CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 672

Heard at Montreal, Tuesday, September 12,1978

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Yard Foreman H.G. Cato of Toronto, Ontario, effective June 13, 1977 for unauthorized possession of customer goods in his private automobile while employed as Yard Foreman on May 22, 1977.

JOINT STATEMENT OF ISSUE:

At approximately 04:30 hours on Sunday, May 22, 1977, Yard Foreman H.G. Cato, who had just completed his regularly assigned shift in Malport Yard, was apprehended by the CN Police after he had been observed loading his private automobile with customer goods.

After a formal investigation, the employee was discharged for unauthorized possession of customer goods in his private automobile.

The Union appealed the Company's decision. The Union requests re-instatement of the employee in his former position with full compensation for time out of service commencing June 13, 1977.

The Company declined the request.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(Sgd.) G. E. McLELLAN	(Sgd.) S. T. COOKE
GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

G. E. Morgan	– System Labour Relations Officer, Montreal
W. E. Green	– Assistant Superintendent, Toronto
P. L. Ross	– Trainmaster, Hornepayne (formerly Trainmaster at Malport Yard)
K. MacDonald	– System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

G. E. McLellan	– General Chairman, Toronto
P. A. Corcoran	– Vice General Chairman, Toronto
J. A. McLean	– Secy. General Committee (Yard) Ottawa
H. G. Cato	– Grievor

AWARD OF THE ARBITRATOR

The essential issue in this case is whether the grievor has given an adequate account of his being in possession of customer goods. A number of issues were raised in argument which may be briefly dealt with. One is whether or not the penalty of discharge constituted a second penalty for the same offence, the grievor having already been held out of service. As to that there is no doubt that when the grievor was taken out of service (following his investigation) he would be in that status until the Company had determined the matter of his discipline, if any. It could not reasonably be thought that taking the grievor out of service was the end of the matter. It is not a case of being penalized twice for the same offence. Another question is as to the regularity of the investigation which lasted overall, some eleven hours. Some at least of that time was attributable to a delay caused by the need to await the arrival of a fellow employee to assist the grievor. At the conclusion of the investigation, the grievor indicated that he was satisfied with the manner in which the statement was obtained. There do not appear to have been any substantial irregularities in the procedure, and that is not raised as an issue by the joint statement. A third question is as to the propriety of the Company's referring to the grievor's disciplinary record. The reason stated for the grievor's discharge was his unauthorized possession of customer goods. Having acted on that ground the Company would not be allowed to introduce a new ground of discipline at the hearing. Having a disciplinary record, however, is not a ground of discipline. It is a consideration (and so, by the same token, is the absence of a record) with respect to the matter of the severity of the penalty. The question may not be decisive in the instant case because of the nature of the offence alleged. It would, however, be my view that it is proper to consider the grievor's disciplinary record with respect to the question of severity of penalty, if that question arises.

A question which must be decided at the outset is that of the standard of proof to be applied. The Company has the onus of showing that it had just cause to discharge the grievor. It is my view that in every such case it must establish the facts on which it relies according to the regular civil standard of proof, that is, according to the balance of probabilities. This rather too-general proposition may be modified somewhat by what is said in the case of **Re Bernstein and College of Physicians and Surgeons** (1977) 76 D.L.R.(3rd) 38 (Ont. Div. Ct.) where the Court held that before a tribunal can find a fact proved it must be reasonably satisfied that it occurred and a mere mechanical comparison of probabilities independent of the belief in the reality of the factual occurrence of the alleged event is not sufficient. The proof, it was said, must be clear and convincing and based on cogent evidence. The gravity of the consequences of any finding is of particular relevance. I am, with respect, in agreement with what the Court says, and I have been guided by those propositions in this case. I would add, with respect to the instant case, that a case of industrial discipline is not a criminal case even where the act relied on as grounds for discipline may also be a criminal offence. The consequences of a finding that there is just cause for the discharge are grave in any case, whether the grounds for the discharge amount to a criminal offence or not. Further, the relationship between employer and employee are not those of the state and its subjects, nor again (to refer to the context of the **Bernstein case**) are they those of a professional person and a governing body. The consequences for the employer of an incorrect finding, while perhaps not as disastrous or poignant as those for the employee concerned, are nevertheless a subject of serious concern.

On most of the important matters of fact there is no real dispute. As a result of a rough coupling which occurred at about 11:30 hours on May 21, 1977, during the shift for which the grievor was responsible, two large bundles of lumber fell out of one of the cars being handled. On one bundle the strapping broke open, and the lumber was scattered about. The other bundle remained intact but obstructed the track. The grievor, being Yard Foreman, cut off the remaining cars being handled and sent the helper, along with the engine, to replace them. The grievor then started to clear the track. He was working with a reduced crew. The intact bundle was moved clear of the track, and the loose lumber piled on the north side of the adjoining track, adjacent to a service roadway in the yard.

The grievor ought to have reported this incident, and the presence of the lumber in the yard, to the Yardmaster. It would seem there may also have been a duty on the helper and engineman to ensure it was reported but the grievor advised them he would do so. He did not, his position being that when he went to the yard office the Trainmaster was there, and the grievor was afraid that the Trainmaster, knowing his disciplinary record, would be hard on him. Giving full credit to this excuse it may be said to be an understandable one, but not an acceptable one. There was no immediately succeeding shift and the effect of the grievor's action was simply to leave a customer's property, unidentified, loose in the yard, subject to a number of hazards.

The lumber was, however, discovered by a section foreman who reported it to the Trainmaster. The Trainmaster reported it to the Assistant Superintendent who informed the railway police and instructed that the lumber be piled as it had been when found. That evening, the grievor and his crew returned for a second shift, in accordance with their schedule. The grievor still made no report of the spilled lumber. The grievor and his crew completed their switching assignment in just under four hours. Then the grievor went to the parking area by the yard office and got his car. He proceeded with his car to the east end of the yard (farthest from the office) where the lumber was piled and there he met the other members of his crew, who had come there on the engine. Apparently telling the crew members that he was removing the lumber to the team tracks (near the yard office) to protect it and to remove the safety hazard, the grievor instructed the crew to load the lumber in his car (a station wagon). They did so, although not all of the lumber could be loaded on the car. The lumber could have been loaded on the engine. That might have been somewhat less convenient, but not much less so.

The grievor then drove to the area of the yard office and parked, backing his vehicle toward the team tracks. The engine was put away and the crew were prepared to go off duty. The grievor took his switch lists to the yard office and gave them to the Car Control Clerk. The Yardmaster, it seems, was not in the office. No report was made of the spillage or the removal of the lumber.

The grievor then returned to his car and while removing his work boots, was arrested by the railway police. Later he was taken to the local police station and charged with theft of goods of a value of over $200.00. On his release from the police station he was directed to return to the yard and unload the lumber there, and he did so. The Trainmaster observed that at that time the lumber was neatly covered with a blanket.

The grievor was tried on the charge referred to, and was acquitted. While the matter before me involves a judgement on much the same facts, the issue is not the same and of course, as I have indicated, the standard of proof is not the same. There is certainly no contradiction between a finding that the Company had just cause to discharge the grievor, and the finding by the court that he was not guilty of a crime. In the case which is before me, and on the material presented, it must be my conclusion that there was just cause to discharge the grievor, and on the grounds stated by the Company. While there may be, as the Court's finding shows, a "reasonable doubt" as to the grievor's guilt, it is nevertheless the most probable case that he took the lumber improperly. The proof thereof is, I think, clear and convincing, in accordance with the propositions put forward in the **Bernstein case**, above.

It is significant that the grievor did not report the spillage as he ought to have done, even although there were three different occasions when he might easily have done so, and even although he knew he ought to do so. His explanation for not reporting insufficient as it may be – applies to only one of those occasions. That the grievor would use his own vehicle (perhaps at some risk) for this Company work when he could have used the engine seems odd, although in itself this fact does not carry great weight. It is, again, strange that he would direct the crew to load the car (this would be a proper assignment) but not to unload it, nor even, it seems, to finish removing the spilled lumber, for all this would come within the scope of work they could have done before leaving – and they had ample time. It is odd that he should have removed his work boots just before (if his story were true) unloading the lumber and piling it by the team tracks. It is strange, too, that the lumber would be neatly covered by a blanket.

In all of the circumstances, it is my finding that the grievor has not given an adequate explanation of his possession of customer property. He had no authority to have such property in his own vehicle, and his explanation thereof is not satisfactory. For these reasons, it must be my conclusion that there was just cause for the discharge of the grievor. It may be added that at the very least, without making any finding relating to criminal conduct, the grievor's handling of customer property was quite improper and would subject him to discipline. In view of his record of 40 demerits, discharge would be proper in any event.

For the foregoing reasons, the grievance is denied.

(signed) J. F. W. WEATHERILL
ARBITRATOR