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PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

ROY L. CUTHILL,

Grievor,

AND:

TREASURY BOARD
(Ministry of Transport),

Employer.

DECISION

Before: D.G. Pyle, Board Member and Adjudicator.

For the Grievor: C.H. MacLean, Counsel.

For the Employer: M. Thomas, Counsel.

Heard in London, Ontario, September 21, 1982.

ART 14

CODE 402/79

ACTING PAY

DECISION

1. In this reference to adjudication are two grievances, dated July 16, 1981 in which Mr. Roy L. Cuthill grieves that:

(1) He was improperly denied acting pay while working as an instructor at the Regional Training Unit ("RTU") in Toronto; and

(2) he was improperly denied the mileage allowance of 26¢ a mile while travelling between his home in Thamesford, Ontario and Toronto, weekly, between October 14, 1980 and January 15, 1981.

2. The replies of the employer, both dated February 24, 1982, denied the grievances on the grounds that:

(1) During his voluntary assignment to the RTU the grievor had provided assistance to the instructors in their work and he was deemed not to have performed substantially all the duties of the AI-4 position; and

(2) the grievor was not required to travel home on weekends but the option was available to him. Therefore the provisions of clause 28.03 of the collective agreement were not applicable and the grievor was to be reimbursed at the rate provided for in the Administrative Policy Manual, Chapter 370, i.e., 9¢ a mile.

3. The parties were in agreement that the grievances would be heard together inasmuch as the witnesses were common to both and the evidence related to a common set of events.

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4. Mr. Cuthill is an air traffic controller (AI-2) and is represented for collective bargaining purposes by the Canadian Air Traffic Control Association. The relevant collective agreement bears code 402/79; expiry date: December 31, 1980 (exhibit 1).

5. In September 1980 Mr. Cuthill, who is employed at the London (Ontario) control tower, was approached by Mr. Ronald M. Carpenter, regional instructor (airports) at the regional ATS training school, Toronto to inquire if he were still interested in accepting an assignment to participate in teaching during a 13 week course, from October 14, 1980 to January 15, 1981 at the VFR section of the training school. Mr. Carpenter, prior to his present position, had been employed in the London control tower with the grievor and subsequent to his promotion Mr. Cuthill had indicated to Mr. Carpenter his interest in a teaching assignment at the school when the opportunity arose.

6. It is agreed that the grievor was assured during the telephone conversation that his expenses would be covered, that he would not lose his "operational" status for pension purposes but that he would be on a "non-operational" basis for purposes of hours of work, i.e., 37 1/2 hours per week, Monday through Friday and the observance of paid holidays on the days on which they were celebrated. Moreover, the grievor inquired as to his ability to return to his home on weekends inasmuch as he did not wish to be absent from his home for such an extended period. In addition he inquired as to his receiving acting pay while on such an assignment. No objection was raised by Mr. Carpenter with respect to the grievor's wish to travel home on weekends but, inasmuch as there was no position allotted for the assignment, the policy of the regional office was that there could be no acting pay. The grievor accepted these terms.

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7. During the week prior to October 14 Mr. Carpenter familiarized the grievor with the content of the course, the lessons, etc. The grievor has had, as part of his regular duties at the London control tower, a responsibility for the training of new controllers (exhibit 6) and it is agreed that he did have suggestions to make to Mr. Carpenter as to updating some of the material. During the classes he conducted he was allowed to vary the actual content of some of the lessons because of the practical knowledge of the students who were in attendance. During the 13 week course the grievor shared the instruction of a class of 22 students on a 50-50 basis with Mr. Carpenter and, together with Mr. Carpenter, they operated the "table top simulator" inasmuch as two persons were required to do so. Ultimately Mr. Cuthill and Mr. Carpenter "debriefed" the students and jointly produced the evaluation of each of them.

8. Following the completion of the course the grievor was furnished with a copy of a memorandum dated January 30, 1981 (exhibit 2) addressed to the Unit Chief, London Control Tower from OATT-S (identified by the parties as the Ontario Regional Superintendent of Training, Mr. R.J. McDonald), signed on his behalf by "Ron Carpenter". The memorandum reads as follows:

> INSTRUCTIONAL ASSISTANCE - ROY CUTHILL
>
> On behalf of the Unit Chief and myself, I wish to take this opportunity to thank you for your Unit's contribution in providing the extended services of Mr. Roy Cuthill as an instructor at the Regional ATS Training Unit. We realize that the release of staff for temporary duty assignments is not without sacrifice to the unit concerned, and we appreciate the contribution very much.

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> Would you extend my personal thanks to Roy for his assistance during PRE-TCTI Course 2/80.
>
> Roy brought to the classroom and students he encountered an enthusiastic drive for understanding and excellence in Air Traffic Control, and aviation in general. In addition he offered to the class a widely diversified aviation and ATC oriented background, which the students were free to tap at any time.
>
> Roy gave willingly of his time and knowledge to the students, to the extent of working more than occasionally beyond what would normally be expected of him. He also provided suggestions, and additional valuable background information to some of our lesson plans, for which I am grateful.
>
> In the classroom Roy presented an air of open interpersonalness which placed the student comfortably and yet demandingly into the situation confronting him or her.
>
> It is always a refreshing pleasure to work with Tower personnel who are not only dedicated controllers, but are equally energetic and enthusiastic about the training of new personnel.
>
> Again, many thanks Roy for a job well done.

9. It appears that the grievor left the school each Friday afternoon at 4:30 p.m. and arrived back at the school on Monday morning at 8:00 a.m. In his one expense account which he submitted on January 19, 1981 (a copy is attached to exhibit 3) he identified his hours of travel and the distance of 100 miles per one way trip between Thamesford and Toronto International Airport, for which he charged the rate of 26¢ a mile.

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10. Under date of February 19, 1981 is a statement (exhibit 3) from a Ms. J. Montgomery which reads as follows:

> ROY CUTHILL
>
> The following correction has been applied to your claim dated January 19, 1981.
>
> We have credited you with incidentals from Oct. 14, 20, 24, Nov. 3, 11, 17, 24, Dec. 1, 15, 22, 1980 and Jan. 5, 12, 15, 1981 the sum of $4.80 per day X 14 = $67.20.
>
> However, mileage for weekend travel home has been reduced to .09¢ (sic) per mile as per Travel Directive Regulations.
>
> The sum of $441.00 has been credited to your advance issue.
>
> It is necessary to forward a further refund of $374.70 to settle your advance.
>
> Please review attached dupe copy of original claim for detailed corrections.
>
> Pse forward cheque to the Receiver General for Canada to the attention of Mrs. J. Montgomery. Tel: 224-3410.
>
> Thank you.

11. The grievor testified that this was the first occasion on which he was made aware that there was any dispute as to his entitlement to the rate of 26¢ a mile. He thereupon took the matter up with someone, a person whom he could not identify at this (late) date, and wrote across the letter:

Feb. 25/81

Authority for 26¢/m
Letter being sent from RTU to
J. Montgomery

(signed)
Roy

12. When the grievor received no further word on the matter he addressed a letter to Mr. Chambers, Unit Chief, London Control Tower, dated April 15, 1981 (exhibit 4) reading as follows:

Dear Carl:

In reference to the letter requesting additional refund of $374.70 on my travel claim while instructing at the RTU -

The terms of agreement arranged between me and the RTU were:

1. They would pay me 26¢ a mile for all my travel
2. Travel would be on company time
3. I would be driving because this was the most economical method
4. I would be returning home on weekends because it was less expensive than staying on expenses for a weekend. (approximately $2646 less expensive over the 14 weekends)

The sum of 9¢ per mile is not sufficient to cover my expenses for my vehicle and I assure you that I had no intention of taking a position that would cost me money to attend.

I therefore respectfully request that this penalty refund be dropped.

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13. Sometime later, the grievor discussed his problems with Mr. W.J. Robertson, president of the Association and, according to the grievor, he was encouraged by Mr. Robertson to press not only for the higher mileage allowance but also for acting pay, and to grieve if he were not successful. Accordingly he did grieve in due course and no issue was raised as to the timeliness of the grievances in these proceedings.

14. The grievor acknowledged in cross-examination that he had volunteered to take the teaching assignment, which was his first, and that he had been assured that the regulations would not permit the payment of acting pay. In addition, he acknowledged that he had received no specific assurance as to his travel expenses while on the teaching assignment. However, he was paid at overtime rates for the time spent in travelling to and from his home with the approval of Mr. Hall when he had put in his expense account. He testified that Mr. Carpenter had assured him that he would be travelling on "company time" and on this basis he had assumed he would be paid the rate of 26¢ a mile. The grievor did admit that there had been very little conversation as to expenses. He could not identify the person with whom he had discussed Ms. Montgomery's letter of February 19.

15. Mr. Ronald M. Carpenter was the first witness called by counsel for the employer. Mr. Carpenter was an air traffic controller with the RCAF from 1957 to 1959 and then until 1974 with the employer, first in the control tower at North Bay and later at the control tower at London. Since July 1974 he has been engaged as a regional instructor (airports). More recently the training unit, or school, has been transferred from Toronto to the Transport Canada Training Institute ("TCTI") at Cornwall, Ontario.

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16. Mr. Carpenter testified that his teaching duties were primarily related to "*ab initio*" training, i.e., the initial indoctrination of newly engaged personnel in VFR. He conducts an average of four courses each year. Since the beginning he has selected an operational employee to work with him inasmuch as two people are required and an operational employee would speak from current practical experience. Mr. Carpenter testified that he maintained a file of those who had either expressed an interest in teaching such a course or had come to his attention otherwise as potential candidates. When a course was scheduled he would select one, contact him to be assured that he was interested and then communicate with the appropriate unit chief to determine if the employee could be released.

17. After securing Mr. Cuthill's agreement Mr. Carpenter had then contacted Mr. Chambers who agreed to release the grievor from his regular duties. Mr. Carpenter was convinced that he would have advised Mr. Chambers that it would be for Mr. Chambers and Mr. Cuthill to determine any and all financial arrangements and then for Mr. Chambers to secure approval from the regional office. Furthermore, he was satisfied that, apart from telling the grievor that he would not be entitled to acting pay, he would not have discussed any matter relating to finances as such matters were "just not within my area". He could recall no discussion as to any mileage allowance or travelling on "company time". He had been aware that Mr. Cuthill had been seeking overtime compensation for travelling, but "Personally I did not care if he was eligible or not. That is done by local management."

18. In reviewing his position description (exhibit 7) Mr. Carpenter stated that the position is now classified at the AI-3 level but his personal classification is at the AI-4 level. In reviewing his position

description Mr. Carpenter acknowledged that Mr. Cuthill had performed the same duties as he had done during the 13 week period. Duties of the position which would have been performed by Mr. Carpenter at other times than during a course may briefly be noted as follows:

- Defining lesson objectives, developing lesson plans, selecting or designing and making appropriate training aids;
- Collaborating with other instructors in writing test items and developing and validating tests, etc.
- Inspecting equipment, etc.
- Participating in seminars for regional and headquarters ATC instructors ...;
- Studying publications ... to keep abreast with control problems generated by new types of aircraft ...;
- Visiting manufacturers' displays and symposiums, visiting new installations ...;
- Analysing and developing proposals for new or revised standards for approval by senior personnel;
- Carrying out projects assigned by regional headquarters, such as determining the requirements of new training courses ...;
- Conducting familiarization courses for non-ATC personnel.

Mr. Carpenter testified that he would only concern himself with these latter duties between courses. He and Mr. Cuthill had reviewed the lessons and the operation of the simulator. Suggestions made by Mr. Cuthill were reviewed but at all times Mr. Cuthill must have been aware that he was assisting the course director and any administrative problems, had they arisen, would be the responsibility of Mr. Carpenter.

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19. In cross-examination Mr. Carpenter agreed that during his years as an instructor at the school he had solicited a large number of air traffic controllers to participate in giving the course and that he could not too clearly recall any specific conversation which he had with any one of them, including the grievor. He was, however, adamant that he would not have authorized any travel arrangements on weekends simply because he lacked any authority in this regard and, hence: "It would have been asinine for me to do so". He had been instructed to inform candidates that it was the decision of regional management that, inasmuch as there was no position against which acting pay could be assigned, no acting pay could be authorized. Finally, there is no classification or position of assistant instructor at the school.

20. Mr. Roy H. Hall was the second witness for the employer. He testified that he was the acting unit chief of the training school in the fall of 1980. As chief he had a small budget for the operation of the school but all financial arrangements with personnel such as the grievor were made by the regional office. He had signed Mr. Cuthill's overtime forms simply because he had been made aware that the regional office would approve of the travel time as overtime. His only conversation with the grievor about his travelling home would have been a comment on the weather if Mr. Cuthill had told him that he was leaving for his home that evening.

21. In cross-examination Mr. Hall could not recall the grievor approaching him as to his mileage allowance after the 26¢ a mile had been disallowed. Mr. Hall testified that he was aware the grievor was having a problem but not as a matter which required his attention.

Argument for the Grievor

22. Counsel for the grievor at the outset of her argument noted that clause 14.03(a) of the collective agreement reads as follows:

> When an employee is required by the Employer to perform the duties of a higher classification level for a period of at least four (4) consecutive working days, he shall be paid the pay of the higher level, calculated from the date on which he commenced to perform the duties of the higher level.

The grievor was required to perform the duties of the higher classification in that Mr. Carpenter first telephoned the grievor to satisfy himself that the grievor was still interested, then he secured the agreement of Mr. Chambers and, finally, advised the grievor that he was to report to the school. It is clear from the evidence that the employer did require a second person to conduct the training course and the grievor's willingness to cooperate should not be used to excuse the employer from acknowledging that the grievor was required.

23. As for the duties for a higher classification, the grievor is classified at the AI-2 level and the normal classification for a person performing the duties of Mr. Carpenter, as a VFR instructor, is now that of an AI-3, notwithstanding Mr. Carpenter's personal classification. Exhibit 7 is the position description of an instructor and Mr. Carpenter, in his evidence, highlighted his duties. The grievor did not perform all of the duties which could be required of a VFR instructor but not all of the duties must be performed by the grievor for him to qualify for acting pay. Mr. Cuthill not only performed the

bulk of the duties set out in the position description but he did, in fact, perform all of the duties which Mr. Carpenter performed in a period in which he conducted a training course. By his own admission, Mr. Carpenter did not attend to his other duties and responsibilities while he was conducting a training course.

24. To qualify for acting pay an employee is not required to perform all of the duties of a higher classification. Some of the duties of a higher classification are not performed by an incumbent of the higher classification on a day-to-day basis. For example, a supervisor may be required to evaluate those under his supervision and may do so at a particular time each year. An employee replacing the supervisor at another period of time would not be denied acting pay simply because he was not required to evaluate employees. The grievor was performing the same work as Mr. Carpenter was doing, sharing the teaching sessions on a 50-50 basis and sharing the work involved in the operation of the simulator. Admittedly, Mr. Carpenter may have had additional duties, as course director, but essentially he was _primus inter pares_ and there is no evidence that the grievor was not performing the duties of an instructor when a training course was being conducted.

25. The adjudicator should not be misled by the use of any expression such as "assistant instructor". There is no such classification in existence, no rate of pay or position number. The grievor could be described as working on a "non-operational" basis but he could not be told by the employer that he was to perform the work of an assistant instructor. The whole setup is an interesting commentary on the employer's mode of operations. To avoid its obligations for VFR instruction the employer requires one employee to do the work on a permanent basis and then secures additional personnel for periods of up

to 13 weeks by asking employees to accept the assignment without acting pay. If an employee such as the grievor accepts the assignment on that basis he is welcome to come to the school and to assume the duties of an instructor. If not, the employer seeks someone else. Obviously Mr. Cuthill was interested in his own personal advancement and did accept the assignment on the basis proposed by the employer. The practice of the employer was, however, in violation of the principles of collective bargaining, i.e., negotiations with individual employees is prohibited.

26. As for the grievance relating to the mileage allowance, clause 28.03 of the collective agreement reads, in part, as follows:

> 28.03 When an employee is required by the employer to travel to or from his Headquarters area as normally defined by the employer, he may in accordance with paragraph 28.01 above:
>
> (a) Elect to travel via scheduled air carrier at the applicable economy fare or its equivalent; or
>
> (b) Elect to use privately-owned transportation and be reimbursed at the rate shown in paragraph 3.03 (b) of the Treasury Board Travel Directive;

The parties are in agreement that the reference to "the rate shown in paragraph 3.03(b) of the Treasury Board Travel Directive" may simply be translated as "26¢ a mile". The grievor was required to travel from his headquarters area. He was assured that the employer was not opposed to his travelling home on weekends when he stated that he was not prepared to leave his family for the period of the training course.

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Mr. Carpenter apparently found nothing unusual in that qualification. Indeed, Mr. Carpenter cannot recall too clearly anything that was said other than his emphasizing the employer's policy of not paying acting pay. On this basis Mr. Cuthill made an estimate of his expenses and secured a travel advance sufficient to cover his living and travel expenses at 26¢ a mile. His request for this advance was approved.

27. Clause 28.01, and clause 28.02 (in part), read as follows:

> 28.01 Where an employee is required by the Employer to travel to or from his Headquarters area as normally defined by the Employer, his method of travel shall be determined by the Employer. However, if an employee wishes to use a different method, his wish will not be arbitrarily refused provided that the method chosen is consistent with the purpose of the travel and does not entail additional costs.
>
> 28.02 When required to travel, he will be compensated in the following manner:
>
> (a) ...
>
> (b) On a normal working day on which he travels and works, the employee shall be paid:
>
> (i) his regular pay for the day for a combined period of travel and work but not exceeding eight (8) hours,
>
> and
>
> (ii) at the applicable overtime rate for additional travel time in excess of an eight (8) hour period of work and

> travel, with a maximum payment for such additional travel time not to exceed eight (8) hours' pay at the applicable overtime rate in any day.

The grievor was paid his regular pay for a period not exceeding eight hours and, in addition, was paid for his hours of travel at the applicable overtime rate. The employer must have concluded that the grievor was required to travel for the purposes of clause 28.02. The employer cannot argue that the grievor was required to travel for the purposes of clause 28.02 but was not required to travel for the purposes of clause 28.03.

28. Finally, it is clear from the evidence that Mr. McDonald approved of the travel claim for 26¢ a mile and only later was the claim rejected by the employer. The two witnesses for the employer have testified that this whole matter was not their concern but, significantly, the employer has not brought forward a witness to offer any explanation or rationale for critical decisions made by the employer, both as to acting pay and the mileage allowance.

Argument for the Employer

29. Counsel for the employer submitted in argument that the grievor has not discharged the onus of establishing that he was entitled either to acting pay or to the 26¢ mileage allowance.

30. Clearly the grievor was an assistant instructor and was not fulfilling the duties of a higher classification. Mr. Carpenter was performing certain duties encompassed by his responsibility for

maintaining the syllabus, for keeping himself currently informed of new developments, etc. Admittedly, while the course was being conducted the class instruction was divided equally but an assistant instructor would not be analysing proposals for lecture content, setting test questions or performing the general administrative duties such as assigning students to the classes, etc. In summary, there is no evidence to show that the grievor was performing the duties of a higher classification when he was involved in conducting the training course.

31. As for the mileage claim, there is no conflict in the evidence. The grievor did not testify that he had any mandate from the employer to select his means of travel, something any prudent employee would have secured had he anticipated payment at the higher rate. The grievor, moreover, was not directed to travel to his home on weekends. It is not the policy of the employer to pay the higher mileage allowance to employees who wish to travel home on weekends. The weekends were the grievor's own time. If he wished to return home he was free to do so, but at the mileage allowance of 9¢ a mile.

32. The grievor in his application for travel authority and advance may have included an amount to cover his travelling at 26¢ a mile but one cannot infer from advancing him that sum of money the employer's approval of the higher mileage allowance. In fact the grievor's evidence in this regard is incomplete, unclear and unsatisfactory. If the grievor were satisfied that he was improperly denied the higher mileage allowance it was incumbent upon him to have acted more expeditiously. Instead, he simply noted on the letter he received from Ms. J. Montgomery that a letter was being sent in reply. In his testimony he could only testify that his conversation was with Mr. Carpenter, or with Mr. Hall or with Mr. Hall's secretary. In fact he could neither identify the person with whom he had spoken nor the contents of any letter which may have been sent.

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33. The fact that overtime has been paid and has not been recovered might appear to have some bearing on the mileage allowance but that payment cannot be regarded as the determining factor to satisfy the adjudicator that, in light of all of the evidence, another term of the collective agreement, namely, clause 28.03 (b), has been violated.

34. Counsel cited the recent decision in the Robert White case (Board file 166-2-11959) as relating to the same issue.

Rebuttal Argument for the Grievor

35. In rebuttal counsel for the grievor argued that there had been no evidence advanced that Mr. Carpenter was performing any administrative duties or any duties other than those of an instructor while he was engaged in conducting the training course.

36. The travel authority and advance is of real significance. The grievor would have no reason to distinguish between one administrator and a regional instructor. By approving his application for an advance the employer encouraged the grievor to believe that he would be paid at the rate of 26¢ a mile for the time required to travel to and from his home. In this regard his case is to be distinguished from the Robert White case (supra) in that in that instance Mr. White had not received any such travel authority and advance.

Decision

37. Turning first to the grievance in which Mr. Cuthill seeks acting pay, on the evidence it is apparent that the grievor did perform substantially the duties of a higher classification for a period

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significantly longer than four consecutive days. The work performed by the grievor during the thirteen week period was similar if not identical to the work performed by Mr. Carpenter. Mr. Carpenter in his testimony made it clear that any additional duties he might perform from time to time and which are set out in his position description are not duties which he would perform while a training course is in progress. Employees in positions which have such a full range of duties and responsibilities as are set out in exhibit 7 could scarcely perform the full range in such a limited a period as "four (4) consecutive days"; hence the parties certainly must have contemplated that an employee, such as the grievor, would be entitled to acting pay if he were called upon to perform the duties which an incumbent would perform, during a period of thirteen weeks. In the Deley case (Board file 166-2-289) adjudicator Weatherill in considering a claim for acting pay observed, at page 9:

> Of course, not all of the duties of the job were required to be performed during that period: only during a period of a year or more would the full range of duties be performed.

38. I find the position of the employer somewhat anomalous. There is the position description (exhibit 7) which sets out the duties and responsibilities of a regional instructor (airports) for the Regional ATS Training Unit and Mr. Carpenter on behalf of the unit chief in his letter of January 30, 1981 (exhibit 2) acknowledges "the extended services of Mr. Roy Cuthill as instructor at the Regional ATS Training Unit". Given this clear identification of the grievor as an instructor, (together with the evidence adduced which established that he performed the same duties as Mr. Carpenter during the course), the conclusion that

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the grievor, classified at the level of AI-2, was performing the duties of a higher classification, at the level of AI-3, appears in my opinion to be incontrovertible.

39. The reply of the employer to the grievance of Mr. Cuthill refers to his attendance at the school as a "voluntary assignment", mentions his "assistance to the instructors" and concludes that the grievor had not "performed substantially all of the duties of the AI-4 position". In that Mr. Carpenter's personal classification is that of an AI-4, while the position is now classified at the AI-3 level, the grievor could be excused for specifying the higher classification. One would expect, however, that the employer would have clarified the matter in its reply. There was no dispute between counsel that at issue in these proceedings is whether the grievor performed the duties of the AI-3 position, as Mr. Carpenter did during the training course. Further, I would note that the reference to "instructors" flies in the face of all of the evidence adduced in these proceedings.

40. It is not without interest that Mr. Carpenter, apart from assuring the grievor that he would profit personally from the experience, had but one message for the grievor, that he (Mr. Carpenter) was under instructions to advise the grievor that there would be no acting pay. Given the evidence of Mr. Carpenter that there was a real necessity for a second person to conduct the course with him, one is left to wonder why the employer would find it necessary to instruct Mr. Carpenter to so advise each and every potential candidate. To be charitable, early adjudication awards relating to acting pay arose from language in collective agreements that, in effect, required the determination of the deputy head that the acting appointee was entitled to some compensation by way of acting pay (see section 83 of the Public

Service Terms and Conditions of Employment Regulations). Mr. Carpenter and his superiors may have been acting on the assumption that such a determination was still necessary, ignorant of the fact that the relevant clause of collective agreement prevails over section 83 of the Regulations. As adjudicator K.E. Norman stated when considering a claim for acting pay in the Shanley case (Board file 166-2-3044) at page 7:

> But, as of July 16 the rules change. Article 28.01 of the new Collective Agreement rids me of the need to consider the provisions of Section 83 ...
>
> From July 16, 1976, my task is simply to answer two questions:
>
> (1) Was the Grievor required by his Employer to perform duties beyond his normal duties?
>
> (2) Did the Grievor substantially perform the duties of the Group Controller?

On the other hand, and to be less charitable, if the employer were seeking "volunteers" to perform the work of a higher classification, without appropriate compensation, it may well have been, in effect, endeavouring to negotiate with employees individually, thereby circumventing the provisions of the collective agreement. Legal jurisprudence, notably Syndicat Catholique des Employés de Magasins de Québec. Inc. v. Compagnie Paquet Ltee. 18 D.L.R. (2d) 346 at pp. 353-4 [1959] S.C.R. 206, has made it clear that the presence of a collective bargaining relationship excludes "private" negotiations.

41. Was the grievor "required by the Employer to perform the duties of a higher classification level"? The grievor, to his credit, had asked to be considered for such an assignment so as to advance his own personal development. He confirmed his interest in September, 1980. At that point in time he could presumably have declined the assignment when advised that he would not be paid acting pay. Once at the school the grievor did the work required by Mr. Carpenter and in a commendable fashion (exhibit 2). In passing I would suggest that in modern industrial society, when an employer asks or requests an employee to do something the employer is, in reality, requiring the employee to do the thing requested. Demands or requirements in the form of a direct terse order are more the exception, than the rule. The point in time when the grievor was made aware that he was not to be paid acting pay may also have been the point in time when the grievor could only look upon the "request" as one he was obliged to accept.

42. In any event, the word "required" is capable of two meanings, one being the equivalent of "demand" and the other being the equivalent of "need". On the evidence the employer clearly had a need for the grievor to perform the duties of a higher classification. Accordingly, I would find that the grievor was required by the employer to perform the duties of a higher classification level, based on one meaning of the word, if not on the other.

43. It follows that the employer has violated clause 14.03(a) and is directed to pay to the grievor the pay of the higher level, calculated from the date on which he commenced to perform duties of the higher level. Failing agreement on the amount of compensation by the parties I will remain seised of that issue.

44. Turning to the grievance as to the mileage allowance, I cannot find that the grievor was required by the employer to travel between his headquarters area and his home on weekends. The grievor, in his letter of April 15, 1981 to Mr. Chambers (exhibit 4), a date somewhat after the fact, has referred to terms of an agreement arranged between himself and the "RTU" that "they" would pay him 26¢ a mile for all of his travel. The grievor did not pursue this "agreement" in his testimony before me. In his testimony before me he made no reference to any understanding with anyone other than Mr. Carpenter and that simply related to his freedom to visit his family on weekends if, as and when he wished. Mr. Carpenter did assure the grievor that his expenses would be covered but that assurance is scarcely grounds for holding that there was an agreement to pay him 26¢ a mile. I need hardly add that, in contrast, is the testimony of Mr. Carpenter to the effect that, while he would have assured the grievor that his expenses would be covered, he studiously avoided any commitment as to any specific financial arrangements, that he had insisted that the grievor make his arrangements with Mr. Chambers and that it would be for Mr. Chambers to secure approval from the regional office.

45. The grievor apparently asked for and secured one large travel advance and then submitted one large expense account on January 19, 1981. Further, towards the end of the course, he put in a claim for the overtime hours spent in travelling home each weekend and this claim was approved. It would appear from the grievor's own testimony that his advance was based on his being paid at the rate of 26¢ a mile. Counsel for the grievor argued very persuasively that the approval of the advance, as well as the approval of the overtime claimed, are evidence that the grievor was required by the employer to travel between his headquarters area and his home each weekend and, therefore, his claim for the higher allowance must be sustained for those reasons.

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46. I do have in evidence Mr. Hall's assurance that the grievor was paid at overtime rates for his travel time and that this payment was made on instructions from the regional office. I do not, however, have in evidence the grievor's application for a travel advance and I do not, therefore, have in evidence any way of establishing that the employer did approve of the higher mileage allowance. It would appear that Ms. Montgomery was not satisfied that the employer had approved of the higher mileage allowance.

47. Why the grievor should have been paid overtime compensation for the time spent in travelling to and from his home on weekends, as though he were required to do so, but denied compensation at the higher mileage allowance on the grounds that he was <u>not</u> required to so travel, escapes me. Given the language of article 28 it would appear that he was entitled to both, or neither.

48. Having regard to all of the evidence, I am driven to observe that the grievor has alleged a violation of clause 28.03(b). To establish a violation of that provision the onus is on the grievor to satisfy the adjudicator that he was required by the employer to travel to and from his headquarters each weekend. Whether the word "required" is used in a sense of a "need" or "demand", the simple fact is that the grievor himself testified that he was willing to undertake the assignment at the school on condition that he could return home on weekends. In direct examination he simply stated "it was important to me" and in cross-examination he stated "I had no desire to be away at Christmas". Given his undertaking to participate in a thirteen week training course and his being relieved of his duties as an air traffic controller at the London control tower, there is no apparent reason why the employer would require, need, or demand of the grievor that he return to Thamesford each weekend and, of course, none was suggested.

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49. It follows that the grievor has not established that the provisions of clause 28.03(b) were violated when he was paid a mileage allowance of 9¢ a mile and the grievance is dismissed.

For the Board,

D.G. Pyle,
Board Member and Adjudicator.

OTTAWA, October 29, 1982.