CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 669

Heard at Montreal, Tuesday. September 12, 1978

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood claims that the Company violated Article 24.2 of Agreement 5.1 when it denied Air Express Clerk R. Bir the assistance of a Union Representative when being questioned by representatives of the Investigation Department.

JOINT STATEMENT OF ISSUE:

On February 5, 1977, CN Police officers entered and searched Mr. Bir's home. They were acting as peace officers under a legally issued search warrant.

The Brotherhood contends that Article 24.2 of the Collective Agreement has been violated; **a.)** by not notifying the employee concerned of the alleged charge; **b.)** by not giving the employee concerned a one day's notice of the investigation; and **c.)** by not giving the employee concerned the right of representation at the investigation.

The Company denied there was any violation of the agreement.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) J. A. PELLETIER	(SGD.) S. T. COOKE
NATIONAL VICE-PRESIDENT	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

H. J. G. Pye	– General Solicitor, Montreal
C. L. LaRoche	– System Labour Relations Officer, Montreal
W. C. Skelly	– Police Chief, CN Investigation Department, Montreal

And on behalf of the Brotherhood:

F. C. Johnston	– Representative, London
J. D. Hunter	– Regional Vice President, Toronto
B. Murray	– Local Chairman, Toronto
R. Bir	– Grievor

AWARD OF THE ARBITRATOR

Article 24.2 of the collective agreement is as follows:

> **24.2** Investigations in connection with alleged irregularities will be held as quickly as possible. An employee may be held out of service for investigation (not exceeding three working days). He will be given at least one day's notice of the investigation and notified of the charges against him. This shall not be construed to mean that a proper officer of the Company, who may be on the ground when the cause for investigation occurs, shall be prevented from making an immediate investigation. An employee may, if he so desires, have the assistance of one or two fellow employees, or accredited representatives of the Brotherhood at the investigation. Upon request, the employee being investigated shall be furnished with a copy of his own statement, if it is made a matter of record at the investigation. The decision will be rendered within 21 calendar days from the date the statement is taken from the employee being investigated. An employee will not be held out of service pending the rendering of a decision, except in the case of a dismissable offence.

The Company did not give the grievor any notice that a search of his home was to be conducted, nor did it notify him of any charges against him. A search of the grievor's home was conducted, as is set out in the Joint Statement of Issue. The search was itself lawful, a warrant having been issued. The search did not reveal anything of interest, and no charges were laid.

I consider, as I indicated in **Case No. 280**, that the Company's police officers are agents and employees of the Company, and that it cannot evade its obligation under the collective agreement by relying on their authority as peace officers. If the Company were to conduct an investigation of an employee within the meaning of Article 24.2, then it would have to comply with the requirements of that article, whether or not the officers conducting the investigation were peace officers. I do not consider this view to be contradictory of anything said either by the Supreme Court of Canada in **McCleave v. City of Moncton** (1902), 32 S.C.R. 106 or by the Quebec Superior Court in **Morantz v. City of Montreal** (1949) C.S. 101, both of which cases hold that a Municipality is not liable for the acts and omissions of its Constables in enforcing the law. That rule does not have as a necessary corollary that actions which may be contrary to the provisions of a collective agreement are, as between the employer and the employee, somehow validated by reason of their having been done by a peace officer in the execution of a lawful writ.

However this may be, it is my view that the search of the grievor's home pursuant to a warrant, while it was an "investigation" of a sort within the general meaning of that term, was not an "investigation" within the meaning of Article 24.2 of the collective agreement. That article does not require notice, statement of charges and a right to Union representation whenever the Company makes any sort of enquiry with respect to an employee. It is, rather, a provision within the context of an article dealing with "discipline and grievance procedure", and should be understood in that light. The execution of the search warrant might, perhaps, have led to discoveries which would be the basis for the formulation of charges and the conduct of a disciplinary investigation pursuant to Article 24.2. The same might, indeed, result from the most casual observation of an employee by his employer.

In **Case No. 280** Company police officers searched and questioned the grievor. It was considered in the award that the officers had relied on the employer's ordinary supervisory authority to have the grievor "instructed" to report for questioning. What took place, it was held, went well beyond the type of day-to-day query respecting an employee's work or conduct which would be a normal part of industrial life. By way of contrast, reference was made to **Case No. 279**.

In the instant case, had the search warrant been executed by the local police, there would be no question of the application of Article 24.2. The participation of the Company's officers does not alter the fundamental nature of what took place. The requirements of Article 24.2 were simply not apposite: obviously advance notice of the execution of a search warrant would render it ineffective; there were no charges, so no notice of charges could be made. There was no statement, as contemplated by Article 24.2, and, of course, there was no "decision" to be rendered.

For these reasons it is my view that what took place in the instant case was not an “investigation” of the sort contemplated by Article 24.2, and that its requirements were not applicable. There was, I find, no violation of the collective agreement. The grievance is accordingly dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR