File No.: 166-2-14687 No. 179

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

LAWRENCE A. STUART,

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: Theodore K. Tax, counsel.

Heard at Winnipeg, Manitoba, on October 18, 1984.

ART 13
CODE 402/82

CANCELLATION OF SHIFT
EXCHANGE BY EMPLOYER

DECISION

This is a reference to adjudication under paragraph 91(1)(a) of the *Public Service Staff Relations Act*, the grievor being Lawrence A. Stuart employed as an air traffic controller at the Winnipeg Air Control Centre.

The grievance which is dated February 4, 1984 reads as follows:

> On Oct. 10, 1983 I was required to work overtime in accordance with article 12 of TB/CATCA collective agreement. On Jan. 29, 1984 I requested expenses for mileage from Rhein, Sask. to Winnipeg Airport for Oct. 10, 1983. I was denied the expense claim.

The corrective action requested is:

> In accordance with article 12 of the TB/CATCA collective agreement code 402/82 I request the employer honour my expense claim of $105.00 (300 miles @ $.35 per mile).

Counsel for the employer stated that the issue in this case was, in reality, solely overtime and the representative for the bargaining agent agreed. Counsel explained that although overtime had been allowed at the outset, the decision had been reversed after it was found out that overtime had been granted by error. The grievor's representative declared in relation to the expense claim that the latter now intended to ask mileage only from his home in Winnipeg to the airport and return for a total of 16 miles. It was agreed by both parties that if the grievance was sustained, mileage would be paid in accordance with the collective agreement and the travel directives.

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THE EVIDENCE

Three witnesses testified on behalf of the grievor including the grievor himself. The employer did not call any witness.

The following exhibits were filed:

For the grievor

G-1: copy of page from shift exchange book;
G-2: copy of page from shift exchange book;
G-3: copy of grievance of October 20, 1983;
G-4: copy of memorandum of November 30, 1983;
G-5: copy of travelling expenses dated January 29, 1984;
G-6: copy of travelling expenses dated January 26, 1984;
G-7: copy of memorandum of January 27, 1984;
G-8: copy of memorandum of January 30, 1984;
G-9: copy of page from shift exchange book;
G-10: copy of page from shift exchange book;
G-11: copy of page from shift exchange book.

For the employer

E-1: copy of shift schedule of August to November 1983;
E-2: copy of shift schedule of spares;
E-3: copy of memorandum of October 21, 1983;
E-4: copy of reply at last level of June 1, 1984.

The grievor was the first witness. He stated that he has been an air traffic controller since 1975. He had arranged to spend October 10, 1983 which was Thanksgiving Day with his family on a relative's farm in Rhein, Saskatchewan which is located at about 300 miles from Winnipeg. He had previously worked a shift for another

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air controller named Ed Holt. An extract from the shift exchange book was filed showing that on July 10, 1983 an exchange had been approved by the supervisor on duty, the latter's initials being "GK". An extract from the shift exchange book was also filed as exhibit G-2 to show that on October 10, 1983 Ed Holt was supposed to work on the evening shift for the grievor and that such exchange had also been approved by a supervisor, the latter's initials being "GS". According to the witness, Ed Holt had a serious accident at home on September 27, 1983 and had to be hospitalized. When the employer found out that Mr. Holt was sick, it cancelled the exchange and advised the grievor that he would be expected to work on the evening shift of October 10. The witness testified that despite the fact that he intended to comply with the employer's instructions, he nevertheless proceeded to Rhein. He came back to Winnipeg on October 10 and worked his shift. After having worked his shift, he filed a grievance concerning the cancellation of the shift exchange, such grievance being exhibit G-3. Shortly after and more precisely on November 30, 1983, he was advised that his grievance was allowed and he was paid overtime at the applicable rate. He then filed a claim for his expenses to cover his mileage from Rhein to the Winnipeg Airport. This claim was denied on January 27, 1984 and the present grievance was filed. The employer recovered from him in July 1984 the overtime which had been paid previously.

Under cross-examination, the grievor stated that there is at the Winnipeg Air Control Centre a shift cycle which is in fact a pattern of which days an air controller is going to work. The shift cycle is the same for all air controllers and it consists of five days on, four days off, five days on, four days off, five days on, three days off, six days on and four days off. There is a new cycle every 36 days. The master shift schedule covering the months of August to November 1983

was filed as exhibit E-1. Such schedule is posted in the terminal control unit well in advance and in accordance with the agreement. There is in the terminal another shift schedule showing the spares for a period of one month. This shift schedule is also posted in advance. The shift schedule showing the spares for the month of October 1983 was filed as exhibit E-2.

The letters "COMP" appearing on the master shift schedule (exhibit E-1) mean the extra day that an air controller has to put in one of every 36 days to make the hours per week work out. The "COMP" day re-occurs every 36 days. The witness stated that his own "COMP" day was to be on October 9, 1983 but he had asked his supervisor to move it to October 18. He in fact worked his "COMP" day on October 18. His letters of identification on the master shift schedule (exhibit E-1) are "Gb". On October 6, 7 and 8, he was off. He had just finished his shift cycle of five days on and three days off and he was moving to the next shift cycle, that is six days on and four days off. He was to work accordingly on October 9, 10, 11, 12, 13 and 14. His standard cycle never changes. He knew when looking at the master shift schedule (exhibit E-1) his scheduled hours of work. His intention was to come back to work on October 11. As far as he was concerned, July 10, 1983 was a day of rest. He admitted that the exchange was a private arrangement between Ed Holt and himself. It meant that as of July 10, one day was owed to him by Holt. He was not paid by the employer for having worked on July 10. Holt was. This was in accordance with article 13.04(d) of the agreement. If after July 10, Holt had gone away or had left his employment, it would have meant a bad exchange for him. The obligation was his to see that he would get the exchange at a later date. He decided in September to approach Holt to return the favor on October 10. That was before exhibit E-2 was posted. Holt was in agreement regarding October 10. It became around September 28 that Holt had been injured and that he would be off for sometime.

Stuart worked during the evening of September 28 and it is then that he was advised by the shift supervisor that the exchange had been cancelled. He was advised that it had been cancelled because it involved overtime. He did not attempt to exchange the shift with another air controller. He stated that he did not like to owe somebody else a favor. Holt finally came back to work in January 1984. The employer's first reply was to deny the grievance for overtime, as evidenced by exhibit E-3. He was advised at the time of the reply at the final level dated June 1, 1984 that after all he was not entitled to overtime compensation and that his claim for mileage was also being denied. He was paid about $200 net for the day when he had worked overtime on October 10 and he did not file another grievance when a deduction was made on his pay in July. He felt that he already had a grievance going on and he simply acted under the guidance of his bargaining agent. He nevertheless felt that he was being treated unjustly.

Duane Olson was the second witness. He has been employed as an air traffic controller for 16 years at the Winnipeg Airport. He filed under reserve as exhibit G-9 an extract from the shift exchange book showing that on August 20, 1983 he had worked on the midnight shift for another air controller, the latter's initials being "RP". He filed as exhibit G-10 (also under reserve) an other extract from the shift exchange book showing that on August 22, the other air controller with the initials "RP" was to work in his place on the day shift. He filed as exhibit G-1 (still under reserve) another extract from the shift exchange book showing that on August 21, there had been a reciprocal exchange of shifts with the other air controller with the initials "RP". He related that August 22 was a day off as far as he was concerned, that the air controller with the initials "RP" called in to advise that he was sick, that he himself was asked to work and that he was paid overtime.

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Counsel for the employer objected to Duane Olson's testimony as it referred to an event that occurred after October 10, 1983, that we are dealing with "future practice", that there was no relevancy and that at any rate if the employer had made an error, it would ask for a reimbursement. The evidence was accepted under reserve.

Ed Holt was the third and last witness. He has been an air traffic controller for the last 13 years. On October 10, 1983, his qualifications were identical to those of the grievor. He confirmed the latter's testimony regarding the exchange and the fact that he had agreed to work for the grievor during the evening shift of October 10. His letters of identification on the master shift schedule (exhibit E-1) are "Bb". On October 10, he was on his first day off of four days off. He had an accident on September 27, 1983 when he fell from the roof of his house. On October 10, he was still in the hospital and he was unable to work. He was on sick leave until January 5, 1984. He expected the employer to call somebody else to cover his shift on October 10.

Under cross-examination, the witness admitted that the exchange on July 10, 1983 was a private arrangement. In return he had agreed to work for the grievor at a later time. His salary was paid to him on July 10. The grievor on July 10 was on a day off. He advised his employer shortly after his accident that he would be off for an indefinite period of time. He was not able to replace the grievor on October 10. It was known 13 days in advance that he could not replace the grievor on October 10. He could not due to his accident reciprocate with the grievor. He feels that he does not owe the grievor one day of work anymore. He did not offer any money to the grievor for the day that the latter had worked for him on July 10.

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ARGUMENTS

The grievor's representative argued that the situation is awkward. The grievor no doubt succeeded with his first grievance. He however received a denial under the second grievance which related only to expenses. The employer had no right to recover the overtime paid to the grievor. Reference was made to articles 1.01, 1.02 and 13.04 (d) and (e) of the agreement. The shifts were exchanged for the benefit of the employer and a supervisor approved the exchange. The employer became responsible to cover the shift when Ed Holt became sick.

Counsel for the employer replied that exhibits E-1 and E-2 established the hours of work for the grievor on October 10, 1983. He was to work on the evening shift. The exchange was approved for the reasons outlined in article 13.04. The exchange was cancelled when it became known that Holt would be unable to attend. One has to conclude that the grievor wanted to make an exchange with an individual who was incapacitated. What the grievor had to do under the circumstances was either to report to work personally, or to find somebody else. The evidence is to the effect that the exchange is a private accommodation between two employees. The employer did not police the exchange in any way. The question is: Can a regularly scheduled person report to work after an exchange and claim overtime? Can a person be paid overtime for working his own shift? It has to be noted that a shift cycle never changes. According to counsel, there are in fact five issues in this case:

1. Is the employer bound by the decision at level 2 with regards to the grievance of October 20, 1983 (exhibit G-3)?

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The answer is that the employer is not bound as the decision then was contrary to the expressed terms of the collective agreement.

2. What is overtime?

The answer is that according to the collective agreement, it is time outside the employee's scheduled hours of work.

3. What is the effect of a shift exchange on the hours of work?

The answer is that there is no effect except as provided in article 13.02.

4. Can a shift exchange approved by the employer be subsequently cancelled?

The answer is that this right to cancel falls under the management rights' clause, that is article 3.01 of the agreement.

5. Did the grievor work a shift of authorized overtime and if so, what expenses can he receive?

The answer is that there was no authorized overtime.

Referring to the first question, counsel for the employer argued that the answer has been confirmed in a number of decisions including International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, (UAW-CIO) in re The Ford Motor Company of Canada Ltd., 3 L.A.C. 1159, at pages 1161 and 1162 and Greene (Board file: 166-2-393). There is also section 95(2) of the *Public Service Staff Relations Act* which clearly sets out the

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jurisdiction of the arbitrator. Finally, article 13.04(d) clearly reads that one of the conditions precedent to the shift exchange is that "it will not require the payment of overtime". Concerning the question no. 2 relating to overtime, articles 15.01 and 13.03 are clear. Relating to question no. 3, there is definitely no effect by virtue of the exchange. As a matter of fact if any of the conditions listed in 13.04 is missing, the employer could refuse or cancel the exchange. Reference was made to articles 13.02 and 13.03 of the collective agreement and to re International Nickel Co. of Canada Ltd. and United Steelworkers, 8 L.A.C. (2d) 446, at pages 447 and 448. The notion here is exactly the same. There were internal arrangements. As regards question 4, the employer was certainly not locked in in using Mr. Holt. The circumstances changed after the exchange was approved. There is in a case such as the one we have here no possible benefit for the employer. There is only a burden. It is definitely the employee's and not the employer's reponsibility to see that the exchange goes through. Nothing prevents the employer from cancelling an exchange previously approved under the management rights' clause (article 3.01 of the agreement).

The grievor's representative asked: What would have happened if on October 10, the grievor could not have been contacted? The result of the exchange was no doubt that October 20 became a day off for the grievor. Holt was the employee involved and he simply was the one who had to report to work.

REASONS FOR DECISION

The facts underlying this dispute are relatively simple.

The grievor and another employee agreed to exchange shifts. Both were air traffic controllers and equally qualified employees.

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The grievor worked the other employee's shift on July 10, 1983. The other employee had undertaken to work for and instead of the grievor on October 10, 1983, which was Thanksgiving Day. He however was involved in a serious accident on September 27, 1983. The grievor was then advised by the employer that the exchange was cancelled and that he would have to work as originally scheduled. He did work on October 10, 1983 and he is now claiming overtime.

Although this issue of overtime seemed at one point to have been settled, such is not the case and I am asked to decide it.

The parties have agreed that should this grievance be sustained, mileage (more precisely 16 miles and not 300 miles) would be paid in accordance with the collective agreement and the travel directives.

My opinion is that this grievance should be dismissed.

Article 13.04 of the agreement provides as follows:

> Equally qualified employees may exchange shifts provided:
>
> (a) the provisions of clause 13.05(a) or clause 15.04 are not violated,
>
> (b) the employees shall make every reasonable effort to provide a minimum of twenty-four (24) hours' advance notice of the change,
>
> (c) the shift change receives the approval of the Employer, which shall not be unreasonably withheld,
>
> (d) it will not require the payment of overtime,
>
> (e) once such an exchange of shifts has been approved, it will be the responsibility of the employees involved to report for duty in accordance with the approved revision.

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A prerequisite to the exchange is as stated that "it will not require the payment of overtime". One has to conclude that when two employees agree to an exchange of shifts, they also accept or are deemed to accept in advance that there will be no overtime paid. The exchange had not been completed on September 27, 1983 (the date when the other employee became disabled) and the employer was no doubt justified in advising the grievor that it was cancelled. I cannot accept that because the exchange had been approved at the outset, it gave the grievor the opportunity to finally work his shift as originally scheduled and then be paid overtime.

I am satisfied, notwithstanding the wording of paragraph 13.04(d) that the shift worked on October 10, 1983 cannot be construed as being overtime. Article 15.01 of the agreement reads that

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

The evidence is to the effect that on October 10, 1983, the grievor was scheduled to work on the evening shift (see exhibit G-2). There was, between the grievor and the other employee, a "private arrangement", to quote the grievor's own words. It was also an arrangement entered into on a voluntary basis. It was, I submit, the two employees' responsibility after the exchange was approved to see to it that the agreement would be respected.

An almost similar situation arose in Re International Nickel Co. of Canada Ltd. and United Steelworkers (supra). The arbitration tribunal dismissed the grievance and ruled that

> ...where internal arrangements of employees, voluntarily entered into, break down, the company can become liable to

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> pay up to one and one-half hours over-time pay where they have received no extra benefit. To state the proposition, it seems to us, is to provide the answer.
>
> (page 448)

If I were to recognize here the existence of overtime, it could, to say the least, be tempting for employees to agree to an exchange and at the last moment refuse to complete the exchange, thereby allowing one of the parties to the agreement to be paid overtime. One can visualize the possible consequences.

Turning to the evidence rendered by witness Duane Olson, the employer's objection is maintained. The terms and conditions of the collective agreement are clear and I cannot see how "future practice" could be relevant. At any rate, Brown and Beatty, in Canadian Labour Arbitration (2nd edition), state at pages 158 and 159, no. 3:4430, that "one or two occurences will not normally constitute a sufficient practice to be reliable".

This grievance is dismissed.

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

OTTAWA, November 21, 1984