CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2072

Heard at Montreal, Wednesday, 14 November 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

On April 16, 1987, CN Police chose Labourer D. Goldhawk in a spot check to search his gym bag and other belongings.

BROTHERHOOD'S STATEMENT OF ISSUE:

It is the union's position that every worker has the right to be secure against unreasonable search and seizure and that CN Police acting on behalf of the Company cannot discriminate against an employee without advising the employee of the charges against him.

The grievance was processed through the grievance procedure. The Company asserts that the policy grievance is not arbitrable and has declined to join the union in a Joint Statement of Issue.

FOR THE BROTHERHOOD:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Company:

B. R. O'Neil	– Labour Relations Officer, Montreal
M. M. Boyle	– Manager, Labour Relations, Montreal
S. Grou	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg
T. McGrath	– National Vice-President, Ottawa

PRELIMINARY AWARD OF THE ARBITRATOR

The Company has raised a preliminary objection to the arbitrability of this grievance. In the Arbitrator's view, as a matter of general principle, the objections taken by the Company would appear to have some foundation in the precedents of this Office (**CROA 924**) as well as other arbitration awards from within the railway industry (*see e.g.* ***Ontario Northland Railway and Division No. 4, Railway Employees Department AFofL–CIO****, award dated October 30, 1980 (Weatherill)*).

Moreover, the Arbitrator is not persuaded by the submission of the Brotherhood's representative that the requirements of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration, and in particular the obligation to particularize the articles of the Collective Agreement alleged to be violated, either in a joint statement or in an *Ex Parte* statement, as provided in Paragraph 8 of the Memorandum, have no application in the case of a policy grievance. It is, of course, open to any Union participant in the Canadian Railway Office of Arbitration to file a policy grievance and to pursue it to arbitration, subject always to the provisions of the collective agreement in question and to the requirements of the CROA Memorandum. There is nothing in the Memorandum which exempts the requirement for specificity as to the disclosure of the articles of the Collective Agreement which are alleged to have been violated in the case of a policy grievance. The position of the Brotherhood in respect of this aspect of the dispute must therefore be rejected.

There are, however, equitable considerations which, in the Arbitrator's view, override the preliminary objection of the Company in this case. The unchallenged representation of the Brotherhood's spokesperson is that on April 14, 1989, when the Brotherhood's claim was in the same form as it is now presented, the Company's representative agreed to allow it to be processed to be heard in this Office. The Company's representative was not at the hearing, and it may be that he had an intention different from that that was gathered by the Brotherhood's officer. However, I am satisfied, on the balance of probabilities, that an indication was given which the Brotherhood believed, or had reasonable grounds to believe, was tantamount to an agreement by the Company that this dispute should be heard in the Canadian Railway Office of Arbitration. It appears that the communication between the two gentlemen was the result of an abortive attempt to have the matter first dealt with through a separate expedited grievance and arbitration process. It would, in my view, be inequitable to permit the Company to now reverse a position ostensibly taken previously, and upon which the Brotherhood has relied to progress this matter to arbitration. For this reason the Arbitrator must reject the preliminary objection made by the Company. The grievance shall therefore be docketed to be heard on its merits.

November 16, 1990 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR

On Tuesday, 11 December, 1990:

There appeared on behalf of the Company:

B. R. O'Neil	– Labour Relations Officer, Montreal
M. M. Boyle	– Manager, Labour Relations, Montreal
J. Dysart	– Labour Relations Officer, Montreal
G. Wheatley	– Senior Manager, Human Resources, Montreal

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

In the Arbitrator's view the facts of the instant case are fully dealt with by the prior decision of this Office in **CROA 279**. That case, which concerned the same parties under the same Collective Agreement, established that there was no violation of the Collective Agreement when the Company exercised its prerogative to conduct routine spot checks of containers being carried out of its premises by its employees. In that award Arbitrator Weatherill found that the spot check search of a utility bag by a Canadian National Railway constable did not violate Article 24.2 of the Collective Agreement, in respect of investigations, or any part of the agreement. Mr. Weatherill commented, in part, as follows:

> Routine inspection of lunch pails or packages being carried out of employers' premises are a common procedure in industry. While the practice is, in a sense, a sort of "investigation" within the everyday meaning of that word, it does not constitute an investigation within the meaning of Article 24.2. What is involved here is simply a surveillance of employee conduct on the premises, a matter well within the normal managerial process and not restricted by anything in the collective agreement. It is not necessarily an exercise of any of the special powers held by the company's police as peace officers, but is simply an exercise of management's right to check what may be carried off its premises.
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> There is nothing in the circumstances of this case to indicate that the grievor was being deliberately victimized or embarrassed by this procedure. He may have found it a distasteful matter, but the fact is that it is a normal incident of industrial life, and, at least in this case, carried no particular implications with respect to the grievor. In my view, there was no violation of the collective agreement in these circumstances.

It is not disputed that in the twenty years since that award there has been no amendment of the Collective Agreement and the practice of the Company to conduct spot checks has continued. In these circumstances I cannot find any violation of the intention of the Collective Agreement, as the parties must be implicitly taken to have accepted the result of the award of this Office, having made no subsequent change to their Collective Agreement. Moreover, there is nothing the facts of the case placed before the Arbitrator to suggest that the Company's policy is unreasonable or that, in the circumstances of this case, it would have resulted in undue embarrassment or offence to the privacy and dignity of a reasonable person in the place of the employee concerned.

Nor can the Arbitrator accept the suggestion of the Brotherhood's representative that the actions of the Company were in violation of the employee's right to be secure against unreasonable search or seizure protected by Section 8 of the **Canadian Charter of Rights and Freedoms**. Firstly, I would find that the Company is not sufficiently government related, in the administration of its collective agreement, as to be subject to the Charter. Alternatively, if the Charter does apply, I would be compelled to conclude that the policy of the Company, as a public carrier of goods, to conduct periodic spot checks as a means of assuring the security of its freight, premises and equipment is consistent with a reasonable limitation of the individual rights of its employees that is long established in practice and is demonstrably justified within a free and democratic society, as contemplated under Section 1 of the Charter.

For the foregoing reasons the grievance must be dismissed.

November 16, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR