

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1132

Heard at Toronto, Wednesday, August 17, 1983  
Concerning

CANADIAN PACIFIC EXPRESS LIMITED  
(Canadian Parcel Delivery)

and

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

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DISPUTE:

Appeal of discipline assessed employee, P. Hesse, Kitchener, Ontario,  
dated October 1982.

BROTHERHOOD STATEMENT OF ISSUE:

On October 12, 1982, employee, P. Hesse, on completion of his shift was instructed to work overtime. Employee, P. Hesse, had advised management approximately 7 - 8 weeks previously that for personal reasons it would not be possible for him to work overtime on Tuesday evening. October 12, 1982, was a Tuesday evening. Employee, P. Hesse, was subsequently notified to attend a question and answer session. At the time of question and answer session, no charges had been laid against employee, P. Hesse, nor had he been advised in writing of the purpose of the aforementioned session.

Following the question and answer session employee, P. Hesse, was assessed twenty demerit marks for:

"Refusing to work overtime".

The Union appealed the assessment of twenty demerit marks on the grounds that employee, P. Hesse, had been dealt with unjustly and the Company had failed to comply with the provisions of Article 6 of the Collective Agreement. In addition the discipline was excessive.

The Company declined the appeal.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE  
General Chairman, System Board  
of Adjustment No. 517.

There appeared on behalf of the Company:

D. W. Flicker	- Counsel, CPR, Montreal
D. R. Smith	- Director, Industrial Relations, Personnel and Administration, CP Express, Toronto

B. D. Neill - Manager, Labour Relations, CP Express, Toronto  
A. D. Salis - Area Manager, Ontario, CP Express, Toronto  
J. N. Bennett - District Manager, Southwestern Ontario,  
CP Express, London

And on behalf of the Brotherhood:

D. Watson - Counsel, Toronto  
J. J. Boyce - General Chairman, BRAC, Toronto  
J. Crabb - General Secretary-Tr. BRAC, Toronto  
M. Gauthier - Vice General Chairman, BRAC, Toronto  
J. Bechtel - Local Chairman, Lodge 2311, BRAC, Cambridge  
P. Hesse - Grievor, BRAC, Kitchener

#### AWARD OF THE ARBITRATOR

On the day in question the grievor was asked to work overtime. He refused, and while overtime is generally voluntary, Article 8.6 of the Collective Agreement permits the Company to assign overtime to junior employees in reverse order of seniority where senior employees have not been willing to work. In the instant case it is my conclusion from the evidence that the grievor was assigned in his turn. It may be that a senior employee was not actually asked to work overtime on the day in question, but, from the grievor's own evidence, that would appear to have been due to the Company's compliance with a request, similar to the grievor's own request, to be excused at certain times. In such cases, it does not appear that employees were favoured by being excused from assigned overtime where the grievor was not, but simply that they did not want the voluntary overtime to which they would otherwise have been entitled on those occasions. There is nothing to support the union's allegation that the grievor was the victim of improper favoritism.

The grievor had, some time previously, requested to be excused from overtime on Tuesday evenings, because his wife took singing lessons on those evenings at the other end of town, and needed the car. That would be a good reason for the grievor's not accepting voluntary overtime on such occasions. The Company was, however, entitled to have its work performed, and the Collective Agreement gives preferential rights to senior employees both to work overtime on a voluntary basis, and to refuse its assignment. While the Company might do what it could to accommodate the grievor, the real effect of his request was to impinge on the seniority rights of other employees, as set out in the Collective Agreement. In any event, the Collective Agreement allowed the Company to assign the work in question to the grievor, and his refusal to accept that assignment was wrong.

The grievor was subject to discipline on the occasion in question. In assessing the penalty imposed, however, it is to be borne in mind that the grievor had made a general request to the Company to be relieved of Tuesday night overtime, and while the Company could not, under the Collective Agreement, properly give any undertaking in that regard, it is to be noted that it did not refuse his request. This would appear, from what is before me in the instant case, to have been the first instance of discipline of the grievor for this offence. Further, as other C.R.O.A. cases have indicated, the effect of the assessment of discipline under the Brown system may properly be taken into account. In the instant case, given the grievor's

disciplinary record (as it stands subsequent to the decision in Case No. 1131), the grievor would be subject to discharge if the penalty assessed stands. In all of the circumstances, I do not consider that such a result would be justified, In my view, while the grievor was subject to discipline, the appropriate penalty in the circumstances would be the assessment of five demerits.

For the foregoing reasons, the grievance is allowed in part. The penalty of twenty demerits is set aside, and a penalty of five demerits substituted therefor. The grievor's disciplinary record now stands at fifty-five demerits.

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