CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 937

Heard at Montreal, Wednesday, April 14, 1982

Concerning

QUEBEC NORTH SHORE & LABRADOR RAILWAY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of trainman C.E. Ross.

JOINT STATEMENT OF ISSUE:

Mr. C.E. Ross was found in unauthorized possession of goods belonging to the Company. Following an investigation held on August 5th, 1981, he was discharged.

The Union filed a grievance requesting Mr. Ross' reinstatement. The Railway rejected the grievance.

FOR THE UNION:

(SGD.) JACQUES ROY
GENERAL CHAIRMAN

FOR THE RAILWAY:

(SGD.) ROGER L. BEAULIEU
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

Me. J. Bazin	– Counsel, Montreal
R. P. Morris	– Superintendent Transportation, Sept-Îles
C. Nobert	– Assistant, Labour Relations, Sept-Îles
J. J. Martin	– Foreman Security, Sept-Îles

And on behalf of the Union:

Me. R. Bernatchez	– Counsel, Quebec
J. Roy	– General Chairman, Sept-Îles
R. Proulx	– General Chairman, Quebec

INTERIM AWARD OF THE ARBITRATOR

During the hearing, the union's lawyer objected to the minutes of the employer's investigation, conducted in accordance with Rule 17 of the Agreement, being admitted as evidence.

This objection is based on the fact that the grievor, who had been accused of criminal acts, should have been warned during the investigation which was about these same acts and events. It is alleged that in the absence of such warning, the investigation was not "fair", a requirement of the Agreement. In addition, in the union's opinion also, the grievor was not entitled to protection under Section 5 of the Canada Evidence Act with respect to arbitration and would thus be prejudged in the presentation of his case.

As the accusations made against the grievor, although made by the police, originated from Company investigations, it is alleged that the Company is trying to have it both ways, laying charges against the grievor before the criminal courts and at the same time imposing industrial disciplinary measures, that is dismissal. It should finally be noted that the grievor was cleared by the court on three charges of theft and there is currently one charge pending (being in possession of stolen goods).

In cases of discipline heard by this Office, it is practice to admit (unless there is evidence to the contrary) the minutes of the investigation conducted by the employer before discipline is assessed. I am not convinced that this practice should change solely because there may be criminal charges against the employee in question. Criminal proceedings and industrial proceedings clearly differ from each other. Though they originate from the same acts and events (and there can even be differences at this level), it remains that the parties are different, that criminal law and collective agreements are not the same thing and that the potential penalty is quite different.

It is my opinion that since my jurisdiction is limited to ruling on a case of arbitration dealing with the application or interpretation of a collective agreement – in the case before us, a case of industrial discipline, I am not supposed to apply rules of criminal law nor those of proof of common law. It cannot be concluded simply because the grievor faces charges before the criminal courts that customary procedures for industrial relations should be changed in his favour. My decision is that I should receive as evidence the minutes of the investigation as usual (unless there are other objections that I am not dealing with here). I should grant the grievor the same rights, no more, no less, as I would in any other case of industrial discipline.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR

On Tuesday, 8 June 1982, there appeared on behalf of the Company:

Me. J. Bazin	– Counsel, Montreal
R. P. Morris	– Superintendent Transportation, Sept-Îles
C. Nobert	– Assistant, Labour Relations, Sept-Îles
J. J. Martin	– Foreman Security, Sept-Îles

And on behalf of the Union:

Me. R. Bernatchez	– Counsel, Quebec
J. Roy	– General Chairman, Sept-Îles
R. Proulx	– General Chairman, Quebec

AWARD OF THE ARBITRATOR

There is no doubt that the Grievor was in possession of goods belonging to the Company. These goods were found during a search that took place at the grievor's main residence as well as on his boat moored at the Yacht Club and inside a chalet he had rented in Matamek.

At the chalet, the policemen (an officer from the QNS&LR and IOC Police force as well as a detective from Sept-Îles' municipal police department) met with the grievor. They searched the house in the presence of the grievor and found in his travelling bag a rubber recoil hose that the grievor admitted having taken from a Company caboose.

Later, at the grievor's main residence, the investigators found various items which, by the initials or numbers engraved on them, seemed to be Company property as well. Amongst these items was a chain saw which was subsequently identified as belonging to the Company.

Search of the boat did not result in any seizures.

Now, the search warrant mentioned solely the Grievor's residence. It may well be, therefore, that searches of the chalet and boat were unauthorized; nonetheless, the grievor was found in possession of a recoil hose and he admitted that the hose belonged to the Company. Even if (and I do not believe it to be the case) the law demanded the rejection of evidence obtained illegally (and I am not concluding either that it was necessarily illegal proof), the fact still remains that during a proper search, goods belonging to the Company were found at the grievor's main residence.

From this I conclude that it was established the grievor was in possession of Company property. He had no valid explanation for such possession, which cannot be described as normal. When he was asked whether he had bought these goods, he had "no comment".

The Union claims that it was the Employer's duty to inform the employee of his essential rights, namely that he was not obliged to cooperate in the investigation. The investigation mentioned is the one required under Rule 17.01 of the Agreement. That Article reads as follows:

> **17.01** An employee will not be disciplined or dismissed without first being given a fair, complete and impartial hearing of the facts and his responsibility established. Hearing will be conducted by an officer of the Railway. The employee whose case is under investigation may be represented at the hearing by the fellow employee of his choice, who may be a committeeman, and who will be permitted to question witnesses. The employee and his representative will be permitted to read the testimony of witnesses and examine documents submitted as evidence.

In my opinion, this argument tends to confuse obligations in criminal matters with those of an industrial nature. It is only the latter that concern us in the present case. Even had the Employer collaborated with the municipal police department, the criminal charges do not come under the jurisdiction of the Employer who is however supposed to comply with the stipulations of the Collective Agreement, i.e., to hold the investigation mentioned in Rule 17.01. It should be pointed out that the grievor had received a warning during an interrogation at the municipal police station on July 31, that is, before the investigation held on August 5.

The investigation was in accordance with the stipulations of the Collective Agreement. The grievor was granted the right to cross-examine Mr. Martin but he did not exercise it. He acknowledged that the facts established in Mr. Martin's report were accurate. He had no explanation.

I therefore conclude that the grievor was in possession of Company property and it is clear that there was no justification or valid explanation for such possession. In rare instances, employees guilty of theft have been reinstated; in this case, however, there are no exceptional features as in other such cases. Here the discharge was fully justified. The grievance is therefore dismissed.

(sgd.) J. F. W. WEATHERILL
ARBITRATOR