File No.: 166-2-15531

No. 94

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

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BETWEEN:

ROBERTA L. JOHNSON,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Michael Bendel, Deputy Chairman.

For the Grievor: Catherine MacLean, Counsel.

For the Employer: Craig Henderson, Counsel.

ART 13
CODE 402/85
SHIFT CHANGES
LESS THAN
15 DAYS.

Heard at Winnipeg, Manitoba, March 12, 1986.

DECISION

1. In her grievance, Ms. Roberta Johnson, an Air Traffic Controller employed in Winnipeg, alleged that the employer violated clause 13.04 of the collective agreement between the employer and the Canadian Air Traffic Control Association (Code 402/85) when, on August 10, 1985, she was instructed to work a shift commencing at midnight August 10/11, in place of the shift commencing at 4:00 p.m. on August 11 which she had been scheduled to work. Specifically, it was claimed that, contrary to the provision in question, the employer, having been apprised of her serious objections to working the midnight shift, failed to make every reasonable effort to accommodate her. She sought monetary compensation for the inconvenience she suffered.

2. Clause 13.04 of the collective agreement reads as follows:

> 13.04 Shift schedules shall be posted at least fifteen (15) calendar days in advance in order to provide an employee with reasonable notice as to the shift he will be covering. The shift as indicated in this schedule shall be the employee's scheduled hours of work. If it is necessary to amend the posted schedule, the Employer will make every reasonable effort to contact the employee affected by the amendment to advise him of the change at the earliest possible opportunity. If the employee has serious objections to the amendment, the Employer shall make

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> every reasonable effort to accommodate the employee provided that it will not result in any additional overtime payments than would have otherwise been the case if the employee had not been so accommodated.

3. In order for the issue raised by the grievance to be understood, it should be noted that the provision of the agreement alleged to have been violated was the subject of interpretation by Mr. J.H. Brown, Q.C. in Breen et al. (Board Files 166-2-14873 to 14876), a decision rendered in May 1985 in relation to the previous collective agreement for this bargaining unit (in which the clause in question was numbered 13.03). An application to the Federal Court of Appeal to set aside that decision was dismissed on November 26, 1985 (Court File No. A-491-85). In his decision, Mr. Brown held that the employer could amend a posted shift schedule with impunity, upon less than 15 days' notice to the employees affected, except where there was a violation of one or other of two specific obligations contained in what is now clause 13.04. The pertinent part of the decision reads as follows:

> 21. The article provides that where an amendment is made to the shift schedule two obligations are imposed on the Employer subsequent to the making of the amendment. First, the Employer is to make every reasonable effort to contact the employee affected and advise him of the change. Second,

> if the employee concerned has serious objections to the amendment, the Employer is obligated to make every reasonable effort to accommodate the employee, provided no overtime payment is involved. However, in the absence of specific language so providing, it cannot be said that a failure on the part of the Employer to comply with either obligation automatically entitles the employee concerned to overtime for the hours worked outside of the original schedule. Such a result simply does not flow from the provisions of article 13.03.
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> 22. This is not to say that the Employer can act with impunity insofar as its obligations under the article are concerned. The obligations are clear and a failure to comply with them could result in an award by an adjudicator of compensation in circumstances where it is shown that such failure has caused serious inconvenience to the employee concerned. There is no evidence of such circumstances, however, in the instant cases.

4. Counsel for the grievor accepted this interpretation of clause 13.04, as did counsel for the employer. The evidence and argument presented before me revolved around two questions, namely whether, in the circumstances of the case, the employer was obliged to make every reasonable effort to accommodate the grievor and, if so, whether the employer did in fact make every reasonable effort to accommodate her.

5. Evidence was given by the grievor and by her shift manager, Mr. Glen Shewfelt. Except on one important point, there were no contradictions in the evidence presented.

6. Ms. Johnson worked on what was known as the "west specialty" in the Winnipeg Area Control Centre, which meant that her responsibilities related to air traffic within the area between Winnipeg, Saskatoon and Regina. Controllers are checked out for specific specialties and do not normally rotate between specialties. In all, some 19 controllers in Winnipeg were checked out for the west specialty. Air traffic control services were provided for the west specialty on a 24-hour per day basis.

7. Each employee assigned to the west specialty had a shift cycle covering a 36-day period, during which the employee would be scheduled to work 21 shifts. Within that period an employee's days on and days off were arranged as follows: 5 on, 4 off, 5 on, 4 off, 5 on, 3 off, 6 on and 4 off. An employee was designated a "spare" on the 14th day of each such cycle and was scheduled for a "comp. shift" on the 27th day. No evidence was tendered on whether or when a "spare" was scheduled to work a specific shift (since this was irrelevant to the grievance), but the evidence established that when designated for a "comp. shift", an employee was scheduled to work a specific shift, invariably the evening shift commencing at 4:00 p.m. In such a case, however, the

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employee in question would be surplus to minimum staffing requirements. The practice was for the shift supervisor to integrate the "comp." employee into the team on duty for that shift so as to lighten the load on the other employees working that shift.

8. Sunday, August 11, 1985, was to be the grievor's "comp. shift" and she had been scheduled to work the evening shift commencing at 4:00 p.m. On the afternoon of the previous day, however, she was telephoned at home by Mr. Shewfelt, who told her that, since the employee scheduled to work the shift commencing at midnight Saturday/Sunday had called in sick, he wanted her to cover that shift instead of the evening shift on August 11. According to the grievor, the phone call was at precisely 2:23 p.m., although Mr. Shewfelt put it slightly later. While nothing turns on the precise time of the call, different accounts were given by the two witnesses of the substance of the conversation.

9. The grievor's account was that she told Mr. Shewfelt that she had plans for that evening and did not want to work the midnight shift. Mr. Shewfelt, according to the grievor, told her that she was the "comp." employee and that she had to come in. She told him that she was part of a foursome due to have a barbecue dinner and then go to a pool party that evening. Mr. Shewfelt undertook to try to find someone else scheduled to work the evening shift on August 11 who might be prevailed upon to work the midnight shift in place of her, but he told her that, if he was unsuccessful, she would have to work the shift.

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10. Mr. Shewfelt's testimony was consistent with Ms. Johnson's, except that he testified that she merely said that she had previous plans, as a result of which she did not want to work, without specifying the nature of those plans.

11. Mr. Shewfelt called the grievor back about 10 minutes later and told her that he had not been able to find anyone else to work the midnight shift and that she would therefore have to work it. The grievor agreed to report to work for that shift, but made it clear that she was unhappy with having to do so and would be working it under protest. Mr. Shewfelt suggested to her that she try to find someone with whom she could exchange shifts. Ms. Johnson testified that she was unable to contact anyone who could change shifts with her.

12. According to Mr. Shewfelt, the grievor was the first person he contacted upon being informed that a replacement was needed for the midnight shift. He knew from the shift schedule that she was the only person designated as a "spare" or a "comp." for that day. After his first telephone conversation with the grievor on the afternoon in question, he checked the schedule to see who might be available to work the midnight shift. One employee had gone home sick that day while working the "overlap shift" from 11:00 a.m. to 7:00 p.m., and Mr. Shewfelt therefore did not regard him as available. Three employees on the evening shift on August 10 and one other employee on the overlap shift that day were

regarded as ineligible for the midnight shift since employees were not normally required to work a shift within eight hours of the completion of their previous shift. He testified that he spoke to one employee, identified on the schedule as "DD", who was working a day shift on August 10 and due to work a day shift on August 11, to see if he would accept to work the midnight shift so as to permit the grievor to work the day shift on August 11. That employee, however, declined and Mr. Shewfelt did not press the matter with him, since both regarded such a change of shifts as voluntary for him. Mr. Shewfelt testified that he regarded another employee (identified as "FB" on the schedules) as available to change shifts with Ms. Johnson, but he could not recall whether he had been unable to contact this employee or whether the employee had declined the change. In any event, he testified that, as in the case of "DD", such a change would have been purely voluntary for "FB". No other employees were scheduled to work on the west specialty on August 11.

13. In cross-examination, Mr. Shewfelt made it clear that he was looking for a volunteer to replace the grievor on the midnight shift. She was the "comp." employee and thus the person who had to work the shift if no one else would volunteer to do so. He also stated that he did not consider the possibility of suggesting to the grievor or any other employees that a written agreement be entered into with management, pursuant to clause 13.03(a) of the collective agreement, to amend the schedule. Clause 13.03(a) reads as follows:

13.03 Changes in Shift Cycle - Operating Employees

(a) On a temporary basis an employee and unit management may mutually agree in writing to amend the shift cycle applicable to the employee. Such agreement may be terminated in writing by either the employee or unit management with at least thirty (30) calendar days' notice.

14. Following her second telephone call with Mr. Shewfelt, the grievor cancelled her participation in the dinner planned for that evening. While she did attend the pool party, she arrived late, left early and, while there, was unable to relax or drink any alcohol as she had to report for work that night.

15. The grievor worked the midnight shift in question. She received no overtime pay or other compensation for working that shift over and above her regular salary.

16. In her submissions, counsel for the grievor stressed that a claim for overtime payment (on the basis that the grievor had been required to work outside of her scheduled hours of work) was not being put forward. The grievor was seeking compensation for the inconvenience caused her by the employer's violation of clause 13.04 of the collective agreement. The violation alleged by the grievor was that the employer did not make every reasonable effort to accommodate her after she expressed her serious objections to the amendment of her schedule.

Ms. MacLean argued that Mr. Shewfelt had misinterpreted the collective agreement, as well as the decision in Breen (supra) (which was referred to in replies to the grievance) when he decided that Ms. Johnson, by reason of her being a "comp." employee, should be ordered to work the midnight shift despite her objections to doing so, while the two other eligible employees (identified as "DD" and "FB" on the schedules) were merely viewed as persons who should be asked to volunteer to work the shift. The collective agreement, Ms. MacLean noted, did not sanction the view held by Mr. Shewfelt that "comp." employees were entitled to less consideration in this regard than others.

17. Ms. MacLean noted that, in clause 13.04 of the collective agreement, the employer was required to make "every reasonable effort" to accommodate an employee in Ms. Johnson's position. She referred to the recent decision of Mr. Galipeault in Pinard (Board File 166-2-15381), in which it was held that a requirement to make "every reasonable effort" to achieve a particular result was a more onerous obligation than a requirement to make "a reasonable effort". Mr. Shewfelt, in light of this obligation, should have gone beyond looking for volunteers, according to the grievor's counsel. He should have pressed the employees identified as "DD" and "FB" as to their reasons for not wanting to cover the midnight shift. He should have considered the possibility of a shift exchange agreement as envisaged in clause 13.03(a). In short, she argued, he should have taken the extra step to try to accommodate Ms. Johnson.

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18. Ms. MacLean argued that Ms. Johnson's plans for dinner and a pool party, which formed the basis of her objection to working the midnight shift, should be regarded as satisfying the condition in the final sentence of clause 13.04 to the effect that an employee must have "serious objections" to the amended shift schedule. These were serious social commitments on the part of Ms. Johnson. It caused a disruption in her social life to have to drop out of the planned dinner and curtail her participation in the pool party. When pressed on the meaning of the term "serious objections" in clause 13.04, Ms. MacLean suggested that the expression was used so as to exclude employees' objections based on a simple desire to remain with their scheduled shift and so as to include objections based on factors such as a desire not to disrupt plans involving other people, tickets to cultural events and the like.

19. Counsel for the grievor stated that the measure of the compensation claimed by the grievor was based on article 15 of the collective agreement, which provided for overtime compensation at the rate of time and one half (and double time in some situations) for hours worked outside of an employee's scheduled hours of work. According to Ms. MacLean, the parties to the collective agreement had recognized that this was an appropriate measure of compensation for a disruption to an employee's private life when called upon to depart from previously scheduled hours of work. She suggested, in the alternative, that I consider clause 13.08 of the collective

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agreement, which provides for a premium of four hours' pay at the straight-time rate in certain situations involving a change in an employee's status from an "operating employee" to a "non-operating employee". Finally, she stressed that, while such compensation would be appropriate in this case, other situations involving more serious inconvenience to employees caused by a violation of clause 13.04 might warrant greater compensation.

20. Mr. Henderson, counsel for the employer, reviewed the evidence and suggested that the fate of this grievance ultimately depended upon an interpretation of the facts. He argued that Mr. Shewfelt had taken a reasonable approach to trying to find someone else to work the midnight shift. He pointed out that, according to Mr. Shewfelt, he knew little or nothing of the grievor's plans for the evening of August 10 at the time. A manager should not be expected to engage in an exercise of balancing the seriousness of the competing objections by employees to working a particular shift.

21. Mr. Henderson also noted that in the Breen case (supra), Mr. Brown had stated that compensation was only appropriate where "serious inconvenience" had been established. Ms. Johnson's upset plans for the evening of August 10, he argued, did not constitute serious inconvenience. He also referred to the decision in Boyce and Bizzarro (Board Files 166-2-9797 and 9820) relating to the same collective agreement provision. Finally, Mr. Henderson questioned my jurisdiction to award compensation. He also questioned the validity

of Ms. MacLean's submissions on the question of the appropriate measure of compensation in a case such as this.

22. Three distinct questions require consideration in order to resolve this grievance:

(a) whether the grievor had "serious objections" to the amendment to her shift schedule, within the meaning of clause 13.04;

(b) if she did, whether Mr. Shewfelt made "every reasonable effort to accommodate" her; and

(c) if he did not, whether Ms. Johnson is entitled to compensation for the inconvenience she suffered.

23. On the question of the seriousness of Ms. Johnson's objections, I should state in the first place that I prefer her version of the telephone conversation to that of Mr. Shewfelt, and I thus find that she did tell him what her plans were for the evening of August 10 when they first spoke by telephone that afternoon. This should not be interpreted as a finding that Mr. Shewfelt's evidence lacked veracity. In my view, it is probable that the grievor's recollection of the conversation was more accurate than Mr. Shewfelt's. It is unlikely that he regarded the conversation as worth remembering in detail, while the contrary is the case for the grievor. I have noted, in this regard, that Mr. Shewfelt was not able to recall whether or not he spoke to the employee identified as "FB" on the afternoon of August 10.

24. The collective agreement offers no guide as to how weighty or of what kind an employee's objections to a shift change have to be before they qualify as "serious objections". One can imagine objections far more deserving of sympathetic consideration by management than those of Ms. Johnson, which were motivated by a desire not to disrupt plans to go to dinner with friends and then to a pool party.

25. Nevertheless, in my view, Ms. Johnson's objections should qualify as "serious objections" for the purpose of clause 13.04. I do not understand why objections motivated by a desire not to disrupt planned leisure-time activities should not be deserving of sympathetic consideration under this clause. An employee working shifts on a schedule covering 24 hours per day and seven days per week almost inevitably experiences significant difficulties in juggling leisure-time activities and work commitments. Success in arranging social activities that are consistent with the availability of family and friends is often elusive for such employees, even on the basis of shift schedules posted 15 days in advance of the month in question. For such employees, I would regard objections to amendments of shift schedules based on a desire not to disrupt planned social activities as serious objections. I am inclined to agree with Ms. MacLean that an objection would not be "serious" if it were based on nothing more than an aversion to a change in one's scheduled shifts. The same would be true if the objection were based on frivolous considerations.

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26. This leads me to a consideration of the second question I must examine, namely whether Mr. Shewfelt made every reasonable effort to accommodate the grievor. I agree with Ms. MacLean's submission to the effect that, from the perspective of the collective agreement, Mr. Shewfelt was wrong in looking to the employees identified as "DD" and "FB" only as potential volunteers and not as employees who might be required to change shifts. The collective agreement does not single out "comp." employees for special treatment. Their objections to changes in shifts are therefore entitled to as much consideration as those of any other employee. Mr. Shewfelt should have come to a determination as to whether the two other employees had reasons as good as Ms. Johnson's for not wanting to work the midnight shift. I would add that it seems obvious that the only way an objecting employee can be "accommodated" for the purposes of clause 13.04 is to assign someone else the shift that such employee objects to working, although the clause makes it clear that the employer is not required to go as far as to incur additional overtime expenses. What the employer is required to do, however, is to consider assigning the shift to another employee, whether a volunteer or not. Since Mr. Shewfelt failed to consider assigning the shift on a compulsory basis to the other two employees, he failed to make "every reasonable effort to accommodate" the grievor.

27. The final issue I must decide is whether any compensation should be granted to the grievor for the inconvenience she suffered. I pause to note at this

point that the grievance filed by Ms. Johnson asked for overtime compensation for the shift in question and that at the hearing before me Ms. MacLean, with no objection from Mr. Henderson, amended the relief sought so as to claim compensation for the inconvenience suffered by the grievor.

28. I have concluded that a case for compensation has not been made out. I express no opinion on whether serious inconvenience has to be shown before compensation can be awarded (as decided by Mr. Brown in Breen (supra)) or on what the appropriate measure of compensation might be. My reason for denying compensation is that the evidence, in my view, does not establish a link between the violation of the collective agreement and the inconvenience experienced by the grievor. I am not satisfied that faithful compliance with the collective agreement by the employer would have resulted in the grievor not suffering the inconvenience of a disrupted evening. If the employer had made every reasonable effort to accommodate Ms. Johnson, I am by no means satisfied that it would have been successful in that regard. No evidence was presented to show that the other two candidates for the midnight shift did not have objections as serious as, or more serious than, those of Ms. Johnson. In order to be entitled to compensation, in my view, the grievor had the onus of demonstrating, on a balance of probabilities, that if the employer had made every reasonable effort to accommodate her, in compliance with clause 13.04, it would have succeeded in doing so. In civil proceedings, it is a principle too elementary to require the

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citation of authority that a plaintiff claiming damages for breach of contract must prove that the loss was caused by the defendant's breach of contract. The same is true, I believe, in a case such as the one before me. This matter was not raised in argument and I have therefore unfortunately not had the benefit of counsel's submissions on this point. Nevertheless, it would be wrong in principle for me to award compensation unless I were satisfied of a sufficient link between the loss complained of and the violation, and, as I have stated, I am far from satisfied of such a link.

29. I therefore declare that the employer violated clause 13.04 of the collective agreement, but I must dismiss the claim for compensation.

Michael Bendel,
Deputy Chairman.

OTTAWA, April 3, 1986.