

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1422

Heard at Montreal, Thursday, October 10 1985

Concerning

CP EXPRESS AND TRANSPORT LTD.

and

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

DISPUTE:

Concerns fifteen demerit marks issued to Mr. D. Bain, Warehouse-Tractor Driver, Edmonton, Alberta, for alleged "refusing to carry out duties as assigned by his supervisor, Tuesday, March 12, 1985, and payment of ninety minutes at the overtime rate while attending an investigation".

JOINT STATEMENT OF ISSUE:

The Company's position is that Mr. D. Bain elected to do things his way rather than the method he has instructed to adopt and that the penalty of fifteen demerit marks was just and would not remove the demerits or pay for time while he was attending an investigation.

The Union's position is that this employee did carry out his duties, that the Company Officer instructed Mr. D. Bain to attend a Company sponsored and Company controlled investigation which lasted for ninety minutes, that D. Bain would not submit to perform what he believed to be unsafe work practices in which he truly believed he could be injured, that this employee used every measure at his control to convince his supervisor that if he continued to carry two barrels at a time he could be injured, that this employee time and time again asked his supervisor for assistance and continued to carry out his duties and at no time refused to work or disobey the orders of his supervisor.

That the ninety minutes of unpaid wages at the overtime rate be paid and that the fifteen demerits be removed from his work record.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) N. W. FOSBERY
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

N. W. Fosbery – Director, Labour Relations, Toronto

And on behalf of the Brotherhood:

J. J. Boyce – General Chairman, Don Mills

G. Moore – Vice-General Chairman, Moose Jaw

AWARD OF THE ARBITRATOR

The grievor is employed as a Warehouseman/Driver at the company's warehouse at Edmonton, Alberta.

On March 12, 1985, the grievor's supervisor instructed him to unload some drums from a boxcar into a trailer. The drums were stacked one on top of the other. The grievor was directed to lift the two stacked drums onto his cart and carry the same to the trailer. The grievor requested assistance from his supervisor to help him tip the stacked drums onto the cart. The two drums weighed 420 pounds.

The grievor refused to carry the drums, two at a time, but proceeded to discharge his duties in transporting them one at a time. The Company considered the grievor's refusal to carry the stacked drums to be insubordination and assessed him 15 demerit marks for that infraction. The Company claims it lost substantial productive time as a result of the grievor's misconduct.

The grievor claimed that he ran a serious risk of incurring a back injury should he have carried the drums two at a time without first securing the assistance of a colleague to tip the stacked drums onto the cart. In taking the drums one at a time the suggestion was made that the grievor acted prudently. Accordingly, the Trade Union argued that an exceptional circumstance to "the obey now grieve later rule" was established. That is to say, the grievor's legitimate concern for his safety warranted his refusal to obey his supervisor's directive.

It is noted that P. Filkin (who was also assigned the task of moving the stacked drums) gave contradictory statements as to the difficulties that were entailed in moving the drums. In the one statement dated March 21, 1985 he indicated he had no problem in moving the stacked drum and therefore, in his opinion "this was not unsafe". In a subsequent statement he indicated at the time in question that: "I could use another man to tip the barrels for me as I was having a hard time".

In the particular circumstances of this case I am prepared to give the grievor the benefit of the doubt. I am satisfied that he may very well have had a legitimate concern about an injury to his back if he was forced to tip the stacked barrels onto his cart without some assistance. These barrels weighed 420 pounds and may have created an unnecessary risk to the grievor's well being if he were denied the request for aid. In other words, the grievor did not refuse his supervisor's request to carry the stacked barrels to the trailer but simply wanted the assistance of a colleague to tip them onto his cart.

Moreover, the grievor, when he did not receive the requested assistance, did not simply refuse to carry out the task. He transported the drums one at a time. That it took the grievor longer to complete the task is no doubt true. But, on balance, considerations for the grievor's safety in the particular circumstances of this case must outweigh the employer's concerns for securing the most productive use of the grievor's working hours.

Insofar as the Trade Union's request is concerned that the grievor be paid the overtime rate for the period of time (90 minutes) he spent at the investigation interview outside working hours, I simply rely on the precedent in **CROA 220**. In that decision it was noted that, in the absence of a provision in the collective agreement that specifically provides for overtime pay for the period during non scheduled hours spent at an investigation, an employee has no claim for payment of any such premium.

In the result, the company did not have just cause to discipline the grievor and therefore is directed to remove the 15 demerit marks from his personal file.

(signed) DAVID H. KATES
ARBITRATOR