

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

BETWEEN:

HAYWARD R. CLARKE,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: David Kwavnick, Board Member.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Sheila Ray, counsel.

ARTICLE 13
CODE 402/85

Heard at Gander, Newfoundland, January 29, 1986.

CHANGE OF POSITION IN UNIT SHIFT CYCLE

DECISION

1. The present reference to adjudication concerns a grievance by Mr. Hayward R. Clarke, an air traffic controller, employed at the Gander Air Control Centre, Gander, Newfoundland. Mr. Clarke grieves the employer's interpretation and application of article 13.03(d) of the collective agreement between the Treasury Board of Canada and the Canadian Air Traffic Control Association (code 402/85). Article 13.03(d) reads:

The Employer may amend an employee's position in the applicable unit shift cycle where the requirement for amendment will be consistent for thirty (30) consecutive calendar days or more, and notice of the change is provided to the employee at least fifteen (15) calendar days prior to the change. No overtime compensation shall be payable for such a change in shift cycle, except that overtime compensation at the applicable rate shall be payable for all hours worked in excess of those stipulated under clause 13.01 as a result of the change.

2. The grievor testified in his own behalf and submitted 10 exhibits. Messrs. David Soucy and Robert Billard testified for the employer. The employer submitted no exhibits.

3. The grievor testified and said that he is an operational air traffic controller at Gander Centre

and has been employed in the Public Service since July, 1956.

4. He explained that due to the requirements of greater manning at certain times of the day, there are five shifts at Gander. Each shift is designated by a letter:

Shift C 0800 hours to 1600 hours.
Shift A 1600 hours to 2400 hours.
Shift D 2400 hours to 0800 hours.
Shift B 1000 hours to 1800 hours.
Shift E 2000 hours to 0400 hours.

5. The shift cycle is designated 5, 4, 5, 3, 6, 4; that is, five days on, four days of rest, and so on.

6. The witness said that there are a total of nine teams or crews at Gander. Each team consists of nine members. On any day, five teams are scheduled to work and four are scheduled for days of rest.

7. He identified Exhibit G-1 as the master schedule for April 1985. He was then a member of Crew 5. This schedule shows that Crew 5 began a shift cycle on Monday, 1 April, on Shift E. The following day it worked Shift A, then Shift B, then Shift C and, finally, Shift D before going on four days of rest from 6 to 9 April inclusive.

8. He identified Exhibit G-3 as the schedule for Crew 5 for April 1985. He noted the date in the upper lefthand corner: Mar-15-1985, and said that shift schedules are posted 15 days in advance at the shift manager's desk. These schedules show the job assignments for each crew member. They will also indicate such matters as leave, shift exchanges and so on.

9. The witness explained that a shift exchange is a private agreement between two air traffic controllers one of whom is scheduled to work on a particular day while the other is scheduled for a day of rest. The agreement provides that the latter will replace the former, the favour to be returned at some later date. Such exchanges are provided for by article 13.05 of the collective agreement and require the approval of the employer. He identified Exhibits G-7, G-8 and G-9 as examples of the form that must be completed to obtain authorization for a shift exchange.

10. The witness said that for several years prior to April 1985, he had been a member of Crew 5. On 3 or 4 April, he was called to the office of David Soucy, the shift manager and advised that he would be moving to Crew 7 "before the end of April". But he was not told precisely when that change would be made.

11. Upon completion of his shift on 5 April, he went on holidays for two weeks, returning on 18 April and reporting to work the following day. Upon his return to work he found a memorandum in his pigeon hole informing

him that he would be moving to Crew 7. The first day on which this move resulted in a change in his work schedule was 28 April. As a member of Crew 5 he had been scheduled to work the E shift on that day. As a member of Crew 7, he was rescheduled for a day of rest on that day. He identified Exhibit G-10, dated 11 April 1985, as the memorandum which he found in his pigeon hole.

12. He said that he thus learned of the change in his shift cycle only on 19 April, with the result that he did not have 15 clear days of notice as provided by article 13.03(d) of the collective agreement. If he had been given 15 days notice, the change would not have taken effect until 6 May 1985. Between 28 April, when he reported for work as a member of Crew 7, and 6 May, he was obliged to use a day of annual leave on 5 May.

13. With respect to 5 May, he explained that as a member of Crew 5 he would have had a day of rest on that date. In the knowledge that he would be having a day of rest, he had arranged for his daughter to be seen by an orthodontist in St. John's, some 300 kilometres away. He said that such appointments are made months in advance and are necessary because there is no resident orthodontist in Gander. As a member of Crew 7, he was scheduled to work that day and was, therefore, obliged to use a day of leave in order to be able to take his daughter to St. John's.

14. He said that his holidays, from 5 to 18 April, had been spent visiting his wife's family in Ontario. He said that Mr. Soucy knew on 3 or 4 April, that he (the grievor) would be going on leave but he (Soucy) did not ask for an address or telephone number at which he could be reached.

15. In cross-examination he said that he had not been surprised to find a notice of change in shift cycle in his pigeon hole upon returning from holidays as he had been forewarned on 3 or 4 April. He said that he had not told Mr. Soucy of the orthodontist appointment.

16. Mr. David Soucy testified for the employer. He said that he is an air traffic control shift manager at Gander and that he held this position at the time of the events under review here. He recounted the circumstances which led to the decision to move the grievor from Crew 5 to Crew 7.

17. He said that he met with the grievor on the afternoon of 4 April, and informed him that he would be moved from Crew 5 to Crew 7 before the end of the month. He explained why the grievor had been chosen to be moved; namely, he had the necessary qualifications and was next on the priority list. He said that the grievor gave no indication that he would be inconvenienced by the change.

18. In cross-examination he said that he had told the grievor that the change would "in all likelihood"

be made before the end of the month. He said that he could not be more definite since such assignments are the responsibility of the training officer, a Mr. Billard. He said that he was not aware that the grievor would be going on leave the following day.

19. Mr. Robert Billard testified for the employer. He said that he is the Unit Training Officer at the Gander Control Centre and he had held this position at the time of the events under review here. He said that one of the responsibilities of the Unit Training Officer is the setting of work schedules including the assignment of air traffic controllers to the various crews.

20. He identified Exhibit G-10, the grievor's notice of change of crew, and said that he had prepared that document on 11 April 1985. He then placed a copy in the grievor's pigeon hole and also attempted to inform him by telephone. After several fruitless attempts to reach the grievor at his home by telephone he concluded that the grievor had gone away on holiday. He said that he is responsible for scheduling 104 employees and does not keep track of their whereabouts.

21. In cross-examination he said that he was aware that the grievor was on leave when he prepared Exhibit G-10, but did not become aware that he was out of town until he attempted to reach him at home. He made no subsequent attempt to determine where the grievor had gone.

ARGUMENT FOR THE GRIEVOR

22. Counsel for the grievor said that the point at issue in the present reference to adjudication is the failure of the employer to provide 15 days notice of a change in shift cycle as required by article 13.03(d). She referred to definitions (7) and (8) in the collective agreement for the purpose of distinguishing between a change of "shift cycle" and a change of "shift schedule". She said that the present case is clearly one of a change of "shift cycle".

23. She reviewed the background to article 13.03 of the collective agreement and pointed out the difficulties that the employer had encountered in changing shift cycles under previous collective agreements. The purpose of article 13.03 is to give the employer the right to change shift cycles under certain circumstances and subject to certain conditions. In the present case, article 13.03(d) applies and it sets out two conditions which must be met. First, the change must be for 30 days or longer. This condition presents no problem in the present case. Second, the employer must provide notice of a change "at least fifteen (15) calendar days" in advance. This, she said, is the condition which the employer failed to meet in the present case and this failure is a breach of the collective agreement.

24. She said that the notification given the grievor on 4 April by the shift manager, Mr. Soucy, cannot be

considered to be the notice required by the collective agreement since the grievor was not informed of the date on which he would commence working with Crew 7. She said that the purpose of the notice is to enable the employee to plan his affairs. An employee cannot be expected to do so until he has been told the effective date of a change of shift cycle.

25. She said that the grievor was notified officially of the change in his shift cycle by the memorandum of 11 April (Exhibit G-10). However, this memorandum cannot be deemed to be notice to the employee until it has been received by the employee. In the present case, Mr. Billard put the notice into the grievor's pigeon hole knowing that the grievor might not see it before 19 April.

26. She said that merely putting information on paper cannot be deemed to be notice. It becomes notice only when the employee receives that piece of paper and, therefore, it is the responsibility of the employer to ensure that it gets to the employee. This, the employer failed to do and, therefore, it failed to meet its obligations under article 13.03(d) of the collective agreement.

27. The failure of the employer to meet its obligations under article 13.03(d) means that the remedy set out by the Federal Court of Appeal in the case of Regis Richard (Court File A-866-83) must be applied. In the event, this would mean that the grievor is to be compen-

sated at overtime rates for the shift worked on 4 May 1985 and that he be credited with one day of annual leave to compensate for the leave which he was obliged to take in order to take his daughter to St. John's for orthodontistry.

28. In conclusion, counsel for the grievor asked for:

(i) a declaration that the employer had violated clause 13.02 and paragraph 13.03(d) of the collective agreement;

(ii) that the grievor be credited with one additional day of annual leave;

(iii) that the grievor be compensated at overtime rates for the shift which he worked on 4 May.

ARGUMENT FOR THE EMPLOYER

29. Counsel for the employer said that even if the notification given to the grievor by Mr. Soucy at the meeting of 4 April is not deemed to be the notice required by article 13.03(d) of the collective agreement it is, nonetheless, a forewarning and the grievor ought to have governed himself accordingly.

30. For example, the grievor knew that his daughter had an appointment with her orthodontist in St. John's. The evidence is that these appointments are made months

in advance. He knew that a change of shift cycle towards the end of April might interfere with an appointment in early May. But he did not warn Mr. Soucy of this possibility.

31. She said that the purpose of advance notice is that the employee shall not be taken by surprise; he should have the necessary time to rearrange his affairs. Here the grievor had adequate notice on 4 April. She cited the case of Aitkens (Board File 166-2-14157) to support the position that notice need not be written but can be oral.

32. She cited also the principle of the post box acceptance rule. Although this rule properly applies in contract law, she said the point of interest here is that notice of acceptance of a contract is deemed to be given when the letter of acceptance is posted rather than when it is received. In the present case, the evidence is that the notice was placed in the grievor's pigeon hole, the workplace equivalent of a post box, on 11 April. Thus, there was more than 15 days notice as required by the collective agreement. It is not the fault of the employer that the grievor did not take his mail out of his pigeon hole until eight days later.

REPLY FOR THE GRIEVOR

33. Counsel for the grievor said that there was no obligation on the grievor to have informed Mr. Soucy on 4 April of the pending appointment in St. John's.

34. With respect to the post box acceptance rule, she said that the giving of notice is not the same as the acceptance of an offer and, therefore, this rule cannot apply. Notice cannot be said to have been given until the person has been notified. In the present case, the grievor was not notified until 19 April.

REASONS FOR THE DECISION

35. Counsel for the grievor said that at the meeting of 4 April, when he was informed that his shift cycle would change before the end of the month, the grievor was under no obligation to inform Mr. Soucy of the appointment with the orthodontist in St. John's. With respect, I disagree. Everyone is always under an obligation to act with reasonable prudence in the protection of his own interests. That is certainly the case if he intends to recover his losses from another party.

36. What is the purpose of article 13.03(d) of the collective agreement? Its purpose, as stated by counsel for the grievor, is to ensure that employees are not taken by surprise and that they are afforded adequate opportunity to rearrange their private affairs to accommodate a change in shift cycles. I agree, and I also conclude that article 13.03(d), and other similar provi-

sions, are not intended to be elaborate tripwires for the entrapment of the employer and the provision of windfall gains to employees.

37. On 4 April 1985, the grievor was informed that his shift cycle would be changed before the end of the month. At that time he was undoubtedly aware of two things. First, he knew that he would be taking his daughter to St. John's in early May to visit her orthodontist, that the appointment had been scheduled for what he anticipated would be a day of rest and that a change of shift cycles could result in his being required to work on that day. In the circumstances, reasonable prudence would require that he inform Mr. Soucy of the appointment. This, he did not do. Indeed, there is no evidence that he informed Mr. Soucy of this appointment after his return to work on 19 April, or at any other time.

38. Second, he knew that he would be leaving on vacation the following day, 5 April, and would not be returning to work until 19 April. Thus, he knew that if he wanted the full 15 days of notice to which he was entitled in respect of a change of shift cycle before the end of April, it would be necessary for the employer to reach him while he was on vacation. The uncontradicted evidence is that he left neither a forwarding address nor a telephone number at which he might have been reached.

39. On 11 April, Mr. Billard prepared a memorandum to the grievor informing him of a change of shift cycle with effect from 28 April. He left this memorandum in the grievor's pigeon hole. However, recognizing that the grievor was on holiday and might not come to collect his mail, Mr. Billard made several attempts to reach the grievor at home by telephone. These attempts were unsuccessful because the grievor was then visiting his wife's family in Ontario.

40. When the employer attempted to meet its obligations under the collective agreement, the grievor was half-way across the country. With two weeks of vacation at his disposal, he could just as easily have been half-way around the world. Having failed to leave either a forwarding address or a telephone number, can the grievor now argue that it was the responsibility of the employer to track him down wherever he was? I think not.

41. I find that the employer did everything it could reasonably have been expected to do under the circumstances to meet its obligations under the provisions of article 13.03(d) of the collective agreement. It was unable to do so through no fault of its own. Such fault as there is must be attributed to the grievor who, by going away on vacation knowing that the employer would be giving him notice, failed to act in accordance with the dictates of reasonable prudence; namely, he failed to inform the employer of his intended whereabouts and thereby frustrated the delivery of timely notice.

42. For these reasons, the grievance is dismissed.

David Kwavnick,
Board Member.

OTTAWA, February 21, 1986.