CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3202

Heard in Montreal, Tuesday, 10 July, 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

Discharge of Toronto Yard employee T. Slywka.

JOINT STATEMENT OF ISSUE:

Toronto Yard employee T. Slywka was assessed the penalty of Discharge" effective 11 May 2000, for his "Failure to protect employment during the period between 1st September and 5th November 1999 and fraudulent misrepresentation of your employment status during that same period."

The Union has appealed the discipline.

The Company had declined the Union's appeal.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) R. A. BEATTY	(SGD.) F. O'NEILL
GENERAL CHAIRPERSON	FOR: SENIOR VICE-PRESIDENT, EASTERN CANADA

There appeared on behalf of the Company:

A. Giroux	– Counsel, Montreal
F. O'Neill	– Labour Relations Officer, Toronto
R. Hayes	– Risk Management Officer, Toronto

And on behalf of the Council:

M. Russell	– Counsel, Toronto
G. Gower	– Local Chairperson, Toronto
T. Slywka	– Grievor

AWARD OF THE ARBITRATOR

The record discloses that for a considerable period of time the grievor, South Toronto Yard Employee Terry Slywka, demonstrated difficulties with respect to attendance at work. Owing to a substantial rate of absenteeism between March 1, and July 16, 1999 the Company conducted an investigation concerning the grievor's time keeping. Following that investigation, held on July 20, 1999, the grievor confided in investigating officer Robert Hayes. He then related to Mr. Hayes that he was suffering stress as a result of family difficulties, which included court proceedings and an order of child support made against him. In the circumstances the Company's officer decided to hold off assessing discipline during a further period of observation, to determine whether the grievor's attendance would improve. When Mr. Slywka again registered attendance problems in the period between September 1 and November 5, 1999 the Company decided to proceed with the assessment of fifteen demerits for the investigation conducted on July 20th and convened a further investigation on November 18, 1999.

It should be noted that following the disclosures to Mr. Hayes by the grievor, to the effect that his absences were due in part to the fact that he did not want to have a high rate of earnings, as his wages with the Company were garnisheed to satisfy a court order of support for his children, and that he was getting by by performing other work "under the table", Mr. Hayes decided to retain the services of a private investigation company to ascertain whether in fact the grievor was performing work for another employer while failing to report for work for the Company, albeit he did not make indemnity claims for sickness for the dates of his absences from Company service. It appears that the surveillance was conducted on six occasions between November 2 and November 17, 1999, with a final report being issued to the Company on or about November 30, 1999 by King-Reed & Associates Ltd.

In the result, at the time of the investigation of November 18, Mr. Hayes, who commenced the investigation as its presiding officer, was in possession of only brief verbal reports from the investigation service, and had not received a full and complete final report with respect to the private investigator's observations and findings. In that context the investigation of November 18 took place without any disclosure to the Council of the ongoing investigation being conducted. It appears, however, that at the conclusion of the proceedings on the 18th. Mr. Hayes made a verbal request to then Local Chairman Rob Chappel for an extension of the period for the assessment of discipline, to which the Council's representative agreed. It also appears that at the conclusion of the November 18 proceeding in light of a response by Mr. Slywka that his absences were the result of "Personal matter, I told you that last time", Mr. Hayes suggested that the grievor should consult his physician. As the record discloses, Mr. Slywka did see his family physician on November 22, 1999. A medical note provided to the Company authorized the grievor's further absence from work from November 22, 1999 to January 17, 2000, a period which is not the subject of this grievance.

It appears that the grievor did return to work for a short period in late January, but again reverted to absence by reason of his claimed illness. It is in that context that the Company attempted to convene a resumption of the investigation on February 15, 2000. While the Company adduced evidence of a registered mailing to the grievor to advise him of the investigation of that date, and the grievor denies having received any such written notice, it is not disputed that Supervisor Mike Brown did reach Mr. Slywka by telephone on the 14th of February, at which point the grievor advised him that he did not receive notice and would not be able to attend the following day, as he would need to instruct his Council representative in preparation for any continuation of the investigation. Mr. Brown appears to have agreed with postponing the matter, pending further instructions from the grievor with respect to the availability of his Union representative and the setting of a date. It appears, however, that the grievor was not forthcoming in that regard, and in the result the investigation was resumed only on April 7, 2000, involving several days of investigations concluding on April 20th.

It should be noted that Mr. Hayes, who was the presiding officer at the commencement of the investigation on November 18, 1999, stood down from the chair of the investigation at the time of its resumption in April, when Mr. Brown became the investigation officer. Mr. Hayes explained that he felt that he could be in a possible conflict of interest, and might be called as a witness, by reason of the content of the final report of the private investigators, whom he was instrumental in retaining. Indeed, it appears that Mr. Hayes' concerns proved valid, as he eventually did become a witness during the continuation of the proceedings, as he was called to answer questions at the request of the Council's representative, Mr. Glen Gower.

The Council makes a number of preliminary objections based on alleged violations of article 82 of the collective agreement. It provides, in part, as follows:

> **82.1** Employees will not be disciplined or dismissed until the charges against them have been investigated. Employees may, however, be held off for investigation not exceeding 3 days and will be properly notified, in writing and at least 48 hours in advance, of the charges against them.
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> **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.

The first objection taken by the Council is that the grievor did not receive a fair and impartial investigation as Mr. Hayes did not disclose to the grievor or his Council representative on the occasion of the investigation of November 18, 1999 that he had received brief verbal reports, by telephone, from the private investigator concerning the grievor's activities. The Arbitrator cannot sustain that objection, in the specific circumstances of this case. Firstly, it is clear that Mr. Hayes knew at the time of the investigation of November 18, 1999 that a full written, detailed report of the findings of the investigators would be produced within a relatively short time. As is clear from his subsequent conduct, Mr. Hayes came to the view that he should not continue to preside over the investigation himself, given the eventual contents of that report. Most importantly, as regards the substance of article 82 of the collective agreement, the course followed by Mr. Hayes and the Company did ensure that the grievor ultimately had the right to hear and see "all of the evidence submitted". It is common ground that at the resumption of the hearing in April of 2000 the grievor and his Council representative were shown the written report, and were eventually given their own copy of it. They were additionally provided with the opportunity to see the video tape and photographs taken by the investigators, and provided to the Company. In the Arbitrator's view the Company did not violate article 82 in the manner in which it proceeded, as it did provide the private investigator's report, including the video tape and photographs, to the Council in a manner consistent with the intention of article 82.2 of the collective agreement at the appropriate time during the course of the investigation, when the Company itself was in possession of those documents.

The Council next argues that a fair and impartial investigation was not provided as Mr. Hayes knew or reasonably should have known that he might become a witness in the proceedings. The Arbitrator cannot agree. Firstly, at the time he commissioned the investigation Mr. Hayes did not know whether the material so obtained would be adverse to the grievor. It is only when he came into possession of the final report, which in the Company's view tended to show that the grievor was performing outside work while on a medical leave of absence, that he stood down as chair of the investigation. In the Arbitrator's view there is nothing in that course which can be said to violate the standard of a fair and impartial investigation. To the contrary, the course followed by Mr. Hayes appears to have understood and respected the prior awards of this Office, which are to the effect that a person who may be a material witness against an employee should not, absent extraordinary circumstances, be the individual conducting that employee's disciplinary investigation (**CROA 1720, 1886, 3061** and **3107**).

The next objection raised by the Council gives rise to arguments which have not previously been made in this Office. During the course of the investigation proceedings in April of 2000 the Council was advised that the video tape which was provided to it, as well as the photographs, was the full record of the material provided to the employer by the private investigator. The Council's representative was also told, however, that the private investigator did retain in its own possession other supplementary segments of video tape and photographs which, based on its own judgement, were not provided to the Company nor referred to in its written report. The Council's representative objected at the investigation that the Company must produce to the Council all of the investigative material in the possession of the private investigator, whether or not that material had in fact been provided to the Company. The investigating officer overruled that request, and counsel for the Council reiterated the objection in these proceedings.

Before turning to the substance of that objection it should be noted that in this arbitration the Council does not object to the admissibility of the video tape which was received by the Company, and which was duly provided to the Council. Implicitly, therefore, the Council does not assert that the Company did not have reasonable and probable cause to initiate the investigation. Indeed, in light of the statements of Mr. Hayes, which the Arbitrator accepts, that he was himself told by the grievor that he was keeping his Company earnings down to evade a court order for the payment of child support, and was getting by by performing other work "under the table", there were more than sufficient grounds to doubt the grievor's honesty and to initiate surveillance of him.

Counsel for the Council submits that where inculpatory evidence is obtained through the extraordinary measure of surveillance, it is incumbent upon the employer to provide to the union all of the evidence so obtained, thereby ensuring the disclosure of evidence which might be disculpatory as well as inculpatory. In the Arbitrator's view, considered at the level of the internal investigation conducted by the Company itself under the provisions of article 82, that position goes too far. What article 82 mandates is a fair and impartial informal inquiry procedure. While the elements of that procedure have been commented upon elsewhere in the jurisprudence, it is well established that the fundamental purpose of the investigation procedure is to maintain a non-legalistic and informal means for the employer to obtain a basis of knowledge surrounding an incident or a course of conduct of an employee on the one hand, and for the employee to be given an opportunity to fully hear and answer any allegation which may result in his or her discipline. The disciplinary investigation is not intended to be a legalistic proceeding fraught with the technicalities of a civil trial (see **CROA 3129, 2643, 2488, 2073** and **1858**).

For the purposes of this case it should be stressed that the concept of fair and impartial proceedings contemplated by article 82 is that all evidence in the possession of the Company, whether inculpatory or exculpatory, should also be in the possession of the employee and his or her Council representative. While arbitration proceedings conducted under the provisions of the **Canada Labour Code** may allow some scope for the production of documents, including documents in the possession of a third party, the obligation of documentation and disclosure contemplated within article 82 of the collective agreement is not so sweeping. Nothing would have prevented the Council from obtaining a subpoena *ducus tecum* against the private investigator in these arbitration proceedings, had it felt the need to do so. However, at the investigation stage, article 82 plainly limits the right of discovery of the Council to evidence and material in the possession of the Company. That standard was met in the instant case. On that basis the Council's objection must be denied.

Nor can the Arbitrator sustain the objection of the Council to the effect that the standard of article 82 was not met because the Company failed to provide the Council its own copy of the investigative report and video tape until the end of the investigation process. It is not disputed that the Council was allowed to view the video tape and to read the report at the outset of the proceedings commencing on April 7, 2000. In the Arbitrator's view the procedure followed by the Company did correspond to the general obligation described in article 82.2 of the collective agreement. The language of the article at issue in the instant case is to be contrasted with the provisions considered by this Office in another grievance between these same parties, **CROA 1475**. Item 4(d) of Addendum 41 of the agreement as it then stood did provide in part: "at the outset of the investigation, the employee will be provided with a copy of all the written evidence as well as any oral evidence which has been recorded and has a bearing on his responsibility." A scan of the current collective agreement reveals, under Addendum No. 41 the following words: "Intentionally left blank". The Arbitrator can only conclude by the removal of that addendum and the alternative wording of article 82 as it presently stands that, for reasons they best understand, the parties consciously departed from the more narrow requirements of **CROA 1475**. The question now to be resolved under article 82 is whether the broader standard of "… the right to hear all of the evidence submitted" has been met. I am satisfied that it has and that the Council's objection in that regard must also be dismissed.

Finally the Council submits that the delay between November of 1999 and April of 2000 in the resumption of the investigation caused prejudice to the grievor, and departed from the standard of a fair and impartial investigation. I cannot agree. Such issues must, of course, be judged on the specific facts of the case in which they arise. It is common ground that the grievor was largely absent from work for the period in question. The Company attempted to schedule the continuation of the investigation in February, but was unsuccessful when the grievor claimed to have not received notice, and requested a further delay to retain and instruct his Council representative. This is not a situation where Mr. Slywka can claim surprise. Based on the questions put to him on November 18, 1999 he was aware that the Company had concerns as to whether he had worked elsewhere during his sick leave. In that context the Arbitrator is not persuaded that the grievor would have had considerable difficulty responding to questions in February or April of 2000 with respect to any possible employment activities outside the Company which might have occurred in the period of September to November of 1999, the period which relates to the investigation report obtained by the Company. The case at hand is, in my view, to be distinguished from **CROA 1833** where no indication whatsoever was given to an employee with respect to the significance of an incident which took place several months prior to the date of his investigation. The Council's objection with respect to undue delay is therefore rejected.

I turn to the consideration of the issue of just cause. Firstly, I must agree with counsel for the Council that there is no basis disclosed on the evidence before me for the fifteen demerits assessed against the grievor for his alleged failure to appear at the investigation scheduled for February 15, 2000. As the record indicates, Mr. Michael Brown

of the Company spoke specifically with Mr. Slywka on February 14, by telephone. During that conversation the grievor clearly explained to Mr. Brown that he had not received written notice of the investigation, and required additional time to instruct his Council representative. No objection to that was taken by Mr. Brown, who effectively agreed to a postponement of the proceedings. I fail to see on what basis the grievor can be assessed fifteen demerits for failing to appear at an investigation which the Company's own representative agreed to postpone. While the Arbitrator can appreciate the frustration experienced by management in attempting to re-establish dates for that investigation, any failure of cooperation on the part of the grievor after the fact cannot be brought to bear for the purposes of assessing demerits described in the discipline Form 780 as relating to "failure to appear for a formal employee statement on Tuesday, February 15, 2000." There was no such failure, as the investigation was in fact postponed by Mr. Brown. The Arbitrator therefore allows the grievance with respect to the assessment of fifteen demerits and directs that they be removed from the grievor's record forthwith.

The second aspect of just cause pertains to whether the grievor failed in his obligation to the Company during the period between September 1 and November 5, 1999, and fraudulently represented his employment status during that period. Firstly, the Arbitrator is compelled to conclude, on the evidence adduced, that Mr. Slywka did fail to maintain proper protection of his employment during the period in question. There is no medical documentation to indicate that he was either physically or emotionally unable to perform the work of his classification during that period. Nevertheless, he consistently represented to the Company that he was unable to come to work by reason of illness. He did so, it should be stressed, notwithstanding a prior investigation for a similar problem in July of 1999, and the assessment of fifteen demerits in relation to that period as registered on October 5, 1999. In the result, the Arbitrator is satisfied that the grievor was engaging in an excessive rate of absenteeism for which he provided no justification to the Company in a timely fashion.

The second and more serious element of the Company's allegation is that the grievor engaged in fraudulent misrepresentation of his employment status. On a careful review of the evidence the Arbitrator is compelled to the unfortunate conclusion that that allegation is also made out. What the file discloses is an individual who deliberately stayed away from work for an extensive period of time the spring, summer and fall of 1999 for the admitted purpose of fraudulently depriving his four children of support payments to which they were entitled under the terms of a court order. By Mr. Slywka's own admission during those periods of time, for which he made no claim for sick leave benefits, he supported himself by doing outside work "under the table", and presumably defrauded government taxation authorities in the same manner. What is perhaps most disturbing is the apparent attempt by the grievor to bring the Company, in the person of Mr. Hayes, into his confidence with respect to these unsavoury schemes, in the apparent hope that his employer might become sympathetic to, if not complicit in, his questionable endeavours. Apart from his comments to Mr. Hayes, however, the grievor continued to falsely hold out to other Company personnel that he was unable to work due to illness.

There is nothing in the record to suggest that at any time Mr. Hayes or any other officer of the Company indicated to Mr. Slywka that it was appropriate or permissible for him to report sick when, in fact, he was not sick, but was deliberately reducing his income to deprive his children of support payments, and was working elsewhere to gain hidden income. As the evidence indicates, in fact the employer had reason to believe that the grievor was a dishonest individual of doubtful character whose continued absences, notwithstanding the prior discipline issued against him for his unacceptable absenteeism, showed no improvement. In fact, as the evidence obtained by the private investigators discloses, it is clear that the grievor was gainfully performing work in the nature of home renovations during the period of his sick leave. Given the grievor's obvious propensity for prevarication, the Arbitrator is not inclined to accept the suggestion which he put forward to the effect that his personal stress caused him to worry as to his ability to perform the safety sensitive work of a yard employee in railway operations. Notwithstanding the extremely able and thorough arguments put forward on his behalf by legal counsel, the Arbitrator does not find the grievor to be credible.

I am satisfied, on the balance of probabilities, that for an extensive period during 1999 and more specifically during the period of the grievor's absence between September 1 and November 5, 1999 Mr. Slywka was deliberately dishonest towards to the Company with respect to his illness and supposed inability to perform work. His deception in that respect is, in my view, so extensive as to have undermined the bond of trust fundamental to the employment relationship, quite apart from the failure of his fundamental obligation to be at work, absent a valid excuse. In the circumstances I am satisfied that the termination of the grievor was an appropriate disciplinary response. In this case, neither the length nor the general quality of the grievor's service come to bear as persuasive mitigating circumstances.

For all of these reasons the grievance must be dismissed.

July 13, 2001

(signed) MICHEL G. PICHER
ARBITRATOR