

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1480

Heard at Montreal, Tuesday, March 11, 1986

Concerning

CN MARINE INC.

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Union's claim that punitive rates be paid to each of the unlicensed personnel assigned to the 2230-0630 shift on the M.V. "Abegweit", 4 March 1985, for time worked beyond 0630 hours (approximately four hours), and to the 1530-2330 shift on the M. V. "John Hamilton Gray", 3 March 1985, for time worked beyond 2330 hours (approximately forty-five minutes).

JOINT STATEMENT OF ISSUE:

The Brotherhood contends that payment for the time in question should be paid at punitive rates in accordance with Article 28.1 of Agreement 5.61.

The Company disputes this, maintaining that the time was paid on the basis of Article 28.3, which is an exception to punitive payment provisions of Article 28.1.

FOR THE BROTHERHOOD:

(SGD.) J. GEORGE BOUDREAU
Regional Vice-President

FOR THE COMPANY:

(SGD.) G. J. JAMES
Director Human Resources

There appeared on behalf of the Company:

L. H. Wilson	- Sr. Labour Relations Officer, CN Marine, Moncton
Capt. D. G. Graham	- Manager Fleet, CN Marine, Charlottetown
N. B. Price	- Manager Labour Relations, CN Marine, Moncton

And on behalf of the Brotherhood:

Garry T. Murray - Representative, CBRT&GW, Moncton

AWARD OF THE ARBITRATOR

Article 28.1 of the collective agreement sets out the general circumstances wherein an employee is entitled to overtime worked at the punitive rate of time and one half.

That very same provisions contains exceptions where overtime worked will not necessarily attract the punitive rate immediately but may be credited towards a punitive rate at the completion of 320 hours worked. One of those exceptions, of course, is "the delay in arrival provision" contained in Article 28.3 which reads as follows:

"28.3 An employee, due to be relieved, who is retained on duty in excess of his regularly assigned hours of duty as a result of late arrival of the vessel which prevents the relieving employee taking over, shall be paid for such excess time at the hourly rate."

The parties appear to be agreed that the exception that would permit the employer to escape the requirement to pay punitive rates for overtime worked related to delays in causing the completion of an employee's shift were due to circumstances beyond the employer's control. Accordingly, where mechanical problems are caused a vessel or where weather conditions retard a vessel's arrival time the employer would not be required to pay the punitive rate even though the employee affected has worked beyond his scheduled hours.

Of course, there are other legitimate reasons for delay that are beyond the employer's control but relate to contingencies that may affect the employer's customers. Accordingly, delays caused by the customer's arrival at port for the loading of freight or cargo on board the vessel may very well be caused by unforeseen supervening circumstances which is beyond anyone's control. It is the employer's view that that contingency would also give rise to the exemption from the requirement to pay overtime as a result of any such delay.

Accordingly, as the situations herein disclosed, a train derailment while a vessel is in the process of being loaded or difficulties encountered by CN yardmen in delivering freight prior to loading are the type of delays for which the company has absolutely no control and therefore it argues should not be required to pay its employees the punitive rate for overtime hours worked.

In resolving this difficulty I believe it is important to stress the exact words of Article 28.3 of the collective agreement. Punitive rates are not to be paid in situations where the employee is retained in excess of his regularly assigned hours of duty "as a result or the arrival of the vessel" which prevents the relieving employee from taking over. It is important to stress that the circumstance where the company exemption takes hold is not expressly restricted to problems directly affecting the vessel but with respect to its late arrival. Those problems, in my view, may be much broader than simply weather conditions mechanical problems afflicting the vessel directly. In that sense it appears to me any "legitimate" problem affecting the business purpose of the employer in meeting its demand for service which is beyond the employee control will give rise to the exemption. It is in that context that I have elected to interpret the provision.

I do so not only because of the business efficacy of the result but for more cogent reasons affecting the allegedly victimized employees.

These employees are not necessarily denied payment at the overtime rate for the excess hours worked on account of the delay. In the last analysis they are credited towards the payment of overtime beyond 320 hours worked in an eight week period. Accordingly, in the even these delays are not merely isolated occurrences but happen on a frequent basis they are to be paid, irrespective of the cause, at the overtime rate upon the attainment of the necessary credits.

In that sense the parties have achieved a balance both in protecting the employer and employee from unfortunate delays that are beyond each of its control.

For the foregoing reasons the grievance is denied.

DAVID H. KATES,
ARBITRATOR.