

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 816

Heard at Montreal, Tuesday, March 10, 1981

Concerning

CANADIAN PACIFIC EXPRESS COMPANY

and

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

DISPUTE:

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The assessing of fifteen demerit marks to employee M. Deliva, CANPAR, Montreal, Quebec, for insubordination.

EMPLOYEES' STATEMENT OF ISSUE:

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March 28th, 1980, employee Deliva was requested to work overtime. He declined this overtime and was charged with insubordination.

The Union claims as overtime is in a voluntary manner by seniority, classification and shifts, the discipline assessed was not warranted and requested the fifteen demerit marks be rescinded.

The Company denied the Union's request.

FOR THE EMPLOYEES:

(SGD.) J.J. BOYCE  
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Cardi -- Labour Relations Officer, CP Rail, Montreal

B.D. Neill -- Manager, Labour Relations, CP Express,  
Toronto

R.A. Colquhoun -- Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

J.J. Boyce -- General Chairman, BRAC, Toronto

J. Crabb -- Vice-General Chairman, BRAC, Toronto

F.W. McNeely -- General Secretary-Treasurer, BRAC, Toronto

AWARD OF THE ARBITRATOR

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The grievor, a Driver Representative responsible for pick-up and delivery of traffic in certain regularly assigned areas, works from 8:00 a.m. to 5:00 p.m., Monday to Friday. In accordance with standing instructions, at 4:30 p.m. on March 28, 1980, the grievor called the Delivery Supervisor to report on the completion of his pick-ups, to receive information regarding any late pick-ups to be done and to advise the Supervisor of any shipments that he had not attempted to deliver. There were a number of parcels not yet delivered, although it is not suggested that the grievor was not doing his job properly.

The Supervisor then advised the grievor that he would like him to stay out and complete his run. That is, he asked the grievor to work overtime. The grievor replied that he did not feel like staying out, as he had personal things to do. That is, he declined the overtime. The Supervisor then ordered the grievor to stay out and finish his run. The grievor simply said "good-bye". Shortly after 5:00 p.m. he returned to the centre, and he did not work the overtime.

The grievor's refusal to work overtime was not based on any improper motive. He did in fact have valid personal reasons for not wishing to work overtime. His reasons may or may not have been particularly weighty, but they were real, and the grievor was under no particular obligation to discuss them in the circumstances. He later said, as well, that he was tired. It may be noted that the grievor has often worked overtime in the past, and worked some eleven hours' overtime during the two-week period ending on the day in question.

The matter is governed by Article 8.6 of the Collective Agreement, which is 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. Overtime shall be allocated on the basis of seniority wherever possible, in a voluntary manner, within the work classification and shifts, provided the employee is capable of performing the duties; however, upon reaching the bottom of the seniority list in that classification and shift, the junior employee(s) will be required, in reverse order, to work the overtime."

It is clear from this Article that overtime is to be allocated "in a voluntary manner" - that is, it may be refused - except that where employees have, in order of seniority, refused overtime, then they may, in reverse order of seniority, be required to perform such work. In the instant case, the grievor exercised the general right given him by the use of the phrase "in a voluntary manner" in Article 8.6. The Company could override that and require the grievor to work overtime, if it were to show that it had then canvassed employees in that classification and shift, and that the grievor was the junior employee. That has not been shown to be the case here. This was not a situation, then, in which the Company could properly require the grievor to work overtime.

The Company argued that the provision for allocation of overtime in a voluntary manner was "clearly intended to apply to those situations where there are a multiple number of similar positions performing the same work at the same location". With respect, such an intention simply does not appear in Article 8.6 as it stands, although of course it would be easier for the Company to apply the Article in situations such as that. It is not, as the Company argued, "ludicrous" to contemplate the possibility of a driver working on one route having to complete the work of a driver working on another. Such circumstances might well arise in cases of vacation or illness, and may equally well arise where overtime limits imposed by legislation are met.

However that may be, the Collective Agreement as it stands permitted the grievor, in the circumstances of this case, to refuse an overtime assignment. In my view, therefore, it was not proper for the Company to assess a penalty of fifteen demerits in this case. One of the important factors to be considered in insubordination cases is whether or not there has been a clear communication to an employee of an instruction, and of the importance of his following it. Communication, it should not need to be said, is a two-way street. In the instant case, the Supervisor was entitled to think that the grievor, however disgruntled he may have been, would work the overtime after he said "good-bye" on the telephone. He had certainly not made it clear to the Supervisor that he was acting within the general right conferred by the Collective Agreement, nor did he seek to be assured that he was not the junior employee. Having received a direct order, he made no comment, but simply did not comply. That was not proper behaviour and could itself be the subject of mild discipline, although it was not the serious offence that the refusal of a proper order would have been.

For the foregoing reasons, then, it is my award that the fifteen demerits be removed from the grievor's record, and that a reprimand be substituted therefor.

J.F.W. Weatherill,  
Arbitrator.