present their case in the manner that they believe is most persuasive without imposing procedural limitations that might impair their advocacy strategies. Therefore, there are sufficient statutory safeguards to ensure due process before the Adjustment Board and Public Law Boards.

In conclusion, due process is critical to claims handling on the railroad property, especially with regard to pre-disciplinary hearings. I advise railroad hearing officers to preside over and conduct the hearing as if they were the charged employee. Stated differently, the question posed to these hearing officers is: How would they want the hearing to be conducted if they were facing discipline from the carrier regardless of whether they were innocent or guilty of the charge? Similarly, I advise union representatives to vigorously and zealously advocate for the charged employee as if the representative was on trial at the hearing. The rhetorical question becomes: How would the union representative want his or her representative to perform if his or her job was in jeopardy? If the participants repeatedly ask themselves these questions and then act accordingly, they should achieve the desired result of conducting a fundamentally fair hearing.

II. Due Process in the Railroad Industry

John Moreau*

Let me say at the outset how much your system mirrors that of the Canadian Railway Office of Arbitration, commonly known by its acronym CROA.

I note from John LaRocca's paper that the equivalent railway adjudicative forum in the United States is the National Railway Adjustment Board (NRAB). I understand that this arbitration of railway disputes dates back some 80 years. The CROA is the kid brother of the U.S. legislation. Some 3,700 cases and counting have been issued by the CROA, with the bulk of the jurisprudence being authored by two Presidents of this distinguished Academy, Ted Weatherill and Michel Picher, the current Chief Arbitrator.

*Member, National Academy of Arbitrators, Calgary, Alberta, Canada.

I have been helping Michel, as his back-up goalie, with the case load for some four years now. It has been a steep learning curve getting up to speed on the operational side of this historic and essential transportation industry.

The CROA operates in much the same way as proceedings before the NRAB here in the United States. The key step to deciding if, and how much, discipline will be imposed is the investigation. The investigation is at the heart of our due process model. Under our own established rules and collective agreements, the investigation must be conducted in a *fair and impartial* manner. There is a similar requirement, I understand, that exists under your collective agreements. The stakes are very high in your forum as they are at CROA regarding due process issues arising from the investigation. I note from John's paper that he expects a fairness challenge in the neighbourhood of 75 percent of the cases he hears. We are probably in that neighbourhood in Canada as well, particularly in those cases where the union is represented by legal counsel.

As you all know, if the union obtains a favourable ruling on a fairness issue as a preliminary procedural objection, then the whole house comes crashing down with a void ab initio ruling on the discipline. In a dismissal case, the grievor is reinstated, awarded back pay compensation, and has his or her seniority restored.

Accordingly, there is a great deal of pressure on all the participants at these investigations to get it right. For example, the company must have all its ducks lined up with documents, statements, and supervisory staff present at the investigation. Failure to do so risks an *adverse inference* finding.

That is one argument that we see more and more of in hearings at CROA. I find it interesting that it has its roots in a party failing to call an expert (like a treating physician) and has evolved into something where the absence of any document, such as reporting to a regulatory authority, may give rise to such an argument by the union. The company proceeds at its peril if it omits to adduce all related hearing documents, or tries to introduce a document at the arbitration hearing that has not been put to the grievor at the investigation or referred to during the grievance procedure.

So:

- The company must put all its investigative cards on the table or risk having the discipline declared null and void at arbitration.

- The union, for its part, must interject with timely objections or risk a waiver ruling later on at the arbitration hearing. If there is an issue, then it must be raised and properly put on the record during the investigation.
- The Presiding Officer in turn must ensure that all the questions are fair and allow the grievor to tell the story. Leading questions are evidently discouraged.

As has been noted in John's paper, these hearings have all the trappings of an appellate forum, with the parties submitting written briefs and all the evidence and arguments being in those briefs. Is that due process?

In my view, it reminds me of the saying about democracy that "it's not perfect, but it's better than all the rest." Certainly the biggest trade-off is not having the grievor or supervisor present to testify. The absence of their viva voce testimony in a discharge case—which constitutes at least half of our file load—is the biggest challenge to the due process model. Not being able to judge credibility in a close case is problematic. Having the grievor sit there in the hearing room without testifying can be a bit unnerving to the arbitrator when a job is on the line.

I have heard some lawyers, in particular, complain about the CROA process, mostly due to the absence of oral testimony at arbitration. Our procedures have been the subject of judicial review but to my knowledge the process itself has never been criticized in the courts as a violation of the rules of natural justice or due process. The courts evidently see that there has been a buy-in to this process by the parties and fortunately, for more than 40 years now, the courts have stayed out of it.

I have a slight fear that one day a judge on judicial review might decide to step into the fray. This is particularly so because the Supreme Court of Canada has recently ruled that the standard test for arbitral review is now a reasonableness simpliciter test, whereas before the patently unreasonable standard was applied.

What about the award itself?

It is mandatory under our CROA rules for the parties to attempt to come up with an agreement on the issues: what we call the "joint statement." If unable to agree, then either side can put in their own ex parte statement. But the idea is to try as much as possible to get a joint statement together in order to expedite the hearing process. That issue lead-in by the parties, in my view, protects the

integrity of the process. If the arbitrator answers the issues raised in the joint statement, then the parties will live with the result.

A few explanatory paragraphs on how you got to your decision are all that is usually required. But the parties also want some rationale, and that includes, in almost all cases, at least some reference to the jurisprudence. At this stage of the CROA experience, there are few areas that have not been canvassed. Although some, like drug testing in the workplace, require a little more writing attention and elaboration. By and large, however, the parties are happy with a brief analysis that addresses the issue in the joint statement. That approach, in my view, also satisfies any due process concerns.

In the end, the process is a good one, one that I have been surprised to see works so well and will likely remain for a while yet. CROA arbitrators are subject to an annual review by the parties. That is happening as we speak. I will carry on, as we all do in the meantime, without looking up to see if the sword of Damocles is still hanging by a horse hair over my chair at the front of the room.