

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 252

Heard at Montreal, Tuesday, November 10th, 1970

Concerning

CANADIAN PACIFIC EXPRESS COMPANY (CP EXPRESS)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT
HANDLERS,
EXPRESS AND STATION EMPLOYEES

DISPUTE.

Claim of employee C. Grandmaison, Lachine Terminal, Montreal for five hours overtime pay at rate of double time account Sunday Work given to Junior employee A. Ricard.

JOINT STATEMENT OF ISSUE:

Article 13, Overtime, Clause (j), of Agreement, reads as follows.

"Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week, in all other cases by the regular employee".

Both Grandmaison and Ricard hold positions of Intrip Clerk. The nature of the work required by the Company to be performed on a Sunday was such as is performed by both employees on their regular assignments.

Both parties to this dispute are in agreement that in such circumstances both employees could be considered the "regular employee".

At issue is whether or not in such instances the Company is obligated to offer overtime work required to employees in seniority order.

FOR THE EMPLOYEES:

(SGD.) L. M. PETERSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. T. HARFORD
DIRECTOR, PERSONNEL

There appeared on behalf of the Company:

F. E. Adlam	Industrial Relations Representative, CP Express, Toronto
J. T. Harford	Director Personnel, CP Express - Toronto

D. R. Smith	Regional Manager, CP Express, Montreal
J. G. MacMillan	Supervisor Personnel, CP Express, Toronto

And on behalf of the Brotherhood:

L. M. Peterson	General Chairman, B.R.A.C., Toronto
F. C. Sowery	Vice General Chairman, B.R.A.C., Montreal
M. Peloquin	Admn. Asst. to Int'l. Vice Pres., BRAC, Montreal
V. P. Gray	Grand Lodge Organizer, B.R.A.C., Toronto
G. Duval	Local Chairman, Lo. 2303, B.R.A.C., Montreal

AWARD OF THE ARBITRATOR

It is clear from the Joint Statement that the grievor was one of the "regular employees" referred to in article 13 (j) of the collective agreement. As such, he would have a claim with respect to the work in question. At the same time, Mr. Ricard was also a "regular employee" and also had a claim. As between the two of them, did one have a claim superior to the other, or was the company entitled to assign the work in its unfettered discretion?

It is the union's contention that work should be assigned, in such circumstances, in order of seniority. Some support may be found for this view in article 7.1 (a) of the collective agreement, which provides, in English as follows:

"Article 7.1 - Promotion and Assignment

- (a) The promotion and assignment of employees will be governed by seniority and ability, senior qualified applicant to be given preference. The Officer of the Company in charge shall be the judge, subject to appeal, which must be made in writing within 14 calendar days of the appointment."

It may be of interest to compare the French version of this provision, which is as follows:

"Article 7.1 - Promotion et designation

- (a) La promotion et la designation d'un employe seront regies par l'anciennete et la competence. On donnera la preference au candidat le mieux qualifie. Le Dirigeant de la Compagnie en charge jugera de la question, sujette a appel. Tout appel devra etre formule par ecrit dans les 14 jours suivant la nomination."

The collective agreement provides that the English text is to govern in cases of conflict. In the instant case, however, it is not a matter of promotion or assignment, as the term is used in article 7, but of a particular overtime opportunity, to be "assigned" as between employees already holding the assignment. There appears to be no provision in the collective agreement dealing with the distribution of overtime: the agreement does not provide, as some do, for "equitable distribution" of overtime, and it does not expressly provide that overtime should be assigned to the senior available

employee. In my view, it does not follow from the absence of express provision dealing with the matter that the company can direct any of the qualified employees to do the work, in its unfettered discretion. The direction of a particular individual to perform certain work might be justified on a number of grounds, for example, that it was work on which he was already engaged, that it was work for which he had special qualifications, that he had worked less overtime than others, or that, indeed, he was the senior available employee. Seniority itself, however, is not necessarily a sufficient basis upon which to claim work as against another employee.

In answer to the grievance, the company took the position that it had offered the overtime work to the Junior employee because he was more efficient than the grievor. In its presentation at the hearing, however, the company did not rely on this ground, but argued simply that there could be no violation of article 13 (j) in the circumstances. In my view, however, in assigning work to one of the "regular employees" as it is required to do under that article, the company may not properly act in a manner inconsistent with the provisions of the collective agreement. In particular, it is my view that it would be a violation of the collective agreement for the company to discriminate unfairly as between qualified employees in making such assignments. While, as I have indicated, the senior regular employee could not properly claim all the overtime work in his classification, seniority is the appropriate criterion to be relied on where the considerations mentioned above do not arise. In the instant case, as it was presented at the hearing, it is my conclusion that the grievor ought to have been called for the work in question, pursuant to article 13 (j). That article required an assignment within a particular class of employees, and having regard to the whole of the agreement the grievor was, in the circumstances, entitled to be considered "the regular employee".

It is accordingly my award that the grievor be paid five hours pay at double time with respect to the work in question.

J. F. W. WEATHERILL
ARBITRATOR