

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4785

Heard in Gatineau and via Zoom Video Conferencing, July 13, 2021

Concerning

CANADIAN NATIONAL RAILWAY

And

UNITED STEELWORKERS, LOCAL 2004

DISPUTE:

Appeal on behalf of R. McLeod, discharged from service on June 4, 2020 for fraudulent overtime claims between January 1, 2020 and April 2, 2020.

JOINT STATEMENT OF ISSUE:

The Union claims that the employee was unjustly discharged from service.

The Union requests that the discharge be expunged from the grievor's record immediately and that he be reinstated and made whole.

The Company disagrees with the Union's contentions, and has declined the grievance.

FOR THE UNION:

(SGD.) J. Desjardins

Chief Steward

FOR THE COMPANY:

(SGD.) C. O'Neill (for) **D. Klein**

Senior Vice President & Chief Officer, Human Resources

There appeared on behalf of the Company:

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|--------------|---|
| M. Salemi | – Labour Relations Associate, Toronto |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| F. Daignault | – Senior Manager Labour Relations, Montréal |
| A. Daigle | – Manager, Labour Relations, Montreal |
| R. Marcelo | – Senior Manager Engineering, Vancouver |

And on behalf of the Union:

- | | |
|----------------|---|
| K. Adhikari | – Counsel, Toronto |
| R. Leblanc | – Area Coordinator, Eastern Ontario, Hawkesbury |
| J.F. Migneault | – President, USW 2004, Montreal |
| J. Desjardins | – Chief Steward, Wilkie |

2200 hours and 0459 hours are entitled to a shift differential payment of \$1 per regular and overtime hour worked, commonly referred to as the “third shift differential”. For the purposes of pay, Engineering employees are responsible for recording their hours of work in the Company’s Connected Time Sheet (CTS) system. They are trusted to do so with integrity, based on an honour system.

5. When recording their hours of work, employees are not required to claim the shift differential, as the Company’s payroll system automatically generates the payment when applicable, based on the shift worked. Nonetheless, the dropdown menu shows, in part, the following options when recording hours of work:

- 0100 – Attendance hours
- 0204 – Overtime 1.5X
- 0220 – OT 1.0X w/3rd shft diff.
- 0224 – OT 1.5X w/3rd shft diff.

Evidently, the options include distinct codes for regular and overtime hours, with more detailed options for overtime hours.

6. On or around April 25, 2020, a Company audit revealed that the grievor had claimed approximately 173 regular hours of work as overtime, on fourteen (14) occasions from January 3 to April 2, 2020, for a total overpayment of approximately \$2,700. The grievor’s erroneous claims occurred on days when he was working regular hours followed by overtime hours. Instead of recording his regular hours and his overtime hours separately in the CTS system, using the appropriate codes in the dropdown menu options, he recorded all his hours as overtime under code 0224. The grievor contends that he had never worked on the third shift before November 2019,

and that he genuinely believed this was the appropriate way to record his hours when entitled to the third shift differential payment for both regular and overtime hours. The grievor effectively worked a total of approximately 18.5 hours of overtime on these fourteen (14) occasions, in addition to his 173 regular hours claimed as overtime.

7. The Company submits that it became aware of the irregularities with the grievor's claims on or around April 25, 2020 and drafted a notice to appear, by which it required the grievor to provide a statement in the course of its investigation. The Company suggests that the grievor learned about the investigation and conveniently self-reported a coding error before receiving the notice to appear on May 4, 2020.

8. In response, the Union submits the following. The grievor was assigned to work in the Squamish, B.C. area from January to April 2020, which is approximately an 8-hour drive from his home location. During that period, he did not review his statements of earnings, which were sent to him by mail. He did not review them electronically on the Company's e-portal either. Upon his return home on May 3, 2020, the grievor opened his mail, reviewed his statements of earnings and noticed the overpayment resulting from his coding error. He self-reported the next day, before being aware that the Company was investigating the situation.

9. The documentary evidence filed by the parties establishes the following chronology of events. On Monday, May 4, 2020, at 8:19 A.M., while he was off work for a few days, the grievor sent a text message to his supervisor, which reads: "Pat can you

call me when you're not busy". Later that morning, at 11:44 A.M., the grievor called his supervisor. According to the grievor's statement, he left a voice message for his supervisor, indicating he had discovered errors on his statements of earnings and apologizing for the mistakes. At 3:32 P.M., the grievor's supervisor sent him an email titled "Notice to Appear – Richard Mcleod", with a PDF attachment. The email read: "Hello Richard, Please let me know when you get this". At 5:37 P.M., the grievor's supervisor sent him a text message, indicating he had sent the grievor an email and that they needed to chat on Monday. The grievor replied that he was unable to read the email via his phone and would look at it on Thursday (May 7, 2020). On Tuesday, May 5, 2020, at 9:52 A.M., the grievor called an administrative employee involved with payroll, explaining that he had mistakenly recorded overtime hours on days when he meant to claim a shift differential and asking her to make the adjustments required.

10. Considering this chronology of events and the supporting documents, I find that the Company did not discharge its burden to prove that the grievor acted intentionally and deliberately to defraud the Company. Specifically, the Company did not provide evidence to support its theory that the grievor knew, prior to sending a text message and leaving a voice message to his supervisor on May 4, 2020 to report his error, that an investigation into his time claims was underway. The fact that the grievor self-reported before being informed of the investigation is the determining factor which leads me to conclude, on a balance of probabilities, that his improper coding of regular hours as overtime was not fraudulent.

11. The next question is whether the grievor's actions warrant discipline and, if so, to what extent.

12. During the investigation, the grievor was asked if he knew the codes applicable to the recording of regular and overtime hours of work, which he confirmed and quoted adequately, i.e. 0100 and 0204. When asked why he had recorded his regular hours using an overtime code, in this case 0224, he indicated it was to receive the shift differential payment.

13. I find this explanation nonsensical, for the following reasons. First, if the grievor generally knew to record his regular hours under code 0100 and his overtime hours separately under code 0204, I see no logical reason for him to think that he should code his regular hours as overtime hours when working the third shift. He should have known that by coding his regular hours as overtime, they would be paid out at a higher rate. Second, while I understand the Union's argument that the dropdown menu could reasonably appear to be missing the option of "regular hours with third shift differential", this does not in any way justify entering regular hours under an overtime code. If the grievor was unsure or worried about the absence of a specific code for regular hours with the third shift differential, he could have simply asked his foreman, his supervisor, a manager, the Payroll department or the Workforce Deployment group, for clarification. Finally, over the course of his career, the grievor held foreman positions on a few occasions, for a total of approximately 45 months. As a foreman, his responsibilities included entering time claims of crews. Therefore, he could reasonably be expected to

know how to properly enter his own time and who to turn to for clarification when in doubt. Moreover, I note that on November 28, 2019, the grievor sent an email to an administrative employee to ensure that he was “staffed in for 3rd shift [differential] starting November 7, 2019”, which was confirmed the same day. The grievor’s request suggests that he was proactive about his pay and aware that the shift differential payment would be processed automatically by the Company.

14. I also reject the Union’s argument that the Company is partially responsible for the grievor’s error, for not providing training on the CTS system. Although the grievor’s training record does not show CTS training, he confirmed during the investigation that he had received training on the recording of hours. He did not raise training issues relating to the CTS system, which was introduced in or around 2015. I also note that there is no suggestion that other employees were confused about the coding applicable to regular hours on the third shift.

15. For the reasons outlined above, I find that the grievor knew, or reasonably should have known, that it was not appropriate to record regular hours as overtime hours, irrespective of his entitlement to the third shift differential payment. Specifically, he should have known that using an overtime code to record regular hours would result in an overpayment. His failure to seek clarification if he had any doubts regarding proper coding amounts to negligence and an error in judgment, which warrant discipline.

16. In view of the circumstances of this case, including the absence of fraudulent behaviour in the grievor's discipline history, the fact that he had only five (5) active demerit points on record at the time of discharge and the fact that he took responsibility for his error, I am not persuaded by the Company's assertion that the bond of trust is broken beyond repair. Therefore, I am satisfied that this is an appropriate case for a substitution of penalty. However, in the absence of a compelling explanation for the grievor's negligence and error in judgment, I find that this is not an appropriate case for compensation.

17. The grievance is allowed in part. I direct that the grievor be reinstated in his employment forthwith, without compensation or benefits, without loss of seniority, with all time lost to serve as a suspension.

18. I remain seized with respect to any and all disputes arising from this decision.

August 25, 2021



JOHANNE CAVÉ

ARBITRATOR