DEC 01 1986

File: 166-2-14889 No. 301

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

DONALD LAY,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

- employer can take premium rates into account when assigning O/T.
- need not cost in 2½ x rate if less total hours than 1½ or 2x.

Before: David Kwavnick, Board Member.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Marlene I. Thomas, counsel.

ARTICLE 15
COLL AGREEMENT
CODE 402/85

OVERTIME EQUALIZATION

Heard at Toronto, Ontario, October 28, 1986.

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CHAIRM
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DECISION

The present reference to adjudication concerns a grievance by Mr. Donald Lay (AI-4), an air traffic control supervisor employed by Transport Canada at the control tower at Toronto International Airport. Mr. Lay grieves the employer's interpretation and application in respect of him of Article 15.03 of a collective agreement between the Treasury Board of Canada and the Canadian Air Traffic Control Association (Code 402/82). Article 15.03 reads:

> 15.03 The Employer will endeavour to keep overtime work to a minimum and shall assign overtime equitably among employees who are qualified to perform the work that is required at the location concerned.

The particulars of the present reference to adjudication concern events which occurred on 25 and 26 June 1984, and were described in the following terms in Mr. Lay's grievance:

> I am a qualified AI-4 tower supervisor at Toronto International Control Tower. On the evening shift (15:05-23:50 Hrs. Lcl) of June 25, 1984, and again on June 26, 1984, I was denied the opportunity to work overtime as tower supervisor (AI-4) although I

> was available to do so, when that position became vacant due to sick leave. Subsequently, an AI-3 tower controller was called in on overtime to fill the vacant supervisor's position for both shifts on the above dates. The vacant supervisor's position was ultimately filled by an AI-3 controller already on duty (on both shifts in question) and the AI-3 controller called in on overtime actually worked as an AI-3 controller on both shifts to fill the created vacancies in the controllers' position. All of the above is in contravention of Article 15.03 of the collective agreement (402/82) between the Treasury Board and the Canadian Air Traffic Control Association.

The grievor sought the following remedy:

> That I be reimbursed at the appropriate overtime rate of pay for all hours that I was denied the opportunity to work as described above; i.e. 8.75 hrs x 2 x 2.5 (my overtime rate of pay for June 25 and 26, 1984). That in future, overtime replacements for an AI-4 tower supervisor's position be offered first to those equally qualified AI-4's that are available, no matter what their overtime rate of pay for that date, in accordance with Article 15.03 of the collective agreement.

In her opening remarks, counsel for the grievor said that the point at issue in the present reference to adjudication is the interpretation of Article 15.03 of the collective agreement with particular reference to the meaning of the word "equitable" as it applies to the assignment of overtime work opportunities.

She said that the evidence would show that the grievor, a supervisor, had been denied two opportunities to work overtime as a replacement for a sick supervisor; that these overtime opportunities had been given to a controller; and, that the reason the grievor had been denied these opportunities was because his overtime rate on the days in question would have been two and one-half times the straight time rate. She said that at that time the employer had adopted a policy of refusing overtime to persons at the AI-4 level if that overtime would have attracted compensation at two and one-half times the straight time rate. Such a prohibition did not apply to persons at the AI-3 level. This, she said, is the inequitable treatment complained of in the present reference to adjudication. She said that instead of giving overtime opportunities to the employee with the lowest accumulated hours of overtime worked the employer had chosen to give such opportunities to the employees who would attract the lower premium rates, but only in the case of supervisors, and this resulted in discriminatory treatment to the detriment of the AI-4 supervisors.

The grievor testified in his own behalf. He said that he has been an air traffic controller since

1972 and a supervisor at Toronto International Control Tower since 1981.

He said that the Toronto tower operates 24 hours per day with three shifts of controllers, namely 625 hrs to 1520 hours (the day shift), 1505 hrs to 2400 hrs (the evening shift) and 2400 hrs to 625 hrs (the night shift). There is also a swing shift consisting of one controller from 1100 hrs to 2000 hrs. In 1984, the day and evening shifts each consisted of four controllers (AI-3) and one supervisor (AI-4). The night shift consisted of a single controller (AI-3).

He said that records were kept of the overtime worked by each employee. These records were kept in "expanded hours". He explained that "expanded hours" means the number of hours of straight time pay earned through overtime work. Thus, five overtime hours worked at double-time rates would be shown in the records as 10 expanded hours. (Note: "expanded hours" will be indicated as "X hrs").

He said that accumulated overtime is "zeroed" every six months on 1 April and 1 October. That is, as of those dates employees are shown as having no accumulated overtime and record keeping begins anew.

The witness said that he was asked by the Centre Operations Manager to prepare a summary of the overtime worked by air traffic control employees at Toronto between 1981 and 1985. He found that among controllers (AI-3), there were some who had accumulated as many as 500 X hrs

or even 600 X hrs during six month periods. On average, he found that controllers accumulated approximately 300 X hrs over the course of a six month period. In the case of supervisors (AI-4), he found that the average six month overtime accumulation was approximately half of that for controllers.

The witness said that he had kept records of his own overtime work. These records showed that he had accumulated overtime as follows:

1982 calendar year, 770 X hrs
1983 calendar year, 525 X hrs
1984 calendar year, 403 X hrs
1985 calendar year, 782 X hrs.

The witness then described the procedures used for the assignment of overtime work in 1984. He said that some overtime shifts were assigned prior to the coming into force of a shift schedule. A shift schedule must be posted 15 days prior to coming into force and it will be known at that time that due to scheduled vacations, or for other reasons, certain shifts will be available to be filled by employees working overtime.

There is also fortuitous overtime which comes up while a shift schedule is in operation: sick leave, special leave, and so on. To the extent that overtime requirements were known in advance, a supervisor would attempt to line up overtime workers for those shifts.

If there was a need for a controller (AI-3), the supervisor would offer the opportunity to eligible AI-3 employees in reverse order of accumulated overtime. If no AI-3 employee could be found who was willing to work the overtime, the supervisor would then offer the opportunity to eligible AI-4 employees, again, in reverse order of accumulated overtime.

Similarly, if the overtime opportunity involved filling in for an absent supervisor (AI-4), it would be offered first to eligible AI-4 employees and, if none could be found who were willing to work, to eligible AI-3 employees, in both cases in reverse order of accumulated overtime.

As to the meaning of the word "eligible", he pointed out that under the terms of Article 15.04 of the collective agreement, an operating employee is not permitted to work more than 12 consecutive hours or more than nine consecutive days.

The witness then made reference to the schedule for June 1984 (Exhibit G-2). He noted that he is identified by the letters LD. The schedule shows that on June 18 to 22, inclusive, he was slated to work the evening shift. The schedule also shows that he was to have been on days of rest during the period June 23 to 26, inclusive, and on annual leave for the rest of that month.

He then referred to a privately kept work record on which he records his work activities day-by-day (Exhibit G-1). This document shows that he worked the

evening shift on June 18, 19, 20 and 21 and that he took special leave for his scheduled shift on June 22. This document also shows that he worked 10.5 X hrs of overtime on the evening shift on 23 June, that he worked 17.5 X hrs of overtime on the evening shift on 24 June and that he worked 7.5 X hrs of overtime on 25 June.

The witness explained that he worked 7 hours of the evening shift on 23 June. His overtime rate on that day was time and one-half, thus giving a total of 10.5 X hrs. He worked a full shift of 8.75 hours on 24 June. His overtime rate on that day was double-time, thus giving a total of 17.5 X hrs. On 25 June, he attended a three hour supervisors' meeting. Since he had worked on his first and second days of rest, his overtime rate for work on 25 June was double time and one-half under the terms of Article 15.02(a)(ii). Thus, he received 7.5 X hrs of overtime on that day.

Following the supervisors' meeting he asked Trevor Moores about the availability of overtime for that evening and the following evening. He explained that Mr. Moores was the supervisor who had responsibility for staffing the evening shift that week. He told Mr. Moores that he would be available to replace the evening shift supervisor who was sick.

The witness said that Mr. Moores told him that he (Moores) could not call him in because his (the witness') overtime rates would be double time and one-half and that Mr. Baxter, the Centre Operations Manager, would refuse to approve payment at that rate unless there was no other employee available.

The witness then identified two excerpts from the overtime call-in log at the Toronto control tower (Exhibit G-4). He explained that a supervisor seeking an overtime replacement would keep a record of the employees whom he had called.

The first excerpt begins with the notation "VO SICK EVES June 25th". The witness said this means Bruce Owens was sick for the evening shift on 25 June. The next notation reads: "CV 39 Unable". He said this refers to a Mr. Vasey, another supervisor whose identifying letters are CV. The 39 indicates that at that point in the six month cycle Mr. Vasey had worked 39 X hrs of overtime. The "unable" means that Mr. Vasey had been offered the opportunity to work the overtime but was unable to do so. The next notation reads "LD 108 No permission for X 2.5". He said the LD refers to himself. The 108 indicates 108 X hrs of accumulated overtime at that time. The remainder of the notation means that he could not be offered the overtime opportunity because Mr. Moores did not have permission to offer overtime to someone who would have to be paid at double time and one-half. The next notation reads: "BW No". He said this indicates that a Mr. Williams had been offered the overtime shift but had declined it. The next notation reads: "KP 15 T No Ans." This means that Mr. Moores had attempted to telephone a Mr. Pollok, who at that time had more than 15 X hrs of accumulated overtime, but that there had been no answer. The final notation reads: "SG 128 O/T". This means that a Mr. Glassford, who at that time had 128 X hrs of accumulated overtime, had agreed to work the shift.

The witness then proceeded to explain the second excerpt which reads as follows:

VO	ILL	EVE	26th June	
116	LD	2.5	6	
2	BW	1.5	1	not avail
101	CW	1.5	3	out
141	SG	2	5	O/T
	PG			not avail
173	SM	2.5	7	
83	TC	2	4	out
44	RK	1.5	2	line busy

The witness interpreted this excerpt to mean that Mr. Owen (VO) was ill for the evening shift of 26 June. He then referred to the notations below. The first column of numbers, beginning with 116, indicates the amount of accumulated overtime, in expanded hours, for each of the employees listed. The column of letters indicates the different employees to whom the overtime opportunity was to be offered. The next column of numbers, beginning with 2.5, indicates the overtime premium for each employee listed. The final column of numbers, beginning with 6, indicates the order in which the employees were to be offered the overtime opportunity.

The excerpt shows that the opportunity was offered first to a Mr. Williams (BW), but he was not available. It was to be offered next to a Mr. Rakopoulos (RK) but his line was busy. Then it was to be offered to Mr. Chant (CW) but he was out when called. It was then to be offered to a Mr. Chater (TC) but he was also out when

called. Somewhere along the line the opportunity was offered to a Mr. Paget, but he was not available. The opportunity was then offered to Mr. Glassford (SG) and was accepted by him.

The witness noted that the first three offers were made to employees whose premium rate was only time and one-half even though one of them (CW) had 101 X hrs of accumulated overtime while another (TC) had only 83 X hrs. He said that he (LD) and Mr. Williams are both AI-4 supervisors but the overtime opportunity to work an AI-4 level shift was offered to AI-3 level employees before being offered to him. He said that this represented a change in the previous policy. Previously, the employer would make an offer of an overtime opportunity across ranks only if no employee of the same rank could be found to work the overtime. Although the employer has here, apparently, crossed ranks in order to avoid paying an AI-4 at a double time and one-half premium, the witness said that he is not aware of any instance of the employer crossing ranks and offering AI-3 overtime to an AI-4 employee in order to avoid paying an AI-3 at that premium rate.

In cross-examination the witness said that the prevailing practice had always been that overtime replacements for an AI-3 controller would first be sought among AI-3 employees and only if none could be found to do the work would the opportunity be offered to an AI-4 supervisor. Similarly, if there was a need for an overtime replacement for an AI-4 supervisor, the opportunity would be offered first to all eligible AI-4

employees and only if none were available would the opportunity be offered to an AI-3 employee. He said that the nub of his complaint is that he ought to have been offered the overtime opportunities on June 25 and 26 before they were offered to an AI-3 controller.

He admitted that the practice described above had been communicated to him by other supervisors when he arrived at the Toronto Control Tower in 1981 and that he had never seen a directive from the employer making the practice mandatory or giving it any official sanction.

With respect to his findings that, on average, controllers worked more overtime than supervisors, he admitted that part of the reason may have been the smaller number of overtime opportunities for supervisors since there is no supervisor on the night shift. He also admitted that employees are free to turn down overtime opportunities and that this study of overtime distribution had not taken account of refused opportunities.

In re-examination he said that the complement of the Toronto Control Tower in 1984 had consisted of 20 or 21 controllers and five supervisors.

He said that he had not received a staff memorandum in 1984 concerning the distribution of overtime. He had been told by Mr. Baxter, the Centre Operations Manager, that whenever possible he was to avoid offering overtime opportunities to employees who

would be eligible for the double time and one-half premium.

Mr. James Kilburn testified for the grievor. He said that he has been the Toronto Tower Branch Chairman of the Canadian Air Traffic Control Association since 1979. He said that he checks all directives posted by management and he does not recall seeing a directive dealing with the distribution of overtime. He said that the practice had always been that overtime opportunities would first be offered to all eligible employees at the level of the vacancy regardless of their premium rate before crossing ranks. To the best of his knowledge, no change has ever been made in this practice. He is not aware of any restrictions on the overtime employment of AI-3 controllers at the double time and one-half premium rate.

In cross-examination he said that he is a controller at the AI-3 LEVEL. He admitted that in 1984 no record was kept of overtime opportunities refused by employees.

There was no re-examination.

Mr. Ian Desand testified for the employer. He said that he is an operations specialist with the Ontario Air Traffic Services Branch of Transport Canada and has held this position for nine years.

He identified a document dated 13 September 1982, as a Management Directive by the Regional Manager to

unit managers on the subject of overtime. He said that the general rule has been that overtime was not to be assigned to employees at the double time and one-half rate without special authorization.

In cross-examination he admitted that at the time in question he had very little direct contact with the Toronto control tower. He was employed in the operations centre which is located in a different building. He could not say for a fact that Exhibit E-1 had been distributed to those responsible for operations in the control tower.

Turning to Exhibit E-1, he admitted that paragraph 3(iii) specifies that overtime records are to be kept in terms of actual hours worked rather than in terms of expanded hours. He admitted that this was not done. He admitted that paragraph 3(iv) requires the employer to keep a record of refused offers of overtime work opportunities and he agreed that this had not been done in 1984.

There was no re-examination.

By consent of the parties, I accepted into evidence a letter dated 18 February 1985, from Mr. G.M. Allan, Director of Staff Relations, Transport Canada to Mr. J.C. Butt, President, Canadian Air Traffic Control Association (Exhibit G-5).

ARGUMENT FOR THE GRIEVOR

Counsel for the grievor referred to Article 15.03 of the collective agreement and said that some confusion had arisen over the years respecting the intentions of the parties as expressed therein. She said that the parties had been in agreement that the requirement of equitable assignment of overtime applied to both compulsory overtime assigned by the employer and to voluntary overtime which employees were free to refuse.

She referred to the case of Jennens (Board File: 166-2-3178) in which Adjudicator Abbott was called upon to interpret Article 15.03. Despite the fact that the parties there were in agreement on that Article 15.03 was intended to apply to both voluntary and involuntary overtime, Adjudicator Abbott found otherwise. Noting that the parties appeared to be in agreement on that point, he said:

> However, I must be mindful of the limitation imposed on me by Section 95(2) of the Public Service Staff Relations Act that my decision on this grievance must not have the effect of requiring the amendment of this collective agreement. I would take it that not even the agreement of the parties' representatives at a grievance hearing can displace that legislative limitation. . . . . Therefore it must follow that I cannot accede to the submission that Clause 15.03 deals with voluntary overtime, in the face of my conclusion that it only contemplates situations in which overtime

> is imposed on unwilling employees. (page 10)

The decision in that reference to adjudication was based upon another point and that finding was not referred to the Federal Court of Appeal.

Counsel then referred to the case of Archer (Board File: 166-2-13812). The point at issue there was whether the employer, in assigning overtime, could consider the level of premium pay to which different employees would be entitled. At page 17 of his decision, Adjudicator Pyle adopted the line of reasoning formulated by Adjudicator Abbott in Jennens (supra).

Counsel then argued that the correct interpretation of Article 15.03 is that it is applicable to both voluntary and involuntary overtime. There is no contradiction, she said, between the bargaining agent seeking to have the employer keep overtime to a minimum and, at the same time, asking that all overtime be equitably distributed. Thus, she said, there is no reason for finding that Article 15.03 does not apply to both voluntary and involuntary overtime.

Counsel then turned to the letter from the employer to the bargaining agent (Exhibit G-5) and directed my attention to its final paragraph:

> Although Adjudicators Pyle and Abbott have ruled that the Employer cannot be required to equitably distribute overtime in voluntary situations, the

> Department's interpretation is that the principle of equitable distribution applies to all types of overtime. I am quite prepared to issue a direction to the field to this effect. However, CATCA must recognize that a precise, exact distribution of overtime is impossible in a voluntary system and that the best management could hope for is an approach which is seen by our supervisors and controllers as being an equitable and fair distribution of overtime.

In summary, she said that the parties know what they have agreed. The problem has been that adjudicators have persisted in finding a meaning that the parties had not intended. She urged me to find that the requirement of equitability in the assignment of overtime, as set out in Article 15.03 of the collective agreement, applies to both voluntary and involuntary overtime.

Counsel then proceeded to distinguish between the case of Archer (supra) and the present reference to adjudication. She said that in Archer (supra) the claim was that controllers were not being treated equitably in relation to each other. It was held that the employer may deny overtime opportunities to employees who would earn a premium rate of double time and one-half without such a policy being inequitable. That is, the employer is not violating the requirement of equitability if it applies the same rules to all employees equally provided that the rules themselves do not violate the collective agreement.

In the present case, the point at issue is differential treatment of employees. There are supervisors and there are controllers. The former are denied overtime opportunities at their highest premium rate while the latter are not. The result is that supervisors are treated inequitably by comparison with controllers and have fewer overtime opportunities.

With reference to the case of Sumanik (Board File: 166-2-395) as interpreted by Adjudicator Pyle in Archer (supra) she said it was taken to mean that the employer is entitled to consider the unit cost of overtime when offering overtime opportunities to particular employees provided that in doing so there is no violation of the collective agreement and provided, also, that over the long haul any temporary inequities would be dissipated.

In the present case the evidence shows that for a short time in 1984, the employer discriminated against the AI-4 supervisors by denying them overtime opportunities at their top premium rate, but did not adopt a similar policy with respect to the AI-3 controllers. The result was that although, on 25 June 1984, the grievor had 20 X hrs less of accumulated overtime than Mr. Glassford, he was denied the opportunity to work a supervisor's overtime shift on that day. By the following day, 26 June 1984, the difference was 25 X hrs, yet the grievor was again denied an overtime opportunity in favour of Mr. Glassford.

In conclusion, she said that the grievor had been inequitably denied overtime opportunities on 25 and 26 June 1984, and she asked that he be awarded payment for the overtime shifts on those days at the rate of pay he would have earned had he worked those shifts.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer referred to Exhibit G-5 and said that the employer has attempted to allocate overtime opportunities on an equitable basis. However, there are difficulties in doing so. Equitable does not necessarily mean equal, yet the parties have never reached agreement on a standard of equitability. In addition, there are such matters to be considered as refusals of voluntary overtime, unavailability of employees for various reasons and the limitations imposed upon both the employer and the employees by Article 15.04 of the collective agreement:

> 15.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

Furthermore, in its review of Archer (supra), the Federal Court of Appeal found that the employer's policy of attempting to avoid assigning overtime at the highest premium rates was not a violation of Article 15.03 (Court File: A-1195-83).

She said that there is no evidence to show that the grievor was treated inequitably in violation of Article 15.03. Overtime was zeroed every six months on 1 April and 1 October. The grievor was denied two overtime shifts at the end of June, at the middle of the six month period. No evidence was presented to show that the grievor's accumulated overtime for that period was distorted as a result of the denials complained of. In the absence of such evidence, it must be assumed that the grievor was offered other overtime opportunities later -- at time and one-half or double-time.

Counsel said that charges of inequitable treatment should be made, if they are to be made at all, at the end of a six month cycle. In mid-cycle there is no entitlement to any particular shift. What the grievor is complaining about here is that he was denied the opportunity to work two especially lucrative overtime shifts rather than about overall equitability of treatment. But it is the latter that Article 15.03 is intended to cover.

With respect to the study which the grievor undertook for Mr. Baxter, counsel said that little weight should be given to the findings of that study. She noted that the only evidence with respect to that study had come from the grievor's memory and that no documentary evidence had been adduced.

In summary, she said that the grievor has no entitlement under the collective agreement to the overtime shifts which he was willing to work on 25 and 26 June 1984, and she urged me to dismiss the grievance.

REPLY FOR THE GRIEVOR

Counsel for the grievor said that if the employer acts upon principles which are discriminatory, there is no need for the grievor to wait until the end of a six month cycle. He is entitled to grieve the employer's action immediately. She reiterated that the point at issue in the present reference to adjudication is the differential treatment accorded two groups of employees working under the same collective agreement and, by Article 15.03, entitled to be treated equitably.

REASONS FOR THE DECISION

The grievor complains that for an indeterminate period in mid-1984, the employer adopted a policy which violated the requirement, as set out in Article 15.03, of equitability in the distribution of overtime work opportunities. Previously, and subsequently, the policy was to offer opportunities resulting from the absence of an AI-4 employee to other AI-4 employees. Only if no such employee could be found to do the work would the opportunity be offered to an AI-3 employee. Similarly, where there was a vacancy caused by the absence of an AI-3 employee, the overtime opportunity would be offered first to all available AI-3 employees and only if no such employee could be found to do the work would the opportunity be offered to an AI-4 employee.

The grievor alleges that in mid-1984, the above described practice was altered. In the case of a vacancy caused by the absence of an AI-4 employee, the overtime

work opportunity would be offered only to AI-4 employees whose overtime premium rate was time and one-half or double time but not to those whose overtime premium rate was double time and one-half. If an AI-4 employee could not be found to take the opportunity at time and one-half or double-time, the opportunity would be offered to AI-3 employees. Thus, the employer was attempting to deny overtime opportunities to AI-4 employees earning an overtime premium of double time and one-half. However, a similar policy had not been adopted in respect of the AI-3 employees. According to the grievor, this selective, or discriminatory, application of the employer's policy violated the requirement of equitable treatment as provided by Article 15.03 of the collective agreement.

What evidence is there to show that the employer had, indeed, adopted the policy alleged by the grievor? There is no documentary evidence before me from which I could find that there was such a policy nor was the adoption of that policy confirmed by the testimony of any witness. The closest we come to confirmation of the adoption of that policy was the testimony of the grievor to the effect that Mr. Moores, a fellow supervisor, had told him that that was the policy. Counsel for the employer objected that this was hearsay and ought not to be admitted into evidence. After considering the arguments of the parties on this point, I ruled that I would accept the grievor's testimony as evidence of what Mr. Moores had said to him but not as evidence on the question of the truth of Mr. Moores' allegations or the employer's policy. Accordingly,

I have no evidence before me from which I can conclude that the employer had, in fact, adopted the policy alleged by the grievor.

I would note, in passing, that it strikes me as being rather curious that the grievor, in alleging the adoption of a certain overtime policy by the employer, was obliged to rely upon statements made to him by a fellow supervisor. The grievor is himself a supervisor. Offering overtime opportunities to other employees is part of his duties. If the employer had adopted the policy alleged by the grievor, one would expect that he, in his capacity as a supervisor assigning overtime, would have been informed of that policy by the employer just as Mr. Moores was alleged to have been informed.

Turning to the present reference to adjudication, I would note that the remedy sought by the grievor consists of two parts:

> (i) that he be paid for the overtime opportunities denied him on 25 and 26 June, 1984;
>
> (ii) that the employer be ordered to offer supervisors the opportunity to work overtime supervisory shifts in preference to controllers without regard to the overtime premium to which those supervisors would be entitled.

I would note also the decision of Adjudicator Pyle in the case of Archer (supra), and the decision of the Federal Court of Appeal, which found that the employer does not violate Article 15.03 when it considers premium rates in the assignment of overtime work opportunities.

If the employer is entitled to consider premium rates when assigning overtime, two conclusions must follow. First, it must follow that the second part of the requested remedy, to the effect that the employer be required to offer supervisory overtime to supervisors regardless of their premium rate, cannot be granted. The employer is entitled to pass over employees with high premium rates and offer overtime opportunities to those with lower premium rates regardless of the amount of accumulated overtime such employees have worked up to that point in the cycle.

The second conclusion, following in part from the first, is that under certain circumstances an employee cannot assert a right to a particular overtime opportunity. Equitability cannot be determined on a day-by-day basis but only over an extended period of time. It must follow from this that the grievor cannot make a claim against the employer in respect of the overtime shifts which he was not offered on 25 and 26 June 1984.

Is there any evidence to show that the grievor was treated inequitably over an extended period of time even assuming that voluntary overtime must be assigned equitably? The only evidence relevant to that point was given by the grievor. He testified that at the

request of his superior he undertook a study of the overtime worked by controllers and supervisors during the period 1981 to 1985. He found that while some controllers worked an average of 500 or 600 X hrs of overtime per six month cycle, the average was 300 X hrs per six month cycle. He found that the average for supervisors was approximately half of that for controllers.

The only long term evidence concerning the grievor comes from his own records. He testified that according to those records he worked 770 X hrs of overtime in 1982; 525 X hrs in 1983; 403 X hrs in 1984 and 782 X hrs in 1985. This works out to 2480 X hrs over four years or an average of 620 X hrs per year or an average of 310 X hrs per six month cycle.

In view of the fact that the grievor found that controllers worked an average of 300 X hrs of overtime per six month cycle, I must conclude that the evidence before me does not permit me to find that the grievor was treated inequitably by comparison with the AI-3 controllers.

What of the fact that the grievor found the average overtime of supervisors to be only half of that for controllers? The allegation of the grievor is that the policy of passing over high premium supervisors while offering overtime opportunities to high premium controllers was in force for only a short while during 1984. The grievor's findings, however, cover a period

of several years from 1981 to 1985. Therefore, I must conclude that the disparity between controllers and supervisors cannot be due to the policy complained of by the grievor even if such a policy had been adopted by the employer.

In summary, the decision of the Federal Court of Appeal in the case of Archer (supra) means that it is not a violation of the collective agreement for the employer to give consideration to the premium rates payable to different employees when offering overtime work opportunities. Thus, the employer may determine that overtime opportunities will not be offered to employees at a premium rate of double time and one-half unless no other employees are available to do the work. Furthermore, it is not a violation of the collective agreement for the employer to cross ranks in attempting to avoid high premium rates and such a policy does not violate Article 15.03 if it is applied equally to all members of the bargaining unit.

For all of the above reasons, the present grievance must be dismissed.

David Kwavnick,
Board Member.

OTTAWA, November 24, 1986.