IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAYS COMPANY

("the company" / "the employer")

- AND -

NATIONAL AUTOMOBILE, AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 100

("the union")

CONCERNING ACCIDENT INVESTIGATIONS

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the union:

Brian McDonagh, National Representative

Robert Bourrier, National Health and Safety Representative

John Burns, Vice-President

Clancy Serafin, Health and Safety Co-Chair, Lodge 448

Bryon De Baets, President

For the company:

Ross Bateman, Senior Manager Labour Relations, Toronto

Sam Berrada, Assistant Vice-President, Safety and Occupational Health, Montreal

Ed Falardeau, Risk Management Officer, Winnipeg

Hearing held in WINNIPEG on May 28, 2004.

Award issued on August 23, 2004.

AWARD

1 This matter arises from the Health & Safety Plan ("the Plan") between the parties. The union contends that the company has violated Article 9(a) and (b) of the Plan. The union further contends that, by acting as it did, the company violated the *Canada Labour Code*, Part II, s.124, s.125(c), and s.135.7(e), and the regulations, standards, codes of practice, and guidelines formulated under the *Code*. The union adds that the company has violated a Letter of Understanding on this matter, signed by the parties on May 26, 2003. As relief the union seeks a declaration that the company has violated the Plan, the Letter of Understanding, and the *Code*; an order that the company conduct joint accident and incident investigations under the terms of the Plan; and an order that the company pay $10,000 in punitive damages. The company denies any violation, claiming there was substantive compliance with the Plan.

2 Article 9(a), (b) and (c) read:

> 9 ACCIDENT AND INCIDENT INVESTIGATIONS
>
> a. Every injury or near-miss which involved or would have involved a worker going to a first aid attendant, doctor or hospital will be investigated. As well,

> incidents involving hazardous releases of hazardous substances to the air, land or water systems must be investigated.
>
> b. The Union co-chair or designate and the Company co-chair or designate shall investigate the accident or incident.
>
> c. The Company shall immediately notify the Union co-chair and HRDC (Labour Program)(formerly Labour Canada) of all critical or serious injuries.
>
> d. …
>
> e. …

3 The Letter of Understanding concluded between the parties on May 26, 2003 concerned the resolution of a dispute between the parties regarding the investigation of accidents under Article 9(a) and (b) of the Plan. In paragraph 1 of the Letter the parties quote these Articles, and then add:

> Such investigations will be conducted expeditiously, in accordance with Article 3(f)(iii) and (v), and in good faith, with the cooperative spirit contemplated in Article 1(b).

4 The references to Article 3(f)(iii) and (v) are to the parties' agreement that accident and incident investigations be conducted jointly, and that "the union co-chair or alternate shall participate in and keep a record" of such inspections. The reference to Article 1(b) is to a general undertaking by the parties in the Preamble to the Plan that they comply with the Plan "in a spirit of good faith and cooperation".

5 The Letter of Understanding includes an undertaking by the company to ensure that Article 9(a) and (b) of the Plan "is applied by the Company Officers and Company Co-chairs, throughout the system".

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6 The incident giving rise to this complaint occurred on the night of October 19-20, 2003. Terry Shannon, a car mechanic, was working at the Bissell Yard (an outpost of Walker Yard) in Edmonton. At about 2 a.m. on October 20, 2003 he strained his lower back while closing hopper doors. On returning to Walker Yard he told his supervisor his back was sore.

7 Prior to the start of his next shift on October 20, 2003, Mr. Shannon informed the company that his back was appreciably worse and that he would not be coming to work, but seeking medical attention. It was at this time that the company learnt that Mr. Shannon had sustained a workplace injury. He saw his family doctor.

8 On October 21, 2003 Mr. Shannon came to the workplace and completed a company Injury Form. He was then away from work and returned on November 23, 2003.

9 The company itself conducted an investigation into Mr. Shannon's workplace injury. The union was not notified of the injury until the regularly scheduled Joint Health and Safety Committee meeting in late November 2003, once Mr. Shannon returned to work. According to the company (though disputed by the union) Mr. Shannon was invited to attend the Health and Safety Committee meeting to review and discuss his injury and potential preventative measures, but he did not attend.

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10 Mr. Shannon's workplace injury falls within the parties' definition of an accident (Article 9(a): "Every injury which involved .. a worker going to a .. doctor .. will be investigated."). An investigation was required. The investigation ought to have been conducted jointly (Article 9(b) read with Article 3(f)(iii)). This did not occur. The Health and Safety Committee meeting in November 2003 did not substitute for, or fulfil, the

requirements of Article 9(b).

11 A joint investigation has two parts to it. The first is that the union must be notified of the accident or incident so that arrangements can be made to conduct the investigation; the second is that the investigation is then done, jointly. Article 9(c) requires the company to notify the union co-chair "immediately" of all critical or serious injuries. This suggests a different time frame for notifying the union co-chair of those injuries which are not critical or serious. The question is whether, as the company argues, notifying the union more than a month after the accident is compliance.

12 The notification need not be "immediate" (immediate notification is restricted to "critical or serious injuries"), but the parties have agreed in the Letter of Understanding of May 26, 2003 that the investigation be done "expeditiously". By agreeing to this provision the parties have defined, or modified, what they intend by Article 9(b). They want the investigations into Article 9(a) events to be done "expeditiously". This requires that the notification of an injury or near-miss under Article 9(a) be expeditious; that is, prompt, once the company has knowledge of the non-critical or less than serious injury. In other words, notification should be soon after the company learns of the injury, so that the joint

investigation can occur relatively quickly thereafter.

13 The purpose of a joint investigation is so that the union and the company can obtain information which is fresh in people's minds, and perhaps apparent from an inspection of the area where the accident or incident occurred, so that lessons can be learned from the investigation, which might be applied to avoid a recurrence of the accident or incident.

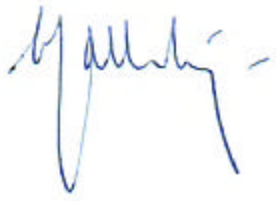
14 The notification was untimely in this case. No joint investigation has occurred, and this is largely because the company did not notify the union promptly of Mr. Shannon's injury. I find therefore that the company has breached Article 9(a) and (b), read with Article 3(f)(iii) and (v), of the Plan.

15 I direct that the company take all reasonable steps to ensure compliance with Article 9 of the Plan and with the Letter of Understanding of May 26, 2003, particularly paragraph 2 thereof.

16 In light of these conclusions it is not necessary for me to consider whether the company has breached the provisions of the *Code*, as the union alleges.

17 Assuming, without deciding, that I have jurisdiction to grant punitive damages, the circumstances of this case do not warrant such damages.

18 In summary, I uphold the union's complaint. The company is in breach of its obligations under the Plan, as read with the Letter of Understanding, for the reasons explained, and it is directed to comply with those obligations. No order is made with respect to the union's request for punitive damages.



Christopher J. Albertyn

Toronto

August 23, 2004