No. 62

File: 166-2-13868

JUL 4 1983

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

W.H. JASHEWSKI,

Grievor,

AND:

TREASURY BOARD
(Transport Canada),

Employer.

## DECISION

Before: J.C. Mayes, Board Member and Adjudicator.

For the Grievor: R.W. Willis and R. Chase.

For the Employer: P.M. Kremer, Ms. Parrott and R. Lindey.

ART 2
CODE 402/82

Heard in Thunder Bay, May 4, 1983.

RESIDENCE WHEN MILEAGE PAID FOR OVERTIME

## DECISION

1. This is a reference to adjudication brought under paragraph 91(1)(a) of the Public Service Staff Relations Act. The grievor, Mr. Jashewski, alleges a violation of article 12 of the collective agreement applicable to him by the employer's refusal to grant travel compensation when calling him in to work overtime from the residence which he occupies annually during the months of July and August. He is supported in his reference to adjudication by his bargaining agent, the Canadian Air Traffic Control Association.

2. Mr. Jashewski is employed at Transport Canada, Thunder Bay, Ontario, Air Traffic Services Branch as an Air Traffic Control Supervisor, job classification AI-4. At all times relevant to the instant reference, the grievor's terms and conditions of employment were governed by the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association for the Air Traffic Control Group, Code: 402/82 which agreement expired on December 31, 1982.

3. At the hearing of this reference held on May 4, 1983, the grievor testified on his own behalf and Mr. G.B. Llewellyn testified on behalf of the employer. The following exhibits were filed in support of the grievor's case.

Exhibit 1 - Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association Code 402/82 with expiry date December 31, 1982.

Exhibit 2 - Thunder Bay Supervisors Shift Schedule for July, 1982.

Exhibit 3 - Thunder Bay Supervisors Shift Schedule for August, 1982.

With one minor correction to exhibit 2, exhibits 1 and 2 were received in evidence without objection from counsel for the employer. Counsel

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for the employer, however, objected to the admissibility of exhibit 3 on the grounds that it was irrelevant since it dealt with shift schedules which followed the date of the grievance filed by the grievor. The grievor's representative argued that the grievance related to a violation of a collective agreement which was continuing in nature and that therefore the data respecting the August schedules should be admissible. I admitted exhibit 3, informed each of the parties representatives that they could elaborate on their views respecting the admissibility of the exhibit during their argument, and stated finally that should it be necessary to do so I would make a final ruling on the admissibility of the exhibit in my written decision.

4. For reasons which will become obvious later in this decision it is advisable at this point to reproduce the grievance presented by Mr. Jashewski together with the corrective action he has requested as well as the final level reply signed by the employer's authorized representative, the Deputy Administrator, Canadian Air Traffic Transportation Administration, for the Deputy Minister. The grievance dated July 27, 1982, reads as follows:

> For the past 10 (ten) years my prime residence, for the months of July and August, has been located 32 miles from my work place. There is no public transportation to this location.
>
> In contravention of ARTICLE 12 of the Collective Agreement between Treasury Board and The Canadian Air Traffic Control Association, I have been refused travel compensation when Called-In to work overtime from this residence. See attached Round Trip Memorandum dated 10/07/82.

By way of corrective action the grievor requested as follows:

> A) Travel compensation, at the appropriate rate, for Call-In overtime shifts worked on July 3, 4, 6, 10, 19, and 21, 1982.
>
> B) Subsequent compensation at the appropriate for travel to work Call-In overtime from my residence, located 32 miles from my work place, during the months of July and August.

It is to be noted that the claim made by the grievor with respect to July 6 was withdrawn at the hearing.

5. The final level reply to the grievance reads as follows:

> Your grievance of July 27, 1982 has been carefully reviewed and discussed with a representative of your Association.
>
> Mileage entitlements for situations involving authorized overtime are governed by Section .7.1.1 of the Travel Directive. On the days you were scheduled to work overtime you were not precluded from using your regular means of transportation and for this reason your grievance is denied.

6. Having regard to the reply from the employer at the final level of the grievance procedure, at the commencement of the hearing I asked counsel for the employer if he would be providing a copy of the travel directive referred to and whether he would provide evidence indicating that the travel directive had been agreed to by the parties. Mr. Kremer, on behalf of the employer, informed this adjudicator that he would not base his case on the travel directive but simply on the language of the collective agreement.

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7. Mr. Willis, on behalf of the grievor, and with the consent of counsel for the employer filed exhibit 1 and reaffirmed that the grievor's claim was made under article 12 of the collective agreement which reads as follows:

ARTICLE 12

CALL-IN

12.01 When an employee is called in to work overtime that is not contiguous to his scheduled shift, he is entitled to the greater of:

(a) compensation at the applicable overtime rate,

or

(b) compensation equivalent to four (4) hours' pay at his straight-time hourly rate.

12.02 When an employee is called in to work overtime under the conditions described in clause 12.01, and is required to use transportation services other than normal public transportation services, he shall be reimbursed for reasonable expenses incurred as follows:

(a) mileage allowance at the rate normally paid to an employee when authorized by the Employer to use his automobile when the employee travels by means of his own automobile,

or

(b) out-of-pocket expenses for other means of commercial transportation.

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8. The grievor has been an air traffic controller employed with Transport Canada for 27 years. He is now in his 21st year at Thunder Bay and is employed as a supervisor - AI-4. He testified that for all of the dates in July with the exception of July 6 for which he was making no claim, he had been compensated at the appropriate overtime rate for his hours worked. He testified that his residence during the summer months of July and August was Lot 9-M-204-Fowler Township (Dog Lake). The distance from that residence to his workplace is 32 miles. To get to work during the periods for which he is claiming he used his private motor vehicle. After each shift worked he returned to his summer residence. Respecting alternate methods of transportation, he testified there were none. There were no buses or other public transportation and short of the use of his private vehicle a taxi could have been made available. It was established that during months other than July and August he resided at 447 Southern Avenue, Thunder Bay. When asked why he had given that address on his grievance dated July 27, he stated that 447 Southern Avenue was the address at which he received his mail.

9. In answer to questions put to him by counsel for the employer in cross-examination the grievor stated that on June 29 the Chief at the tower at which he was employed became ill. He had a meeting with Mr. G.B. Llewellyn and was advised of Mr. Llewellyn's appointment as Acting Chief of the tower. Asked whether he had revised the July shift schedules on or about the end of June or first of July, he admitted that such was possible but that it could have been later. He said that based on equitable distribution of overtime he had worked on the schedule for July and slotted himself and other supervisors into those shifts which would normally have been covered by Mr. Llewellyn had it not been for his acting appointment. He admitted to having some priority on the equitable distribution list because of the fact that he had been well below other supervisors in hours of overtime worked. Mr. Kremer asked the grievor, based on Mr. Llewellyn's

inability to work his normal shifts, whether all supervisors had been alerted on the need to cover him so that plans could be made as far in advance as possible. The grievor indicated that that was probably so but recalled that it had not been done on a monthly basis. He said he could not be sure with respect to any of the days that he worked how much notice he had been given except for those days he had scheduled himself and which were not changed. He admitted he could not recall getting less than one day's notice on any specific occasion that he had to cover for Mr. Llewellyn.

10. Mr. Llewellyn testified on behalf of the employer. He is now a supervisor, AI-4 at Thunder Bay Terminal Control Unit. During July and August he was in an Acting Unit Chief capacity and had been appointed on June 29. The Unit Chief was on sick leave and he had been appointed by the region for four months to cover the absence. He had originally been scheduled for a number of shifts in July and because of his replacing the Unit Chief, it was necessary that his scheduled shifts be covered by one means or another. Asked what steps were taken in this regard, he stated that through discussions with regional headquarters regarding a replacement for him on these particular shifts two options had been considered. One was his replacement by another employee on an acting basis or secondly the use of available supervisors who could pick up his shifts in addition to their own. The latter option was chosen. Mr. Llewellyn testified that he asked the grievor to fill in the schedules for July on or about the end of June or the first of July. He said he wasn't positive when the schedules as revised were completed but recalled that it was in the same time frame. He admitted that further changes were subsequently made because of a change in policy respecting overtime. He recalled that this change in policy occurred on or about July 7 and that the changes to the schedules would have become effective after that date.

ARGUMENT FOR THE GRIEVOR

11. Mr. Willis noted that the grievor's testimony respecting the overtime he worked and the dates on which he worked such overtime was not disputed. He used his private motor vehicle because it was the cheapest means of transportation available to him. Availing himself of the option to use a taxi would have resulted in an extravagant claim. Mr. Willis argued that article 12 is clearly the operative article with respect to overtime which is not contiguous to an employee's scheduled shift. There is no dispute that the overtime was paid and it is Mr. Willis' contention that it was paid under the provisions of clause 12.01. It follows then that the grievor is entitled to those rights provided by clause 12.02 of the collective agreement. Since paragraph (b) has no application in the circumstances of the grievor's claim he should be paid under clause 12.02(a). The grievor has demonstrated that he incurred those expenses. Contrary to a line of questioning adopted by counsel for the employer, there is nothing in article 12 which makes a period of notice relevant to a claim. Article 12 is clear and its language is unambiguous and mandatory if the circumstances surrounding the employee's claim are substantiated and meet the requirements of the language of clause 12.02. In this case it is clear from the evidence that the grievor is so entitled. Mr. Willis reiterated his argument that because the grievance is of a continuing nature by the continued misapplication of the provisions of clause 12.02 by the employer, he should also be paid for the dates he worked such overtime during the month of August.

ARGUMENT FOR THE EMPLOYER

12. Mr. Kremer, for the employer, argues that the representative for the grievor has oversimplified the claim in a manner that is not justified by the language of the collective agreement. He argues that it is important to look to other provisions of the collective agreement

which will demonstrate that the grievor has no entitlement under article 12 as he has alleged. Article 12 deals with noncontiguous overtime under "call-back". Clause 12.01 has application only if

(1) it is a call-in
(2) it is a call-in to work overtime
(3) the overtime is non-contiguous to the employee's scheduled shift
(4) the overtime shift has not been scheduled.

Therefore two questions must be determined. Firstly, what is overtime and secondly, was the overtime shift scheduled and what do "schedules" mean.

13. Noting that article 15 of the collective agreement deals with overtime Mr. Kremer pointed to the fact that in clause 15.01 the term "in excess or outside of his scheduled hours of work" is used. He compared that to the language of clause 12.01 which refers to a "scheduled shift". Mr. Kremer concluded from this that overtime had a very special meaning and dealt with work performed in excess of an employee's scheduled hours of work. He noted that under article 13 shift cycles were established which included overtime shifts. He drew particular attention to the language of clause 13.03 which reads in part as follows:

> 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....

He also made reference to the following two definitions found at page 2 of the collective agreement:

> (7) "Shift Cycle" means the recurring sequence of an employee's days of work and days of rest.
>
> (8) "Shift Schedule" means the Employer's advance posting of shifts to be worked by employees within their shift cycle.

Contrasting these references to the language of article 12 it is to be noted that the drafters of article 12 did not say "that is not contiguous to his hours of work". Scheduled shift therefore must mean something different to scheduled hours of work. It must be concluded from all of this that the supervisor's shift schedule for July and August included overtime shifts. Overtime refers to hours in excess of the regular hours of work. From all this we can now decide what article 12 means, i.e. employees under that article must be called in for overtime on non-scheduled overtime. In the instant case, based on the evidence, the overtime shifts were scheduled in advance. The grievor therefore does not fall under clause 12.01 or 12.02.

REPLY ARGUMENT FOR THE GRIEVOR

14. According to Mr. Willis, counsel for the employer is trying to whitewash the rights of employees under article 12. Counsel for the employer has referred to clause 13.03 of the collective agreement. That clause requires the posting of shift cycles fifteen calendar days in advance. It is clear from the evidence that the employer did not (got) that route. If one reads the whole of article 13 it appears clear that clause 13.03 refers to the regular shifts of employees, i.e., within their normal hours of work. The employer agrees that the grievor worked the overtime. The language of article 12 is clear and

unambiguous and fits his situation and the employee should be reimbursed accordingly.

REASONS FOR DECISION

15. While the grievor has made reference only to article 12 of the collective agreement the employer has argued that article 12 has no application and that one must look to articles 13 and 15 to establish whether the obligations as alleged rest on the employer. It is noteworthy that counsel for the employer has distinguished scheduled hours of work from scheduled shifts. Both are covered by article 13 of the collective agreement which is titled "Hours of Work". Clauses 13.01 to 13.03 read as follows:

> 13.01 Non-Operating Employees
>
> (a) Thirty-seven and one-half (37½) hours exclusive of lunch periods shall constitute the normal work week for non-operating employees.
>
> (b) Consistent with the operating requirements of the service, management may authorize each non-operating employee to vary the normal schedule of daily and weekly hours to be worked over each four (4) week period. In doing so, the maximum number of straight-time hours scheduled on any given work day will not exceed eight (8) hours and twenty (20) minutes.
>
> (c) In applying paragraph (b) above, the employee and his supervisor will make every reasonable effort to reach agreement on the appropriate number of days and hours of work and rest.
>
> 13.02 Operating Employees
>
> (a) Thirty-four (34) hours, inclusive of a mandatory fifteen (15) minute period in

which the employee shall prepare himself to assume his duties prior to the commencement of each shift, shall constitute the work week for operating employees; except that when hours of work are scheduled on a rotating or irregular basis, employees will work thirty-four (34) hours per week averaged over a period of time not to exceed seventy (70) days.

(b) Standard Shift Cycle

The parties further agree that it is both appropriate and desirable that in the interests of the employees, shift cycles within which these hours are worked be standardized.

Accordingly, at those air traffic control facilities or portions thereof where through local consultation between management and the Association, a mutually agreed upon shift cycle is now in effect:

(i) such cycle will remain in effect for the term of this agreement unless through local consultation between management and the Association, a different shift cycle is agreed to,

or

(ii) a party who desires a shift cycle change shall notify the other in writing and shall include the reasons for the change. The parties shall consult on any request. A party shall not withhold its consent unreasonably. A party who refuses to consent shall deliver in a timely fashion its reasons in writing for withholding its consent.

(c) It is further agreed that if new air traffic control facilities or portions thereof (except those whose advertised hours of operation are less than fifteen (15) hours per day), come into operation during the

life of this agreement, the shift cycle within which these hours are worked shall be five (5) days on, four (4) days off, five (5) days on, and three (3) days off, unless either party desires a different shift cycle in which case they shall notify the other in writing and shall include the reasons for the different shift cycle. The parties shall consult on any request. A party shall not withhold its consent unreasonably. A party who refuses to consent shall deliver in a timely fashion its reasons in writing for withholding its consent.

(d) Where operational requirements permit, the Employer will provide operating employees with meal and relief breaks.

(e) An employee's days of rest shall be consecutive and not less than two (2).

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. If it is necessary to amend the posted schedule, the Employer will make every reasonable effort to contact the employee affected by the amendment to advise him of the change at the earliest possible opportunity. If the employee has serious objections to the amendment, the Employer shall make every reasonable effort to accommodate the employee provided that it will not result in any additional overtime payments than would have otherwise been the case if the employee had not been so accommodated.

Article 15 referred to by counsel for the employer reads as follows:

OVERTIME

15.01 Time worked by an employee in excess or outside of his scheduled hours of work shall be considered as overtime.

(emphasis added)

15.02

(a) An employee shall be paid for overtime worked by him at one and one-half (1½) times his straight-time hourly rate except that:

(i) if the overtime is worked by the employee on two (2) consecutive and contiguous days of rest, the employee shall be paid at two (2) times his straight-time hourly rate for each hour worked on the second day of rest;

and

(ii) if the overtime is worked by the employee on three (3) or more consecutive and contiguous days of rest, the employee shall be paid at two and one-half (2½) times his straight-time hourly rate for each hour worked on the third and subsequent days of rest.

Second or third and subsequent days of rest means the second or third and subsequent days in an unbroken series of consecutive and contiguous calendar days of rest.

An employee is entitled to overtime compensation for each completed fifteen (15)-minute period of overtime worked by him.

An employee at his request, shall be granted time off in lieu of overtime at the appropriate overtime rate. The employee and his supervisor shall attempt to reach mutual

agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated.

Where an employee requests time off in lieu of overtime, he must indicate this to his supervisor prior to the end of the month in which the overtime occurred.

Where an employee has not utilized accumulated time off in lieu of overtime by the end of the fiscal year, the unused portion will be paid off at the appropriate overtime rate.

(b) Except as provided in 15.02 (a) the Employer will endeavour to make cash payment for overtime in the month following the month in which the overtime was worked.

(c) Where an employee works in excess of the regularly scheduled hours of work on a day that is a holiday, or on his first working day to which the holiday has been moved, he shall be paid at two (2) times his straight-time hourly rate for all hours worked in excess of his regularly scheduled hours.

15.03 The Employer will endeavour to keep overtime work to a miniumum and shall assign overtime equitably among employees who are qualified to perform the work that is required at the location concerned.

15.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

16. Early in argument counsel for the employer contended that clause 12.01 or clause 12.02 only had application based on four prerequisites. The fourth prerequisite he mentioned was that the overtime shift to be worked was not to be scheduled. I can find nothing in the language of 12.01 or 12.02 that would lead me to that conclusion. Certainly the scheduled shift referred to in clause 12.01

was the grievor's regular prescheduled shift and not the one which he was to cover for Mr. Llewellyn. That type of scheduled shift surely was within his scheduled hours of work. Looking next to the language of article 13 dealing with "Hours of Work", I find nothing in the language of that article that would convince me that the overtime performed by the grievor which was not contiguous to his scheduled shift was not also "not contiguous to his scheduled hours of work". If shifts and cycles were not meant to be within the normal hours of work provided for in clause 13.01 and 13.02 then it seems to me they would have been dealt with in some other part of the collective agreement other than the article dealing with "Hours of Work".

17. Looking to the wording of clause 15.01 it is found that "...time worked by an employee in excess or outside of his scheduled hours of work shall be considered as overtime." It is clear from the language of article 13 that the "scheduled hours of work" referred to above are those defined in clauses 13.01 and 13.02. Shift cycles are defined within those scheduled hours of work. Article 15 goes on to deal with the conditions under which and the mechanics by which employees will be paid overtime.

18. Looking again to the evidence and in particular to that of Mr. Llewellyn, the employer had two options with regard to the coverage of Mr. Llewellyn's shifts necessitated by his promotion to Acting Unit Chief. The employer chose to cover it by overtime. Indeed the testimony of the grievor, uncontradicted by the employer, is that he was paid the overtime in question. The question is: was the overtime worked that type of overtime contemplated by clause 12.01 of the collective agreement? The grievor was called in to work overtime which was not contiguous to his scheduled shift. Looking to clause 15.01 the time worked by the grievor was outside of his scheduled hours of work and was therefore considered as overtime. This latter fact

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must be true since the employer admits, or did not deny that he had paid him at the overtime rate. It seems clear to me from the language of the collective agreement that, failing any other precondition or restriction, where the overtime worked is outside of the employees scheduled hours of work and qualifies as not being contiguous to his scheduled shift one would look to 12.01 for the entitlements of the grievor. It follows that he was paid "compensation at the applicable overtime rate" in accordance with clause 12.01 (a) of the collective agreement. Looking finally to the language of clause 12.02 it states that when an employee is called in to work overtime under the conditions described in clause 12.01, (and I have found that he was) and is required to use transportation services other than normal public transportation services (and the evidence reveals that he was so required), he shall be reimbursed for reasonable expenses incurred as follows:

(a) Mileage allowance at the rate normally paid to an employee when authorized by the employer to use his automobile when the employee travels by means of his own automobile, or

(b) out of pocket expenses for other means of commercial transportation.

The grievor did not use other means of commercial transportation as provided for in (b) so it follows, failing any other precondition or restriction, that the grievor would be entitled to reimbursement under clause 12.02(a) of the collective agreement.

18. It is to be noted from earlier paragraphs in this decision that the employer at the final level of the grievance procedure stated that employee entitlements under the circumstances experienced by the grievor were covered by certain provisions of the "travel directive". Counsel for the employer stated that he did not intend to rely on the

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provisions of the travel directive and would rely solely on the language of the collective agreement. I do not have the travel directive before me in evidence and it cannot be used in any way to assist me in the interpretation of the collective agreement or in deciding the entitlements of the grievor. Based on the evidence and argument before me it is therefore my conclusion that the grievor has met the preconditions to his entitlement under article 12 of the collective agreement.

19. In his grievance dated July 27, 1982, the grievor indicated certain dates on which he had worked "Call-Ins". He made claim for reimbursement under clause 12.02 for each of those dates and for any subsequent dates he may be required to work such overtime during the balance of July and the month of August. I agree with the grievor's representative that his grievance related to an ongoing or recurring misapplication of the provisions of the collective agreement and specifically to the employer's denial of the grievor's rights under clause 12.02 (a) of the agreement. For that reason I find that exhibit 3 is admissible in evidence in this proceeding. Having given the opportunity to counsel for the employer to dispute the dates claimed by the grievor for full shifts worked during the month of August on behalf of Mr. Llewellyn, and having heard no evidence to the contrary, I accept that the grievor worked those shifts indicated on exhibit 3 as overtime described in article 12 of the collective agreement.

20. In summary, I have found that the grievor is entitled to be reimbursed under clause 12.02(a) for reasonable expenses incurred on each of the dates during the months of July and August, 1982, that he worked overtime to cover the shifts which would normally have been

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worked by Mr. Llewellyn. I will remain seized of this decision should any dispute arise regarding the dates on which the grievor worked overtime to cover the shifts left unmanned by Mr. Llewellyn's acting promotion.

For the Board,

J.C. Mayes,
Board Member and
Adjudicator.

OTTAWA, June 24, 1983.