CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 989

Heard at Montreal, Wednesday, October 13th, 1982

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of Track Maintenance Foreman L.R. Desrochers, Leading Track Maintainer G.S. Charette and Extra Gang Foreman R.J. Bromley effective 25 September 1981 for the removal and possession of goods consigned to the Company's care.

JOINT STATEMENT OF ISSUE:

Following an investigation Track Maintenance Foreman Desrochers, Leading Track Maintainer Charette and Extra Gang Foreman Bromley were dismissed from the Company's service on 25 September 1981 for deliberate and unauthorized removal and possession of goods and material consigned to the Company's care involved in derailment at Shawmere, Ontario, 1 July 1981.

The Union contends that dismissal was too severe a penalty and requests that the grievors be reinstated in the service of the Company.

The Company declined the request.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) PAUL A. LEGROS	(SGD.) D. C. FRALEIGH
SYSTEM FEDERATION GENERAL CHAIRMAN	DIRECTOR LABOUR RELATIONS

There appeared on behalf of the Company:

K. J. Knox	– Manager, Labour Relations, Montreal
Lt. R. C. Werden	– Witness, Hornepayne
T. D. Ferens	– System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

P. A. Legros	– System Federation General Chairman, Ottawa
W. Montgomery	– General Chairman, Belleville
F. L. Stoppler	– Vice-President, Ottawa
L. R. Desrochers	– Grievor
R. J. Bromley	– Grievor

AWARD OF THE ARBITRATOR

The instant case involves circumstances similar in many ways to those giving rise to **Case No. 986**. From all of the material before me in this case, however, I consider that a somewhat different result should follow.

There is no doubt that the grievors took property which was not theirs. It was the property of the Railroad or of its customers, and it was wrong of the grievors to take it. Although the grievors stressed the distinction between "taking" and "theft", I am satisfied that what occurred was indeed theft, although the name given to the conduct does not affect its character as an industrial offence. Certainly, the grievors were subject to discipline for what they did. Generally, the appropriate penalty for such conduct is discharge.

While the employer contended that the grievors took the property in question from a derailed freight car, the evidence before me, considered on the balance of probabilities, does not support that conclusion, but supports rather the grievors' contention that they picked it up on the ground at the scene of the derailment. They appear to have picked up a haphazard collection of items, many of which could, after washing, be worn. There is no substantial support in the material before me for the view that the grievors' taking of this property was part of a continuing scheme of theft, that they had "pilfered" or "looted" Company premises or equipment, or that they trafficked in stolen goods.

There was, and here again the case is different from what was put before me in **Case No. 986**, nothing surreptitious in the grievors' taking of the goods. They transported a few garbage bags of goods from the derailment side to the yard where their cars were parked, in a rail car while they were on duty. While it was, as I have said, quite wrong for the grievors to have taken those goods, the circumstances in which they were found would account in part for their thinking (too easily) that they were, or would be abandoned.

The grievors frankly admitted what they had done, and recognized that it was wrong. In the case of Mr. Desrochers particularly there is, I think, a significant similarity between this case and the situation dealt with in the **Ford Motor Co.** Case, 22 L.A.C. 35. While there is no similar evidence of the personal circumstances of the other grievors, who have somewhat less seniority, I do not consider that distinctions can properly be drawn on that basis in the circumstances of this particular case. One final consideration which appears is an atmosphere of laxity with respect to pilfering and looting which seems to have developed among some of the grievors' fellow-townsmen. The grievors, from the material before me, did not engage in that behaviour. That atmosphere, however, may have made the grievors' own wrongdoing seem acceptable to them. While this does not alter the fact that it was wrong, it would support the view that what the grievors did was an aberrant episode.

Having regard to all of the foregoing it is my conclusion that the penalty of discharge was, in the particular circumstances of this case, too severe. It is my award that the grievors be reinstated in employment forthwith, without loss of seniority, but without compensation for loss of earnings or other benefits.

(signed) J. F. W. WEATHERILL
ARBITRATOR