File: 166-2-14387 No. 52

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

RONALD N. CHASE,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: Thomas W. Brown, Board Member

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

For the Employer: Craig Henderson, Counsel

Heard at Thunder Bay, March 27, 1984.

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CHANGE IN UNIT SHIFT CYCLE

DECISION

The grievance forming the basis of the instant reference to adjudication is in respect of an alleged violation by the employer of clause 13.02(b)(ii) of the collective agreement between the Treasury Board, as employer, and the Canadian Air Traffic Control Association. (Code 402/82). Clause 13.02(b) reads in its entirety as follows:

> (b) Standard Shift Cycle
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> 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:
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> (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,
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> or
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> (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

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> consent unreasonably. A
> party who refuses to consent
> shall deliver in a timely
> fashion its reasons in
> writing for withholding its
> consent.

The grievance, which is signed by the grievor alone, states that the grievor and "81.48% of the membership", that is, 81.48% of the employees in the bargaining unit in the Thunder Bay Tower (Thunder Bay, Ontario) including the grievor, desired a change in shift cycles, but were refused by the employer. The corrective action requested is that "According to article 13 of the collective agreement 402/82, I request that the work cycle at Thunder Bay be changed to 5-4, 5-4, 5-4, 6-3". The other persons on behalf of whom the grievor purports to grieve are not named nor does their consent to be included in the grievance appear anywhere. It would seem to follow, therefore, that the grievance cannot succeed except in respect of the grievor himself, particularly in light of a number of decisions previously rendered by adjudicators.

There was agreement between the parties that there had been a request submitted at the local level for a change in shift cycles and that local consultation had ensued on such request. Local management had, however, refused the request for the desired shift cycle changes.

A preliminary objection to my jurisdiction to hear the grievance was raised orally by counsel for the employer at the outset of the hearing. His argument was that the obligation to consult on desired shift cycle changes

imposed by clause 13.02(b)(ii) is an obligation owed solely by one "party" to another "party", namely, the employer to the bargaining agent and vice-versa - it is not owed to an individual employee. The only consultation which took place was local consultation, whereas National Consultation was called for by clause 13.02(b)(ii). It is obvious, in such circumstances, that the matter could only be referred by the Canadian Air Traffic Control Association and this by way of section 98 of the Public Service Staff Relations Act. The grievor's grievance is improperly filed because it is an individual grievance which would, if allowed, alter the terms and conditions of employment of all employees in the Thunder Bay Terminal.

Counsel for the grievor stated that she anticipated the preliminary objection by the employer and understood the grounds full-well: consultation is required between the bargaining agent and the employer before changes to shift cycles can be effected under clause 13.02(b)(ii)and the bargaining agent has not requested national consultation nor has it consulted. The grievance is, therefore, premature. She, however, rejects this submission by the employer. Clause 13.02(b)(ii) requires consultation but it is clear that it is not "National" consultation that is required but the very type of consultation that actually took place at the local level in this case. "Parties" under clause 13.02(b)(ii) can only mean the Local of the Association and local management. This is supported by the wording of article 21 dealing with "Association - Management Consultation", which provides for consultation at different levels, including the local level. The

.../4

shift cycles are set up through local consultation and changes are made following local consultation. Accordingly, the objection by the employer must fail.

A second branch of her argument was that having to do with the employer's position that section 98 was the appropriate section of the Act to make a reference under clause 13.02(b)(ii) and not section 91. She expressed surprise that the employer would advance the decision in Bernier (166-2-13603) in support of its position when, in that decision, dealing with similar facts, the adjudicator found that the grievance under section 91 was properly before him, and his decision was supported by the decision of the Associate Chief Justice of the Federal Court of Canada, Trial Division (Court No. T-2427-83, unreported) in which he dismissed an application for a writ of prohibition. At page 6 of the Court decision, it was held that changes in hours of work or changes in the length of shifts appear fundamentally to be questions of the interpretation or application of a collective agreement "in respect of the employee". Here, the grievor, Mr. Chase, is an employee affected by the employer's refusal to change the shift cycle. He has filed an individual grievance under section 91 which, if allowed, it was admitted, will affect more than himself alone.

All parties agreed that I should hear the evidence on the merits, under reserve of the objection made, so that it would be unnecessary to arrange for a further hearing in the event that the objection was later dismissed by me.

The merits of this grievance were then fully explored in evidence and in argument.

.../5

REASONS FOR THE DECISION

Having considered the employer's preliminary objection to my jurisdiction, I find first that, with regard to the level at which consultation should take place, the opening words of 13.02(b), which provide for the standardization of shift cycles "in the interests of the employees" reveal that the local and not the national interests are involved. In the circumstances, one would look for words which would reflect this "local" interest and, I believe, they are found explicitly in 13.02(b)(i) where "local consultation" is provided for between "management" and the "Association". The words "management" and "Association" are best understood in context of article 21 and can only mean, in the present case, the local management and the Association Local Unit. This would be otherwise, were the word "Employer" used together with the word "Association", for then there would be clear indication that "Association" was to be given its strict meaning, just as the word "Employer" has been strictly defined under the "Definitions" section of the collective agreement. This finding is supported by the fact that local conditions will no doubt govern a decision to agree or not to agree to a shift cycle change - otherwise there would likely be standardization of shift cycles across the system and a provision for changes based on local consultation would be rendered meaningless, as would the provision that consent to such changes would not be withheld "unreasonably". I find, therefore, that the consultation contemplated by clause 13.02(b)(ii) is consultation at the local level between local management and the Association Local Unit. I find also that nothing hinges on the

conjunction "or" found between clauses 13.02(b)(i) and 13.02(b)(ii), as regards the matters before me.

We are left then with the question of whether, when local management refused to consent to the requested shift cycle change, it did so "unreasonably". However, the issue has arisen as to whether the grievor has the right to bring his grievance under the provisions of the Public Service Staff Relations Act.

In International Brotherhood of Electrical Workers Local 2228 and the Treasury Board (169-2-11), Edward B. Jolliffe, the Chief Adjudicator as he then was, stated at page 16:

> "A collective agreement ordinarily includes provisions with respect to rights and obligations of several different kinds. The Employer has certain rights and obligations with respect to employees. Employees have certain rights and obligations with respect to the Employer. The Employer also has certain rights and obligations with respect to the Bargaining Agent. And the Bargaining Agent has rights and obligations with respect to the Employer. These categories are distinct, they were created for distinct reasons and there are distinct methods of enforcement. It is important to avoid confusion as between them.
>
> The obligation to "consult" the Bargaining Agent is one often assumed by an employer in concluding

.../7

> a collective agreement, as it was in this case. If the Employer is unwilling to meet such an obligation, it should not agree in writing to do that which it will not do. A covenant or obligation in an agreement should be fully respected by all parties; surely nothing could be more obvious. It does not follow, however, that the breach of an obligation as between the Employer and the Bargaining Agent must result in "consequential relief" to employees..."

In Canadian Union of Postal Workers and Jacques Turmel (166-2-3104), Adjudicator Jolliffe stated, at page 12, that in the case before him "a large part of the confusion stems no doubt from the fact that articles 11 and 13 of the agreement contain joint obligations in the sense that they concern rights belonging to employees, to the union, or to both. In the circumstances, it is inevitable that cases will arise in which there is some ambiguity as to the identity of the party who is entitled to benefit from the obligation that a party is seeking to have enforced."

Part IV of the Public Service Staff Relations Act contains the basic provisions concerning grievance adjudication; subsections 91(1) and 98(1) read as follows:

> 91. (1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
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> (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

.../8

(b) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

Enforcement of Obligations of Employer and Employee Organizations

98. (1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award, and

(a) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and

(b) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies,

either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board, which shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.
(emphasis added)

In _Canadian Union of Postal Workers and Jacques Turmel vs. Treasury Board_ (supra), it was held, at page 10, in reference to sections 91 and 98 of the _Act_, that:

> The simple juxtaposition of these two sections shows clearly the fundamental difference between the two remedies, the first being individual in nature and the second, collective in nature. As counsel for the employer indicated, the Act uses the word "employee" in sections 90 and 91. Conversely, in section 98, the words, "employee organization" or "bargaining agent" are used. Moreover, these two remedies are mutually exclusive. In fact, one of the prior conditions for a reference under section 98 is that enforcement of the obligation cannot be the subject of a grievance under section 91. Conversely, recourse under section 91 is available to an employee only if the interpretation or application in _respect of him_ of a provision of a collective agreement are involved.

In _Michel Smith_ (166-2-847), Adjudicator Meyer rejected a reference to adjudication, under section 91, of a grievance alleging a violation of clause 40.01 of the collective agreement under review, which provided that the parties to the agreement shall conduct meaningful consultation about any changes planned in conditions of employment or in working conditions not covered by the collective agreement. He did so on the basis that, in keeping with existing jurisprudence, the obligation to

consult was an obligation as between the parties to the agreement and the failure to consult did not involve a violation of the agreement <u>in respect of the grievor</u>. At page 19 he states:

> "I have already dealt with a very similar situation in the case of <u>Morabito</u> (166-2-771). It is true that in <u>Morabito</u> the facts were somewhat different, and there was no direct change in the grievor's working conditions in that instance. In the present case it is obvious that some changes were implemented which may have affected the grievor in some direct way, although I will not deal with the merits of the case until later. However, even assuming that there has been a violation which directly affects the grievor, and that as provided in clause 40.01, this involves a change in the grievor's conditions of employment, I still find it difficult to accept the grievor's argument. The obligation to consult, as I have already pointed out in the <u>Morabito</u> decision, is one which clause 40.01 of the agreement imposes on the parties to the agreement, these parties being the employer and the bargaining agent. The employer is the Treasury Board, and the bargaining agent is the Council of Postal Unions. It seems to me that if there is a failure to engage in meaningful consultation, it is the party which failed to engage in such consultation that is in violation of the agreement, and it is the other party who was not given the opportunity

to conduct meaningful consultation which has the right to complain. Such a collective complaint by the bargaining agent itself must be made under the provisions of section 98 of the Act by a reference to the Chief Adjudicator and not by way of an individual grievance referred to adjudication under section 91 of the Act. Thus, although on the facts the grievor's position may be somewhat different and perhaps stronger than was the case in Morabito, I nevertheless cannot find that the grievor has any interest or status to refer to adjudication a grievance arising from a violation of clause 40.01. Although a change in working conditions may affect the grievor very seriously, the grievance itself does not concern the interpretation or application in respect of the grievor of clause 40.01. According to section 91(1)(a) the grievance must concern the interpretation or application in respect of the grievor of the relevant provision of the collective agreement, and it seems to me that all violations of clause 40.01 of the collective agreement are violations, if it is the employer who has not consulted, in respect of the bargaining agent. The net effect of such a violation may be quite drastic as far as individual employees are concerned, but it cannot be said that the grievance concerns the interpretation or application in respect of an individual employee of a provision of the collective agreement which does not say anything about

.../12

> individual employees but requires the employer to consult with the bargaining agent only. Thus, even if the grievor were clearly distinguishable from all the other members of his working group in so far as the direct effects of the change in working conditions are concerned, I would still have to arrive at the same conclusion.
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> I agree with the view expressed _dubitante_ by the Board in the _Mathematics_ case, _supra_*, that the proper remedy for a violation of clause 40.01 of the agreement would probably be under section 98 of the Public Service Staff Relations Act, under which the bargaining agent itself may proceed to the enforcement of an obligation that is alleged to arise out of the collective agreement by referring the matter to the Chief Adjudicator."
>
> *(148-2-11)

The grievor relied on the decision of Vice-Chairman J.-Maurice Cantin in _J. Bernier et al_ (supra), which was supported by a decision of the Federal Court of Canada, Trial Division, for his contention that the grievance in the instant case was properly referred under section 91. In that case, the grievors objected specifically to "the implementation of nine-hour shifts effective April 1, 1982, in violation of article 22.05(b) of the said agreement". Clause 22.05(b) contained a requirement to consult prior to making changes, which constituted an obligation towards the bargaining agent. According to the grievor, that

clause also contained provisions dealing with individual rights of employees. The Adjudicator found that the question of consultation was not in play and, in addition, there was no evidence that consultation had or had not taken place. What was evident, though, in his opinion, was that the changing of shift schedules was a term or condition of employment which affected the grievor personally and could be the subject matter of a grievance referrable under section 91 of the Act as being "in respect of him". He disagreed with the position taken by counsel for the employer that the obligation set forth in article 22.05(b) of the agreement in question is an obligation to the union only, and not to its members. He stated at page 8 that "the questions of what obligations arise from article 22.05, who is the beneficiary of these obligations and whether these obligations have been met will be decided when the case is heard on its merits".

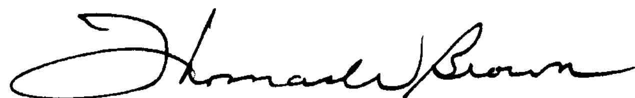
The decision in Bernier is clearly distinguishable from the instant case in that in Bernier there was not a grievance under section 91 against a failure to meet an obligation which existed between the bargaining agent and the employer. In Bernier, there was a grievance in respect of the grievors which was clearly referrable under section 91.

In the instant case, the grievor desired a change in shift cycles. "Shift cycles" are obviously a term and condition of employment applying to the grievor personally and any misinterpretation or misapplication of shift schedules affecting the grievor could properly be the subject of a grievance referred to adjudication under section 91 of

the Act in that they are "in respect of him". However, clause 13.02(b)(ii) provides for the possibility of changing shift cycles but only if, in local consultation, one "party", as earlier identified in this decision, requests the other "party" in writing to change the shift cycle and the latter agrees to the change. It is very apparent that the right to request or agree to any desired change does not reside in an individual employee but resides with the "party". It follows naturally that, if one "party" withholds its consent "unreasonably", the other "party" and only the other "party" may formally complain by filing a reference to adjudication and this by way of a reference under section 98 of the Act. In such a situation, the alleged violation of clause 13.02(b)(ii), if it is the employer who has withheld its consent to a change in shift cycles, is a failure to meet an obligation in respect of the bargaining agent.

It is unnecessary for me, in the circumstances, to reach any conclusions on the merits. The thrust of the grievor's evidence was in the direction of attempting to prove that the employer had "unreasonably" withheld its consent to the requested change in shift cycles.

This grievance is dismissed on the ground that it is not one which can be referred to adjudication under section 91 of the Public Service Staff Relations Act.



Thomas W. Brown,
Board Member.

OTTAWA, April 18, 1984.