File: 166-2-10027

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

LIBRARY

BETWEEN:

RALPH K. JOHNSON,

grievor,

AND:

THE TREASURY BOARD,
(Department of Transport)

employer.

DECISION

Before: Kenneth E. Norman, Board Member and Adjudicator.

For the Grievor: Catherine MacLean, counsel.

For the Employer: Craig Henderson, counsel.

Heard at Winnipeg, January 19, 1983.

ART 13
CODE #02/79

UNILATERAL SHIFT CYCLE CHANGE

DECISION

The issue presented for adjudication is remarkable. The very action grieved in the matter at hand was adjudicated upon by Deputy Chairman Leon Mitchell, Q.C. in Graham and Onieu (166-2-9787 & 9833) earlier this year. And, the grievance by two of the grievor's co-workers was sustained. On this footing, Ms. MacLean, for the grievor, would have me simply adopt Graham and Onieu, as res judicata, and then fashion a remedy for Mr. Johnson. Mr. Henderson, for the employer asks nothing less than that I find that Mr. Mitchell not only got his law wrong, but that he also managed to get his facts wrong. Although the question of res judicata has been considered by several arbitrators and adjudicators, none have been placed in quite such an unenviable position as that which I must uncomfortably occupy in addressing the evidence and argument presented to me in this matter. More of this later.

The grievance referred to adjudication before me alleges that:

> In contravention of the collective agreement between the Treasury Board and CATCA, Code 402/79, between January 5, 1981 and January 20, 1981, my shift cycle was changed.

The corrective action sought by Mr. Johnson was a declaration to this effect coupled with appropriate overtime for the days that he worked which under his agreed cycle would have been days of rest.

The declaration sought is the same as that which was obtained by Messrs. Graham and Onieu. And, the period of

time during which the agreed shift cycle was unilaterally altered by the employer, is the same. Finally, the employer's expressed rationale for the change remains constant.

Mr. Mitchell summarized the salient facts before him in Graham and Onieu, in these words.

> On or about October 13, 1980, the employer began a series of training sessions to familiarize air traffic controllers in Winnipeg, Saskatoon, Regina, Kenora and Thunder Bay with new equipment to be installed in the air traffic control towers at these locations referred to as "C-Jets" equipment. The course included theory and practical train-in...
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> By memorandum SM-80-95PT dated November 17, 1980 (Exhibit G-2) the schedule of training for certain controllers, including the grievors, was set out as follows:
>
> Winnipeg Area Control Centre
> Subject: C-Jets Training Courses
>
> The following personnel have been scheduled for C-JETS courses:
>
> ...
>
> Course 5
> Jan 5 - Jan 14
>
> | | |
> |---|---|
> | G. Onieu | *R. Johnson* |
> | A. Graham | R. Frith |
> | J. Pischak | G. Nosworthy |
>
> (Emphasis added.)
>
> In sum, the comparison between the shift cycle agreed to and the one imposed is as follows:
>
> | AGREED SHIFT CYCLE | IMPOSED CYCLE |
> |---|---|
> | 6 on 3 off | 5 on 2 off |

5 on 4 off . . . 6 on 5 off

> The issue is whether the employer had authority to impose the revised shift cycle when there was no agreement between the Association and the employer regarding any revision to the shift cycle agreed upon.

I have emphasized the name 'R. Johnson' listed in the memorandum of November 17, 1980 as this is none other than the grievor in the instant reference to adjudication. On this footing Ms. MacLean, for the grievor, argued that I was obligated to respect the doctrine of res judicata and sustain the grievance. I was referred to the full discussion of the doctrine, as it has been applied by arbitrators, set down in the award in Re Steel Co. of Canada Ltd., Hilton-Works and United Steelworkers, Local 1005 (1980), 27 L.A.C. (2d) 252 (McLaren). At page 257, the following assertion on the subject at hand appears:

> In arbitration matters, res judicata arises where a board is called upon to decide an issue that is identical to one decided by an earlier arbitration board, involving the same parties and under the same or an unaltered collective agreement.

Ms. MacLean invited me to study the arbtiral awards cited in the Steel Co. of Canada award. She submitted that I would not find a case where a more identical issue presented itself to an arbitrator or adjudicator than the one with which I am seized in this adjudication. The union, the employer and the collective agreement are the same. The issue of interpretation is identical. Moreover, both this case and Graham and Onieu revolve around the same event. And, the icing on the cake for the purposes of the res

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judicata is the fact that the grievor and Messrs. Graham and Onieu were co-workers unilaterally assigned to the same altered shift cycle in order that they might be trained for the new en route air traffic control system to be implemented in their region. On this footing she proposed that I adopt the view taken by several arbitrators that I am bound to adopt a strict application of res judicata.

In the event that I was not so disposed, Ms. MacLean said that I ought, at very least, to take the view that Graham and Onieu ought to be followed unless I came to the conclusion that it was 'manifestly wrong'. A number of arbitral awards cited in the Steel Co. of Canada decision were relied upon for this test. In particular, Ms. MacLean asked me to consider two adjudications on the matter of res judicata, as they set down the policy reasons for the doctrine being applied by arbitrators. These decisions are Derbyshire (167-2-5) (Jolliffe) and Chandler et al (166-2-4139 and 4142) (Beatty).

Mr. Henderson, for the employer, submitted that it was quite inappropriate to consider that arbitral awards were binding on subsequent arbitrators. He referred me to an article by J.F.W. Weatherill, "The Binding Force of Arbitration Awards", (1958), 8 L.A.C. 323, which makes this point with some force. At most, he suggested that Graham and Onieu ought to be regarded by me as having weight; as being persuasive. But, I ought to feel free to differ with Mr. Mitchell's decision if I considered it to be wrong. In support of this test, Mr. Henderson cited as an example Re Air Canada and Canadian Air Line Employees' Assoc. (1975), 10 L.A.C. (2d) 113. (O'Shea).

At the conclusion of argument from counsel on the matter of res judicata, I indicated that my decision on the question would be reserved in order to provide me with an opportunity to review the several cases relied upon by the parties. Mr. Henderson sought leave to file written argument on the issue. I granted him a week to do so and gave a further week to Ms. MacLean to reply. By letter of February 4, 1983, from the Deputy Registrar of the Public Service Staff Relations Board, I was advised that Mr. Henderson had decided not to file written argument and wished to have the decision authored on the footing of the evidence and argument presented at the hearing.

As Ms. MacLean did not want to put her client to the possible expense entailed should I accept the employer's position with regard to Graham and Onieu, she then opted to lead evidence. Mr. Henderson objected to this procedure. He said that he first wanted my decision on the legal question of res judicata. I ruled that there was no sufficient basis for me not to hear the evidence while I and everyone else concerned was present and available. I said that I was not prepared to adjourn, with all the risks of cost to the parties involved in such a course of action unless a very strong case indeed was presented for such a procedure. And, Mr. Henderson's simple assertion that he would prefer that I adjourn would not do, so far as I was concerned. Accordingly, the hearing then began with the testimony of the grievor, who said again what had been said before by his co-workers in Graham and Onieu.

Mr. Johnson was followed to the stand by Mr. McFarlane, Chief of Winnipeg Control Centre at all material times.

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To my surprise, Mr. McFarlane, who had testified in Graham and Onieu, was called by Mr. Henderson in order to lay a foundation for a conclusion by me differing from that which was reached by Mr. Mitchell as to the employer's reasoning in taking its unilateral decision. At page 9 of Graham and Onieu, Mr. Mitchell says:

> In this case Mr. R. M. McFarlane, ... testified that the shift cycle was changed to avoid "considerable overtime costs". Indeed, Mr. McFarlane conceded that it would have been possible to arrange the attendance of the controllers without revising the shift cycle. The question to be decided in this case is therefore simply whether the agreement contemplates that the employer may change the shift cycle of the grievors to avoid payment of "considerable overtime" when arranging "adequate training and instruction on equipment and procedures prior to their introduction" as set out in article 8.02(a).

The gist of Mr. McFarlane's evidence before me was that although overtime costs were a factor in management's mind, they were by no means the only factor. Other matters were also taken into account. And, on this footing, Mr. Henderson argued that I had before me quite a different case from that which was decided by Mr. Mitchell. The 'other factors' could be looked to in order to justify a result similar to that which was reached in Corbett et al (166-2-3698 to 3700).

My reaction, then and now, to this evidence and argument was and is to think of Sir William Gilbert's lyric in The Mikado - "Here's a pretty state of things. Here's a Howdy do!" I am satisfied that there is every good reason

for arbitrators and adjudicators to do what they can to discourage parties who have been unsuccessful before one arbitrator and who have chosen not to seek reversal of the award in the courts, from re-litigating the self same issue before another arbitrator. This is so when the same issue of interpretation is presented to the second arbitrator. It must be so, a fortiori, when a different finding is being sought on the basis of somewhat different facts being found, albeit on precisely the same set of circumstances.

In Chandler et al, supra, Adjudicator Beatty made the point at pages 5 and 6 of his decision in this language:

> I have had an opportunity to review the Larose et al award closely and I am satisfied that it unequivocally and definitively resolves this second issue in a manner favourable to the grievor's position. That case is virtually on all fours with the grievances before me...
> I would be loathe to interfere with such settled opinion (and the parties subsequent reliance on it) unless I were satisfied that it was clearly in error. Were one to adopt any other position, the effect of an adjudicator's decision would be merely transitory and devoid of impact, and the parties would be encouraged to "re-arbitrate" any decision unfavourable to their interests. Moreover it is not as if an aggrieved party is remediless in the face of an award whose validity it disputes. This employer is more familiar with the proper means by which it could have challenged an award such as Larose had it wished to do so. It is to those procedures rather than to a subsequent arbitration proceeding that resort should

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> have been had if the employer wished to challenge the Larose award.

In Derbyshire, supra., then Chief Adjudicator Jolliffe expressed a similar opinion. He concluded at page 7 of his decision by saying:

> Any other course is to invite caprice, inconsistency and perhaps chaos in the administration of collective agreements and the grievance processes within the public service...
>
> In my opinion, it was not the intent of the Act to provide facilities for endless exercises of litigious habits or gambits by employers or employees; the purpose was to introduce some order, consistency and justice into employer-employee relations by way of collective agreements under which disputes were to be resolved in the grievance process and - as a last resort - by adjudication. In other words, a legislative effort has been made to establish what might be termed the rule of law in place of unfettered administrative discretion on the one hand and irresponsible employee protests on the other.

To return to the issue of res judicata, I am persuaded by the reasoning of Mr. Weatherill in his article, "The Binding Force of Arbitration Awards" and of those arbitrators and adjudicators belonging to the 'manifestly wrong' school, that it is not appropriate to inject into arbitration the legal rigidities inherent in adopting the res judicata principle as having binding effect. Arbitrators are intended by the parties to have more scope for interpretive adjudication than the state will permit judges. Thus, the legal doctrines of stare decisis and res judicata ought not to

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be allowed to become procrustean beds in which arbitrators must be forced to lie. In sum, I share the following view of Mr. McLaren in Re Steel Co. of Canada, supra., at page 260:

> It is found by this board that even when the facts of the dispute and the language of the collective agreement are identical that the application of the principle of res judicata should not blindly result in the same disposition of the case because the previous award was binding on the subsequent board. Nevertheless, having said that, the result should be the same unless the subsequent board is convinced that the earlier board's decision was manifestly wrong.

With this, I return to the facts. For my purposes, they must be what they were found to be by Mr. Mitchell. Adjudicators under the Public Service Staff Relations Act do not conduct hearings with a court reporter in attendance. Thus, there is no transcript to which I might have recourse in an attempt to ascertain whether Mr. McFarlane's testimony before me differed from that which he gave to Mr. Mitchell. Were there such a document I might at least begin to consider whether Mr. Mitchell "got his facts wrong" with regard to his crucial finding that "considerable overtime costs" lay at the heart of the employer's decision to alter the grievors' shift cycle. In the absence of a transcript, I have not the slightest basis upon which to ask myself whether I am "... convinced that the earlier board's decision was manifestly wrong". Further, for me to look to Mr. McFarlane's "other factors" would be to fly directly in the face of the principle that "re-arbitrating" ought to be discouraged, in

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the name of the rule of law.

With the facts unaltered, I then turn to the matter of whether Mr. Mitchell so misinterpreted the collective agreement that I might feel justified in asserting that I was convinced that his decision was manifestly wrong. At pages 10 and 11 of his decision, Mr. Mitchell distinguishes Corbett, in these words:

> In Corbett the adjudicator found that the disruption in the shift cycle "was necessitated by the demands made of the employer in the arranging of the grievor's annual refresher training course"...
>
> However, in the case before me the evidence is that it would have been possible to arrange attendance by the controllers at the C-JETS training course without changing the shift cycle but it would have resulted in considerable overtime costs. In the instant case, the difficulty did not relate to scheduling the training but rather to avoid overtime costs. That was not the evidence in Corbett. Furthermore, it is evident that the parties addressed the issue of overtime costs related to training in article 8.02 (b)(ii) which reads:
>
> In addition to the training referred to in 8.02(a), controllers shall be provided refresher training as follows:
>
> ...
>
> (ii) an additional five (5) days of job-related training each year provided staff permits and such training will not require the payment of overtime.

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> It is clear then that the parties addressed directly the issue of overtime arising out of the obligation to provide training each year by providing that no additional five days of training would be provided if it required payment of overtime.
>
> I am therefore unable to conclude that "there was an implicit attempt by the parties to exempt (such) disruptions from the grievors' shift cycle" by reason of resulting overtime costs.

In conclusion, at page 14, after reiterating the last quoted paragraph, Mr. Mitchell said:

> If the parties had intended that the same or similar considerations regarding the overtime costs shall apply to training pursuant to article 8.02(a) they would have said so.

Thus, on the facts, Graham and Onieu is clearly distinguishable from Corbett, in Mr. Mitchell's opinion. And, I agree with him. The latter decision spoke to a situation of annual refresher courses under article 8.02(b)(ii), which expressly addresses the matter of overtime. Mr. Mitchell placed weight upon the absence of any reference to overtime not being paid in 8.02(a). On that basis, he determined that the bargained shift cycle, as set down in article 13.02(b), could not be altered by the employer "... in order to save overtime costs except by agreement between management and the Association". Am I convinced that this interpretation of the collective agreement is manifestly wrong? My answer is in the negative. The language of articles 13.02(b) and 8.02(a) can reasonably bear the construction reached by

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Mr. Mitchell. I therefore declare that the employer violated the collective agreement by unilaterally altering the grievor's shift cycle during the period of time in question.

There remains the matter of compensation. Ms. MacLean asked that I make a finding that Mr. Johnson is entitled to an amount of money equal to the difference between what he would have earned, had his cycle not be altered, less the amount that he actually earned. Mr. Henderson objected to such an award arguing that it would amount to an order that overtime be paid for hours which were not actually worked. With all due respect to this contention, it seems to me that I have some capacity to fashion a remedy which would make whole the grievor. And, the formula proposed by Ms. MacLean does the trick, so far as it can be done after the fact. I do not purport to say that overtime must be paid. I do, however, find that the grievor ought to be given some redress for the employer's action in violating his rights. That the compensatory formula takes into account the principle that unilateral shift cycle alterations in order to mount training courses under article 8.02(a) cannot be put into place in order to avoid the payment of overtime, only stands to reason. I remain seized of this adjudication should the parties fail to come to terms on the compensation to be paid to the grievor under the formula proposed by his counsel.

For the reasons which I have given, this grievance is sustained.

For the Board,

Kenneth E. Norman,
Board Member and Adjudicator.

SASKATOON, February 16, 1983.