CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 135

Heard at Montreal, Tuesday, November 12th, 1968

Concerning

CANADIAN NATIONAL RAILWAYS

and

BROTHERHOOD OF RAILROAD TRAINMEN

DISPUTE:

Dismissal of Yard Helper Stanley George, of Limoilou, Que., effective February 23, 1967.

JOINT STATEMENT OF ISSUE:

Following investigation in accordance with Article 121 of the collective agreement, Yard Helper Stanley George, of Limoilou, Que., was dismissed from the Company's service, effective February 23, 1967, for the following reasons:

> having neglected your duties as an employee, and misappropriated materials on the property of the company for your personal profit.

The Brotherhood requested that the discipline be reduced on the grounds that it was unduly severe. The request was declined by the Company.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(Sgd.) PAUL LaROCHELLE	**(Sgd.) E. K. HOUSE**
GENERAL CHAIRMAN	**ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

A. Giard	– Attorney, Montreal
R. St. Pierre	– Labour Relations Assistant, Montreal
A. J. DelTorto	– Labour Relations Assistant, Montreal
J. R. Gilman	– Senior Agreements Analyst, Montreal
J. M. Gagnon	– Assistant Superintendent, Quebec
G. A. Carra	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

L. Corriveau, QC	– Quebec City
P. LaRochelle	– General Chairman, Quebec
G. W. McDevitt	– Vice President, Ottawa
S. George	– Grievor

AWARD OF THE ARBITRATOR

In January of 1967 a number of employees working in the company's Limoilou Yard were discharged, and a number of others were disciplined for theft of scrap metal from railroad cars en route to the Gulf Iron Company. Those whom the company believed guilty of theft were discharged The others were disciplined for negligence in the performance of their duties, for violation of safety rules, or for violation of General Rule L. General Rule L is as follows:

> **L** Employees must always be vigilant to protect, and must promptly report anything detrimental to the Company's interest, and in case of danger to the Company's property must unite to protect it.

Originally, grievances were submitted on behalf of all of those who were discharged. None of these was successful, and the only one now proceeded with is that of the grievor. If the grievor is in fact guilty of the same offence as the others, then to proceed with his case while abandoning the others might be inconsistent. The abandonment of the other grievances, however, has no relevance at all to the determination of that issue of fact. Whatever the reasons for which others do not proceed, it is the grievor's case which is before me, and it must be considered on its own merits. In a case such as this, the onus is on the company to establish that it had just cause to discharge the grievor.

There would appear to be little doubt that certain employees in the Limoilou Yard were in fact pilfering scrap metal from cars prior to delivery to the consignee. The matter came to light when claims were made upon the company for shortages in its shipments – claims which had to be satisfied by the company. The metal scrap was a commercial commodity, and theft of the customer's property from the loaded cars was at least as serious a matter as theft from the company itself. As a general matter I have no doubt that this would constitute just cause for discharge. The question is whether the grievor was guilty of such theft.

In the course of the company's investigation of the matter, the grievor admitted that for some eighteen months he had been taking scrap of various kinds from empty cars, and that he had sold the scrap to a dealer in Quebec City. He denied that he had ever taken scrap from loaded cars. The difference between loaded and empty cars is significant: the scrap metal in a loaded car is commercially valuable and is the property of the consignee, or of some person who may make a claim against the company for it. Once the consignee has unloaded the car and it is returned, empty, to the company's yard, any scrap remaining in the car is refuse, and would appear to be abandoned.

The grievor had no right to take even the abandoned scrap from an empty car That he did so, and that it was improper, is acknowledged. This was not, however, the ground on which the grievor was discharged. It is the essence of the company's case that he was guilty of the much more serious offence of theft from a loaded car. Having regard to all of the material before me, I cannot conclude that such an offence has been established.

There is no direct evidence of the grievor's taking any scrap from a loaded car. It is admitted only that he took refuse scrap from empty cars. The grievor stated that he made about $350 from the sale of this scrap. The company asserts that the dealer's records show payments to the grievor in excess of $800. This, of course, would suggest that the grievor took more than his admission might reasonably account for. It would appear to be explained, however, by the grievor's sale to the dealer of other scrap materials taken from a garage by arrangement with its owner, the grievor's landlord. Even if the matter be viewed with some scepticism, there is no more than that to the company's case, and it is simply not sufficient to show that the grievor committed the offence alleged.

In its brief, the company refers to certain criminal offences committed by the grievor some thirty years ago, several years before he was employed by the company, and indeed while he was still a juvenile. The grievor himself admitted these offences, and there is no issue of credibility with respect to which they would be mentioned. Certainly, evidence such as this would not be admitted in a court of law, for it has no probative value on the question whether the grievor in fact committed the offence now alleged. Reference to the grievor's conviction while a juvenile is not only inadmissible for the above reason, but is quite improper – inexcusably so – in itself.

Much was made at the hearing of this matter of the alleged shortcomings of the investigation which was conducted by the company, and of the existence of a practice of condoning the removal of refuse scrap from empty cars in the Limoilou Yard. I do not find it necessary to make any determination of these matters, since they are not relevant to the fundamental issue, namely, whether the grievor was guilty of the alleged offence. He was, to repeat,

admittedly guilty of a lesser offence, and in the circumstances the union is only concerned with the severity of the penalty imposed.

The materials advanced by the company do not, as I have found support the conclusion that the grievor was guilty of the offence alleged. He was admittedly guilty of a lesser offence, for which discipline might properly be imposed. In all of the circumstances, I cannot conclude that there was just cause for discharge. In view of the offence which is admitted however, and the long delay in proceeding with this matter which cannot be attributed to the company, it is my award that the grievor be reinstated in employment forthwith, without loss of seniority, but without compensation for time lost.

(signed) J. F. W. WEATHERILL
ARBITRATOR