CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1518

Heard at Montreal, Thursday, May 15, 1986

Concerning

CP EXPRESS AND TRANSPORT LIMITED

and

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

EX PARTE

DISPUTE:

Concerns the grievance claim for unpaid wages in the names of employees at Edmonton, Regina, Calgary, and Saskatoon due to their being instructed – directed by their Employer as a condition for their continued employment to attend courses outside the hours of their regular assignments – their rest days – Sundays, to take special courses for handling, understanding and reporting procedures and the transportation of dangerous goods, rules and regulations and the safety requirements for the training of all such employees.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Union's position is that when all such employees are directed instructed as a condition for their continued employment to attend special courses on dangerous goods outside the hours of their regular assignments – on their rest days – on Sunday, then they must be considered as in the service of the Company, under the control of their Employer – at work, and paid for all such time at the regular overtime or Sunday double time rate.

The Company's position is that the claims presented are not valid, that the notice posted April 30, 1985, advised all employees that if they wished to attend these courses they must do so on their own time and declined the overall claims.

The relief requested is for the payment of all claims at the regular - overtime and Sunday double time rate of pay where applicable as presented.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

There appeared on behalf of the Company:

N. W. Fosbery	– Director Labour Relations, Toronto
B. D. Neill	– Director Human Resources, Toronto
D. Bennett	– Human Resources Officer, CanPar, Toronto

And on behalf of the Brotherhood:

J. J. Boyce	– General Chairman, Toronto
M. Gauthier	– Vice-General Chairman, Montreal
M. Flynn	– Vice-General Chairman, Vancouver

AWARD OF THE ARBITRATOR

It is common ground that on January 17, 1985, the Governor General in Council gave Royal Assent to P.M. 1985-147 amending regulations to *The Transportation of Damaged Goods Act*. These regulations were proclaimed in force on July 1, 1985. The regulations relevant to this dispute read as follows:

> 9.1 For purposes of this Part, "Employer includes a person who
>
> (a) employs one or more individuals or,
>
> (b) provides the service of one or more individuals."
>
> 9.2 No person shall handle, offer for transport or transport dangerous goods unless he
>
> (a) is a trained person; or
>
> (b) is performing those activities under the direct supervision of a trained person.
>
> 9.3 For the purpose of this Part, a person is a trained person in the aspects of handling, offering for transport or transporting of dangerous goods related to his assigned duties
>
> (a) when his Employer
>
> (i) is satisfied that the person has received adequate training in the aspects of the handling, offering for transport or transporting of dangerous goods related to the duties that he proposes to assign to the person, and
>
> (ii) issues to the person a Certificate of Training that indicates
>
> (A) the date the person completed an initial training in the handling, offering for transport or transporting of dangerous goods,
>
> (B) the date the person completed each subsequent training in the handling, offering for transport or transporting of dangerous goods, if any, and
>
> (C) the aspects of the handling, offering for transport or transporting of dangerous goods for which the person was trained; and"

Pursuant to the above the Employer arranged for "the training" of all of its vehiclemen in order to ensure compliance with the amended regulations. It suffices to say that seminars or lectures were scheduled where presumably the course work that was provided would accord with the training requirements of the regulations. To this end, the Company issued the following bulletin (or like bulletins) advising its vehiclemen of the scheduled arrangements for the course work:

> CP Express & Transport
>
> April 30, 1985
>
> To all Employees
>
> Re: Transportation of Dangerous Goods Regulations
>
> The new Federal Government regulations concerning Dangerous Goods, which cover thousands of our shipments, come into effect on July 1, 1985. Section 9.2 of the regulations states that the Company cannot allow any employee to handle or transport dangerous goods unless the person has received training, passed the written exam and been issued a certificate. In effect, the new regulations will prohibit the Company from allowing drivers, warehousemen and some clerks to work after June 30th unless the person has a certificate of training.
>
> The necessary training to qualify for the required certificate is the individual's responsibility and is available through various sources. The Provincial Trucking Associations are offering 4 hour courses at a cost of approximately $25.00. The training is also available through private seminars at some cost to the participant.

> However, in an effort to ensure that employees required to be in possession of a certificate by July 1, 1985 receive the required training, the Company will also be offering courses to train drivers, warehouse and clerical employees in the proper handling of Dangerous Goods. In this case there will be no charge for the course and certificate of training; however, employees who wish to attend must do so on their own time. Timetables and further details concerning the training program will be issued shortly.
>
> Please remember, all drivers, dockworkers and some clerks must be trained and in possession of a certificate if they wish to work on and after July 1, 1985.
>
> (SGD.) D. R. Smith
> Vice-President, Human Resources

It is also common ground that the employees who attended these courses did so during their off duty hours. As I understood the evidence some of these employees attended course work on a Sunday and some before and/or after their normal tours of duty. The parties have agreed that I should remain seized of any issue with respect to compensation in the event the Trade Union succeeds in this grievance. Accordingly, for present purposes it is only relevant to indicate that the vehiclemen who attended the courses as aforesaid did so when they would otherwise have engaged in leisure activities.

The grievors, accordingly, have requested payment of the relevant overtime premium for the period of time spent attending these training courses arranged for them by the Company. It is also common ground that article 13 of the collective agreement governs the payment of a premium for overtime hours worked. As aforesaid, the relevant provisions of article 13 need not be quoted in this decision. The parties however are joined on the issue in dispute. And that is whether the term "work" as contained in article 13 encompasses the hours spent by the grievors doing the course work arranged by the Company in compliance with the requirements of the amended regulations?

The answer, of course, turns on whether the Company can be said to have "required" its vehiclemen to attend these courses as a condition of their continued employment.

The Company submitted that as far as it was concerned the regulations required the vehiclemen to become trained in the handling of dangerous commodities as required by its terms. The Company, it was argued was simply arranging for their benefit the necessary course work in order that they could become trained. It was quite clearly stated in its bulletin that it was up to the employees to decide as to whether they would attend the training programme on a voluntary basis. Moreover, they were also advised in advance that there would be no payment of overtime for the time spent. In addition, they were advised that if they failed to become trained by the deadline for the implementation of the regulations on July 1, 1985 they did so at the peril of losing their jobs.

Accordingly, if anyone was doing the "requiring" with respect to compelling its vehiclemen to be trained it was the Federal Government. As a result, it was argued, that the Company is not and should not be held accountable for the payment of the overtime premium as it was not responsible for the grievors attending the training course work during their off-duty hours.

The fallacy of the Company's position, in my view, is the assertion that its vehiclemen had to be trained in the handling of dangerous commodities for transport in order to comply with the amended regulations. This simply is not the case. As I understand article 9.2 of the amended regulations the Company was given a choice. Either as article 9.2 (a) prescribed its vehiclemen could be trained in the handling of dangerous commodities. And, of course, if so, the Company would be responsible for ensuring that the necessary training and certification thereto took place in accordance with article 9.3 of the regulation.

Or, as article 9.2 (b) prescribed the vehiclemen could continue to perform their regular driving duties, including the handling of dangerous commodities, provided in such cases "those activities are under the direct supervision of a trained person".

I am of the view that the Company elected the first choice. And in so choosing it must be seen as having required all its vehiclemen to be trained as a condition of their continued employment. Accordingly, those employees attended the training courses, not voluntarily as insisted by the Company, but at the behest of the Company under threat of losing their jobs. And, as such, I am satisfied that their Employer required them to "work" in the sense anticipated by the overtime provisions contained in the collective agreement.

From a business perspective, the Company may have concluded that the second option represented no choice at all. Perhaps, the rearranging of its manpower resources and the hiring of trained personnel to provide "direct supervision" would not have made any financial sense. Quite clearly the efforts that were expended to train its own vehiclemen was most likely the most prudent choice. But this does not mean, as the Employer argued, that the regulations dictated for purposes of compliance that its vehiclemen had to be trained. As a result I am satisfied, that given the choices with respect to compliance with the amended Federal regulations, the Company and not the Government required that its vehiclemen be trained. And, as such, the Company must pay the premium for time spent by those employees in taking the necessary training courses.

I have read, with some interest the American arbitral precedent contained in the Company's brief in **Re Brinks** (1979) 73LA 162 (Hannan). There, the Company, because of the passing of *The Lethal Weapons Training Act* by the State of Pennsylvania, was required to ensure that its employees were trained, in accordance with its provisions, in the handling of fire arms. In dealing with the employees' claim for the payment of wages while they attended a training course in compliance with the Legislation, the Arbitrator ruled that "in no way" did the Company require its employees to meet the training requirement as a condition of continued employment. Rather, the Arbitrator was satisfied that the training requirement "was placed on the employee by the provision of the Act" and therefore declined the request for payment.

The **Brinks case**, of course, is distinguishable from the case before me. In that case there was absolutely no choice with respect to compliance with the Legislation. In the case before me the Company, as aforesaid, was given the choice. And once the choice was made that required the training of its employees in circumstances where overtime became relevant for the time spent at the training programme, the Employer thereby was obliged to meet its obligations under the collective agreement.

For all the foregoing reasons the grievance succeeds. I shall remain seized with respect to the issue of payment of the overtime.

(signed) DAVID H. KATES
ARBITRATOR