conversations constitute the gathering of evidence not made available to the grievor contrary to the provisions of the collective agreement relating to disciplinary investigations. He cites article 17 of the collective agreement which contains the following:

... Employees may select an accredited representative to appear with them at the investigation, and the employee and such accredited representative will have the right to hear all of the evidence submitted, and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility.

In the Arbitrator's view the case at hand does not disclose a violation of the standards contemplated in the above provision. The prior awards of this Office have confirmed, quite properly, that it is inappropriate for an investigating officer to have in his or her possession a document containing information or complaints relating to an employee, and to refuse to provide that document to the employee or his or her representative. Such action would, it has been found, violate the standards of a fair and impartial investigation (see **CROA 1581**).

This Office has also had occasion in the past to comment on the informal nature and general fact finding purpose of disciplinary investigations, as contemplated under the terms of a number of collective agreements. In **CROA 2073** the following appears:

As previous awards of this Office have noted (e.g. **CROA 1858**), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the

essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.

Further, in **CP Rail and CAW-TAC Canada Rail Division, Local 101**, an unreported decision of this arbitrator dated October 26, 1992, the following was said at pp. 6 and 7:

With the greatest respect for the zeal exhibited by Mr. Lemyre, the Arbitrator cannot sustain his view of the nature and purpose of the process contemplated within Rule 28 of the collective agreement. The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigation officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.

The process so contemplated is not a trial nor a hearing which must conform in all respects with judicial or quasi-judicial standards. It is, rather, an information gathering process fashioned, in accordance with the requirements of the collective agreement, to give the employee the opportunity to know the information gathered, and to add to that information before any decision is taken with respect to the assessment of discipline.

If, in the case at hand, the evidence disclosed that Mr. Belanger learned of other incidents or accusations being made by the people with whom he spoke, and did not proceed to reduce those allegations into written complaints to be provided to the grievor, an arguable case for a departure from the standards of a fair and impartial hearing might be made out. That, however, is not what transpired. On the basis of Mr. Belanger's evidence I am satisfied that what he attempted to do, quite properly, was to communicate with certain of the persons whose complaints were before him to ensure that there was nothing further that should be added to their statements. According to his testimony, which I accept without reservation, he was advised by Ms. Lachance, Mr. Machado and Mr. Rochette that there was nothing further to add, and consequently nothing further was gathered in a documentary form. There is, in my view, nothing improper in that way of proceeding, and the evidence does not disclose a departure from the standards of fairness contemplated within article 17 of the collective agreement.

Bearing the foregoing jurisprudence in mind, and in light of the clear requirements of article 82.2 of the collective agreement, I am satisfied that in the instant case the Company did violate article 82.2 of the collective agreement in failing to give the grievor and his Union representative a copy of the letter of professional opinion provided to the employer by Dr. Lindzon, a document which, it is admitted, was in the possession of both the investigating officer and the superintendent who ultimately made the decision to discharge the grievor. On that basis alone it is well settled that the grievance must be allowed, with the discipline in question being voided, *ab initio* (see **CROA 1475, 1734** and **3061**).

In the alternative, regardless of the merits of the issue relating to article 82.2 of the collective agreement, the Arbitrator would also have difficulty sustaining the grievor's discharge on the

basis of the evidence relied upon by the Company. In essence, the videotape material showing Mr. Weir engaged in activities inconsistent with his limitations is extremely thin. While the surveillance took place over a period of a number of weeks, the total time in which he is seen to be doing questionable activities, such as handling barbeque propane tanks and carrying cases of pop, involved only minutes and, in the case of the propane tanks, occurred relatively late in his period of physical rehabilitation. The evidence, some of which was apparently not available to the Company, also indicates that at the time Mr. Weir was taking powerful prescription painkillers, including percocet. On the whole, therefore, the activity of only a few minutes over the period of several weeks falls short, in the Arbitrator's opinion, of establishing that the grievor was engaged in making a false claim, and thereby defrauding his employer. In my view the case at hand is strongly to be distinguished from the kind of extensive and sustained physical activities inconsistent with an injury reflected in other awards of this Office (see, e.g., **CROA 2707**).

Among the materials provided to the Arbitrator is a letter dated September 13, 2002 signed by the grievor's chiropractor, Dr. Robert Waybrandt. He offers an opinion categorically opposed to that of Dr. Lindzon. He relates that he viewed the video surveillance and consulted with the grievor's personal physician, concluding: "… we were both in agreement that the tasks that Mr. Weir performed were possible with his condition although he would be unable to do same activities on a repetitive basis. The activities performed may have caused discomfort later in the day or the following day. The medication he was taking possibly aided his ability to perform these tasks."

Bearing in mind that the Company has the onus of proof in this matter, and that an allegation as serious as fraud requires a high standard of clear and cogent evidence, what the case at hand presents is evidence which is equivocal at best. While the Arbitrator can appreciate the suspicions of the Company, particularly in light of the fact that the grievor's stated limitations appeared, at least for a time, to increase as he was under the care of his chiropractor, the employer is nevertheless under an obligation to present evidence which compellingly establishes, on the balance of probabilities, that the grievor falsified his injury. That is not confirmed on the evidence before the Arbitrator.

Given the disposition of this grievance on its merits it is unnecessary for the Arbitrator to deal with the Union's objection as to the Company being justified in its resort to video surveillance in the circumstances. For all of the foregoing reasons the grievance must be allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost.

January 20, 2003

(signed) MICHEL G. PICHER
ARBITRATOR