CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2280

Heard at Montreal, Wednesday, 9 September 1992

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Appeal of the dismissal of Locomotive Engineer M. Kovich, effective 29 January 1992.

JOINT STATEMENT OF ISSUE:

On or about September 26, 1989 Locomotive Engineer Kovich became entitled to maintenance of earnings protection as a consequence of being adversely affected by the closure of the terminal at Fort Erie, Ontario. The terms and conditions governing such protection were set out in Appendix "C" to a Letter of Understanding dated 30 August 1989.

In May of 1991, an audit of his maintenance of earnings claims and work record disclosed the Mr. Kovich had regularly been claiming and receiving full entitlement to maintenance of earnings even though he had been booking off for miles on the representation that he had accumulated his maximum allowable monthly mileage. He had been following this practice since November of 1989.

Following investigation, Mr. Kovich was discharged for theft through the fraudulent submission of maintenance of earnings claims in the amount of $27,692.39.

The Brotherhood appealed the discharge contending that Mr. Kovich had submitted his maintenance of earnings claims in accordance with the provisions of the collective agreement.

The Company disagrees with the Brotherhood's contentions, including the Brotherhood's stated interpretation of the terms and conditions governing maintenance of earnings and those provisions of the collective agreement governing mileage regulations, and has, therefore, declined the appeal.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) C. HAMILTON	(SGD.) A. E. HEFT
GENERAL CHAIRMAN	for: VICE-PRESIDENT

There appeared on behalf of the Company:

J. B. Bart	– Manager, Labour Relations, Montreal
K. R. Peel	– Counsel, Toronto
A. E. Heft	– Manager, Labour Relations, Toronto
J. M. Kelly	– Senior Project Officer, Toronto
M. L. Brown	– Manager of Train Services, Niagara Falls (formerly)
S. Valcourt	– Assistant Manager/Administration Crew Management Centre, Toronto

And on behalf of the Brotherhood:

J. L. Shields	– Counsel, Ottawa
C. Hamilton	– General Chairman, Kingston
S. Birtles	– Local Chairman, Niagara Falls
G. Johnson	– Witness
P. Gallagher	– Vice-General Chairperson, UTU, [CN Lines Central] Hamilton

[AMENDED COPY]

B. Lennox – Local Chairman, UTU [CN Lines Central], Niagara Falls
M. Kovich – Grievor

At the request of the Brotherhood, the hearing was adjourned by the Arbitrator.

On Tuesday, 8 December 1992, there appeared on behalf of the Company:
K. R. Peel – Counsel, Toronto
A. E. Heft – Manager, Labour Relations, Toronto
J. Vaasjo – Senior Project Officer, Toronto
M. L. Brown – Manager of Train Services, Niagara Falls (formerly)
S. Valcourt – Assistant Manager/Administration Crew Management Centre, Toronto

And on behalf of the Brotherhood:
J. L. Shields – Counsel, Ottawa
C. Hamilton – General Chairman, Kingston
S. Birtles – Local Chairman, Niagara Falls
G. Johnson – Witness
B. Lennox – Local Chairman, UTU [CN Lines Central], Niagara Falls
M. Kovich – Grievor

AWARD OF THE ARBITRATOR

The first issue raised in this grievance, which the parties agree is properly before the Arbitrator, is the claim of the Brotherhood that the grievor was denied a fair and impartial investigation prior to his discharge, contrary to the provisions of article 71 of the collective agreement. Specifically, it alleges that the Company violated the agreement when the Company officer who conducted the disciplinary interview of Mr. Kovich refused his request to be represented by his own lawyer during the course of the investigation meetings.

The facts pertinent to the issue relating to the investigative procedure are not in substantial dispute. The collective agreement between the parties, like many collective agreements in the railway industry, and others, in Canada, makes provision for the holding of a preliminary inquiry by the employer before the assessment of discipline against an employee. Such provisions, which have existed in the railway industry for decades, have been fashioned to provide a minimal degree of shop floor due process as a condition precedent to the assessment of discipline against an employee. The underlying principle is that, before being disciplined, an employee should have a reasonable opportunity to know the precise nature of the accusation made against him or her, with reasonable access to any pertinent statements or documents in the possession of the Company, and be afforded a fair opportunity to offer an explanation, response or rebuttal to the information or material in the Company's possession.

In the collective agreement at hand, the investigation process is governed by article 71, which provides, in part, as follows:

> **71.1** When an investigation is to be held the locomotive engineer whose presence is desired will be properly advised, in writing, as to the time, place and subject matter, which will be confined to the particular matter under investigation.
>
> **71.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his or her responsibility established.**
>
> **…**
>
> **71.4** A hearing shall be held and the locomotive engineer advised in writing of the decision within twenty-eight calendar days from the date of the locomotive engineer's statement, unless as otherwise mutually agreed.
>
> **71.5 At the hearing the locomotive engineer, if he or she so desires, may have an accredited representative of the Brotherhood of Locomotive Engineers present who will be accorded the privilege of requesting the presiding officer to ask questions for the record which have a bearing on the responsibility of the locomotive engineer. The locomotive engineer to be given a clear copy of his or her statement.**
>
> **71.6 A locomotive engineer and his or her accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on**

> **the locomotive engineer's responsibility to offer rebuttal through the presiding officer by the accredited representative. The Local Chairman and/or General Chairman to be given a copy of statements of such witnesses on request.**
>
> [emphasis added]

In the spring and summer of 1991, following an audit of certain wage claims made by Mr. Kovich, the Company had grave concerns that he had knowingly and systematically processed fraudulent wage claims in excess of $27,000.00. Following due notice, in accordance with article 71.1 of the collective agreement, an investigative hearing was convened by the Company, commencing September 30, 1991 at Niagara Falls. The investigation was conducted by Mr. R.J. Chorkawy, Manager Train Service. Mr. Kovich appeared at the investigation in the company of his accredited union representative, Mr. S. Birtles. In response to a question from the investigating officer, Mr. Kovich confirmed that he was properly notified of the investigation, but that he had been told in advance that he would not be allowed to have his own lawyer available at the investigation. The investigating officer then confirmed that understanding for the record, stating, in part:

> "The 1.1 collective agreement allows an accredited representative of the B. of L. E. to be present at the investigation and as such the request to have legal council [sic] was denied."

The investigation was lengthy, as it involved a detailed examination of a substantial number of mileage claims submitted by the grievor over a number of months commencing in November of 1989, and extending to August of 1991. The investigation occupied a total of fourteen days, and was completed on or about November 28, 1991. It is common ground that all relevant statements and documents were provided to the grievor and his Union representative, and that a number of persons from whom statements had been obtained were made available to the grievor and the Brotherhood's representative for questioning at the investigation.

The narrow issue raised is whether article 71 of the collective agreement was violated by the refusal of the Company's investigating officer to allow Mr. Kovich to be represented by his own lawyer during the course of the Company's disciplinary investigation. For the purposes of clarity, it should be stressed that Mr. Kovich sought to have his personal lawyer present, and did not seek to have a union lawyer present, although it appears clear that the Company's position would have been no different had the request involved a lawyer retained by the Brotherhood. The question to be resolved is whether the right to a "fair and impartial" investigation contained in article 71.2 is deemed satisfied when an employee is assisted in an investigation by an accredited union representative, or whether, as the Brotherhood contends, that right confers an independent right of representation by the employee's personal legal counsel. For the sake of clarity, it should be noted that this case does not involve the possibility of representation by an accredited union representative who is legally trained, an issue that did not arise and was not argued.

Counsel for the Brotherhood submits that article 71.5 of the collective agreement does not prohibit the right of an employee to be represented by a lawyer. Stressing that articles 71.2 and 71.5 are fashioned for the benefit of the employee, Counsel submits that the employee's best interests may not be sufficiently served by representation limited to an accredited Union representative. In this regard, he submits, article 71.2 mandates the presence of legal counsel to ensure that the investigation be both fair and impartial. He stresses that that is particularly so in the context of the lengthy and complex investigation in which Mr. Kovich was involved. He further submits that the seriousness of the charges made against Mr. Kovich, which were criminal or quasi-criminal in nature, further justifies the view that he was entitled to the representation of a lawyer during the course of the Company's investigation. Counsel notes that statements made by the grievor could not only prejudice his job security but could also make him liable to criminal prosecution. He submits that given the seriousness and complexity of the charge and of the investigation itself, the assistance of legal advice and expertise would have been beneficial to the grievor and would have ensured a fair and impartial hearing.

By way of precedent, Counsel for the Brotherhood refers the Arbitrator to a prior decision of this Office in a case between Canadian Pacific Limited and the Brotherhood of Maintenance of Way Employees, **CROA 1420**, a decision ultimately sustained by the Quebec Court of Appeal in **Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd.; Kates Mis-en-cause** (1991) 81 D.L.R. (4th) 511. In that case the Court upheld the arbitrator's decision that the right to a "fair and impartial investigation" prior to discipline implied a right of representation by legal counsel.

Counsel for the Company submits that there has been no violation of the requirement of a fair and impartial investigation mandated by article 71 of the collective agreement. He stresses that the procedure contemplated under

article 71 has evolved over many years, pursuant to an understanding between the parties to provide a certain set of procedural protections to employees prior to discipline. He argues that the mutual rights of the parties, as well as the rights of the employee, arise in the context of a relatively informal and non-legalistic procedure intended to be conducted by, and among, lay persons. He emphasizes that over the course of many years the parties have never equated the right to representation by "an accredited representative of the Brotherhood of Locomotive Engineers" to representation by legal counsel of the employee's personal choice, or indeed by any legal counsel. He notes that the concern for informality and expedition in the investigation process, which has long been shared by the parties, was most recently reflected in addendum 49, titled "New Discipline Program" incorporated into the collective agreement on April 23, 1986. The purpose of that addendum, in part, is to avoid delay and obstruction of the proceedings by abuse of the right of consultation between the employee and his or her accredited representative. Addendum 49 provides, in part, as follows:

> The employee under investigation may discuss with his accredited representative any questions directly related to and having a bearing on the alleged irregularity under review. However, this practice is not to be abused so as to impede investigation through the employee holding such discussions prior to answering routine questions, such as name, occupation, work location, hours of work, etc. Also, the accredited representative will be permitted to raise questions through the officer conducting the investigation during the course of the investigation. It will be the responsibility of the investigating officer to rule on whether or not such questions are relevant. Whether considered relevant or irrelevant, the question and answer will be recorded. It is to be emphasized that any advice given by the accredited representative to the effect that the employee under investigation should not answer a relevant question will not be accepted by the officer conducting the investigation. The investigation will be conducted in a proper and dignified manner and at all times under the control of the person conducting the investigation. The role of the accredited representative as well as the officer conducting the formal investigation will be monitored by the Union/Management Regional Monitoring Committee.

In the Arbitrator's view it is also instructive to reproduce the portion of addendum 49 which immediately precedes the passage reproduced above. The addendum takes the form of a letter dated April 23, 1986, signed jointly by the officers of the Company and the General Chairman of the Brotherhood. As its text reveals, it was intended to address the concerns of more than one union with respect to disciplinary investigations within the Company's operations. On occasion it makes particular reference to the United Transportation Union, the bargaining agent which represents trainmen and conductors. The letter traces the origins of the investigation process, noting that what had originated as a relatively informal investigative process, during which an employee might be accompanied by a "fellow employee", it had grown somewhat in scope and formality, in response to the wishes of the unions. As appears from the document, the Company expressed substantial reservations that the efficiency and informality of the process should not be impeded, and received the assurances of the Unions in that regard. These understandings are clearly reflected in the following passage from the appendix jointly incorporated by the parties within the terms of their collective agreement, appearing at page 371 of Collective Agreement 1.1:

> One of the changes to the formal procedure requested by the Unions dealt with the role of the "fellow employee" appearing at investigations. The Unions wanted this role redefined with the view to expanding his responsibilities at a formal hearing. In fact, the role of the fellow employee has evolved through changes brought about by discussion between the parties and various decisions of Arbitrators through the past several years. It is clear that the presence of the fellow employee is not that of a mere observer and that certain rights have now been accepted by the parties. (The U.T.U.[T] have requested, and it was agreed, that for the duration of this trial project, the term accredited representative will be used in place of fellow employee. Accredited representative is the term currently used insofar as locomotive engineers are concerned. However, the term fellow employee will continue to apply with reference to the U.T.U. [E].) However, in moving beyond this threshold, the parties have acknowledged that the additional rights provided the accredited representative will in no way undermine the current procedure which is designed to bring out the facts of the case and to provide for a fair and impartial hearing. It is in the light of this understanding that the Company is prepared to define the role of the accredited representative appearing at a formal investigation.

Counsel for the Company notes that, in accordance with other parts of the addendum, the Company undertook to provide training to both Company and Union officers with respect to the conduct of disciplinary investigations. This,

he submits, reflects an understanding on the part of the Brotherhood that representation by an accredited union representative constitutes appropriate representation for the purposes of a fair and impartial investigation under article 71 of the collective agreement. In the case at hand, he submits that the presence of Mr. Steve Birtles, an accredited representative of the Brotherhood of Locomotive Engineers, in attendance with Mr. Kovich at the investigation, fully satisfies the intent of the provisions of articles 71.2, 71.5 and 71.6 of the collective agreement.

Counsel notes that the intention of the parties is further reflected in paragraph 2 of appendix A to addendum 49 of the collective agreement. Under that provision the concept of a "formal" investigation is established for certain serious offences. Paragraph 2(d), appearing at pp. 376-77 of the collective agreement provides, in that regard, as follows:

> **2. (d)** The employee may have an accredited representative appear with him at the investigation. 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. 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 responsibility. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.

Counsel for the Company further points to the constitution of the Brotherhood of Locomotive Engineers, stressing that it distinguishes between the role of legal counsel and the role of accredited union representatives in the affairs of the Brotherhood. He draws to the Arbitrator's attention the portion of the constitution which he maintains circumscribes the authority of the Brotherhood to employ counsel "… to defend the B. of L.E. against any action brought against it arising out of its labor activities; to defend any member who may be prosecuted under the Criminal Code, or sued under the civil law, for his connection with any accident occurring while in the performance of his duties as a Locomotive Engineer, or other service defined under Section 26 – Statutes and to prosecute any claim of the B. of L.E. on behalf of its protective department." as appearing in Section 7(r) of the constitution of the Brotherhood of Locomotive Engineers.

I turn to consider the merits of the parties' positions. Firstly, I must say that I have some difficulty with the last argument advanced by the Company. In my view the internal management of the Brotherhood, including its constitution, bylaws and policies, can be of little probative weight in understanding the mutual intention of the parties with respect to the meaning and application of their collective agreement. The same might be said of directives and policies generated internally and unilaterally by the Company. In the end, the fundamental question must be what the parties mutually intended by the concept of a fair and impartial hearing within the meaning of article 71 of their collective agreement, and in particular whether that concept implies the right of an employee to representation by his or her personal legal counsel during the course of a disciplinary investigation.

In the Arbitrator's view the decision in **CROA 1420**, and the judgement of the Quebec Court of Appeal in relation to that award, must be considered carefully. Firstly, it must be stressed that boards of arbitration are not strictly bound by a doctrine of *stare decisis*. In other words, a board of arbitration is not legally bound to follow the decision of a prior board of arbitration, even as it might pertain to the interpretation of the same provision and same collective agreement between the same parties. That is not to say that precedent is without any authoritative value. Boards of arbitration, including this Office, generally recognize the importance of settled decisions, and do not depart lightly from the interpretations of prior boards of arbitration. Nevertheless, the prevailing view among Canadian labour arbitrators is that they may properly depart from a prior interpretation made by another board of arbitration if they are satisfied that that interpretation is clearly wrong. The accepted approach was expressed by then Professor Laskin in **Brewers Warehousing Co. Ltd.** (1954), 5 L.A.C. 1797 at p. 1798 in the following terms:

> It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable.

(*See also **CROA 172** and see, generally, Brown and Beatty, **Canadian Labour Arbitration**, Third edition, 1:3000.*)

In **CROA 1406**, which was followed in **CROA 1420**, the union claimed that the employee had been denied a right to a fair and impartial investigation. That case involved an allegation that the grievor had engaged in the theft of

company property, which culminated in his discharge. It appears from the award that the employee was in fact subject to criminal charges arising from the alleged theft at the time of the investigation. The pertinent provisions of the collective agreement of between Canadian Pacific Limited and the Brotherhood of Maintenance of Way Employees were as follows:

> **18.1** No employee shall be suspended (except for investigation), disciplined or discharged until he has had a fair and impartial investigation and his responsibility established.
>
> **18.2** When an investigation is to be held, the employee will be notified of the time, place and subject matter of such hearing. He may, if he so desires, have a fellow employee and/or accredited representative of the Brotherhood present at the hearing and shall be furnished with a copy of his own statement and, on request, copies of all evidence taken.

It is arguable, for the purposes of this award, that **CROA 1406** and **1420** could be distinguished or treated as being of only persuasive value, as they relate to the collective agreement of another employer and another union. In my view, however, to take so technical an approach would be to ignore the substantial similarity between the above provisions and articles 71.2 and 71.5 of the collective agreement at hand and the realities of the industry. The only significant difference between the provisions in **CROA 1420** and the case at hand appears to be the right to ask questions which vests in the accredited union representative under the instant collective agreement. More importantly, for the purposes of this Office, the provision for a "fair and impartial investigation" appearing in the collective agreement in **CROA 1420**, as well as the collective agreement at hand, is found in a substantial number of other collective agreements within the railway industry. Given the importance of the issue to the parties, it is, I think, appropriate to deal squarely with the issue of the precedential value to be accorded to **CROA 1420**.

Firstly, it must be determined whether, as Counsel for the Brotherhood submits, the decision of the Quebec Court of Appeal is to be taken as having substantively confirmed the interpretation of the collective agreement made by the arbitrator in **CROA 1420**. In that case the arbitrator found that the concept of a fair and impartial hearing extended to the right of an employee to be represented by his own lawyer at the disciplinary investigation held by the company. If the decision of the Quebec Court of Appeal reflects a finding by that Court, on the merits, that the collective agreement in that case must be so construed, it would be difficult to escape the conclusion that the concept of a "fair and impartial" hearing contained in the collective agreement at hand can involve anything less.

Before addressing that question, it is important to appreciate certain fundamental principles with respect to the nature of judicial review. Traditionally, at common law, the courts exercised a jurisdiction to review the decisions of administrative tribunals, including boards of arbitration, under three heads: for breaches of natural justice, excess of jurisdiction and errors of law on the face of the record. This they did, generally, by the exercise of the common law writs of *mandamus*, prohibition and *certiorari*. In a number of jurisdictions those writs have been subsumed into statutes governing judicial review. In the province of Quebec boards of arbitration, including boards under the **Canada Labour Code**, are reviewed by the Superior Court, with appeal to the Quebec Court of Appeal, by means of an application for evocation. Under that procedure, if the Court is satisfied that a board of arbitration has made an error which goes to its jurisdiction, it may quash its award.

Judicial review is not an appeal or a consideration *de novo* by a court of the merits of a decision rendered by a board of arbitration. It is, rather, a consideration by the court, in the light of established principles, as to whether a board of arbitration has overstepped its bounds in one of three ways: an error which violates the rules of natural justice, an error which exceeds the tribunal's jurisdiction or an error of law on the face of the record.

In certain jurisdictions, as under section 58 of the **Canada Labour Code**, which applies to this Office, tribunals have been afforded the statutory protection of a privative clause. Section 58, for example, provides as follows:

> **58** **(1)** Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.
>
> **(2)** No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part.

Privative clauses such as the one reproduced above have not been interpreted by the courts as ousting their supervisory authority in matters which go to the jurisdiction of a board of arbitration. In this regard errors in respect of the application of the rules of natural justice are treated as jurisdictional, as indeed are any errors which a court

deems to be so flagrant in the application or interpretation of the agreement as to take the matter outside of the jurisdiction of the arbitrator. For example, if it is found that an arbitrator has effectively altered the terms of a collective agreement, or has refused to answer a question submitted to him or her, or has answered a question which has not been submitted, an excess of jurisdiction may be found.

The law of judicial review is complex, and its rules and principles defy simple restatement. It appears generally accepted, however, that a statutory privative clause has the effect of substantially narrowing, if not eliminating, error of law on the face of the record as a basis of judicial review of the decision of consensually established boards of arbitration. That would appear to be particularly so as regards the interpretation of a collective agreement. (*See, e.g.*, ***Re Wardair Canada and Canadian Airline Flight Attendants Assn.*** *(1988), 63 O.R. (2d) 471 (Ont. Div. Ct.);* ***Canadian Union of Public Employees, Local 963, v. New Brunswick Liquor Corporation*** *[1979] 2 S.C.R. 227*.) In other words, in the face of a privative clause, the courts have generally adopted an approach of curial deference to boards of arbitration with respect to the determination of an issue, such as the interpretation of a provision of a collective agreement, which the court deems to be clearly within the jurisdiction of the board. This involves a recognition of the intent of Parliament or a legislature that the decision should be left to the expert tribunal statutorily charged with making it. Consequently, if it is satisfied that the procedures followed respected the rules of natural justice and that there was a reasonable basis upon which the conclusion could be honestly arrived at, a court will not substitute its own view for that of the arbitrator, even if it should not agree with his or her interpretation. In other words, where honest opinions may differ, so long as a board of arbitration remains within the confines of its jurisdictional boundary, it has "the right to be wrong", and its conclusion will not be disturbed by a court upon judicial review. (*See, generally, Brown & Beatty,* ***Canadian Labour Arbitration,*** *Third edition, 1:5300; 1:5400.*)

It is, I think, important to bear the foregoing principles in mind when considering the decision of the Quebec Court of Appeal in the judicial review of **CROA 1420**. The full decision of the majority of the Court, delivered by Vallerand, J.A. reads as follows:

> This case presents once again the issue of whether an arbitrator's error which has the effect of changing a collective agreement is one going to jurisdiction.
>
> Any error, of course, which affects the interpretation of a collective agreement produces changes in the agreement which add to the losing party's obligations or subtract from his or her rights. If this test were applied to any interpretation made by an arbitrator, without regard for whether or not the interpretation is reasonable, it would mean that any interpretation is a matter going to "jurisdiction".
>
> It is well established, however, that an inferior tribunal has jurisdiction to interpret such agreements except when the interpretation cannot be supported by the text.
>
> Section 18.2 of the agreement, reproduced by my colleague Kaufman J.A., does not explicitly prohibit a lawyer from attending. There is no doubt, however, that one could find an implicit prohibition, as did my colleague, following the judge at first instance and disagreeing with the arbitrator However, as art. 18.2 is silent on the point and because art. 18.1 imposes a "fair and impartial investigation," the arbitrator concluded that the assistance of a lawyer was permitted. **Without expressing any opinion with regard to the propriety of this conclusion**, it is my view that the arbitrator's decision is in keeping with the text of the agreement and does not, therefore, require intervention and review by the Superior Court, given the presence of a "privative clause".
>
> With respect, I am of the view that the appeal should be allowed and that the application for evocation should be dismissed.
>
> [translation] [emphasis added]

In the result, the Court restored the decision of the Arbitrator in **CROA 1420**. It is, I think, paramount to appreciate that in so doing the Court did not endorse either the reasoning or the conclusion of that award. Rather, the majority of the Court exercised deference towards the arbitrator and limited itself to expressing the view that his conclusion that the employee was entitled to the representation of a lawyer during an investigation was one which the arbitrator could reasonably reach on the language of the agreement before him. Its decision, the Court stressed, was "… without expressing any opinion with regard to the propriety of this conclusion …".

It is clear from the foregoing that the decision of the Quebec Court of Appeal cannot be taken as an endorsement of the interpretation of the concept of a fair and impartial investigation pronounced by the arbitrator in **CROA 1420**. It is, at most, a recognition by the Court that the decision rendered by the arbitrator was within his jurisdiction. In the

circumstances, for the purposes of the case at hand, I must therefore view **CROA 1420** as having no more and no less authority than any other prior award of this Office. The issue then becomes whether, for the purposes of the case at hand, it should be followed.

After much consideration, I am satisfied that it should not. Upon a careful review of the evidence presented in the instant case, and bearing in mind the general jurisprudence of this Office which has, for many years, been called upon to consider and comment on the nature of disciplinary investigations similar to those contemplated under article 71 of the collective agreement, with the greatest respect to its author, I am drawn compellingly to the conclusion that the decision in **CROA 1420** is wrong and should not be followed.

The analysis which leads to that conclusion must begin with first principles. At common law, under the law of master and servant, there is little, if anything, which circumscribes the right of an employer to question an employee, in a reasonable manner, with respect to the employee's performance of his or her duties. There is no law, nor principle of law, of which I am aware which would afford to the employee a right to be represented by his or her lawyer in any such conversation. Moreover, the refusal to answer questions, to the extent that they are appropriate and pertinent to the employer-employee relationship, could, of itself, be grounds for discipline. That reality does not reflect any unfairness or hardship. Rather, it is a natural incident of the fidelity and accountability intrinsic to the employer-employee relationship. It is fundamental, if not self-evident, that an employer which assigns to an employee certain duties in the furtherance of its enterprise must have a right to supervise and evaluate that employee's performance of those duties. The employer's right of supervision, of necessity, involves the ability to question the employee directly as to whether he or she has discharged or failed to discharge the tasks or obligations assigned.

The duty of an employee to be accountable to the employer and answer reasonable questions pertinent to his or her performance is no less real when the employee is represented by a trade union. However, many collective agreements provide some adjustment in the rights of employees where such inquiries are made. When employees are represented by a trade union, most collective agreements make some provision for the right of the employee to be accompanied either by a fellow employee or by a union representative in any interview whose purpose is the investigation of the conduct of the employee which could result in some measure of discipline.

Union representation in disciplinary interviews, now widely accepted, serves a number of purposes. At the most basic level, the employee has the benefit of a third person who can serve as a witness to the exchange between the employee and the employer. The right of union representation also gives to the employee several other benefits. Firstly, the union officer who attends may gain a more immediate understanding of a dispute between the employer and the employee, and thereby be better informed to handle a subsequent grievance. Additionally, a union representative may provide assistance to the employee in the form of objective and considered advice during the course of the interview. Union representation can also, at times, permit the input of an experienced person whose thoughts or suggestions, whether they relate to issues of fact or the interpretation of the collective agreement, may give the employer pause, and assist in ultimately sorting out the question under investigation in a manner that is mutually satisfactory. Also, the presence of a union representative may safeguard against the making of concessions or agreed interpretations of the collective agreement or practices in the workplace which go beyond the individual employee's case, and which could adversely affect the larger interests of the union and its membership. These are but the most obvious consequences of representation by a union representative in a disciplinary interview conducted under the terms of many contemporary collective agreements.

In the railway industry disciplinary investigations take on a particular significance which relates directly to the grievance and arbitration process found generally within the industry. The Canadian Railway Office of Arbitration has long followed a procedure whereby hearings are substantially expedited in cases involving discipline. This is due, in large part, to the fact that the parties are required to make their submissions in a written brief. It is common for the parties to include as an exhibit in their arbitration briefs the written record of the questions and answers taken during the course of a company's disciplinary investigation. In many cases that record becomes the substance of the evidence presented, at least to the extent that the parties do not disagree as to the truth or validity of its contents. To that extent, the disciplinary investigation conducted under the terms of a collective agreement can be intrinsic to the grievance and arbitration system fashioned by the parties for the disposition of their disputes. (*See M.G. Picher, "The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails", in Kaplan, Sack and Gunderson,* ***Labour Arbitration Year Book, Vol. I*** *(Toronto, 1991) at p.37.*) The rules of this Office, however, leave ample scope for the further resolution, at the arbitration hearing, of disputes, whether factual or otherwise. At arbitration the parties are able to present the testimony of witnesses under oath, and may, if they choose, be

represented by legal counsel. Through arbitration, as contemplated under the **Canada Labour Code**, the employee has his or her "day in court", with all of the protections that that may imply.

On what basis can it be concluded that, by the terms of article 71 of the instant collective agreement, the parties intended the same measure of protection, including the right to legal counsel, to be available to an employee at the very preliminary stage when the Company attempts to hold an internal investigation to air the facts of an incident before proceeding to any decision as to possible discipline? I can see none that is compelling. As this Office has noted on prior occasions, disciplinary interviews, which are virtually an everyday event in the day to day operations of a railway, were not intended to be conducted according to judicial standards, on the model of a civil or criminal trial, or indeed of an arbitration hearing. As reflected in the language of the instant collective agreement, and the practice of decades, such investigations have been intended as a relatively informal process whereby persons familiar with railway operations and, to some extent, with collective agreements, may come together to exchange questions and answers, as well as documents, in an effort to clarify the facts surrounding the actions of one or more employees in a circumstance which could give rise to discipline. While certain minimum standards of due process are observed, the emphasis, as reflected addendum 49 to the collective agreement, is simply "… to bring out the facts of the case and to provide for a fair and impartial hearing." The object of the investigation is not to make a final determination as to the guilt or innocence of the employee involved or, to put it differently, to resolve whether there is just cause for discipline. At most, the investigation is to provide the Company with a basis for its own opinion in that regard, upon which it may or may not decide to proceed with further action.

The foregoing view is amply reflected in the jurisprudence. In **CROA 628**, which concerned other parties, the following comment was made by the arbitrator:

> … The Company's investigations of what may appear to be disciplinary matters are not judicial or quasi-judicial proceedings as are, for example, arbitration hearings. …

Further, in **CROA 1163** this Office ruled as follows, in the context of another collective agreement with similar provisions:

> It is my view that the employer's obligation to hold a fair and impartial hearing is for the purpose of ensuring that all relevant facts pertinent to an alleged infraction are disclosed in order that an informed decision with respect to the discipline may be made. The hearing's function is principally a fact finding mission. Article 24.5 is designed to make certain that the facts emerge in a fair and proper manner.
>
> The procedure anticipated under Article 24.5 is not a judicial or quasi-judicial exercise. Although the requirements of Article 24.5 ensure a minimum standard of fairness and impartiality in the conduct of a hearing the rules of natural justice or "due process" that apply to the courts and administrative tribunals, such as arbitration boards, do not apply to hearings conducted under Article 24.5 of the collective agreement.

It is trite to say that the elements of what the parties to a collective agreement intend by a "fair and impartial" investigation must, to some extent, depend of the specific wording of the procedural provisions which they adopt. In **CROA 1575**, a case involving CP Express & Transport Ltd. and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, and Express and Station Employees, the Union claimed that the Company's refusal to allow a Union representative to cross-examine a person whose statement was given was in violation of the standard of a fair and impartial inquiry. The arbitrator rejected the Union's objection and commented as follows:

> CROA Case #1562, which arose under a different Collective Agreement, is instructive in that it also concerned a Union's objection to an alleged violation of the Collective Agreement, on the grounds that evidence taken in an investigation hearing was not subject to cross-examination. The Award finds that the right to a "fair and impartial investigation" does not necessarily import the right to the procedural trappings of a full blown trial, including right to counsel and the right to cross-examine statements made. It notes that so long as the grievor is not subjected to cross-examination there would appear to be no departure from the standard of fairness if other witnesses are also not cross-examined. Lastly, it was noted that if the parties had intended to confer upon the grievor the right to cross-examine other witnesses, that right would have been expressly provided, as has been done in the language of other Collective Agreements.
>
> I am satisfied that the principles expressed in CROA Case #1562 apply in the instant case. Article 8.1 of the Collective Agreement mandates that no employee is to be disciplined or dismissed "…

> until after a fair and impartial investigation has been held …" Article 8 is clear in its elaboration of procedural rights of the employee at the time of an investigation. Article 8.2 insures adequate notice of the time, place and subject matter of the investigation. Article 8.3 confers upon the employee the right to be accompanied and assisted by a fellow employee or Union Representative. Article 8.4, in turn, guarantees that an employee may be present while any witnesses whose evidence may touch on his responsibility are examined, or alternatively, has a right to a copy of that evidence in a written form. Next, the Article confers upon the employee the right to "offer rebuttal" to any evidence against him. In the Arbitrator's view that must be construed as the right to offer his own evidence, or the evidence of other witnesses, in rebuttal. It would, in my view, strain the plain meaning of the language, and be inconsistent with the overall intention of Article 8 of the Agreement, to interpret those words as implicitly conferring a right of cross-examination.

That interpretation would, moreover, offend the practical sense of Article 8.4. To the extent that some or all of the evidence adduced might be conveyed to the grievor in a written form, rebuttal could not take the form of cross-examination. It must be borne in mind that in framing the provisions of Article 8 the parties have given effect to their mutual interest to have investigative procedures proceed expeditiously and informally, while guaranteeing certain procedural standards to the employee concerned. Had they intended cross-examination to be part of that procedure, they could have so provided. Absent such a provision, given the language and purpose of Article 8, the Arbitrator cannot conclude that Article 8.4 is intended to confer a right to cross-examination. It should perhaps be stressed, however, that if a grievor is himself cross-examined, the requirement of a fair proceeding would, in all likelihood, imply that he be given the same right with respect to other witnesses.

As the foregoing passage indicates, the standard of what is fair may depend not only on the language of the collective agreement which governs the proceedings, but also on the facts disclosed in any particular case. In keeping with the observations made in **CROA 1575**, it is at least arguable that a violation of the precepts of fairness might be found if an employee or his or her union are denied the assistance of a lawyer at an investigation meeting where the employer's own solicitor is in attendance to advise the investigating officer. To the best of my knowledge, insofar as the records of this Office disclose, no such case has ever arisen. Clearly, an imbalance of that kind did not present itself in the case at hand.

Of course, these observations raise the converse question as to whether the balance of "fairness" is maintained if an employee is represented by legal counsel at a disciplinary interview in which the employer does not have such representation. In practical reality, the prospect of one party being so represented suggests the likelihood that the other party will seek similar representation, resulting in an escalation of process not intended or contemplated by the collective agreement. The likelihood of that result was touched upon in the dissenting opinion of Kaufman, J.A. in the decision of the Quebec Court of Appeal, reproduced below.

The instant collective agreement, like others in the railway industry, has been negotiated and renegotiated in the knowledge of the rulings of this Office with respect to what constitutes a fair and impartial investigation, and the overriding importance of safeguarding informality and straightforward communication in such proceedings. As was observed in **CROA 1819**:

> … This Office has long recognized that while collective agreements do provide important procedural protections for employees during the course of the Company investigations, those procedures should not be elevated to the level of judicial proceedings fraught with undue technicality (*see **CROA 575***).

Two fundamental aspects of the disciplinary investigation bear repeating. Firstly, the original and ultimate purpose of the inquiry is to enable the employer to obtain the fullest possible information. Secondly, the statements made during such a proceeding are not, absent the agreement of the parties, binding on an arbitrator who is subsequently seized of a grievance against discipline which flows from the investigation. These cornerstone considerations were well expressed by Arbitrator J.F.W. Weatherill in an unreported award in the railway shopcraft industry, **Canadian National Railways and Division No. 4, Railway Employees' Department, A.F.ofL.–C.I.O.**, dated March 29, 1977, a grievance against discharge on behalf of Machinist W. Hoffman. In that case the employee was discharged following an assault on a fellow employee. The Union sought to impugn certain statements gathered in the Company's investigation, and suggested that the arbitrator should place greater reliance on statements made by the discharged employee to a board of referees which heard an application which he brought under the **Unemployment Insurance Act**, and to the conclusions drawn by that board. The arbitrator rejected that submission and sustained the discharge. At pp. 7-8 he commented:

> Having regard to all of the material before me, I find that the grievor did institute an unprovoked attack on Mr. McDonald, and that he was properly disciplined on that account.
>
> In its presentation of the case, the union made reference to a decision of a Board of Referees under the Unemployment Insurance Act, in which it was held that the grievor did not lose his employment by reason of his own misconduct. Those proceedings would relate to an application under the Unemployment Insurance Act, and the issue before that tribunal is not identical to the issue before me, although a similar question is involved. The Company was not a party to those proceedings, and the matter seems to have been determined on the strength of the grievor's own statements, and having regard to the manner in which the investigation was conducted by the company. While the investigation might not satisfy the requirements of a judicial hearing, the grievor did have the opportunity, with the assistance of his union representative, to make his statement. The company's investigation need not meet all the requirements of a judicial hearing: **its purpose is to provide the company with information on which it may act;** the collective agreement requires that a hearing be eld so that the company does not act precipitately. Where the company's disciplinary action is later challenged in arbitration the issue is simply whether there was just cause for the action taken. The employee's statement may be part of the case, but **the investigation does not result in any determination which would be binding on the arbitrator.** The comments which the Board of Referees made with respect to the investigation (and apparently without having received any other evidence than that of the grievor) do not affect the matter before me, and the determination made for the purposes of the Unemployment Insurance Act has no force in these proceedings.
>
> [emphasis added]

The awards of this Office are replete with passages similar to the foregoing, and to those reproduced earlier in this decision. (*See* ***CROA 363, 377, 491, 624, 696, 937*** *and* ***1241***.) There are, as well, many awards which have found discipline assessed against an employee to be void *ab initio*, where the investigation was conducted in a manner that violated the procedural standards established in the collective agreement. (*See, generally,* ***CROA 290, 550, 575, 1130, 1255, 1561, 1720, 1734, 1886, 1937*** *and* ***2041***.)

The issue in the case at hand is not what the words "fair and impartial" mean in some absolute sense, but rather what those words mean in relation to a meeting at which an employer asks an employee about his or her actions in the course of employment. What is "fair and impartial" may vary with the context in which those words are used. Accordingly, the standard will differ as they may apply, for example, to a judicial hearing or trial, to the procedures of an administrative authority, to a parole board, to the awarding of public contracts, to the conduct of a public auction or to the internal proceedings of an athletic body. (*See,* ***Nicholson v. Haldimand-Norfolk (Region) Board of Police Commissioners*** *[1979] 1 S.C.R. 311* .) Legal scholarship suggests that even in the context of some quasi-public decision making authorities, the right of an individual to make submissions through a lawyer is not absolute, and is not presumed to be available in proceedings which are private or are the informal proceedings of a "domestic tribunal". (*See, J.M. Evans,* ***deSmith's Judicial Review of Administrative Action****, (Fourth edition), London, 1980 at pp. 213-14*.) As the author of **deSmith's** cautions at p. 214:

> Development of the case-law on the implied rights to legal representation in non-statutory environments should be guided by a realistic appraisal of the interest of the person claiming it, as well as the interest of the organization to which he belongs.

While the foregoing passage primarily contemplates the procedures of professional bodies, social clubs and the like, it suggests an approach which is useful when thinking about standards of representational fairness generally intended in proceedings established by agreement between a company and a union. In the case at hand, the interests of the grievor at the investigation are to know the allegation against him, as well as the information in the possession of the Company, and to have an opportunity to question that information and offer his own explanation. His right to not be disciplined except for just cause is protected separately by the grievance procedure, and, failing settlement, by arbitration, a statutory procedure where legal representation may be available (***Re Men's Clothing Manufacturers' Assoc. of Ontario and Toronto Joint Board, Amalgamated Clothing and Textile Workers' Union****, (1980) 104 D.L.R. (3d) 441 [Ont. H.C. Div. Ct.]*). The employee's interest must be balanced with the interest of the Company, which is to have a relatively informal process to obtain and assess information about the actions of its employees, as an essential part of the supervision of its day to day operations.

As a matter of general principle, the Canadian law of industrial relations does not assume that representation by legal counsel, even at an arbitration hearing, is necessarily essential to the fair representation of an employee's interests. While the courts have ruled that an arbitrator cannot refuse the request of either an employer or a union to be represented by legal counsel at an arbitration hearing, (*see* ***Re Men's Clothing Manufacturers' case****,above*) the authorities charged with the administration of labour relations statutes in Canada have not found that an employee is entitled, as of right, to the services of a lawyer in the presentation of his or her grievance at arbitration, as part of a union's duty of fair representation. Indeed, in **Gary W. Craib, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, and Express and Station Employees and Canadian Pacific Limited**, (1984) 58 di 47; 85 CLLC ¶16,006, (*CLRB #489*) the Canada Labour Relations Board ruled that where a union provided an employee representation through an experienced union representative at arbitration, and denied his request to be represented by legal counsel, it did not violate its duty to represent the employee "… fairly and without discrimination" as required by what was then section 136.1 of Part V of the **Canada Labour Code**. A similar result was confirmed in **Gordon Duncan McCance and Brotherhood of Locomotive Engineers and Canadian National Railway Company**, (1985), 61 di 49, 10 C.L.R.B.R. (N.S.) 23, 85 C.L.L.C. ¶16,042 (*CLRB #515*).

While labour boards have, on occasion, ordered trade unions to provide independent legal counsel of an employee's choice to represent him or her at arbitration, they have done so exceptionally, as part of a remedial order where it has first been found that the union's prior representation of the employee was arbitrary, discriminatory, in bad faith or otherwise unfair, and therefore in violation of the union's statutory duty of fair representation. (*See, e.g.,* ***Leonard Murphy****, [1977] OLRB Rep. Mar. 146;* ***Bedard, Gerard Ontario Ltd.****, [1981] OLRB Rep Oct. 1338;* ***P.W. Bradley,*** *[1983] OLRB Rep. June 865*.) In approaching the interpretation of article 71 of the instant collective agreement, it is well to remember that it was fashioned in a Canadian industrial relations setting, within a statutory framework which expressly acknowledges that employees are presumed to be fairly represented at arbitration hearings when their case is presented by a union officer. That generally held value is an important part of the policy underlying labour relations statutes in Canada favouring the expeditious and informal resolution of disputes.

The procedure conceived under article 71 is plainly not a neutral, third party process which is final and binding, as with arbitration. Appreciation of that fact is, I think, also of assistance in understanding what the parties intended by the concept of an investigation being "fair and impartial". If a purely judicial model was intended, when an employer has information which gives it reasonable and probable cause to believe that an employee has committed an offence deserving of discipline it might be argued that no officer of that employer could impartially chair such a proceeding. However, the parties to the instant collective agreement have clearly recognized that it is appropriate for the investigative proceedings to be initiated unilaterally by the Company, at a time and place of its choosing, and under the presiding control of an officer appointed by the Company, generally a member of local management. This, in the Arbitrator's view, is not a contradiction in terms, but a reflection of the kind of "fairness" which the parties mutually contemplated as appropriate for a preliminary investigation in a matter of potential discipline. They recognize that the right to initiate and conduct the investigation vests in the Company, and that for a Company officer to commence and preside at such a proceeding is not, on its face, inconsistent with the concept of fairness and impartiality for the purpose of their collective agreement. The parties accept, however, that there should be some balance in the participants involved, to satisfy the standards of fairness intended. As a result, their formula of fairness and impartiality guarantees the right of the employee to be accompanied by an accredited union representative who, pursuant to the language of article 71.5, plays an active role, extending to putting questions to persons whose statements are received.

In the Arbitrator's view it is a substantial leap, and one fraught with great consequences for the cost and efficiency of the investigation process, as well as for the grievance and arbitration process, to conclude that the words "fair and impartial" used in relation to an internal Company investigation imply a right to representation in such a meeting by legal counsel. To appreciate the practical considerations inherent in such a conclusion one need go no further than the dissenting judgement of Kaufman, J.A. of the Quebec Court of Appeal in the **Brotherhood of Maintenance of Way Employees** case. In that learned judge's view, the error of the arbitrator in **CROA 1420** in construing the investigation process as contemplating a right to legal counsel was so egregious as to be a jurisdictional error entirely unsupported by the collective agreement. In coming to that conclusion Kaufman, J.A. noted a prior decision of the Federal Court of Canada in which it was found that the principles of fairness were not offended when air traffic controllers, who were made the subject of an investigation by the Department of Transport which could lead to discipline, were denied representation by legal counsel. At pp. 515-17 the learned judge commented as follows:

… I can see grave consequences to the process if employees faced with this type of investigation were to be permitted to appear with counsel. First, if the employee has legal representation, the other side would also wish to do so. The inevitable result (and this should not be taken as an unkind comment on the profession) would be that proceedings of this kind would take longer, not only because more arguments might be had, but also because dates would have to be fixed at the convenience of counsel, and this is not always easy.

Indeed, might one not say that the very purpose of much of our labour legislation is to bring about speedy settlements to industrial disputes, and what better example than the privative clauses generally found in this type of legislation.

However, neither my sympathy for the arbitrator's ruling, nor my fear of complications are determinative of the outcome of this case, for what we must decide is whether or not the trial judge was right in holding that the arbitrator, in ruling as he did, had exceeded his jurisdiction.

As the judge noted, the right to the assistance of counsel on occasions such as this is not embedded in our law, and I refer, for instance, to what was said by the Federal Court of Appeal in *Canada v. C.A.T.C.A.* , [1984] 1 F.C. 1081, where Pratte J.A. said, *inter alia* , at pp. 1085-6:

> The last question to be resolved is whether air controllers involved in an administrative inquiry could not, in spite of article 6.01 of the collective agreement, have the right to be represented by legal counsel by virtue of the principles of fairness referred to by the Supreme Court of Canada in *Nicholson case [Nicholson v. Haldimand-Norfolk (Region) Board of Police Commissioners* (1978), 88 D.L.R. (3d) 671, [1979] 1 S.C.R. 311, 78 C.L.L.C. ¶14,181] and the second *Martineau v. Matsqui Institution (Disciplinary Board)* (1979) 106 D.L.R. (3d) 385, 50 C.C.C. (2d) 353 [1980] 1 S.C.R. 602].
>
> Before answering this question, a few things should be said about those administrative inquiries. They are purely private investigations made at the request of the Department of Transport when there are reasons to believe that an air controller had done something wrong. Their sole purpose is to establish facts, they are devoid of any legal effect since they are neither prescribed nor authorized by statute or regulation; if they take place, it is only because the authorities of the Department of Transport directed that they be made; they are of the same nature as private investigations made by an employer to determine whether his employees did their work to his satisfaction. True these inquiries may lead to findings which may later be the basis of disciplinary action by the employer. However, these findings, being devoid of any legal effect, may be ignored by the employer who may decide to impose or not to impose sanctions whatever be the outcome of the inquiry or, even, without even holding an inquiry.
>
> I am of [the] opinion that the principles of procedural fairness invoked by the respondent do not apply to inquiries or investigations of this nature. I am also of the view that, if these principles did apply, they would not require that the air controllers involved be given the right to be represented by legal counsel. I see nothing unfair in excluding lawyers from that type of inquiry, specially when the bargaining agent of the employees involved has expressly agreed in the collective agreement that they be excluded.

In essence, what the Federal Court of Appeal said, is that where the parties have established a private law and procedure, this must be followed, and neither side can unilaterally make a change. To this I would add only that the law and procedures so established will govern, provided, of course, that they are not contrary to public law.

I do not believe that hearings held in the absence of counsel cannot be "fair and impartial", and the very fact that copies of all evidence taken shall be furnished, on request, to the employee provide him or her the material which may be needed to file a grievance. And, as art. 18.5 provides, "In the event a decision is considered unjust, appeal may be made in accordance with the grievance procedure."

There are, therefore, built-in safeguards to the procedure and while it may be, as the arbitrator suggests, that an employee may, knowingly or otherwise, incriminate himself in the process, the

> fact remains that the investigation is designed to be a buffer, as it were, to prevent the taking of disciplinary actions without having heard the other side.
>
> [translation]

In the Arbitrator's view the above passage fairly reflects the considerations of business efficacy, industrial relations efficiency and generally held standards of fairness current in the administration of collective agreements in Canada. As the learned judge notes in his dissent, there is ample scope for the fullest procedural protections, including the possibility of representation by legal counsel, afforded to employees through the grievance and arbitration procedures of the collective agreement. Whatever an employee's individual preference might be, the Company's investigation is not intended to be his or her "day in court".

In the case at hand, the collective agreement specifies that an employee is to be represented in an investigative hearing ordered by the employer by "… an accredited representative of the Brotherhood of Locomotive Engineers." In construing the intention of that provision, which appears in article 71.5 of the collective agreement, it is instructive to note the approach taken to similar language by the Federal Court of Canada in the **Air Traffic Controllers** case, quoted in the dissent of Kaufman, J.A., above. In a footnote, Kaufman, J.A. notes that Pratte, J.A. found that the collective agreement there under consideration "expressly agreed" that lawyers were to be excluded. In fact, the learned judge notes, the language of the agreement said nothing about legal representation, but rather stated that an employee could be accompanied by an "employee representative of his choice". In that light, based on the principle of interpretation that the inclusion of one implies the exclusion of the other, the **Air Traffic Controllers** case may be read as some judicial authority for the interpretation advanced by the Company in this case, namely that by agreeing to allow an employee to be represented by an accredited union representative, the parties implicitly, if not expressly, agreed to exclude the attendance of others, including legal counsel. Does the possibility of self-incrimination in a disciplinary interview suggest that the parties had some other intention? The experience of this Office does not confirm that an employee is entirely without recourse if he or she should feel that answering certain questions might risk self-incrimination. Prior cases in this Office have involved investigations in which employees have declined, on the prior advice of their lawyer, to answer certain questions. Whether such a response is or is not appropriate, and is, of itself, a justification for some discipline is a matter to be argued and fully considered having regard to the specific facts of the case under consideration. Where actual criminal charges are pending, and a legitimate employer interest is involved, boards of arbitration in Canada have found that the appropriate course may be to suspend an employee from service pending the outcome of a criminal trial. (*See, generally,* ***Toronto Harbour Commission****, (1983), 8 L.A.C. (3d) 433 [Kates];* ***Humber Memorial Hospital****, (1982), 6 L.A.C. (3d) 97 [Davis];* ***Ontario Jockey Club*** *(1977) 17 L.A.C. (2d) [Kennedy]*.)

In the instant case the Arbitrator has difficulty with the submission of Counsel for the Brotherhood who suggests that the right to legal counsel should attach in a case such as the grievor's, solely because it could involve criminal consequences. Firstly, as the record discloses, there were no charges outstanding against the grievor, and none have since been laid. More importantly, however, it would be, I think, unworkable, and would clearly not have been the intention of the parties, to adopt a sliding standard of what constitutes a fair and impartial investigation, depending on the nature or gravity of the allegation which emerges. When an arbitrator finds that a provision such as article 71 has been violated, and that the requirement of a fair and impartial investigation has been denied, the discipline assessed against an employee becomes void *ab initio*. That finding, however, can only emerge in an arbitration award, which usually issues some considerable time after the investigation and the assessment by the employer of the resulting discipline. In the result, without any clear language as to when an allegation is sufficiently serious as to justify legal representation, at the investigation stage the parties would, in many cases, find themselves in a gray area. They might well be forced to proceed with no certainty as to the precise standards of "fairness and impartiality" which attach to a given allegation or infraction. It would, I think, plainly prejudice both parties if they must be involved in a disciplinary investigation whose procedures are not clear, and whose ultimate validity will be determined only by an arbitrator after the fact. In my view, the conclusion that the parties knowingly fashioned such an uncertain system for themselves should not be drawn, absent clear and unequivocal language to support it. The language of article 71 of the collective agreement is, I think, more consistent with the view that the parties intended a single predictable and uniform standard of representation for an employee, in satisfaction of the obligation of fairness and impartiality, governing all disciplinary investigations conducted under its provisions.

Finally, it is, I think, contrary to the most basic premises of collective bargaining to conclude, absent clear and unequivocal language, that a collective agreement intends an employee to be entitled to be represented independently, by his or her personal legal counsel, in any dealing with an employer which involves the application or interpretation of a collective agreement, as in the case at hand. It is well established that the employer and the

union are the sole parties to a collective agreement, and that the collective bargaining regime leaves little, if any, scope for individual negotiation or interpretation of the terms of that document. (***McGavin Toastmaster Ltd. v. Ainscough*** *[1976] 1 S.C.R. 718*) It is, therefore, highly doubtful that a union would, through general language respecting the right of an employee to a fair investigation, intend to surrender to the individual employee, and his or her personal legal counsel, a controlling voice in such an investigation, with the scope to plead facts, positions or interpretations of the collective agreement which, in the end, may not serve the best interests of the general membership or be in accord with the union's own view. The possibility of such consequences, I think, highlights the implausibility of the position advanced by the grievor.

In summary, I am satisfied that, like similar provisions in many collective agreements in Canada, article 71 of the collective agreement was fashioned to provide a relatively informal fact finding process, with certain procedural safeguards to insure that the Company not take disciplinary action without affording to the employee a fair opportunity to know the information in its possession. Further, the employee is expressly given the opportunity to question persons whose statements are presented, and to add such further information as may be appropriate, with the assistance of an accredited union representative. Given the history of these provisions, and the intention reflected both in the language of the collective agreement and Addendum 49, I am satisfied that the parties agreed that representation by a union officer would satisfy the standard of fairness which they intended to be a part of their internal procedure, and that such representation was not intended to extend to legal counsel.

The grievance and arbitration provisions of the collective agreement, and the rules of this Office, speak directly to the possibility, at the arbitration hearing, of a union presenting a grievance with the assistance of legal counsel. By contrast, there is no such provision expressed in article 71 of the collective agreement, which governs investigations, or to be implied from its terms. On the contrary, the parties have agreed that the assistance of an accredited union representative is the appropriate form of representation for the purposes of what is, after all, a preliminary fact finding process. As noted above, the use of legal counsel in such a proceeding introduces an adversarial element which would undermine the informality and expedition intended for the benefit of both parties at this investigatory, pre-discipline and pre-arbitration stage.

For all of these reasons the Arbitrator finds and declares that there is no violation of article 71 disclosed in the refusal of the Company to permit Mr. Kovich to be represented by his legal counsel during the course of its internal investigation of his actions.

I turn to consider the merits of the grievance. The facts with respect to the grievor's actions are not in dispute, although his intention is. As reflected in the Joint Statement of Issue, the grievor became entitled to maintenance of earnings protection in September of 1989, as a result of the closure of the terminal at Fort Erie, Ontario. Fort Erie was closed as a home station following notice served upon the Brotherhood on February 15, 1989. This gave rise to negotiations pursuant to article 78 of the collective agreement, with respect to measures to minimize the adverse impacts on affected employees. As a result, the parties executed a letter of understanding dated August 30, 1989. It is common ground that Mr. Kovich was involved in the negotiation of that document, in his capacity as a Local Chairman of the Brotherhood.

Under that document the grievor, along with other employees, received certain income protection, generally known as "maintenance of earnings". Appendix C to the letter of understanding governs maintenance of earnings for employees in the position of Mr. Kovich, and provides, in part, as follows:

> The basic weekly pay of employees whose positions are abolished or who are displaced because of the closure of Fort Erie as a home terminal shall be maintained by payment to such employees of the difference between their actual earnings in a four week period and four times the basic weekly pay. Such difference shall be known as an employee's incumbency. In the event an employee's actual earnings in a four-week period exceed four times their basic weekly pay, no incumbency shall be payable. An incumbency shall be payable provided:
>
> **…**
>
> **(b)** Employees are available for service during the entire four week period. If not available for service during the entire four week period, their incumbency for that period will be reduced by the amount of earnings they would otherwise have earned.
>
> **(c)** All compensation paid an employee by the Company during each four week period will be taken into account in computing the amount of an employee's incumbency.

(d) Employees will not have their incumbencies reduced account being off for miles.

The final paragraph of the above appendix refers to mileage regulations contained within the parties' collective agreement. Those provisions, found in article 65 of the collective agreement, are established to provide a bench mark as to a reasonable monthly work load for a locomotive engineer in road or spare service. They also tend to distribute the work evenly among the employees and provide some guidance in determining the appropriate number of employees to be maintained in active service.

Under the terms of article 65 of the collective agreement Mr. Kovich was, like other locomotive engineers, restricted to working a maximum of 3,800 miles, or the equivalent, within a calendar month. Once a locomotive engineer has completed that mileage he or she is under an obligation to book "off for miles". The agreement provides a formula which allows time worked to be converted into miles; consequently, employees working in yard service or switching are attributed 12-1/2 miles per hour worked. Lastly, it may be noted that the type of service performed by a locomotive engineer determines the rate per mile at which he or she will be paid. The mileage regulation system is self-policing. Each locomotive engineer is responsible for keeping track of his or her accumulated miles, and is required to voluntarily book off for miles when the maximum of 3,800 miles is reached. That is a natural consequence of the fact that train crews work in a largely unsupervised setting in which they must be responsible, to a great degree, for their own time keeping.

Article 65.10 of the collective agreement provides for the exclusion of certain miles in the calculation of an employee's calculation of his or her mileage during a given working month. It provides as follows:

> **65.10** Mileage made by locomotive engineers in different occupations and under different collective agreements will be taken to total mileage in a working month. In the application of this article, mileages paid for as:
>
> **(a)** Held Away From Home Terminal (Article 25);
>
> **(b)** Payment pursuant to paragraph 28.6 (Article 28);
>
> **(c)** Travel Allowance (Article 64);
>
> **(d)** Payment for Examinations (Article 69);
>
> **(e)** Payment pursuant to paragraph 70.10 (Article 70);
>
> **(f)** General Holiday (Article 76); and
>
> **(g)** Bereavement Leave (Article 80)
>
> will not be included in computing a locomotive engineer's total mileage in a working month.

Upon the closure of the Fort Erie terminal, pursuant to Appendix C of the letter of understanding, Mr. Kovich's basic weekly pay was established at $1,388.05, an amount which increases each year by a percentage which corresponds to the general wage increase negotiated. The maintenance of earnings protection of Mr. Kovich took effect on September 26, 1989 and would have guaranteed him basic weekly pay of $1,443.58 in 1990 and $1,508.54 in 1991.

The method whereby the grievor should, undisputably, have been given his maintenance of earnings protection is described in the following paragraph contained in the Company's brief:

> In respect of the grievor, the maintenance of earnings provisions operated in the following fashion. For each four week period, the grievor was entitled to an income equivalent to four times his basic weekly pay, that is, $5,552.20 in 1989; $5,774.32 in 1990; and $6,034.16 in 1991. At the end of every second pay period (as stated, a pay period is a two week period beginning on a Friday; thus, two pay periods constitutes a four week period for the purposes of maintenance of earnings administration), the grievor would calculate his earnings over the four weeks and claim the difference between his earnings and four times his basic weekly pay. This claim would be made on a standard time return on the back of which the grievor was required to itemize his earnings. He was also required to itemize the days on which he was unavailable so that his incumbency could be reduced accordingly. The claim would then be forwarded to and processed in the Crew Management Centre in Toronto and some four weeks later, the grievor would receive his incumbency payment of his regular paycheque. Notification as to the amount paid would be

included on a statement of earnings, commonly referred to as a blue slip, issued two days before actual payment.

The evidence discloses, however, that commencing in October of 1989, over a period of nineteen months ending in April of 1991, Mr. Kovich booked off for miles on a regular basis, for periods which ranged from three to fifteen days. Significantly, in seventeen of the months in question, he booked off for miles notwithstanding that he had not accumulated the necessary actual mileage of 3,800 miles in his working month. He nevertheless claimed full maintenance of earnings entitlement in each of the months in question.

This the grievor did, according to his explanation, pursuant to his own interpretation of paragraph 65.10 of the collective agreement. The grievor maintains that he believed that he was entitled to claim, as part of his monthly mileage total, mileage figures which the Company used to express the dollar amount of his incumbency payment, as it appeared on his statement of earnings, or blue slip. For example, in the four week period between March 16 and April 12, 1990 the grievor received a maintenance of earnings claim in the amount of $2,607.11. However, at the time in question, for accounting purposes, the Company's computerized payroll system for locomotive engineers generated a mileage figure for any monetary amount paid to an employee. In the month in question, therefore, a mileage figure of 2,241 miles was used to express the incumbency payment made to Mr. Kovich. As the grievor explains his actions, he considered those miles as miles which were not excluded by article 65.10, and so included them in his monthly calculation of miles worked. He would simply add the notional mileage figure generated to express his incumbency payments to his monthly mileage total for the month in question. In other words, in the example given, he would have added 2,241 miles to his monthly mileage for May. By so doing, he substantially inflated his mileage total for the purposes of article 65.10 of the collective agreement, and obviously accelerated the point at which he placed himself in a position to book off for miles. It does not appear disputed that if Mr. Kovich's interpretation were to obtain, in the month of May used in the example, the actual miles he would have had to work before booking off, without any loss of overall income, would have been reduced to 1,559, or less than half of the 3,800 he was actually obliged to work before booking off under the terms of the collective agreement.

The Company did not accept the explanation offered by Mr. Kovich, which the grievor characterized in his evidence at the arbitration hearing as a strict application of article 65.10 of the collective agreement. Simply put, his argument is that the list contained in that article is exhaustive of all kinds of mileage which are not to be included in computing a locomotive engineer's total mileage in a working month. According to Mr. Kovich, since the incumbency miles which he found displayed on his blue slip did not fall into any of the exclusions, he was entitled to add them to his tally of miles worked, and to book off for miles in the manner that he did.

The Arbitrator has substantial difficulty with the plausibility of Mr. Kovich's explanation. Firstly, it does not appear disputed that his is an interpretation for which he sought no confirmation from either his Union, or from any Company officer. More significantly, the record of Mr. Kovich's bookkeeping suggests that, in fact, he manipulated his mileage reports so that his "interpretation" and his timekeeping practice would not be discovered. Firstly, the evidence discloses that Mr. Kovich did not register the mileage figures associated with his incumbency payment in each and every case. Additionally, although an employee is to carry over excess miles from one month to the next for the purposes of calculating the maximum milage, he did not consistently do so. Further, he did not always book off for miles when he accumulated 3,800 total miles, pursuant to his own interpretation, and he ceased booking off for miles in May of 1991 even though his own interpretation would have required him to do so at the outset of his mileage month, and perform no work at all.

The flaw in Mr. Kovich's system, emphasized by the Company's representative, is that he must inevitably reach a point in time at which the overall accumulation of miles actually worked, incumbency miles and the carry over of total miles from one month to the next would take him to a point at which he would have an excess of 3,800 to his credit at the commencement of a four week pay period. He would, in other words, have reached a stage at which he would remain on the payroll, drawing full wages, without the necessity of performing any further work. This point would have been achieved, by the strict application of his interpretation, in November of 1990. Significantly, however, Mr. Kovich appears to have departed from the convictions of his interpretation to avoid the detection of his system, a detection which would have been unavoidable had he taken it to its logical conclusion. When questioned as to why he did not take his system to the point of booking off at the start of his mileage month, he responded that he did not because he felt that the Crew Management Centre might have a different interpretation, and would withhold payment of his wages, pending the resolution of a grievance, a result he wished to avoid.

I find the grievor's interpretation of article 65.10, and his explanation of his actions, to be entirely incredible. Placing his case at its highest, he seized upon an obviously unsupportable interpretation of the collective agreement

to justify grossly inflated mileage claims. He departed from his "interpretation", however, when failing to do so would have lead to the discovery of his practice. In the result, Mr. Kovich falsely manipulated his timekeeping and mileage figures to obtain payment for time which he did not work, and for which he was not entitled to payment, in the amount of $27,692.39. The Arbitrator is driven to the unfortunate conclusion that, over a sustained period of time, Mr. Kovich knowingly and deliberately defrauded the Company through a cynical scheme of transparent sharp practice, similar to that found to justify discharge in **CROA 2304**, an award dated December 11, 1992.

The decisions of this Office have clearly established that a running trades employee, responsible for his or her own timekeeping in a system which is largely unsupervised, works in a position of particular trust. The violation of that trust, an essential element of the employer/employee relationship, is, absent the most exceptional mitigating circumstances, grounds to conclude that the necessary foundation of the employment relationship has been destroyed. (**CROA 461, 478, 899, 1472, 1474, 1835, 2304**)

While the grievor has seventeen years' service with the Company, it is difficult to see in that factor alone sufficient grounds to mitigate the penalty assessed. At the time of his discharge Mr. Kovich's record stood at the dubious level of forty demerits. Moreover, there is no indication, having regard to the testimony of the grievor given at the arbitration hearing, that he acknowledges the gravity of his wrongdoing or exhibits any remorse for his actions. Regrettably, he presents as an individual for whom the process of timekeeping and wage payment under the collective agreement is reducible to a game of interpretation and counter-interpretation, discovery and evasion. His suggestion, stated to the Arbitrator, that his course of conduct is substantially no different from that of the Company when it asserts an interpretation which impacts wages or benefits, and which is subsequently rejected by an arbitrator is, to say the least, cause for concern. Mr. Kovich's inability to distinguish between open differences of interpretation between the parties to a collective agreement and the scheme of manipulation and concealment which he pursued raises serious questions as to the potential for his rehabilitation.

On the whole, the Arbitrator is satisfied that the Company had just cause to terminate the services of Mr. Kovich, and that there is no basis, on the evidence before me, to substitute a lesser penalty. The grievance is therefore dismissed.

January 29, 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR