

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1488

Heard at Montreal, Wednesday, March 12, 1986

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of Machine Operator R. McPeak for 40 hours at the overtime rate of pay for September 21 to 24, 1984 inclusive, which was assigned to Trackman R.J.Charette.

JOINT STATEMENT OF ISSUE:

On 18 September 1984 members of Gang No. 54 were requested to work their rest days, i.e. September 19 to 24, in order to shorten the slow order on the track between Fire River and Argolis East.

The Brotherhood contended Mr. McPeak, the regular Operator on Machine No. 619-15, was not asked to work on his rest days. Mr. McPeak's machine was operated on the days in question by Trackman R. J. Charette from another section and the Brotherhood claimed 40 hours at the overtime rate of pay for September 21 to 24, 1984 on behalf of Mr. McPeak.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD.) PAUL A. LEGROS  
System Federation  
General Chairman

FOR THE COMPANY:

(SGD.) D. C. F-RALEIGH  
Assistant Vice President  
Labour Relations

There appeared on behalf of the Company:

J. Russell	- Labour Relations Officer, CNR, Montreal
T. D. Ferens	- Manager Labour Relations, CNR, Montreal
A. Hayter	- Work Equipment Training Instructor, CNR, Horneypayne,
R. Gagne	- Lead Hand Mechanic, CNR, Capreol

And on behalf of the Brotherhood:

P. A. Legros	- System Federation General Chairman, BMWE, Ottawa
L. C. Boland	- General Chairman, BMWE, London
J. Roach	General Chairman, BMWE, Moncton
R. Y. Gaudreau	- Vice-President, BMWE, Ottawa
G. Schneider	- System Federation General Chairman, BMWE,

Winnipeg  
R. McPeak - Grievor

AWARD OF THE ARBITRATOR

The parties are joined on the issue as to whether the grievor was entitled to overtime pay during the weekend of September 21 to September 24, 1984. The parties dispute relates to whether the grievor's supervisors actually approached Mr. R. McPeak and offered him the opportunity to work the overtime. The company maintains he was offered the opportunity but declined to take advantage. The grievor maintains that he was not offered the opportunity at all. The issue must accordingly be resolved on the credibility of the conflicting evidence.

The parties appear agreed that there were two occasions when the gang employees were advised of the opportunity to perform the overtime work. The one instance occurred at approximately 12.40 p.m. on September 18, 1984 when members of the grievor's gang were all invited to work overtime as a result of a message from Mr. W. F. Lamont over the engineering radio. The second instance when these employees (including Mr. McPeak) may have been invited occurred approximately one hour later when Mr. A. Haytor, Training Instructor, allegedly asked them whether they wished to work the overtime. In that regard, Mr. Haytor's verbal invitation to Mr. McPeak was observed by Mr. R. Gagne, Lead Hand.

The grievor denied that he was asked to work the overtime on either of these occasions. Firstly, he stated that only specific employees were asked by Mr. Lamont to work the overtime over the radio. Since his name was not mentioned at that time Mr. McPeak assumed that his machine was not required for the overtime that was worked.

Mr. Lamont, in a letter dated January 25, 1985, insisted that all members of the grievor's gang were asked to work overtime "either by myself or by my Assistant Mr. Hayter". He goes on to say, "This was done in person or over the engineering radio".

This represents the first serious conflict in the employer own case. Mr. Haytor testified that all employees generally were invited over the radio to work the overtime. Mr. McPeak's evidence as confirmed by Gang Foreman R. J. Bromley, indicated that only specific individuals were invited to work the overtime over the radio. And, of course, Mr. McPeak was not amongst them. But, of greater importance, Mr. Lamont appears to indicate as well that not all employees were asked over the radio. Some were approached personally by Mr. Hayter. In other words, I am satisfied on this aspect of the case that Mr. Hayter may have been mistaken when he suggested that all members of the gang were extended a general invitation.

And this mistake appears to have been compounded in his letter shortly after the incident (i.e., October, 1984) where he insisted that the grievor was amongst those invited to work by Mr. Lamont over the radio.

What is also significant about Mr. Haytor's first letter is that he omitted to mention that he had approached Mr. McPeak personally

approximately one hour later in order to ask him to work the overtime. He insisted that Mr. McPeak rejected the opportunity. This event is only identified in a letter dated March 12, 1985 where Mr. Hayter recalled that that particular episode had transpired. Mr. McPeak denied that at any material time was he approached by Mr. Hayter to work the overtime. Again Mr. Hayter's only explanation for his failure to record the episode in his original letter was attributable to an oversight.

Finally, Mr. Hayter indicated that he usually keeps a written record of a gang member's refusal to work overtime and that this record is made contemporaneously with the request. Accordingly, when Mr. McPeak was asked during the hearing whether his practice is to refuse opportunities to work overtime in the past and he indicated that it was not Mr. Hayter pointed to his written records of instances where the grievor had in fact refused. Nonetheless, an examination of Mr. Hayter's records did not indicate a declination on September 18 by the grievor with respect to the overtime opportunity of September 21 to 24, 1984.

Again, Mr. Hayter suggested that his failure to record as was his practice the grievor's declination of September 18 was due to a mistake.

In short, notwithstanding the conflicting evidence that was adduced as to whether the grievor indeed was asked and declined the overtime opportunity the company's case is somewhat tarnished by the mediocre record keeping of its principal witness. Moreover, Mr. Hayter's evidence in a very significant sense does not even conform to the written evidence of Mr. F. Lamont. In other words, based on these alleged shortcomings I am compelled to the conclusion that the employer may very well have been "mistaken" in its assertion that the grievor was offered the overtime opportunity that it alleges was declined.

Accordingly, I am satisfied that the grievor is entitled to the compensation, as requested, for his being bypassed for overtime as alleged in his grievance.

I shall remain seized for the purpose of implementing this award.

DAVID H. KATES,  
ARBITRATOR.