

No. 68

File: 169-2-400 to 402

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

BETWEEN: Treasury Board, Employer,  
- and -  
Canadian Air Traffic Control Association, Bargaining Agent.

RE: Reference under section 98 of the Act -  
Air Traffic Control Group

BEFORE: J. Harold Brown, Q.C., Chairman.

APPEARANCES AT THE HEARING: Luc Leduc for the Employer.  
C.H. MacLean and D.E. Brown for the  
Bargaining Agent.

ART 13  
CODE 402/82

Heard at Toronto, Ontario, April 12, 1984.

~~UNIT~~ CHANGE IN UNIT  
SHIFT CYCLE BY  
EMPLOYER

## DECISION

1. These are references made by the Employer under section 98 of the Act as a result of the failure of the Bargaining Agent to consent to proposed shift changes at Kitchener/Waterloo Tower, Toronto Island Tower, Toronto Control Centre and Toronto Tower. The Employer alleges that this refusal constitutes a breach of the Bargaining Agent's obligation under paragraph 13.02(b) of the collective agreement in effect between them (Code: 402/82), the provisions of which read as follows:

### 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.

2. At the outset of the hearing counsel for the Bargaining Agent made the following submissions challenging the Board's jurisdiction to hear and make a determination on the instant reference.

The collective agreement is extended by the provisions of paragraph 4(1)(b) of the Public Sector Compensation Restraint Act, (hereafter referred to as the PSCRA) until December 31, 1984. The definition of "compensation" in section 2 thereof covers all forms of pay and benefits and perquisites. Further, the "compensation plan" as defined in the same section means the provisions for determining and administering compensation. Thus changes in payments to employees caused by a change in the shift schedule would constitute a change in the compensation plan. The proposal of the Employer to change the shift cycle at the above facilities would change the compensation plan in the collective agreement. This in turn would result in a contravention of section 6 of the PSCRA.

3. An employee's "daily rate of pay" as it is defined in the collective agreement is calculated by multiplying the employee's normal daily hours of work by his straight time rate of pay. Although the actual method of calculation is somewhat different for operational and non-operational employees, a change in the number of hours an employee works on a shift would affect his daily rate of pay. The reduction proposed in the number of hours worked per shift at the cited tower facilities would result in a lower daily rate of pay for the air traffic controllers and data system employees concerned. Of particular note are those provisions for paying off unliquidated lieu days or vacation leave after the end of the fiscal year as well as the paying off of vacation leave on the termination of employment. In each of these provisions, which are respectively found in paragraphs 16.05(a), 17.06(c)(iv) and 17.10(a) of the collective agreement, the unused lieu days and vacation leave are paid off at the employee's "daily rate of pay" as defined in the agreement. A decrease in the daily rate of pay would cause a decrease in payment to the employee.

4. By way of example, assuming a controller at the Toronto Island Tower was earning a maximum rate of \$42,032 a year, his straight time rate would be \$23.69 per hour. His daily rate of pay under the current shift schedule would be \$203.73. This proposed shift schedule would change his daily rate of pay to \$172.93, or about \$30.00 less. If the controller had ten lieu days from the previous fiscal year paid off pursuant to paragraph 16.05(g), he would receive \$300.00 less as a result of the revised shift schedule. This would be a change in the compensation plan and would contravene section 6 of the PSCRA. Accordingly, the Board is without jurisdiction in this matter.

5. In light of the fact that counsel for the Bargaining Agent gave no advance notice of her intention to make the foregoing jurisdictional challenge, counsel for the Employer was granted an adjournment and the Board acceded to his request to be allowed to submit, in writing, his position as to the effect of the PSCRA on the references. The essence of his written submissions received on May 4, 1984 are set out below.

6. The Employer's proposed changes in the shift schedule of the employees concerned would affect their remuneration under various provisions of the collective agreement as is asserted by counsel for the Bargaining Agent. However, the affect of the PSCRA is analogous to the "freeze" period created by section 51 of the Public Service Staff Relations Act. In its judgment in the Public Service Alliance of Canada and Her Majesty in Right of Canada as represented by Treasury Board (A-429-82), the Federal Court of Appeal held that a shift schedule change provided for in the collective agreement could be implemented during the "freeze" period. More specifically the Court held that section 51 would not nullify an express agreement between the parties providing for a change in shift schedules.

7. The same reasoning applies where the provisions of a collective agreement are continued in force by the PSCRA. Accordingly, notwithstanding that sections 4 and 6 of that Act have extended the provisions of the compensation plan for 24 months, the Employer is seeking to exercise a right which is inherent in a provision of the current collective agreement, namely, paragraph 13.02(b). The exercise of that right is not held in abeyance by reason of the PSCRA.

8. The argument of counsel for the Bargaining Agent would mean that an employee could not be promoted, suspended or receive acting pay, as it would result in a change in the employee's compensation and thereby contravene the PSCRA. In fact, in each of the above situations the basic compensation plan would remain unchanged even though the employee's compensation varied. The same principle applies to any variations in compensation payable to employees as a result of the Employer's proposed changes in their shift cycles.

9. Therefore, the right given to the Employer under paragraph 13.02(b) of the collective agreement is in no way affected by the provisions of the PSCRA. Accordingly, the Board has the necessary jurisdiction to deal with the instant references.

10. Counsel for the Bargaining Agent in her response received on May 15, 1984, took the position that the proposed changes in shift length alter provisions for the determination of compensation and will result in the change of an element in the formula that determines the amount of compensation to be paid to employees, contrary to section 6 of the PSCRA. She also noted that the Act specifically continues in force the terms and conditions of the compensation plan and, where the provisions of the collective agreement conflict with those of the extended compensation plan, the compensation plan must prevail.

DETERMINATION OF THE BOARD

11. Having considered the respective arguments of counsel for the parties, I am in basic agreement with that advanced by counsel for the Employer as it relates to the effect of the PSCRA. Sub-section 6(1) of that Act provides that a compensation plan extended under section 4 thereof shall continue in force without change for the period of its extension. The compensation plan in the instant case includes a method of calculating an employee's rate of pay based on the number of hours he works in a shift. However, the number of hours an employee works in a shift is not set down in the collective agreement. Rather, article 13.02 of the agreement allows for a change in shift hours provided certain conditions are met. In other words, the compensation plan in the collective agreement contemplates the variation of hours in a shift. Further, while a change in shift hours would lead to a difference in the amount of compensation employees receive under various articles of the collective agreement, the change in hours would not constitute a change in the compensation plan itself. Accordingly, the Employer's proposed changes in the shift cycles for controllers at the cited towers would not contravene the PSCRA.

12. In the result the Board finds that it has jurisdiction to hear and determine the instant references.

13. The Secretary/Registrar is hereby directed to schedule this matter of continuation for hearing on its merits. Further, as was indicated at the hearing on April 12, 1984, subject to some other agreement reached by the parties, the Board will proceed separately and successively with each of the three references, with the possibility of their consolidation should that course of action be deemed appropriate at some stage in the proceedings.

DATED AT OTTAWA this 17th day of May, 1984.

J. Harold Brown,  
for the Board.