Files: 166-2-15440
15441

No 80

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

WAYNE J. JUSTINEN and
DEREK NEILSON,

grievors,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: Roger Young, Board Member.

For the Grievor: Catherine MacLean, counsel, Canadian Air Traffic Control Association.

For the Employer: Larry M. Huculak, counsel.

ARTICLE 13
CODE 402/85
CHANGE IN SHIFT CYCLE

Heard at Calgary, February 6, 1986.

DECISION

1. Wayne Justinen and Derek Neilson are each Air Traffic Controllers, classified AI-4, and both work in the Calgary Terminal Control Unit (hereinafter referred to as TCU), part of the Air Traffic Services branch of Transport Canada. Justinen, Neilson and a third Air Traffic Controller, David Colwell, each filed individual grievances against the employer relating to the interpretation of a clause in the relevant collective agreement between the Canadian Air Traffic Control Association and the Treasury Board, Code: 402/85. The three grievances, all arising out of similar fact situations, were scheduled to be heard together. Colwell was unable to be present on the date set aside for the hearing and his grievance was postponed at the request of the parties pending the outcome of the Justinen and Neilson references.

2. Justinen and Neilson allege that the employer has broken or circumvented its obligation under the collective agreement to maintain intact the mutually agreed upon shift cycle in effect at the commencement of the collective agreement. The employer denies any breach of the collective agreement and relies upon two prerogatives of management, namely, the right to assign overtime and the right to assign work (or, more specifically, the right to decide when there is or is not work available to be done by an employee).

3. The relevant clauses of collective agreement 402/85 which are at the centre of these grievances are as follows:

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13.02 Unit Shift Cycle - Operating Employees

(a) 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.

. . .

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) calendays' notice.

. . .

13.04 Shift schedules shall be posted at least fifteen (15) calendar days in advance in order to provide an employee with resonable 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 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.

4. Care should be taken to note the difference between the terms "shift cycle" and "shift schedule" as stated in the "Definitions" section of the collective agreement:

> (7) "Shift cycle" means the recurring sequence of an employee's days of work and days of rest.
>
> (8) "Shift schedule" means the Employer's advance posting of shifts to be worked by employees within their shift cycle.

5. It was undisputed evidence that the mutually areed upon shift cycle in effect at the Calgary TCU, as concerns the grievors herein, was a nine day cycle which followed a rotational pattern 36 days in length consisting of five days on, four off, five on, four off, five on, four off, six on, three off; thereafter the cycle repeats itself, ad infinitum. This was referred to in evidence, in abbreviated fashion, as the "Triple 5-4, 6-3". It was the contention of each of the grievors that the employer's actions with respect to him had resulted in a change to his shift cycle contrary to the obligations expressed above.

6. The alleged change in shift cycle which gave rise to these grievances came about when management at the Calgary TCU decided to ask the Operations Committee of those controllers at the Calgary TCU (consisting of Justinen, Neilson, Colwell and William Hawkins) to attend a simulation exercise, designed to improve the "Western Flow System", at the Simulation Centre of Transport Canada

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located in Hull, Quebec. The Simulation Centre operates on a regular daily basis from 08:00 to 16:00, Mondays through Fridays. It is normally closed on weekends and holidays. The above-mentioned Air Traffic Controllers who were selected by management to attend the simulation exercise normally work one of several irregular shifts, namely, 0545 to 1400, 0645 to 1500, 1245 to 2100, 1445 to 2300 or 1545 to 2359 depending upon their position within the shift schedule, but always according to the "Triple 5-4, 6-3" shift cycle described earlier. It is readily seen what management's problem was: a simulation exercise at the Hull facility involving the four controllers could not be undertaken without some adjustment both to their shift schedule, i.e., their normal hours of work on any given day, as well as to their shift cycle, i.e., their recurring pattern of days of work and days of rest.

7. Justinen and Neilson testified that they were asked by management early in 1985, to go to Hull to assist in establishing new control procedures for the Calgary TCU. The exercise was to take place about mid-May. On 25 March, a meeting took place between F. Gordon Lowe, Chief, Calgary TCU and Messrs. Neilson, Hawkins and Colwell. Lowe sought to obtain the controllers' mutual agreement to amend their shift cycles pursuant to clause 13.03(a) of the collective agreement for the duration of the simulation exercise in Hull and all necessary travel time between Calgary and Hull. Some trade off consisting of overtime payments and days off was offered by the employer; the controllers were not agreeable and

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made counter proposals. It is not necessary to recount in detail, here, the demands of the employees save to say that there appear to have been individual preferences expressed. Both sides then withdrew to consider their respective positions with a view to reconvening at a later date to determine whether mutually agreeable amendments were possible. None was forthcoming; Neilson and Justinen were subsequently told to report to Hull.

8. Had Justinen not been assigned to the simulation project in Hull he would have worked a shift cycle during May 1985 as represented by the column on the left, below. What he actually worked is shown in the column to the right.

WAYNE JUSTINEN

	CALGARY TCU CYCLE	CYCLE ACTUALLY FOLLOWED
May	1- Off	Off
	2- "	"
	3- "	"
	4- "	"
	5- Work	Work
	6- "	"
	7- "	"
	8- "	"
	9- "	"
	10- Off	Off
	11- "	"
	12- "	"
	13- "	"
	14- Work	Work (Calgary)
	15- "	" (Travel to Toronto)
	16- "	" (Toronto)
	17- "	" (Travel to Ottawa)
	18- " (Saturday)	Off*#
	19- Off (Sunday)	"
	20- " (Stat. Holiday)	"
	21- "	Work* (Hull)
	22- "	Work* (Hull)

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23- Work	Work
24- "	"
25- " (Saturday)	Off*#
26- " (Sunday)	" *#(3 hrs. worked in meeting)
27- "	Work (Hull)
28- "	" "
29- Off	" * "
30- "	" * "
31- "	" * (Travel to Calgary)

* Denotes change from day of work to day of rest or vice-versa.

\# Denotes change specifically relevant to this grievance.

9. The situation with respect to Derek Neilson is similarly described in the columns below.

DEREK NEILSON

CALGARY TCU CYCLE	CYCLE ACTUALLY FOLLOWED
May 1- Work	Work
2- "	"
3- "	"
4- Off	Off
5- "	"
6- "	"
7- "	"
8- Work	Work
9- "	"
10- "	"
11- "	"
12- "	"
13- Off	Off
14- "	"
15- "	Work*(Travel to Toronto)
16- "	" *(Toronto)
17- Work	" (Travel to Ottawa)
18- " (Saturday)	Off*#
19- " (Sunday)	Off*#
20- " (Stat. Holiday)	Off*#(Assigned Lieu Day)

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21-	"	Work (Hull)
22-	Off	" * (Hull)
23-	"	" * "
24-	"	" * "
25-	" (Saturday)	Off
26-	Work (Sunday)	" *#(Worked 3 hrs at meeting)
27-	"	Work (Hull)
28-	"	" (Hull)
29-	"	" "
30-	"	" "
31-	"	" (Travel to Calgary)

* Denotes change from day of work to day of rest or vice versa.

# Denotes change specifically relevant to this grievance.

10. Unable to obtain the mutual agreement of those air traffic controllers concerned to amend their shift cycles pursuant to clause 13.03(a) of the collective agreement, Lowe, the Unit Chief and person responsible for establishing the shift schedule from month to month, then posted the schedule for May 1985 (Exhibit 3). In effect what he did was to assign overtime to Justinen and Neilson on those days on which they normally would have been at rest but were required, as participants in the simulation exercise, to be present in Hull. In order to accommodate the fact that the simulation centre worked a regular 0800 to 1600 day, the controllers' hours of work between Mondays and Fridays for the duration of the exercise were adjusted accordingly.

11. The schedule for May 1985, as prepared by Lowe to take into account the needs of the simulation exercise, was posted as required, i.e., 15 days in advance of

commencement. On this schedule the initials "WJ" stand for Wayne Justinen, "XN" for Derek Neilson, "AC" for David Colwell and "WH" for William Hawkins. This schedule clearly shows that each of the four is posted "AOD", Absent on Duty, on the following dates: May 15 to 17, 21 to 24 and 27 to 31. The squares in the AOD category representing the dates May 18 to 20, 25 and 26, with respect to the four controllers, have been left blank. That is to say, the four controllers were all scheduled to be absent but still working and, in some cases, to receive overtime for those days between 15 and 31 May, inclusive, with the exception of Saturdays, Sundays and the statutory holiday on Monday, 20 May. That this would amount to a change in the controllers' patterns of work was known to the employer in advance of posting the schedule. This is also confirmed by the memorandum from John F. Marsden, Terminal Operations Supervisor, Calgary TCU to the four controllers on 11 April 1985. This was adduced as Exhibit 2 and specifies the periods 21 to 24 and 27 to 31 May as the dates for the simulation exercise.

12. On 23 April, Lowe had advised the four controllers by memorandum that:

> Further to our conversations concerning your shift cycles and overtime compensation while

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engaged in the UATFM Simulation Project at the ATS R&D Centre, Hull, P.Q.

Following consultation with Staff Relations, Edmonton, we intend to take the following course of action:

1. Your shift cycle shall be continued throughout the time you are at Hull.

2. Time worked in excess or outside of your scheduled hours of work shall be considered as overtime and compensated for in accordance with Article 15 of the TB/CATCA Collective Agreement.

3. Days on which you are scheduled to work, but on which no work is available shall be subject to pay recovery action. Requests for annual or other types of leave with pay on those days will not be approved.

4. Every effort will be made to ensure the effects of the pay recovery/overtime payment occur in the last half of June 1985.

13. Justinen and Neilson were subsequently compensated for overtime assignments according to the terms of the memorandum sent to them by Lowe. In the instant grievances, however, they claim, essentially, that their shift cycles have been altered by the employer without their consent and, that as a result, they have been denied work.

Justinen claims that he has lost 8 1/4 hours of work on each of 18 and 25 May and 5 1/4 hours of work on 26 May. He seeks compensation in relation thereto. Neilson claims to have been denied work which he was otherwise scheduled to perform at the following times: 8 1/4 hours for each of 18 and 19 May and 5 1/4 hours on 26 May. Additionally, Neilson seeks reinstatement of a lieu day unilaterally assigned to him by the employer on 20 May 1985 and consideration for loss of work on that same day.

14. On behalf of the grievors, Ms. MacLean carefully reviewed in detail the history of the series of grievances between various other members of the same bargaining unit and the employer which had preceded the instant references. The problem at the root of each of these grievances had centred around the need of the employer, for one reason or another, to amend a shift cycle in effect at one of its installations. The relevant collective agreement has remained largely unchanged since 1979 and thus has been construed both by adjudicators appointed by this Board as well as by the Federal Court of Appeal, in the course of determining those several grievances. It appears that the remedy sought by successive grievors has become somewhat enlarged over the course of these hearings. Successive decisions either by the adjudicators seized of the issue or by the Federal Court of Appeal have largely established what is and what is not acceptable procedure or compensation pursuant to the relevant collective agreement in force at the time. One issue, it appears, remains unresolved; it is that upon which I am asked, here, to decide: Are the grievors entitled

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to be paid for those days on which they normally would have expected to work, according to their usual shift cycle, had the employer not said that there was no work for them to do? In effect, are the grievors entitled to a return of the pay which was recovered from them for the dates described and on which the employer did not assign work though they were originally scheduled to work?

15. The previous Board decisions cited by Ms. MacLean were Graham and Onieu (Board Files 166-2-9787 and 166-2-9833), Johnson (Board File 166-2-10027), Richard (Board File 166-2-13797), Cantin (Board File 166-2-14009), Exley et al (Board Files 166-2-14005 to 14008 and 166-2-14454 to 14461), Wilcox (Board File 166-2-14636). The Richard, Exley et al and Wilcox decisions (all supra), were subsequently referred to the Federal Court of Appeal under section 28 of the Federal Court Act. In due course, the Federal Court of Appeal issued its decision in respect of each of these applications: Her Majesty the Queen in right of Canada as represented by the Treasury Board and Regis Richard (Court file A-866-83); Her Majesty the Queen in right of Canada as represented by the Treasury Board and D.J.S. Exley et al (Court File A-1423-84); Ron Wilcox and Her Majesty the Queen in right of Canada as represented by Treasury Board (Court File A-1354-84). Broadly speaking, the rationale of these previous cases as elucidated by Ms. MacLean dealt with, one, actions taken by the employer which constituted a unilateral change in shift cycle and, two, the appropriateness of overtime compensation where work was scheduled on a day of rest. These issues, she suggested, had long since been settled; the matter of compensation for loss of work remained outstanding.

16. Ms. MacLean stressed that the grievors, here, were simply seeking to be made whole. They were not seeking pay for work they had not performed but rather were seeking damages or compensation for breach of the collective agreement by the employer which breach had

caused work to be taken away from them. The grievors' shift cycles had been changed in spite of the euphemisms and fictions of the employer. Ms. MacLean pointed to testimony by the grievors that there had been work which each of them felt could reasonably have been done, in relation to the simulation exercise, on the Saturdays, Sundays and one holiday which had ocurred during their stay in Hull. Ms. MacLean argued that, whereas the employer could have assigned work to the grievors, what it really had sought to do was to place the grievors on the same work schedule as its other employees who normally worked at the Simulation Centre in Hull. The collective agreement did not permit the employer to randomly and unilaterally deny employees work. The employer could have negotiated an exemption to the collective agreement for the purposes of sending employees on simulation exercises similar to clause 13.03(c) regarding employees sent on training programs but, until it did, it was bound by the existing terms and compensation should be forthcoming according to the controllers' usual cycle of work expectations.

17. Ms. MacLean went on to argue that the unilateral assignment of a lieu day to Neilson raised additional problems. The collective agreement only contemplated the assignment of lieu days according to specified conditions. Clause 16.04 describes the premium pay to be awarded an employee who works on a holiday, along with a day of leave which is to be granted in lieu of the holiday so worked. Neilson did not specifically ask for premium pay in his grievance but was entitled to

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consideration of same. The previous Board decisions in Anderson et al (Board Files 166-2-9005 to 9008) and Derrien et al (Board Files 166-2-13805 to 13807) were cited. The employer had failed to make "every resonable effort" as required by clause 16.05(d) to accommodate the employee's wishes.

18. On behalf of the employer, Mr. Huculak agreed that the facts involved at the root of this grievance were not really in dispute. In order to have the four air traffic controllers concerned attend a simulation exercise in Hull, the employer had sought the mutual consent of the employees to a change in their shift cycles. Having failed to achieve an agreement with the controllers, the employer had simply exercised its prerogative to assign overtime to them on what, otherwise, would have been been their days of rest and had then followed up by making a recovery of wages on what, otherwise, would have been a day of work but on which, in the employer's judgment, no work was available. The employer had compensated the grievors for the appropriate overtime according to Article 15 of the collective agreement. Now, the grievors were asking for compensation for work which was not done. The basis of this claim was that their shift cycle had been changed because the sequence of days of rest and days of work had been altered by the employer. If the grievors' argument was accepted, then, by the same logic, every assignment of overtime on a day of rest would be contrary to the collective agreement as, of necessity, the sequence would be changed. The employer, for instance, would be unlikely ever to be

able to assign overtime and still meet the obligations of clause 13.01(c):

> 13.01(c) An employee's days of rest shall be consecutive and not less than two (2).

19. Gordon Lowe, Unit Chief, Calgary TCU, had testified that, had the controllers agreed to his first proposal, they would have lost no regular salary. The employer's original proposal simply meant that its overtime costs would have been minimized because the controllers likely would have lost the potential for some overtime earnings. Lowe stated that the actions he eventually took did not amend the shift cycle in effect at Calgary TCU, merely that overtime was assigned and compensated for while salary recovery was commenced for work not carried out because none was available for assignment. As for Neilson, because he was not going to be working in Hull on Monday, 20 May 1985, he was informed before leaving Calgary that he would be deemed to have enjoyed the benefit of the holiday; thus, no premium pay would be forthcoming, the holiday would not be moved to his next subsequent day of work and his lieu day credits would, accordingly, be reduced through the assignment of one credit on the Monday.

20. Mr. Huculak argued that Neilson could have protected himself as far as his regular salary was concerned. However, Neilson had not accepted Lowe's proposal and so, while he got paid for his overtime, he would not

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get paid when he did not work. Mr. Huculak argued that the instant grievances differed from those previous cases referred to by Ms. MacLean which had come before the Board. This was a simple exercise of management's prerogatives, not a question of breaching the collective agreement. It was not up to the employees to tell management whether work was available or not, and not up to the controllers to decide on what days a review assessment of the simulation exercise should be conducted. The employer was relying on clause 14.02 of the collective agreement which said that "an employee is entitled to be paid for services rendered...". There was no guarantee of any minimum pay.

21. Mr. Huculak cautioned against construing too broadly comments made by Mr. Justice Mahoney of the Federal Court of Appeal in the Exley case (supra). That decision had been reached on narrow grounds; there was no reason to accept Ms. MacLean's suggestion that a "judicial footprint" had been left pointing in the direction of awarding pay for a day of lost work. Equally, he claimed, it might be noted that the Federal Court of Appeal had chosen not to comment on the statement of the learned Vice-Chairman, J.M. Cantin, in the Wilcox case (supra) that the principle of "no work, no pay" applied. Mr. Huculak suggested that the instant case was closest to Wilcox. He suggested that the Vice-Chairman would likely disallow the present grievors' claims. He further referred me to Roncali (Board Files 166-2-15195 to 15197) and Lariviére (Board File 166-2-13917).

22. In concluding, Mr. Huculak pointed to the fact that no work was available because of the nature of operations at the Hull Simulation Centre to which the men had been temporarily assigned. This made the instant case somewhat different than a disciplinary case where, because of a suspension or discharge, work might have been available but the employee was barred from reporting to work.

23. By way of rebuttal, Ms. MacLean stated that the provisions in the collective agreement with respect to overtime were there for the purpose of assigning work, when necessary, to employees outside of their regularly scheduled hours. This permitted management to assign extra duties. On the other hand, while, indeed, management had a prerogative to assign work this did not amount to a power randomly to deny work. With respect to a guarantee of work Ms. MacLean pointed to clause 13.01 which described a controller's regular work week as constituting 34 hours. The term "services rendered" in relation to pay was a reference to services rendered on an annual basis in relation to salaries or pay scales which were also expressed in annual terms. The employer had a contractual obligation to uphold and should be kept to it.

REASONS FOR DECISION

24. Had I simply been called upon to render a decision with respect to the instant grievances on the basis of the evidence adduced and in relation to their merits alone, without reference to any previous jurisprudence

before this Board or the Federal Court of Appeal, I have no hesitation in saying that I would have concluded that these grievances ought to be allowed. To do otherwise, and to give countenance to the arguments offered by the employer, it seems to me, would be to demean the obligations expressed in and expected to be upheld under the collective agreement. I find the logic of the employer to have an alluring but false facade which is unable to stand the test of sincere obeisance to the letter and the spirit of the collective agreement.

25. The basis of my decision in favour of these grievors is the clear and undisputed obligation found in clause 13.02(a) of the collective agreement that:

> 13.02(a) At those air traffic control facilities...where...a mutually agreed upon shift cycle is now in effect: (i) such shift cycle will remain in effect for the term of this Agreement unless...a different shift cycle is agreed to ...

This obligation is subject to clause 13.03(a):

> 13.03(a) On a temporary basis an employee and unit management may mutually agree in writing to amend the shift cycle applicable to the employee...

This is the only relevant exception, in the case of the instant grievances, which is applicable to the basic obligation to maintain the original shift cycle enshrined by clause 13.02(a). The shift cycle in effect at Calgary TCU was the "Triple 5-4, 6-3"; no mutual agreement in writing to amend this was ever forthcoming.

26. Gordon Lowe, Unit Chief, Calgary TCU, testified that he recognized the problems inherent in assigning four of his controllers to a simulation exercise in Hull. Their shift cycles and shift schedules would not fit the times that the Hull simulation facility was normally in operation and at rest. Some accommodation had to be made. Lowe sought the mutual agreement of the controllers concerned to amend their shift cycles pursuant to clause 13.03(a). The controllers refused. Lowe then, on instructions from the Regional Staff Relations office of Transport Canada, assigned overtime on days of rest and commenced pay recovery for work not performed on what otherwise would have been days of work. He claimed to exercise a managerial prerogative.

27. "Shift cycle" is defined in the collective agreement as the recurring sequence of an employee's days of work and days of rest. It is this recurring sequence which, according to clause 13.02(a) must be maintained intact. For the employer to maintain that this recurring sequence had been kept inviolate while at the same time it went about assigning overtime work on days of rest and all the while knew that the "probable outcome", to use Lowe's own words, of sending the men to Hull would be the net

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loss of work on the weekends they spent there is pure sophistry. The same argument has previously been unsuccessful in those cases which have been taken before the Federal Court of Appeal. The employer's actions were calculated and were taken in the full knowledge that the shift cycle was being unilaterally amended. If these actions did not amount to a change in the shift cycle why did management even bother to first seek the amendment that was possible under clause 13.03(a)? The employer seeks to clothe these actions under the guise of managerial prerogatives. To permit management such latitude would be to render this and any similar clauses in other collective agreements meaningless.

28. I am compelled to the strength of my conclusions on at least two other grounds. Clause 13.01(a) deals with hours of work for "operating employees" which description includes the grievors herein. It reads as follows:

> 13.01 Operating Employees
>
> (a) Thirty-four (34) hours, inclusive of a mandatory fifteen(15)-minute period in which the employee shall prepare himself to assume his duties prior to the commencement of each shift, shall constitute the workweek for operating

> employees; except that when hours of work are scheduled on a rotating or irregular basis, employees will work thirty-four (34) hours per week averaged over a period of time not to exceed seventy (70) days.
>
> (Emphasis added)

The words "shall" and "will" being utilized as noted would lead one to conclude that an air traffic controller has every expectation of receiving some 34 hours of work per week or 340 hours over a ten week period. Nowhere else in the collective agreement have I found anything which would dissuade me from this opinion.

29. Given that I am not incorrect in this opinion, any assignment of overtime would necessarily result in the augmentation of one's total, weekly expectation of paid labour. If the employer can exercise its prerogative to assign overtime while at the same time recovering pay for work not performed because it chooses not to assign any work, (as it claims here to have done), does not this, too, make a mockery of an employee's expectation to be additionally compensated for overtime performed by him in excess of his regularly scheduled hours of work? Clause 15.01 of the collective agreement defines overtime as follows:

> 15.01 Time worked by an employee in excess or outside of his scheduled hours of work shall be considered as overtime.

30. By recovering pay on days on which it assigned no work while purporting to assign overtime on days of rest the employer has done nothing more nor less than transfer work from one day to another, albeit at very slight cost to itself. It has, thus, changed the recurring sequence of days of rest and days of work. Furthermore, by taking, in addition, a pay recovery action it has, in effect, diminished the value of the rate of compensation at which it has promised to compensate its employees for overtime performed by them, pursuant to clause 15.02. It has, in short, devalued and demeaned the total compensation an employee might logically have expected to receive by the amount equal to that which it has recovered. The "concept" of "overtime" as time worked in excess or outside of scheduled hours and the expectation of premium compensation to be paid in relation thereto has been rendered less meaningful by the employer's actions. I simply do not believe that any implied prerogatives of management were ever meant in law to be construed so as to subvert the explicit obligations bargained for and expressed, as they so clearly are in this case, in a collective agreement.

31. I am therefore of the opinion that the argument as put forward by Ms. MacLean on behalf of the grievors must be sustained and that these grievances must be allowed. I stated earlier that these conclusions were

based on my own views and restricted solely to the facts and the merits of the instant grievances. Here it was obvious that the actions of the employer, in deducting pay for the non-performance of work which it never expected to assign, taken as these actions were, well in advance of the dates in question and in conjunction with the purported assignment of "overtime" on days of rest, clearly breached the collective agreement. This does not mean that the employer can never have resort to such prerogatives only that it should not have done so in concert as it did here for the purpose of achieving an amendment to the mutually agreed upon shift cycle.

32. I have reviewed those authorities cited to me by counsel and have found nothing in any of the previous decisions of this Board or those of the Federal Court of Appeal which would dissuade me from the conclusions so far expressed. The decisions of the Federal Court of Appeal in Exley et al (supra) and Wilcox (supra) are uniquely applicable to the jurisdictional issues raised therein while any opinions expressed in obiter in other decisions are simply that and of no binding authority. Whether there was intended to be a "judicial footprint" set down by Mr Justice Mahoney in the Exley et al decison (supra) as was suggested by Ms. MacLean I know not. The substance of that claim may yet be tested should either of the parties find itself dissatisfied with my attempt to resolve the question here.

33. The Exley et al case (supra) as well as the Wilcox case (supra) also concerned disputes arising out of changes to shift cycles involving, as here, assignments of overtime

on days of rest and non-assignment of work on previously scheduled days of work. The adjudicator in Exley et al, Mr. Mitchell, appears to have come to the same conclusion as I with respect to the appropriate remedy; however, his reasoning was only fully developed in a subsequent elaboration upon his original decision. The Federal Court of Appeal held that the adjudicator was functus officio and, thus, had no authority to expand upon or clarify his award in a manner which appeared to increase the original award. In Wilcox, the adjudicator, the learned Vice-Chairman of the Board, concluded that the request by the grievors, to be compensated for days on which work was not assigned, had been raised for the first time only at adjudication and not in the original grievance; this amounted to a new grievance. The Federal Court of Appeal upheld this decision. I am not confronted, here, with the problems which arose in either of the Exley et al or the Wilcox cases. Here, the grievors have specifically described their claims as relating to requests for compensation for those days on which work was, in essence, taken away from them whereas they had expected, according to their shift cycles, to perform work. Work was not available because the employer decided that no work would be assigned. Additionally, Neilson seeks restitution in relation to the matter of a lieu day. This claim arises out of the loss of work on a statutory holiday. All of this is to say that the lack of specific request as in Wilcox is no longer relevant here. As to the problem which arose in Exley et al, a detailed explanation of my award follows which I trust will be comprehensive as well as comprehensible.

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34. As to other decisions cited to me, it is clear that Graham and Onieu (supra), fully supports the conclusion that the employer had no authority, through the exercise of managerial prerogatives, to unilaterally deviate from its express obligations under the collective agreement. Those grievances involved a rescheduling which had taken place so that the employer could provide the grievors with some necessary retraining, something which is not the case here. I quote adjudicator Mitchell in the last sentence of paragraph 33 on page 12 of the decision:

> In short, where the words of an agreement clearly impose an obligation neither party may unilaterally impose an alteration to what was agreed to on the ground that to fulfill the obligation would involve additional cost.

The actions taken by the employer which gave rise to the instant grievances were, according to Unit Chief Lowe, just that: attempts to minimize overtime costs related to the simulation exercise. The decision in Johnson (supra) confirms that reached in Graham and Onieu.

35. The Richard case (supra) concerned a grievance again based on a unilateral change made by the employer to an air traffic controller's shift cycle. The remedy sought was overtime compensation for days worked; the grievor did not seek, as in the instant grievances,

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compensation for days on which he did not work although he was scheduled to work. The decision of the adjudicator, Vice-Chairman Cantin, to award overtime compensation was later upheld by the Federal Court of Appeal. Nothing in those decisions detracts from any conclusion I have reached here. On the contrary, they are fully supportive. The case of Cantin (supra) was essentially the same in its result as those in Exley et al (supra) which has already been dealt with.

36. I find nothing in the decisions in Larivière (supra) or Roncali (supra) as cited to me by counsel for the employer which would persuade me to reach any conclusions other than those I have expressed herein. I do find the decisions in Derrien (supra) and Anderson (supra) to be somewhat helpful in resolving the problem of Neilson's lieu day. The explanation of my award related thereto follows.

37. As to the appropriate remedy, it is clear to me that the grievors herein ought to be in receipt of further compensation. Whether this is seen as an award of compensation in respect of days of work which were lost owing to management's breach of the collective agreement, or as a return of pay wrongly recovered by the employer under the guise of the "no work, no pay" principle, or whether it is seen as an award which brings the value of compensation in relation to overtime (as time worked outside of normally scheduled hours) up to the "true value" of what it would normally have been expected to amount to, seems to me to be of little consequence.

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The effort, here, is to make the grievors whole, to leave them no worse off than they would have been had the employer observed the obligations expressed in the collective agreement and had the grievors simply received that to which they could reasonably have expected to be entitled. I therefore find that Justinen is entitled to be compensated for the time he otherwise would have expected to be on duty on 18 and 25 May 1985 and for the balance of 5 1/4 hours for which he remained uncompensated on 26 May 1985.

38. Neilson's situation is somewhat more complicated because of the issue of the statutory holiday. However, here again, I have proceeded on the basis of attempting to make him whole and of requiring the employer to bear the cost of any alteration to his "protected" shift cycle occasioned by its re-assigning him to Hull. Neilson is therefore entitled to be compensated for the time he otherwise would have been on duty on 18 and 19 May 1985 and for the balance of 5 1/4 hours on 26 May for which he was not compensated. In addition, he is entitled to be compensated for the statutory holiday, 20 May 1985, as if he had worked on that day and at the rate established in clause 16.04(a) of the collective agreement. Further, pursuant to clause 16.04(b) Neilson is entitled to a day of leave with pay at a later date in lieu of the holiday. I fully realize that, in actuality, Neilson had a day of "rest" on 20 May 1985, but this occurred only because the employer interfered with his protected shift cycle, not because of any action taken by Neilson. There is no authority for the employer to have unilaterally

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assigned Neilson a lieu day on 20 May 1985 as it purported to do.

39. These grievances are therefore allowed as herein described. I remain seized of these references should difficulties be encountered in the implementation of these awards. Should it turn out that the ultimate cost to the employer of compensating the grievors according to the terms of these awards is greater than that which it would have had to pay had it accepted the offers made by the respective grievors when a mutual amendment of the shift cycle was first discussed, then so be it. That is a loss which the employer shall have to bear as a result of its own course of action. No deduction can be made at this juncture simply because the grievors may now be entitled to more than at one point they offered to accept.

40. I wish, again, as I did at the hearing, to express my appreciation to both counsel for the manner in which these issues were presented. The lucid and detailed explanation by Ms. MacLean of the series of cases leading up to the instant grievances was most helpful in grasping the issues and in comprehending those earlier decisons. Equally appreciated was the concise and forthright manner in which Mr. Huculak sought to explain the employer's motives in pursuing its course of action. Nothing in the remarks I have made herein should be taken as reflecting in any but a complimentary way on the ability or performance of either counsel.

Roger Young,
Board Member.

OTTAWA, March 14, 1986.