CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2315
Heard at Montreal, Wednesday, 13 January 1993
concerning
CANPAR
and
TRANSPORTATION COMMUNICATIONS UNION
EX PARTE
DISPUTE:
Claim for 21 hours at the applicable overtime rate of pay by CanPar employee R. Johnson, Hamilton, Ontario.
Claim for 19 hours at the applicable overtime rate of pay by CanPar employee R. Johnson, Hamilton, Ontario.
UNION'S STATEMENT OF ISSUE:
On December 5, 7 and 8, 1991, a temporary employee working under the supervision of CanPar performed duties at his home, which are normally performed by bargaining unit employees.
On December 14, 15 and 16, 1991, a temporary employee working under the supervision of CanPar performed duties at his home, which are normally performed by bargaining unit employees.
The Union asserts the work performed by this temporary employee at his home should have been performed by a regular assigned employee on overtime at the CanPar terminal, as the work is part of regular assigned bulletined positions.
The Union claimed on behalf of employee R. Johnson a total of 21 hours and 19 hours respectively be paid at the applicable overtime rate of pay.
The Company declined the Union's claim.
FOR THE UNION:
(SGD.) J. CRABB
EXECUTIVE VICE-PRESIDENT
There appeared on behalf of the Company:
P. MacLeod
Director of Terminal, Toronto
K. Henry
Driver Supervisor, St. Catharines
And on behalf of the Union:
J. Crabb
Executive Vice-President, Toronto
J. Marr
Vice-President, Saint John
R. Johnson
Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that a number of additional employees were retained from an outside manpower service company to assist at the Company's Grays Road terminal, in Stoney Creek Ontario, when there was a dramatic increase in the volume of work due to a work stoppage among customs officers and a strike in a competitor's operations. One of the supplementary employees, Mr. David Adkins, was assigned certain paperwork relating to a large number of inquiries with respect to manifests received from Canada Customs in or about the third week of November of 1991. It is not disputed that on the dates referred to in the Statement of Issue, Mr. Adkins completed some of the paperwork assigned to him at home, both on weekend days off as well as on certain evenings, for an approximate total of forty hours.

The sole issue, as the case has been presented, is whether the work completed by the supplementary employee at his home was assigned by the Company. If it was, it does not appear disputed that it would constitute overtime which the Company is obligated to assign to bargaining unit employees on the basis of seniority pursuant to article 8.6 of the collective agreement, which provides as follows: QQINDENT8.6 QQINDENTWhere 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 common ground that the authority to assign work at the terminal vested, at all material times, in Mr. K. Henry, who was the lead hand. Assignments could also be made by his immediate supervisor, Mr. E. Nulle, who is normally stationed at the Company's headquarters in Mississauga, and who was periodically on site to assist with the overflow work at the Stoney Creek terminal in late 1991.

The evidence given at the hearing by Mr. Henry, whom the Arbitrator judges to be a candid and honest witness, confirms that, in fact, he was aware that Mr. Adkins was taking work home. He states that Mr. Adkins specifically asked him if he could take his notes home with him. It appears that Mr. Henry indicated to the employee that he could do so, although he gave him no specific instruction in that regard. In fact, it emerges that Mr. Adkins removed not only his notes, but the packing slips and yellow and white customs manifest papers which were the subject of his notes. According to Mr. Henry, the original notes taken by Mr. Adkins consisted of marginal jottings made on the computer printout of the manifests provided to the Company by Canada Customs.

It is common ground that Mr. Henry was not present in the terminal, being on vacation, when work was taken home by Mr. Adkins on December 14, 15 and 16, 1991. It is clear, however, that at no time prior to his departure did Mr. Henry rescind the approval which he had given to Mr. Adkins to take his notes home to work on. A written statement by Mr. Nulle, filed in evidence, confirms that he became aware of Mr. Adkins' taking work home on or about December 9, 1991. His statement relates, in part, the following:

QQINDENT"On Monday December 9/91 Dave turned in what he had completed and mentioned to me that he had taken home his notes on the weekend and redone them more neatly to present to customs. I told him that he was not required to take work home, that I appreciated what he had done. Apparently he did it again the next week and also did some after hours one night. Until a grievance was entered I was unaware of the second occurrence."

The Arbitrator has some difficulty with the position of the Company to the effect that the homework activities of Mr. Adkins were entirely unassigned. During the course of his testimony at the hearing, Mr. Henry confirmed that it was his impression, at the time, that Mr. Adkins was doing more than simply rereading his notes at home in an effort to better himself. By his own account, he believed that the employee was in fact reorganizing and rewriting his notes in an effort to facilitate the completion of the task assigned to him. It appears that that may have been of some importance, to the extent that the work required of the Company by Canada Customs was to be completed within a deadline, the failure of which could result in the assessment of fines. It is, of course, common ground that no overtime payment was made to the supplementary employee, and indeed no claim for such was filed by him.

On the whole of the evidence the Arbitrator must conclude that, notwithstanding the best intentions of Mr. Henry and Mr. Nulle, Mr. Adkins did perform work for the Company at home with the knowledge and approval of the employer. It is, in my view, significant that he did not commence to do so without first clearing with Mr. Henry his wish to take his notes home to work on. While, from a certain perspective, that wish could be characterized as the initiative of a keen volunteer interested in advancing his own position in the eyes of the employer, it cannot be disputed that it also involved an employee accomplishing work in relation to an assignment given to him, for the overall advancement of the Company's interests. When, after Mr. Henry had gone on his vacation, and Mr. Nulle dealt knowingly with Mr. Adkins, there was no attempt to change the employee's practice of taking work home. As Mr. Nulle's statement discloses, he effectively told the employee that while it was not necessary for him to take work home, his efforts in that regard were appreciated. This must, I think, be taken as a form of tacit approval of the practice originally initiated with the agreement of Mr. Henry. On the whole, therefore, I am satisfied that, notwithstanding the good faith exhibited by Mr. Henry and Mr. Nulle, the work performed at home by Mr. Adkins was accomplished with the knowledge and approval of the Company to such a degree that it cannot now deny the assignment of that work to him.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the grievor, Mr. R. Johnson, the employee to whom overtime work would have been assigned in the circumstances, be fully compensated for all wages and benefits lost by virtue of the violation of the collective agreement.

January 15, 1993

(Sgd.) MICHEL G. PICHER

ARBITRATOR