CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1161

Heard at Montreal, Wednesday, December 21, 1983

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Express Division)

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claim of Motorman A. Berube for three hours at overtime rates.

JOINT STATEMENT OF ISSUE:

On January 18, 1982 the Company called Mr. A. Malepart to perform overtime work prior to the starting time of his assignment. Mr. A. Berube, being senior to Mr. Malepart, claimed he was entitled to the work. The Brotherhood contends Mr. Berube is entitled to three hours at overtime rates for the work performed by Mr. Malepart.

The Company declined the claim.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) TOM McGRATH National Vice-President	(SGD.) D. C. FRALEIGH Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

J. R. Gilman	- Senior Manager Labour Relations, CNR, Montreal
W. W. Wilson	- Manager Labour Relations, CNR, Montreal
S. A. MacDougald	- System Labour Relations Officer, CNR, Montreal
K. Pride	- System Manager Human Resource, CNX, Toronto
D. Lord	- System Labour Relations Officer, CNR, Montreal

And on behalf of the Brotherhood:

G. Thivierge	- Regional Vice-President, CBRT&GW, Montreal
A. Wepruk	- President, Local 334, CBRT&GW, Montreal

AWARD OF THE ARBITRATOR

The grievor, Mr. A. Berube, is employed as a Motorman at the

company's Lachine Express Terminal at Lachine, Quebec. The grievor is one of fifty-three Motormen employed in this capacity at Lachine.

In the absence of a written provision contained in the collective agreement with respect to the distribution of overtime, the company has bound itself to adhere to the seniority of its employees in allocating overtime.

On Sunday, January 17, 1982, the company's supervisors decided, because of the cold weather, to call three Motormen to report for work on January 18th three hours before their normal starting time at 8:00 a.m. to "start-up" the company's vehicles. It was thus anticipated that any problem attributable to the climatic conditions affecting the company's fleet of vehicles might be attended to without any interruption of service.

The grievor's claim is for three hours pay at the appropriate rate for the missed opportunity to work overtime at the time in question. It is agreed that of the three motormen called in to perform overtime work, Mr. N. Malepart was less senior than the grievor in service. It is also common ground that had Mr. Berube been called in to perform the overtime work approximately thirty-five employees more senior than the grievor in seniority would have been by-passed.

The issue in this case is straightforward. The company agrees that it was in breach of its tacit understanding with the trade union with respect to the distribution of overtime. Nonetheless it insists that the grievor, in order to succeed in his claim, must prove entitlement to the premium. The seniority lists adduced in evidence establish that the grievor would not have been an eligible candidate until approximately thirty-five employees with a greater length of service had rejected the overtime opportunity.

The trade union insists that compensation ought to be given to the most senior eligible employee who has filed a grievance. Implicit in the argument is the notion that if more senior eligible employees had been overlooked then their failure to file a grievance is indicative of their unavailability to perform the overtime work. Moreover, it was suggested that the trade union ought not to be placed in a position where it must go "shopping" for grievances in order to uphold the integrity of the collective agreement.

It is settled arbitral law that a claimant for compensation arising out of an alleged breach by the employer of the collective agreement must not only establish employer wrongdoing but personal prejudice or harm that is directly related to the alleged default. Mr. Berube, notwithstanding the assignment of the overtime work to a less senior employee, simply was not entitled to the work. The inference the trade union wishes the Board to draw from the failure of the more senior eligible employees to grieve is unwarranted. I cannot conclude that approximately thirty-five employees were simply disinterested in the overtime opportunity without proof to support that assertion. Rather, the more compelling inference to be drawn from the evidence is the notion that these employees have not been made aware of the missed opportunity of their entitlement to be offered the overtime work. This unhappy circumstance does not per se warrant the grievor being awarded the relief requested for the

employer's default.

Insofar as the trade union's obligations are concerned in such circumstances I might make the following remarks. Trade unions are just as bound as the employer to the seniority provisions of the collective agreement. They have the same access, as the employer, to the relevant seniority lists. It is not the function of the trade union to go "shopping" for grievances. Rather, it is their responsibility to represent its members' interests in a fair, diligent manner. In this regard, the trade union may inform its members of their rights under the collective agreement and may make reasonable effort to uphold those rights on their behalf when compromised by the employer. Beyond these very significant responsibilities, the trade union need not champion a member's cause where, despite the employer's dubious actions, that member has not been prejudiced.

Because Mr. Berube has not been wronged by the employer's violation of the seniority provisions it has applied with respect to overtime, he is not entitled to the compensation he claims. Accordingly, the grievance is dismissed.

DAVID H KATES,
ARBITRATOR.