JUN - 6 1984

File: 166-2-14506

No. 90

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

BETWEEN:

JOHN DOUGLAS SCHILDWACHTER

grievor,

AND:

TREASURY BOARD
(Transport Canada)

employer.

Before: C. Brian Williams, Board Member.

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

For the Employer: Mr. Luc Leduc, Counsel.

Heard at Edmonton, February 24, 1984.

ART 13
CODE 402/82
CHANGE IN UNIT
SHIFT CYCLE

DECISION

SUMMARY OF PROCEEDINGS

The originating grievance in this matter is dated March 15, 1983. It reads in part as follows.

With respect to details:

> The staff of Whitehorse Control Tower has presented to the Unit Chief a comprehensive proposal for changing the present standard shift cycle of 5/4, 5/3 to a shift cycle of 5/4-5/4-5/4-6/3. The request was denied. Article 13 provides for changes in shift cycles. There have been no reasons given for denial of the proposed change and I submit that in accordance with Article 13 that management has withheld consent for change unreasonably.

With respect to the corrective action requested:

> I request that the staff proposal for a 5/4, 5/4, 5/4, 6/3 shift cycle be implemented in Whitehorse Control Tower.

Although the details cited above refer to article 13 of the collective agreement, I am satisfied from the representations of counsel that the article complained of is in fact article 13.02(b). Article 13.02(b) of a "Collective agreement between the Treasury Board and the Canadian Air Traffic Control Association" January 1, 1981 - December 31, 1982 (Code: 402/82) reads as follows:

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(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.

A hearing into the matter was convened at 9:30 a.m. on Friday, February 24, 1984. Counsel agreed that this adjudicator was in all respects properly appointed. With respect to my authority and

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jurisdiction, counsel for the employer entered a preliminary objection. It reads as follows:

> Please be advised that the Employer will be raising a preliminary objection to the Board's jurisdiction to hear the matter in the above mentioned case.
>
> The grievor has submitted to adjudication a grievance under Section 91 of the Public Service Staff Relations Act and it will be submitted that the subject of the grievance should have been made by reference under Section 98 of the Public Service Staff Relations Act. The particular article being grieved is Section 13.02(b) of the Air Traffic Controller's collective agreement which reads:
>
> "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 consultations between management and the Association, a mutually agreed upon shift cycle is now in effect:
>
> (i) Such cycle will remain in effect for the terms of this agreement unless through local consultation between management and the Association, a different shift cycle is agreed to,

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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 with reasons in writing for withholding its consent.

It is submitted that the obligation contained in that particular Section is an obligation owed either to the Employer or the Bargaining Agent and not to the employees themselves.

Upon receiving full evidence and argument from counsel on this objection, I reserved my decision and directed that the reference be heard on its substantive merits.

DECISION ON JURISDICTION

1. Before I turn to the objection noted above, I will briefly respond to Mr. Leduc's claims that (a) this matter is not properly before me as subsection 95(1) of the Act was not complied with and that (b) the employer's reply at level 3 of the grievance procedure should constitute part of the record. With respect to the former claim, and having regard to the Act, its regulations, the evidence before me, and the argument of counsel I am quite satisfied that this reference to adjudication meets the procedural requirements of subsection 95(1) of the Act. With respect to the latter claim, it is my view that as the grievance procedure is accommodative in nature while adjudication is not, it is not proper that positions set out in an attempt to resolve

a difference through an accommodative process should of necessity constitute part of the record at adjudication or be relied upon in an adjudicative determination. In general, such positions are not admissible. Re: City of Calgary, (1979) 22 L.A.C. (2d) 434 (Mason, Alberta). Arbitrator Mason stated it thus: "Our opinion is that the overriding purpose of the grievance procedure is one of settlement and that this Board should not breach the confidence of any of the discussions or communications between the parties during the grievance procedure." In addition, in this case the reference to adjudication is dated November 23, 1983. The employer's final response was given on December 2, 1983. The November 23 reference was quite proper. The employer's final response was simply not timely. For both reasons, I am not prepared to rely upon positions advanced in the grievance procedure to support determinations and conclusions reached at adjudication.

2. I turn now to the preliminary objection set out above. Mr. Leduc called no evidence. Ms. MacLean called grievor J. Douglas Schildwachter. For the past seven years the grievor has been employed as a controller at the Whitehorse Tower. During the course of this time he and his colleagues have been working a shift cycle identified as 5/4, 5/3. Controller Guy Papineau transferred to the Whitehorse Tower from Springbank. While at Springbank he had worked a shift cycle identified as 5/4, 5/4, 5/4, 6/3. After arriving at the Whitehorse Tower he proposed to his colleagues that they move to this cycle. This proposal was discussed informally among the controllers at the tower. The grievor is a union steward at the Whitehorse Tower. It was agreed that the Papineau proposal would be prepared and go forward. Subsequently, on January 28,1983 and following preparation by Papineau a written proposed change in shift cycle was

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filed with the Unit Chief Max Lamoureux (Exhibits #U-2 and #U-3). This proposal was signed and endorsed by all nine controllers working at the Whitehorse Tower. It reads as follows:

> New Shift Cycle 5-4, 5-4, 5-4, 6-3.
>
> We are requesting a new shift cycle of 5 days on - 4 days off, 5 days on - 4 days off, 5 days on - 4 days off, 6 days on - 3 days off.
>
> Each shift would be 8 and 1/4 hrs so as to meet contract requirements.
>
> Any hours owed the employer would be re-imbursed through staff meetings, refresher courses in-house or otherwise, or working 4 minutes extra per shift. This shift cycle is requested so as to make available more 4 continuous days off per cycle leaving only 10 - 3 continuous days off cycles rather than 21 - 3 continuous days off cycles.
>
> Should for any reason, hours be owed the employer at the end of the fiscal year, annual leave or lieu days shall be used to re-imburse the employer.
>
> This shift cycle, at this particular unit, being isolated, would benefit everyone to have 4 continuous days off available almost all the time for travelling to and from Whitehorse. This shift has been implemented in YQU, YXJ, YMM, YBW, YEG centre, YYC terminal, ZVL, which indicates its benefits at improving unit morale and operational efficiency to a level where a return to the standard 5-4, 5-3 cycle has not been re-introduced.

Additional documents were prepared by Papineau and filed with the proposal reproduced above. They compared the effects of the present

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and proposed schedules (Exhibits #U-4 and #U-5) and set out the proposed shift schedule for each of the nine controllers at the unit (Exhibit #U-6). On February 1, 1983 Unit Chief Lamoureux responded to the proposal. It reads in part as follows:

> Proposed Shift Sched:
>
> Attached find your proposal which I return for possible future resubmission.
>
> I checked with Region before looking it over to see if there had been any change in policy re shift scheds - there has not. Region advises me that no changes to the 5-3/5-4 are to be entertained at the present time.

This response was addressed to the nine controllers in the unit and reviewed by each. On March 6, 1983 Schildwachter wrote to Unit Chief Lamoureux requesting further consideration of the proposal. His request and response of Unit Chief Lamoureux reads in part as follows: (Exhibit #U-8).

> We would like G.P.'s shift cycle presentation reconsidered. Was there any discusion (sic) of a change in our shift cycle at the unit chiefs meeting? Is region's stand still the same as when we first made our application? I would appreciate a timely reply.
>
> . . . . . .
>
> There was no discussion as to shift schedules at the U/C Conference.
>
> I telephoned WATO this date and queried him on your request - the answer is unchanged. The triple 5-4, 63 is not to be considered at this time.

Upon receipt of the above response, and as agreed in a meeting of controllers with CATCA Western Regional Director Richard T. Smith in which the proposal and the employer's response were considered, the decision was taken to file a grievance through union steward Schildwachter.

Mr. Leduc argued as follows:

a) A review of the originating grievance establishes that a) the grievor is an employee and b) the grievance is endorsed by the association by the hand of the grievor in his capacity as a union steward.

b) The grievance alleges that the shift cycle proposal was unreasonably refused by the employer. The grievor alleges a breach of article 13.02(b)(ii) of the collective agreement.

c) As this matter is a grievance of an individual employee, the remedy requested can only apply to the grievor.

d) Section 98 of the Act reads as follows:

> 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.

Section 98 refers to "obligations" arising under a collective agreement.

e) Section 90 of the Act sets out the employee's right to present a grievance. It reads as follows:

> 90. (1) Where any employee feels himself to be aggrieved
>
> (a) by the interpretation or application in respect of him of
> (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
> (ii) a provision of a collective agreement or an arbitral award; or
> (b) as a result of any occurrence or matter affecting his terms and conditions of employment, other than a provision described in subparagraph (a)(i) or (ii).

> in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, he is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

f) Section 91 of the Act deals with an employee's right to refer a grievance to adjudication. It reads 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
>
> (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> (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.

g) Sections 90 and 91 make it clear that it is an employee who feels aggrieved and who has the right to formulate a grievance and refer it to adjudication.

h) We submit that the obligation set out in article 13.02 (b)(ii) is to the association and not to an employee. The article reads: "A party shall not withhold its consent unreasonably." As such, the complaint of unreasonably withholding consent cannot be a grievance

of an individual employee as the obligation flows from the employer to the association and not to an individual employee. The reference to adjudication was made by an employee under section 91. It should have been made by the association under section 98. As such, you are without jurisdiction to decide the reference. In support of this view, counsel reviewed at length the decision of Vice Chairman Cantin dated June 9, 1983 in the case of Bernier et al (Board file 166-2-13603), particularly the conclusions stated at page 8. The decision concluded that the employees could file a grievance on changed hours of work. However, when you get down to the grounds for the grievance, if they pertain to obligations between the employer and the bargaining agent then the obligation cannot be carried in an individual grievance reference. It is these principles that should apply in this case. In a subsequent review of the Bernier et al decision, the Federal Court upheld the principle set out therein: Court file no. T-2427-83.

i) We agree that the grievor, as an individual employee, can use section 91 of the Act to file a grievance on article 13.02(b)(ii). However, having done so we have to look closely at the nature of the obligations set out in article 13.02(b)(ii) in order to determine if there is an obligation that flows to the employee. In this case the claim is that the employer unreasonably withheld consent. The question is: What kind of obligation is this and to whom is it owed? Is it

something that affected the individual employee? The answer determines whether it is a section 91 or a section 98 reference. We say that the obligation is owed to the bargaining agent or its representative and not to any individual employee. As such the matter should have proceeded pursuant to section 98. Your jurisdiction is under section 91 only. You are without jurisdiction in this reference.

Ms. MacLean argued as follows:

a) The Bernier et al (supra) decision is relevant to this reference but for quite different reasons than advanced by Mr. Leduc. This decision says that the employee can grieve. The only difference is that in the Bernier et al (supra) decision the employer unilaterally introduced a change, while in this case the employer has refused to consent to a change. In both cases it was the employee's hours of work that were affected by the change. The question is: Did the employer refuse its consent unreasonably? If it did, it directly affects the work schedule of each and every employee in the unit.

b) Article 13.02(b)(ii) could in part be a section 98 reference and in part a section 91 reference. For example, it provides for consultation between the parties. The consultation requirement can only be enforced by the bargaining agent and the employer and not by an individual employee. A complaint with respect to this matter would constitute a section 98 reference. The failure

to provide reasons in writing would also be a section 98 matter. In both cases these obligations are not substantive rights that affect employees.

c) The argument advanced by Mr. Leduc was the same argument he advanced in the Bernier et al (supra) decision and it was rejected by the adjudicator and the Federal Court. At page 8 adjudicator Cantin addresses the argument directly and states his disagreement with it. He states: "...if the article has not been applied, each employee can ask that it be applied." Just as in this case, the reason is we have a shift cycle provision that affects employees. It is our view that this objection falls on all fours within the scope of the Bernier et al (supra) decision.

d) The Federal Court review of Bernier et al (supra) states clearly that the changing of the hours of work in the light of article 22.05 raises a fundamental question of its interpretation with respect to its impact on the individual employee. As such, it falls within a section 91 reference to adjudication.

e) Contrary to Mr. Leduc's argument, we are not seeking a remedy for the grievor only. The collective agreement does not contemplate individual shift cycles. We are asking for a declaration that the employer has unreasonably withheld its consent and an order directing that the proposed schedule be implemented for all nine employees in the unit.

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DECISION ON PRELIMINARY OBJECTION

1. I have reviewed at length the argument advanced by Mr. Leduc. As a result, I characterize the argument of Mr. Leduc as follows:

a) The reference placed before me is pursuant to section 91 of the Act. The reference was made by an individual who also happens to be the union steward in the unit.

b) The reference alleges that the employer failed in its responsibility to "...not withhold its consent unreasonably." This obligation is held by the employer to the bargaining agent. As such, the allegation is not one that falls within the meaning of a grievance as defined within sections 90 and 91 of the Act. i.e., the allegation does not embrace a matter "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement...." (Emphasis added)

c) As such, since the allegation does not fall within the scope of a section 91 reference, it properly falls within a section 98 reference.

d) Since shift cycles are not established on an individual basis and apply equally to all members of the unit, and since the reference is by an individual employee only, the only remedy available is to grievor Schildwachter which, if granted, would offend the principle of uniform

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application of a unit shift cycle.

2. While the foregoing is characterized as a "preliminary objection to the Board's jurisdiction" it is my view that it is not a challenge to my fundamental jurisdiction on a section 91 reference, but a challenge to the arbitrability of the allegations set forth in the originating grievance and referred to me under section 91 of the Act. The evidence clearly supports a finding that this matter at all times proceeded as a section 91 reference. It is my view that the true thrust of Mr. Leduc's challenge is not that the allegation is referring to an obligation properly within a section 98 reference, but that the allegation is not within the scope of my jurisdiction on a section 91 reference application i.e. that the allegation does not fall within the section 91 meaning of "...(a) the interpretation or application in respect of him of a provision of a collective agreement...." This, in my view, is in reality a fundamental challenge to the arbitrability of the allegation referred to adjudication. The question is: Does the reference fall within the scope of arbitrable matters as defined within section 91? As such, I do not believe that the challenge in any way takes us into the question of the application of section 98 or whether the reference should be taken pursuant to section 98. I do not believe that Mr. Leduc reads section 98 as I would. It is my view that he is over-preoccupied with the use of the term "obligation" in paragraph 98(1)(b). Paragraph 98(1)(b) refers to an obligation which "...is not an obligation the enforcement of which may be the subject of a grievance of an employee...." Thus paragraph 98(1)(b) must be read in conjunction with sections 90 and 91 in order to determine whether the subject matter of grievance falls within the meaning of "...subject of a grievance of an employee...." The grievor and his counsel clearly claim that

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the matter is a section 91 reference. The question left with me to decide is whether it is within a section 91 reference or not. It is my view that I have jurisdiction on matters of grievance that fall within the scope of a section 91 reference. If the matter of grievance, as argued here, does not fall within the scope of a section 91 grievance, I am without jurisdiction as the grievance does not raise an arbitrable matter. It is thus that I characterize the argument of Mr. Leduc.

3. The originating grievance claims that (a) no reasons were given for denial of the proposed change and (b) management has withheld consent for change unreasonably. Article 13.02(b)(ii) reads as follows:

> (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,

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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.

It is my view that while article 13.02(b)(ii) consistently refers to the word "party" it is quite wrong to draw conclusions with respect to who properly has an interest in the interpretation or application of the article without giving consideration to sections 90 and 91 and what they define as a grievable matter. It is my view that the claims set out in the originating grievance fall within the ambit of a grievable matter as they fall within the meaning of a matter "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement." Section 91 does not refer to an "obligation". It refers to "...the interpretation or application in respect of him of a provision of a collective agreement." The scope of an arbitrable matter within paragraph 91(1)(a) does not turn solely on perceived obligations drawn from the words of the collective agreement, such as the word "party," but "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement...." In this case, the matter relates to the withholding of consent unreasonably of a proposed change in shift cycle of the nine member controller staff at the Whitehorse Tower. In my opinion, the administration of this aspect of article 13.02(b)(ii) clearly relates to a fundamental matter of controller employment and as such a

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grievance over the application of this aspect of the article to them falls within an arbitrable matter under paragraph 91(1)(a). I believe this position is quite compatible with the views expressed in Bernier et al (supra) and as reviewed by the Federal Court.

4. For the above reasons I conclude that the matter before me is properly before me as a section 91 reference and I am with authority and jurisdiction to dispose of it. The motion to dismiss for want of jurisdiction is accordingly dismissed.

DECISION ON SUBSTANTIVE MERITS

1. The issue becomes: Did the employer withhold its consent unreasonably? Robert Marchand is the Vice-President, Administration for the Canadian Air Traffic Control Association. He assumed his position on July 1, 1983. He testified with respect to his survey of the shift cycles in effect at various units as of January, 1984. (Exhibit #U-10). He identified the five common shift cycles used at transport facilities. Included in the five examples was the 5/4, 5/4, 5/4, and 6/3 shift cycle system. It operates on a 36 day cycle with 21 working days. Shifts consist of 8.25 hours. Under this shift cycle system 16 hours are owed by the employee to the employer at the end of one year. This shortfall is paid back by way of refresher course training or staff meetings. The cycle has been in effect for some time at Halifax Tower and Halifax Terminal Control Unit. In the case of the latter, it has one nine hour shift. It is not used in Quebec or Ontario. The Winnipeg Air Traffic Control Centre uses it with 8 hour and 30 minute shifts resulting in no time being owed by the employee to the employer. It is also used at the Calgary Terminal Control Unit, the Villeneuve Tower, Edmonton Air Traffic Control

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in the Western Region. He was quite aware of the Whitehorse proposals. He stated that regional policy prior to 1983 was that shift cycles, when the results did not meet the collective agreement, would not be approved by him. If a Unit Chief elected to approve a proposal he was responsible for accounting for any time owed the employer. He knew the policy was a liberal interpretation of the collective agreement. Also at that time, they had a way to recover the time owed to the employer through refresher courses and staff meetings. This system and these alternatives subsequently changed. He says that the examples of the proposed shift cycle were all implemented prior to this time and the subsequent changes in policy. Since that time, the employer is no longer prepared to pay overtime for staff meeting attendance and a general tightening of the budget has restricted other alternatives. He pointed out that they were under pressure to manage more efficiently. The current policy is that the method for recovering the time owed by the employee to the employer is simply not acceptable for audit purposes. At the time of the proposal raised in this case, he was not happy with the recovery of time systems in place and the hidden cost associated with various types of shift cycles. As a result, the policy was simply that no shift change should be entertained if its result is less than the agreed upon hours of work set out in the collective agreement. The policy is simply "status quo" on shift cycle changes. Unit Chief Lamoureux was quite right in his position that there should be no change in shift cycles without first checking with Administrator Hoover. He stated that if a Unit Chief changed a shift cycle without checking with him he would be quite upset. In this case, he believes the extra time needed on each shift is seven minutes and not the four minutes suggested by others. It is time that would be completely wasted and he sees no way in which it could be recovered. The shortfall of

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16 hours per year is simply too great in this proposal.

4. On behalf of the grievor, Ms. MacLean argued as follows:

a) The issue is whether the employer denied the request unreasonably. A leading authority on what tests should be applied in a case like this is set out in the decision of the adjudicator dated March 3, 1975 in Benson et al (Board files 166-2-1557 to 1565) at page 25. It reads as follows:

> ...I am of the view that the employer is bound, if he is to act reasonably within the provisions of Article 23.05, to make a serious and diligent inquiry as to the facts alleged in each case before rendering a decision thereon and that failure to do so may in itself be sufficient to establish unreasonableness on the part of the employer in the making of his decision. In short I am of the view that the manner in which the decision is made, as well as the basis for it, may be sufficient to establish that special leave was unreasonably withheld.

b) The employer does not meet the tests with respect to the shift cycle proposal. It was reviewed in a very cursory manner and without proper concern for the isolation factor at the Whitehorse Tower. Management did not review it thoroughly and completely. It was not given the attention that it deserved.

c) The basis used for the decision is quite unacceptable. They did not use objective criteria. They ignored the

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fact that the system is in effect in five units within the Western Region. The proposal could meet the agreement simply by adding a few minutes to each shift.

d) The employer is confusing shift cycles with shift schedules. The cycle proposal simply requires a small alteration to the shift hours or the addition of extra shifts or the use of refresher courses. In the light of what is needed to make it work, it is unreasonable for the employer not to grant the request.

e) The hidden costs, if any, are simply not known. We do not believe there would be any hidden costs associated with this proposal.

5. On behalf of the employer, Mr. Leduc argued as follows:

a) The employer's conduct should be judged against the requirements that it proceed in a diligent manner, that it consider all the facts before it, and has a firm basis for its refusal. We submit that the employer has proceeded properly and rests its refusal on a firm and proper basis.

b) The resulting 16 hours per year shortfall in this proposal is simply not compatible with the collective agreement. The procedures proposed to account for it are not acceptable as they serve no useful purpose and are difficult to administer.

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c) The employer did give every consideration to this proposal. It did not act unreasonably in refusing its consent.

6. It seems to me that counsel quite properly have set out the considerations against which the employer's action should be judged. The case of Benson et al (supra) is particularly helpful in this regard. The tests are (a) a serious and diligent inquiry as to the facts alleged...before rendering a decision and (b) a sound basis for the refusal. E.E. Palmer in Collective Agreement Arbitration in Canada (2nd) when addressing employer reasonableness albeit in a different but still relevant context, expressed it thus at page 535:

> ...arbitrators should not interfere unless the judgement of the employer was exercised in an arbitrary or discriminatory manner. Much of this line of thought can be traced back to the following statement:
>
> > In this and every like case where there is room for honest difference of opinion, if it appears - as here admitted to be a fact - that the employer has acted honestly, we do not feel that the Board of Arbitrators would be justified in interfering, by reversing the employer's decision, for the reason that to do so would result in management by arbitrators rather than management by the employer...where there is evidence on which a reasonable employer, acting reasonably, could have reached the decision such as is here challenged by the Union, no Board of Arbitrators should interfere.

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Latterly, a reaction to this approach has occurred whereby arbitrators have paid more attention to the merits of the grievor's claim. Perhaps the seeds for this line of thought lie within the C.I.L. decision itself.

> In the opinion of the present board, the thrust of the latter approach is the correct one; but we would point out that the glosses placed on Re C.I.L., which gave rise to this reaction, do not really do justice to Mr. Justice Roach's statement. In our view, the introductory words - "where there is room for honest difference of opinion" - tend to militate against the view that proof of mala fides is required in every case where management's decision is to be overridden. Looked at in this light, then discrimination and arbitrariness only become important after an initial determination has been made that reasonable assertions can be made that the relevant facets of the involved employees' skills are roughly equal.

The rationale for this approach has been outlined as follows:

> It is sometimes argued that management judgments should only be reviewed to see if management's decisions were honest, or in good faith, or non-discriminatory, and that this eliminates the evil of total management discretion. There is no doubt that this would eliminate gross abuse but such would be rare in any event. Management decisions may be bona fide but they may also be wrong.

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> In fact, it is rare that an arbitration board could find any basis for a finding of bad faith except evidence that the decision is very wrong. There appears to be no greater reason for giving management total freedom to act in good faith in the seniority field than in the area of discipline.

Cases which are willing to look at the merits of the decision demand two requirements to be met:

> The judgment of the company must, first, be honest and unbiased, and not actuated by any malice or ill-will directed at the particular employee (or any undue favour for another claimant for the position) and second, the managerial decision must be one which a reasonable employer could have reached in the light of the facts available.

7. In this case, the duty to not withhold consent unreasonably is not left to inference or within the general rubric of the management rights doctrine, but is an expressed term of the collective agreement itself. It is a duty held jointly by both parties. I also note that the substance of article 13.02(b)(ii) is a bilateral system for introducing a change in a shift cycle. The system is clearly consultative and accommodative in nature with the outcome limited only by the consent of the parties themselves. Thus, it seems to me that a review of the employer's alleged unreasonable conduct must not lose sight of the details of what it was asked to do in the first place and just exactly what it has refused to consent to and why. As such, I do not believe a review process, such as this adjudication, should place on the employer the total duty of establishing that it

> 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.
> (Emphasis in original)

Thus, at first glance it appears that the decisions on the preliminary objections in the Chase and Schildwachter cases are in conflict. However, a careful review of both decisions suggests otherwise. First, in Chase at pages 2-3 the preliminary objection was framed. It is quite a different objection than placed before me in this case. It reads as follows:

> 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). (Emphasis added)

Thus, it is clear to me that the thrust of the jurisdictional challenge in the Chase case was on the obligation to consult within

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the terms of article 13.02(b)(ii). However, the thrust of the jurisdictional challenge in this case is not on any consultation obligation but on the obligation to not withhold consent unreasonably: page 8. This is quite a different foundation. I quite agree that a section 91 grievance reference may not be available if the complaint is solely with respect to the consultation requirement as set out in article 13.02(b)(ii). Second, and given the thrust of the jurisdictional challenge noted above in the Chase case, I do not believe the authorities cited in similar "consultation" cases such as Smith (Board file 166-2-847) and Morabito (Board file 166-2-771) are of assistance to me in this case. This is not a "consultation" case. Third, the leading case having a thrust on withholding consent unreasonably, such as I have here, is Bernier (Board file 166-2-13603). It is this case which, together with my views of paragraph 91(1)(a), lead me to conclude at page 17 of this award:

> It is my view that while article 13.02(b)(ii) consistently refers to the word "party" it is quite wrong to draw conclusions with respect to who properly has an interest in the interpretation or application of the article without giving consideration to sections 90 and 91 and what they define as a grievable matter. It is my view that the claims set out in the originating grievance fall within the ambit of a grievable matter as they fall within the meaning of a matter "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement." Section 91 does not refer to "obligation." It refers to "the interpretation or application ...in respect of him of a provision of a collective agreement." The scope of an arbitrable matter within paragraph 91(1)(a) does not turn solely

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> on perceived obligations drawn from the words of the collective agreement, such as the word "party," but "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement...." In this case, the matter relates to the withholding of consent unreasonably of a proposed change in shift cycle of the nine member controller staff at the Whitehorse Tower. In my opinion, the administration of this aspect of article 13.02(b)(ii) clearly relates to a fundamental matter of controller employment and as such a grievance over the application of this aspect of the article to them falls within an arbitrable matter under paragraph 91(1)(a). I believe this position is quite compatible with the views expressed in Bernier et al and as reviewed by the Federal Court.

Finally, and with respect, I have difficulty accepting the reasoning in the Chase case when it says:

> 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. (Emphasis in original).

First, I am not convinced that the "parties" referred to in article 13.02(b)(ii), as considered at page 5 of the Chase decision

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i.e. local management and the Association Local Unit, are the "employer" and "bargaining agent" as used in section 98. Second, I cannot agree that "...the alleged violation of clause 13.02(b)(ii)... is a failure to meet an obligation in respect of the bargaining agent." (Emphasis in original). I cannot agree that when one party withholds its consent "unreasonably" only the other "party" may complain. It remains my view that the test for determination of jurisdiction is within the words of paragraph 91(1)(a) of the Act and whether the claim is "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement...." (page 17 supra). I repeat again, paragraph 91(1)(a) does not refer to the term "obligation." In addition, jurisdiction is established not by tracking out an obligation on what to whom within article 13.02(b)(ii), but within the words of paragraph 91(1)(a) of the Act. The words within article 13.02(b)(ii) that give rise to grievance in this case and Chase read: "A party shall not withhold its consent unreasonably." Regardless of to whom and on what these words raise an "obligation," it is my view that the interpretation or application of said words by a "party" (in this case the employer) creates a grievable matter "...with respect to (a) the interpretation or application in respect of him of a provision of a collective agreement...."

C. Brian Williams,
Board Member.

EDMONTON, June 12, 1984.