1984

File No.: 166-2-14636

No. 178

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

RON WILCOX,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: J. Maurice Cantin, Q.C., Vice-Chairman.

For the grievor: Carl Fisher, Canadian Air Traffic Control Association.

For the employer: Campbell Wright, counsel.

ART 13
CODE 402/82

Heard at Winnipeg, Manitoba, on October 17, 1984.

UNILATERAL CHANGE IN SHIFT CYCLE

DECISION

This is a reference to adjudication of a grievance filed by Ron Wilcox, an Air Traffic Controller employed at the Winnipeg Control Tower.

The grievor alleges a unilateral change in his shift cycle and he requests the following corrective action:

> I request a declaration from the employer that he was in contravention of article 13.02 of the CATCA/TB collective agreement code 402/82. Also, I request that I be paid overtime for those days worked that normally would have been days off.

EVIDENCE

The parties submitted the following Agreed Statement of Facts to take lieu of the evidence:

> 1. The Grievor, Mr. R.J. Wilcox, is an air traffic controller, AI-4, employed as an operating controller at the Winnipeg Area Control Centre (ACC).
>
> 2. At all material times, Mr. Wilcox's terms and conditions of employment were governed, inter alia, by the Collective Agreement 402/82 between the Treasury Board and the Canadian Air Traffic Control Association (the "Association").
>
> 3. Pursuant to the shift cycle for the Winnipeg Area Control Centre, established by mutual agreement between the Employer and the Association under Article 13.02(b) of the Collective Agreement, employees are scheduled to work 8 hour 20 minute shifts in a cycle of five consecutive days of work followed by four consecutive days off, followed by five consecutive days of work, followed by four consecutive days off, followed by five consecutive days of work, followed by four

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consecutive days off, followed by six consecutive days of work, followed by three consecutive days off. (Known as the 5 on 4 off, 5 on 4 off, 5 on 4 off, 6 on 3 off cycle).

4. On or about 15 September 1983, the Grievor was advised, by posting of the shift schedule in the Winnipeg ACC, that his shift cycle for October 1983 was unilaterally changed to five days of work, followed by six days off, followed by five days of work, followed by two days off.

5. There was no prior consultation with the Association nor the Grievor concerning the Grievor's shift cycle change for October 1983.

6. In accordance with the agreed to shift cycle at the Winnipeg Acc the grievor should have been off on October 3, 4, 5 and 6; work on October 7, 8, 9, 10 and 11; off on October 12, 13, 14 and 15, 1983.

7. In accordance with the posted schedule for October 1983, the grievor was scheduled off on October 3, 4, 5, 6, 7 and 8; work on October 9, 10, 11, 12 and 13; off on October 14 and 15. (See the attached chart which compares the Grievor's shift cycle with his actual hours of work during the period in question).

8. According to the posted schedule, October 7 and 8 were days of rest, on which the Grievor did not work and therefore was not paid.

9. This agreement is entered into without prejudice to the rights of either party to introduce further evidence at the hearing.

The statement was dated at Winnipeg, October 17, 1984.

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ADMISSION AND ARGUMENTS

At this point, counsel for the employer made the following oral statement:

> The employer is prepared to fulfil completely the corrective action sought by the grievor in the grievance and in particular to provide the declaration that article 13.02(b) was contravened and to pay to the grievor overtime remuneration in accordance with article 15.

The representatives of both parties added however that one issue relating to compensation remained unsolved and that arguments would be put forward in this regard.

It was agreed that since the employer was prepared to pay overtime to the grievor for the days worked (October 12 and 13, 1983) that normally would have been days of rest, the only problem was in connection with the two days of rest (October 7 and 8) that normally would have been days worked.

The grievor's representative argued that the issue here had been dealt with in a number of decisions and he referred to Graham and Onieu (Board files: 166-2-9787 and 9833), Johnson (Board file: 166-2-10027), Richard (Board file: 166-2-13797), Exley et al (Board files: 166-2-14005 to 14008 and 166-2-14454 to 14461) and Cantin (Board file: 166-2-14009). He referred also to article 15.02(a)(ii) of the collective agreement. He stated that the employer having unilaterally scheduled October 7 and 8 as being days of rest, it contravened the agreement and that as result, the grievor who was willing to work was not being paid and as such was being penalized.

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Counsel for the employer replied that the above issue was being raised for the first time and that the consequence was a completely new grievance. He argued that the grievance related to article 13.02 of the collective agreement and called only for payment of overtime for "those days worked that should have been days off". Furthermore the grievance did not relate to article 15.02. Counsel stated, relying on section 73(1) of the Public Service Staff Relations Board regulations, that the present grievance issue should have been identified before and that the employer was justified in addressing itself at the various levels solely to the issue that had been grieved. Counsel referred to the decisions in Stone et al (Board file: 168-2-68) and Re International Chemical Workers, local 721, and Brockville Chemical Industries Ltd. 24 L.A.C. 423. He referred also to Barratt (Board file: 166-2-913). He stated that I was being asked to deal with a substantially different grievance. There is in his view no provision in the collective agreement for remuneration to be paid to an employee when services are not rendered. To decide otherwise would be to alter the collective agreement. Article 14.02 of the collective agreement clearly states that "an employee is entitled to be paid for services rendered". There is no exception provided for in the agreement and there is obviously no reference to a penalty on the part of the employer. The decisions in the cases cited by the grievor's representative have to be distinguished.

REASONS FOR DECISION

The grievance which is dated October 29, 1983 reads that:

> The agreed to shift cycle at Winnipeg ACC is 5 days on, 4 days off, 5 days on, 4 days off, 5 days on, 4 days off, 6 days on, 3 days off. During the month of October 1983, the employer unilaterally changed my shift cycle to 5 days on,

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> 6 days off, 5 days on, 2 days off. In accordance with the agreed to shift cycle I should have been "OFF" Oct. 3, 4, 5, 6; "ON" Oct. 7, 8, 9, 10, 11; "OFF" Oct. 12, 13, 14, 15. I was changed to being "OFF" Oct. 3, 4, 5, 6, 7, 8; "ON" Oct. 9, 10, 11, 12, 13; "OFF" Oct. 14, 15.

The following chart compares the grievor's original scheduled shift cycle with his actual hours of work during the period in question:

Date		Schedule per Shift Cycle	Actual
Mon Oct	3, 1983	Off	Off
Tue	4	Off	Off
Wed	5	Off	Off
Thur	6	Off	Off
Fri	7	Work	Off
Sat	8	Work	Off
Sun	9	Work	Worked
Mon	10	Work	Worked
Tue	11	Work	Worked
Wed	12	Off	Worked
Thur	13	Off	Worked
Fri	14	Off	Off
Sat	15	Off	Off
Sun	16	Work	Worked

As stated at the beginning of this decision, the corrective action requested in the grievance is firstly a declaration from the employer that "he was in contravention with article 13.02 of the CATCA/TB collective agreement code 402/82" and secondly that he "be paid for overtime for those days worked that normally would have been days off".

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Article 13.02(b) of the agreement provides 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,
>
> 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.

The employer advised at the outset of the hearing that it was prepared to fulfill completely the corrective action sought by the grievor in the grievance.

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The grievor requested in his grievance to be paid overtime solely for "those days worked that normally would have been days off", that is October 12 and 13, 1983. He did not request to be paid also for those days off that normally would have been days worked, that is October 7 and 8, 1983.

There are two questions:

1. Can the grievor file this request now, about one year after he realized that his shift cycle had been changed without any notice or reasons in writing, contrary to the provisions of the collective agreement?

2. If the answer is affirmative, is the grievor in fact entitled to be paid for "those days off"?

Section 73(1) of this Board's regulations is clear:

> Each employer shall prepare and submit to the Board for its approval a grievance form or forms which shall require the following information to be stated by the aggrieved employee:
>
> (a) the name and address of the aggrieved employee and such additional information as the employer may deem necessary to identify the aggrieved employee;
>
> (b) a concise statement of the nature of each act or omission complained of, including, where relevant, such reference to
>
> (i) the statute, regulation, by-law, direction or other instrument made or issued by the employer, or
>
> (ii) the collective agreement or arbitral award alleged to have been violated or misinterpreted as will identify the nature of the alleged violation or misinterpretation;

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(c) the steps, if any, that have been taken by the aggrieved employee for the adjustment of the matters giving rise to the grievance;

(d) the date or dates upon which each act or omission or other matter giving rise to the grievance occurred; and

(e) the corrective action requested by the aggrieved employee.

The grievor who filed his grievance on the basis of a contravention of article 13.02 is now referring to another article which is 15.02. The provision which the grievor has in mind is in 15.02(a)(ii) which reads:

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

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> 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.

There is no doubt in my mind that the grievor is in fact filing a new grievance which raises an issue not previously dealt with at the various levels by the employer. I agree with the decision of this Board in Stone and Henson (supra). In his decision, Deputy Chairman and now Chairman J.H. Brown, Q.C., wrote:

> The employer, however, must be made sufficiently aware of the nature of an employee's grievance and the remedy he is seeking so that, if justified, the grievance may be remedied at as early a stage as possible. The grievor should not be allowed, at as late a stage as the adjudication level, to set up a completely new grievance, one which involves changes in the basic nature of the grievance referred to adjudication and one which raises issues not previously assessed by the employer.
>
> (page 24)
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> .....
>
> The whole purpose of the grievance procedure is to resolve problems arising inter alia under collective agreements. Therefore, the proper identification of the issue in a grievance and a mutual understanding of the positions of the

> parties throughout the grievance process is essential if that purpose is to have any possible measure of success. It follows, of course, that should the parties be unable to resolve their differences during the grievance procedure and the matter is referred to arbitration or adjudication for binding decision, the issue upon which the arbitrator or adjudicator is called upon to make a determination must be the same issue that the parties themselves were unable to settle during the grievance procedure. If an employee was allowed to change or substantially amend his grievance at arbitration or adjudication, it would frustrate the whole intent of the grievance process and, at the same time, it could not do other than the prejudice the position of the employer.
>
> (page 25)

I come to the conclusion that the grievor cannot at this late stage file a request to be paid for the days of rest on October 7 and 8, 1983.

Even if I would have answered in the affirmative the first question, my opinion is that the grievor would nevertheless not be entitled to the payment which he is seeking. I agree with counsel for the employer that as a rule and as stated in article 14.02 of the agreement, "an employee is entitled to be paid for services rendered" only.

The grievor's representative referred to a number of decisions. In Graham and Onieu (supra), the grievors had simply asked for a "declaration by management" that their shift cycle would no longer be changed without their agreement. The decision in Johnson (supra) was confirmed by the Federal Court of Appeal (A-281-83). In that case, the grievor

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had solely asked for a declaration and payment of overtime for the days worked that should have been days of rest. In Richard (supra) also confirmed by the Federal Court of Appeal (A-866-83), the compensation which had been asked related only to the days worked and not the days off. I fail to see how these decisions can be said to sustain the present grievor's contention.

It is my opinion however that the decision in Exley et al (Board files: 166-2-14005 to 14008 and 166-2-14454 to 14461) settled, in a sense, although indirectly and partially perhaps the problem relating to the days off. One of the questions in this case was: "If the employer was obliged to pay overtime, then was it proper for the employer to unilaterally schedule an employee to take such earned overtime off on a day unilaterally selected by the employer?" (p. 11). The then Deputy Chairman Leon Mitchell, Q.C., said:

> The time off granted shall, therefore, not be taken into account in determining the compensation due to each grievor.
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> (page 17)

Mr. Mitchell ruled along the same lines in Cantin (supra).

I would say that the result of the above decision and the present one is that neither the employer nor the aggrieved employee can expect in a case such as the one we have here, a compensation for days off, the first by way of a deduction and the second by way of a payment.

To conclude, this grievance is maintained and the corrective action which had been requested on writing on October 29, 1983 is granted. There will be no other redress or remedy.

J. Maurice Cantin, Q.C.,
Vice-Chairman

OTTAWA, November 7, 1984