Catch grievance overtime

File No.: 166-2-13523

No. 33

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

R.D. BROWN,

Grievor,

AND:

TREASURY BOARD,
(Transport Canada)

Employer.

DECISION

ART 15
OVERTIME

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

For the grievor: W.J. Robertston, Canadian Air Traffic Control Association

For the employer: M. Thomas, counsel

JB
3/4/83

Heard at Toronto, Ontario on December 14 and 15, 1982.

The grievor a Toronto Acc Controller, was called in to work overtime ~~evening~~ shift, which was immediately prior to his regular midnite shift. At 9pm he ~~at~~ advised his supervisor that he was scheduled for his regular shift to follow the o/t. His supervisor advised the watch supervisor who declared a staffing emergency and he would pay the grievor double-time o/t for the midnite shift. The adjudicator found that the supervisor offered the grievor something which [illegible] and since he is a supervisor (as distinct fr manager), he

DECISION

1. This is a reference to adjudication of a grievance filed by Mr. Rodney D. Brown, dated January 21, 1982, in which Mr. Brown is seeking compensation at the rate of double time (i.e. twice his regular hourly rate of pay) for work on a regular shift. The grievance reads:

> On Jan. 5/82 I was scheduled to work eves. 1505-2359 LCL, overtime. This was my last day off. My first regular scheduled day of work Jan. 6/82, midnight shift 2345 (Jan. 5) - 0640 (Jan. 6) LCL. About 9 p.m. LCL on Jan. 5 I advised my immediate supervisor that I was working midnights. My immediate supervisor consulted the watch supervisor. The watch supervisor advised he was declaring a staffing emergency and he would pay me double time for the midnight shift. To my knowledge there was no attempt to call anyone else for midnights. I agreed to work the midnight at double time as stated by the watch supervisor.
>
> A few days later I was informed by the enroute manager I would not receive any overtime compensation for the midnight shift although it was stated I would.
>
> Corrective Action Requested
>
> That management honor their promise to pay double time.

2. As of the same date Mr. F.D. Bondy, enroute manager, acknowledged receipt of the grievance under the caption on the grievance form, "Title of Management Representative". In a letter dated February 9, 1982 Mr. Bondy replied to the grievance, as the authorized employer representative at the first level of the grievance process, as follows:

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> A staffing emergency was declared by the Watch Manager on January 5, 1982 evening shift to cover the necessity of requiring you to work more than twelve consecutive hours as per article 15.04 of the AI collective agreement. This was necessitated by the fact you were inadvertently scheduled to work an evening overtime shift on your last day of rest immediately followed by a regular midnight shift.
>
> For the time worked on January 5, 1982, your day of rest, you were compensated at 2 times the straight time hourly rate, however, once you commenced working the midnight shift January 6, there is no provision for extra compensation as it was regularly scheduled time. In order to receive overtime on January 6, it would have been necessary to have worked in excess of the scheduled hours (2345-0645) which you were not required to do.
>
> Your grievance is therefore denied.

3. Mr. Brown is an Air Traffic Controller (AI-4), and has been so employed since 1970. He is presently employed at Toronto Air Control Centre (Toronto ACC), situated at the Toronto International Airport, Malton, Ontario. He is represented by the Canadian Air Traffic Control Association (CATCA) and the parties are in agreement that the collective agreement in force at the material time is coded: 402/79 (exhibit 1).

4. The Toronto ACC is a continuous shift operation under the direction of the enroute manager. On each shift in the control centre there is a watch supervisor in charge and a floor supervisor responsible for the employees in one or more of four sections of the centre.

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5. The parties are in agreement that for the month of January, 1982 a work schedule for all air traffic controllers in the control centre was posted on or about the middle of December, 1981, in accordance with the terms of the collective agreement. Mr. Brown was scheduled to work the midnight shift commencing at 11:45 p.m. on January 5, 1982. At a later date, but prior to the end of the month of December, employees who had indicated their availability for overtime assignments were scheduled where there was a need for additional staff. Mr. Brown was then scheduled to work on the evening shift (3:05 p.m. to midnight) on January 5, 1982.

6. Mr. Brown testified that he was for at least one week aware that he was scheduled to work "back-to-back" shifts. Further, it was not the practice to schedule an employee to work in this manner. Mr. Brown did not advise anyone of the fact and, furthermore, had no answer when queried as to why he had not informed his supervisor. He simply remarked that it was agreed that he would not work overtime at time and one half and that when he was assigned to the evening shift on his second day of rest he was entitled to be paid for that shift at the rate of double time.

7. At approximately 9 p.m. on the evening of January 5, 1982, Mr. Brown approached Mr. Barry Chamberlain, a fellow air traffic controller who had been assigned the duties of a floor supervisor for that shift. He informed Mr. Chamberlain of his schedule and inquired as to whether he was entitled to additional compensation for working two consecutive shifts. Mr. Brown stated that he anticipated receiving something additional to his regular rate of pay, such as a meal allowance or a compensation at an overtime rate for the second shift. An air traffic controller was not to work more than twelve consecutive hours but because he was prepared to do so, Mr. Brown felt that he should be rewarded by additional compensation.

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8. Mr. Brown testified that Mr. Chamberlain left him to discuss the matter with the watch supervisor, Mr. Ray Ferguson. Some time later the grievor joined in the discussion . Mr. Chamberlain then informed the grievor that Mr. Ferguson had decided that a staff emergency would exist on the midnight shift if Mr. Brown did not work. He was then told by Mr. Chamberlain that he was to work the midnight shift at the rate of double time. Mr. Brown stated that Mr. Ferguson indicated his complete agreement with the remarks of Mr. Chamberlain.

9. Mr. Brown in cross-examination testified that he had been prepared to work the midnight shift in any event, that he had not been in the same situation previously while employed in the Toronto ACC. At the time of the discussion he was of the opinion that Mr. Ferguson had the authority to approve the payment of an overtime rate, that Mr. Ferguson's normal duties included his calling in employees on overtime basis to replace employees who were ill or otherwise absent. Finally, he was aware that a staffing emergency would have existed on the midnight shift had his position been left vacant.

10. Mr. Barry Chamberlain has been an Air Traffic Controller for ten years and has been employed in the Toronto ACC for nine of those years. On January 5, 1982 he was working on an overtime shift and, because of a staff shortage, he had been asked to act as a floor supervisor. He testified that following the initial discussion with the grievor he had informed Mr. Ferguson of the potential problem but, at the same time, of Mr. Brown's availability. Mr. Ferguson's reaction was to declare a staffing emergency and for Mr. Brown to work the consecutive shifts. The two supervisors then discussed the matter of remuneration for Mr. Brown and their decision was to regard the second shift as an overtime shift. Mr. Chamberlain stated that it was his understanding that double time would be paid. He then noted on the

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attendance register for January 6, 1982 (Exhibit 5), opposite Mr. Brown's name and under the heading "Remarks", the expression "Staffing EMERG." and under a heading "two x" he had written in "6.92", to indicate the hours of the shift were to be compensated at the rate of double time.

11. In cross-examination, Mr. Chamberlain testified that Mr. Ferguson's reaction upon being advised of the problem and Mr. Brown's willingness to work was that it was a simple matter, "We will call a staff emergency". Mr. Chamberlain recalled that he had then raised the issue of additional compensation, for four hours or for some other period, and the ultimate decision had been to pay Mr. Brown at the rate of double time for the full shift.

12. Mr. Chamberlain stated that "we" had a problem in that "we" were one body short. Mr. Brown had made some reference to extra money but not as a demand. Mr. Chamberlain was satisfied that the staffing emergency provisions of the collective agreement provided the necessary authority to pay a premium rate - until he read clause 15.04. He then agreed that the clause made no reference to compensation. He remained convinced, however, that there was a problem and it followed that the shift should be treated as an overtime shift for Mr. Brown.

13. Mr. Chamberlain testified that he had made the entry on the attendance register (Exhibit 5), so as to bring the matter to the attention of the supervisors on the midnight shift. Queried as to whether it was a regular practice to enter such a notation, Mr. Chamberlain replied that a floor supervisor would enter such a notation when leave was granted to an employee who had previously been scheduled to report for the later shift.

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14. Two witnesses testified on behalf of the employer. The first, Mr. Ray Ferguson, was first employed as an Air Traffic Controller in 1956. He was first appointed a supervisor in 1968 and a watch supervisor in April, 1981. His present duties are to oversee the operations of the control centre on a given shift. He is a member of the bargaining unit and is represented for collective bargaining purposes by the Canadian Air Traffic Control Association.

15. Mr. Ferguson stated that the shift schedule for all air traffic controllers would have been prepared by floor supervisors and a scheduling clerk. Once the schedule was posted he had authority to make changes because of an illness or because of an exchange of shifts between two controllers. Mr. Chamberlain's duties were to determine that the various sections at the control center were properly staffed, to identify the times when each controller was to take his breaks and, generally, to see that the operations were being conducted efficiently.

16. Mr. Ferguson was convinced that he did not make any firm commitment to compensate Mr. Brown at the rate of double time for his work on midnight shift. He stated that when he was unable to fill a position essential for the operation of the control centre there was a staffing emergency. As a matter of practice he would endeavour to contact an employee off duty and to offer him the assignment. Only if he had been unable to secure a replacement would he then have been able to offer Mr. Brown the opportunity to work on midnight shift. In any event he would then inform his superior, the enroute manager, in a memorandum of the particular circumstance of a given situation, including what steps he had taken. Mr. Ferguson testified that it was beyond his authority to approve any additional compensation to the grievor. He had encountered other situations which had led to a staffing emergency and in his opinion he was quite familiar with his

obligation to report all of the facts, including such a matter as additional compensation, to the enroute manager for his decision. Mr. Ferguson was convinced that he did complete such a memorandum for the enroute manager. Unfortunately the memorandum could not be located, notwithstanding an adjournment in these proceedings until the following day.

17. Mr. Ferguson's testimony, at best, tended to be a statement of his general practice in a staffing emergency, rather than what did occur on the night of January 5, 1982. I would not conclude that Mr. Ferguson was endeavouring to mislead me, but, unfortunately, his powers of recall of the events on the evening, almost twelve months prior to these proceedings, were to say the least, limited.

18. The second witness for the employer was Mr. F.D. Bondy, the enroute manager. Mr. Bondy has been employed in air traffic control operations for 25 years. He testified that his supervisors would develop a schedule with the assistance of a scheduling clerk. Once the available employees were scheduled for their regular hours of work for the next period any necessary overtime shifts would be offered to the controllers, commencing with the employee with the least hours of overtime recorded. Initials identifying each of those employees would then be set out in the schedule and the schedule posted. The schedule involved in these proceedings was posted no later than December 29, 1981.

19. Mr. Bondy stated it was brought to his attention shortly after January 6, 1982, that Mr. Brown had claimed compensation at the rate of double time for his regular scheduled shift on January 6, 1982. Mr. Bondy did not regard the grievor as eligible, pursuant to any provision of the collective agreement, for overtime compensation for

that shift. He had struck out the notation on the attendance register and had added "no overtime". He did not discuss the matter either with Mr. Ferguson or with Mr. Chamberlain. The grievor did inform him that he (the grievor) had been told that he would be paid overtime and Mr. Bondy had replied that what he had been told was incorrect, that he would not be paid an overtime rate for his regular scheduled shift.

20. In cross-examination Mr. Bondy testified that the controllers were responsible for checking the schedule posted, that a controller would only be contacted by his supervisor in the event of a change affecting him. He was satisfied that Mr. Ferguson was familiar with the terms of the collective agreement and what was required of him in the event of a staffing emergency. He had not received a copy of the memorandum which Mr. Ferguson had identified. Finally, he was convinced that controllers were never scheduled to work "back-to-back" shifts.

ARGUMENT FOR THE GRIEVOR

21. Mr. Robertson submitted that there was no dispute as to the fact that the grievor was scheduled to work two consecutive shifts and that the schedule was posted at the least 6 days prior to January 5, 1982. The grievor did not bring this situation to the attention of the employer before the evening of that day and has not advanced a reason for not doing so. There is, however, no onus on the grievor to bring the matter to the attention of the employer. The employer should never have permitted the schedule to be posted as it was clearly in contravention of clause 15.04 of the collective agreement. Nevertheless, once the employer did post the schedule it was incumbent upon the grievor to make himself available for the two shifts and he was, in fact, required to work the second shift.

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22. Clearly the testimony of Messrs. Brown and Chamberlain is to be preferred where there is any conflict between their testimony and that of Mr. Ferguson. Messrs Brown and Chamberlain are in agreement that Mr. Ferguson assured Mr. Brown that he would be paid at the rate of double time for his work on the midnight shift. Mr. Bondy was aware that Mr. Brown had been promised double time. Only Mr. Ferguson was uncertain. On the basis of all the evidence it is apparent that what happened was that Mr. Brown raised the matter at approximately 9 p.m. Mr. Ferguson undoubtedly had a busy day and with numerous problems besetting him he had elected to shorten the process. Instead of going through a call-out list to secure a replacement for Mr. Brown he decided to get around the problem by declaring a staffing emergency. As an inducement to Mr. Brown he offered him compensation the rate of double time. The evidence is that such an offer was made. The attendance register for January 5, 1982 (Exhibit 5) shows Mr. Chamberlain's initials and the rate of double time. There was no reason for Mr. Chamberlain to enter that notation without authorization and there has been no suggestion to the contrary.

23. Mr. Brown was offered an inducement to stay in his position for a second shift and he relied on Mr. Ferguson's word that he would be compensated at the rate of double time. He relied upon it to his detriment. If an employee is expected to follow orders or directives given by the employer then the employer should honor that commitment. Accordingly, Mr. Brown should be made whole.

ARGUMENT FOR THE EMPLOYER

24. Counsel for the employer, Ms. Thomas, argued that the grievor has not established that the employer misinterpreted the collective agreement, an essential ingredient for the grievance to succeed.

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25. The essential facts are not in dispute. The regular shift roster was posted on or about December 15, 1981 and Mr. Brown was scheduled to work, as a regular shift, the midnight shift of January 6, 1982. The schedule with the overtime assignments was posted on or about December 29, 1981. The overtime shift was offered to Mr. Brown and he could have declined the offer. He was aware of the "back-to-back" situation for more than one week but elected to remain silent. In any event, there is no way in which the employer can, by applying the provisions of the collective agreement, pay an overtime rate for work on a regular shift.

26. The remaining facts, including the exhibits, are irrelevant. Mr. Ferguson has endeavoured to recall events which transpired one year previously. He has nothing to gain in these proceedings, other than to tell the truth. He has endeavoured to tell the truth but he has been hampered by the disappearance of a particular document. He has testified, to the best of his recollection that he did not make an offer of overtime compensation to the grievor, on the grounds that the collective agreement does not allow it.

27. The "back-to-back" scheduling was an oversight by the supervisors and a scheduling clerk at a busy time of the year. Other controllers to replace Mr. Brown were not available. There was no malice on the part of anyone and Mr. Brown was not put to any detriment. He should have been willing to cooperate. He was aware of the error for at least one week and yet he waited until three hours before the commencement of the succeeding shift. He was undoubtedly aware that Mr. Ferguson would have difficulty in securing a controller to report for work at midnight on a Sunday night. Mr. Robertson has argued that the employer must honor a commitment, a commitment which

does not exist. In any event the employer quite rightly has taken the position that it has no authority to pay any overtime compensation to Mr. Brown for working his regular shift.

28. Was Mr. Brown required to work the midnight shift? Clearly he testified that he was prepared to work that shift without any inducement.

DECISION

29. Provisions of the collective agreement, pertinent to the resolution of the issue in these proceedings, would appear to include the following:

> 5.15 Adjudication of Grievances
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> Where an employee has presented a grievance up to and including the final step in the grievance procedure with respect to:
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> (a) the interpretation or application in respect of him of a provision of this Collective Agreement or an arbitral award relating thereto,
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> ...
>
> and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.
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> 13.03 Shift schedules shall be posted at least fifteen (15) calendar days in advance in order to provide an employee with reasonable notice as to the shift he will be covering. The shift as indicated in this schedule shall be the employee's scheduled hours of work...

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> 13.05 Every reasonable effort shall be made by the Employer:
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> (a) not to schedule the commencement of a shift within eight (8) hours of the completion of the employee's previous shift;
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> ...
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> 15.01 Time worked by an employee in excess or outside of his scheduled hours of work shall be considered as overtime.
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> 15.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.
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> 15.05 An employee who works three (3) or more hours of overtime, immediately following or immediately before, his scheduled hours of work shall be reimbursed his expense for one meal in the amount of three dollars ($3.00) except where meals are provided by the Employer.

30. It is significant to note, for the purpose of these proceedings, that Messrs Chamberlain and Ferguson, as well as the grievor, are employees within the meaning of the collective agreement. The bargaining unit is the occupational group of employees identified as the "air traffic control group (all employees)". Employees whose duties include the supervision of other employees in the occupational group are included in the bargaining unit. The parties in a preface to the collective agreement, titled "Definitions", have set out that certain personnel will be "considered operating employees", including:

> All shift supervisors and controllers in Area Control Centres and Terminal Control Units.

31. In contrast, the definition of the "employer" includes any person authorized to exercise the authority of the Treasury Board. In clause 5.012 of the collective agreement the parties have defined management representative as:

> the officer identified by the Employer as an authorized representative whose decision constitutes a step in the grievance procedure.

It follows that neither Mr. Ferguson nor Mr. Chamberlain were authorized to exercise any authority of the employer beyond their limited function of maintaining an effective operation of the shift to which they were assigned, of determining that there was efficient operating staff and of relieving employees for meal breaks and relief periods. A floor supervisor will assist in developing a work schedule, in assigning employees to their regular shifts and allocating employees who have volunteered to work overtime shifts. A watch supervisor will endeavour to secure personnel to fill in for an employee who is unable to report for duty as contemplated by the work schedule. In every situation, however, the rate of pay for an employee, whether his regular rate of pay or one of two overtime rates, will be determined by the provisions of the collective agreement.

32. It is apparent than an error was made when Mr. Brown was scheduled to commence "a shift within eight (8) hours of the completion of the employee's previous shift" (clause 13.05). The grievor was aware of the apparent error but elected to "lie low", probably because of the possibility that the overtime shift at double time would be cancelled.

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Late in his first shift he assured his supervisors that he was prepared to work his regular scheduled shift, as well as his overtime shift, but raised the question of his getting "something more", such as a meal allowance. The absence of Mr. Brown, or of a replacement, from the midnight snift would leave a position in the control centre unmanned. Given the function of the air traffic control group, i.e., the control of air traffic to ensure its safe and expeditious movement though controlled air space, it is apparent that a vacancy would create an emergency situation on the midnight shift. Given that situation the agreement of the parties, that no employee is to work more than twelve consecutive hours, is waived.

33. Once Mr. Ferguson declared that there was an emergency, and Mr. Brown could work more than twelve consecutive hours, the grievor could have been entitled to be reimbursed his expense of one meal in the amount of $3.00. Clause 15.05 of the collective agreement reads in part as follows:

> An employee who works three (3) or more hours of overtime, ... immediately before, his scheduled hours of work shall be reimbursed his expense for one meal in the amount of three ($3.00) except where meals are provided by the Employer.

34. It follows that Mr. Brown may well have been within his rights to have raised with Mr. Chamberlain the matter of a meal allowance. Mr. Chamberlain, however, appears to have been determined to secure for his colleague, the grievor, compensation far in excess of a meal allowance. He appears to have assured the grievor, in the presence of Mr. Ferguson, that he was entitled to double his regular rate of pay (not a meal allowance and not time and one-half) for all of the hours

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worked on the midnight shift (not just four hours as was discussed at one point). Further, he appears to have been anxious to record the "agreement" and selected the attendance register for that purpose. In all, Mr. Chamberlain appears to be an employee patently unfamiliar with the terms of the collective agreement and clearly misinterpreted the provisions of clause 15.04 of the collective agreement. Of course whether Mr. Ferguson had a better appreciation of the terms of the collective agreement remains a mystery.. If, however, it were critical to my decision I would find on all of the evidence that Mr. Ferguson did associate himself with the Mr. Chamberlain's assurances to Mr. Brown that he would be compensated at double his regular rate of pay for the hours worked the midnight shift.

35. Mr. Robertson would appear to arguing that, in view of the assurance given to Mr. Brown by his supervisors of double time, the employer is estopped from relying upon the strict terms of the collective agreement. If so, and assuming that the doctrine of estoppel could apply, there is one hurdle in the path of the grievor. There were no representations made by one party to the other party to the collective agreement on the evening of January 5, 1982. Messrs. Ferguson, Chamberlain and Brown are all identified with one party, the bargaining agent. Messrs. Chamberlain and Ferguson are supervisors. They are aware that, as members of the bargaining unit, they do not represent the employer for purposes of the collective agreement. Their duties are supervisory, as distinct from managerial. Mr. Brown may have believed that Mr. Ferguson could assure him of payment at the rate of double time but his response to this question was guarded; he said that at the time of the discussion he was of the opinion that Mr. Ferguson had the authority to approve of the payment. In any event his ignorance, as well as the ignorance of Mr. Chamberlain (and perhaps of Mr. Ferguson) does not bind the employer to provide

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Mr. Brown with compensation over and beyond that contemplated by the terms of the collective agreement. The hours worked by Mr. Brown on the midnight shift were his scheduled hours of work, not hours in excess of or outside of them, hence they could not be considered as overtime.

36. One final note, in Tevendale (Board file 166-2-9629) adjudicator R.D. Abbott had before him a not dissimilar situation. A leave of absence was approved by two supervisors who clearly lacked the authority to grant the leave with pay in the amounts sought by the grievor. At page 7 the adjudicator states:

> I furthermore reject the suggestion that the employer is somehow bound by the approval given by the grievor's immediate superiors. They may have had a good foundation for "approving," but they had no authority to grant the requested special leave. The argument based on estoppel has no role to play here; first, since it is being used, not as a defence, but as a foundation for the assertion of a claim, and second, because it has not been shown that the grievor relied, to his detriment, on anything that might be said to have been held out to him by those immediate superiors.
>
> For the foregoing reasons, that the employer's exercise of discretion at the level of the Director General to reject the grievor's application for special leave was beyond successful attack in view of the wording of Clause 24.04 of the collective agreement, and that the approval of the grievor's application at lower levels did not bind the employer, this grievance is rejected.

In the result, the application is hereby dismissed.

37. Accordingly, the grievance is denied and the reference to adjudication is dismissed.

For the Board,

D.G. Pyle,
Board Member & Adjudicator.

OTTAWA, March 3, 1983