File: 166-2-16366

No. 212.

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

RALPH K. JOHNSON,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: David Kwavnick, Board Member.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Craig John Henderson, counsel.

CCDR 402/85

ARTICLE 28 TRVL DIR.

MILEAGE NON-CONTIGUOUS OVERTIME

Heard at Winnipeg, Manitoba, June 10, 1987.

DECISION

The present reference to adjudication concerns a grievance by Mr. Ralph K. Johnson (AI-4), an air traffic controller employed by Transport Canada at the Winnipeg Control Centre. Mr. Johnson grieves the employer's interpretation and application to him of Article .7.1.1 of Chapter 370 (Travel) of the Treasury Board Administrative Manual.

Pursuant to Article 29 of a collective agreement between the Treasury Board of Canada and the Canadian Air Traffic Control Association (Code 402/85) and an agreement between the Treasury Board of Canada and the National Joint Council of the Public Service of Canada with effect from 30 August 1984, Chapter 370 of the Treasury Board Administrative Manual is incorporated, by reference, into the collective agreement.

The disputed provision reads:

> .7.1.1 **Transportation costs - overtime** In a situation involving authorized overtime:
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> . . .
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> - which requires the employee to report to work for a period of time not contiguous to normal hours of work, and the employee is required to use transportation services other than normal and reasonable public transportation, the use of a taxi or, when a private

> vehicle is available, the payment of a kilometric (mileage) rate as set out in article .1.1 of Appendix C (higher rate) shall be authorized from the employee's home to the work place and/or return if necessary. Necessary parking charges will also be reimbursed.

The grievor seeks payment of the mileage allowance in respect of three non-contiguous overtime shifts worked by him on 21, 22 and 23 August 1985. He also seeks an order to the employer to pay him the mileage allowance in respect of all future non-contiguous overtime shifts which he may work.

There is no dispute with respect to the evidence. The grievor has been employed at the Winnipeg Control Centre since December 1974 and has for some years resided in an area of Winnipeg known as Charleswood. His home is located approximately one-half kilometre inside the Perimeter Highway in the west end of Winnipeg.

The Perimeter Highway, as its name indicates, is a highway which encircles the Winnipeg area (in fact, in the north-east the circle is incomplete, but this point is irrelevant here). The evidence shows that at some time in the past an employee who resided outside the Perimeter Highway had presented a grievance in respect of mileage allowance. He alleged that "reasonable" public transportation was not available to him and that, therefore, he ought to be paid mileage allowance for the use of his car when reporting to work for non-contiguous overtime.

The evidence shows, further, that the employer and the bargaining agent negotiated a mutually acceptable settlement of this grievance. The nub of the settlement was that any employee who resided outside the Perimeter Highway would be deemed not to have "reasonable" public transportation available to him and would qualify for mileage allowance in respect of non-contiguous overtime.

The grievor said that in early 1985, he and some fellow employees discussed the matter of mileage allowances for non-contiguous overtime. They concluded that it was unfair for the employer to deny such allowance to employees resident within the Perimeter Highway while paying it, as a matter of right, to employees residing outside that line. It was noted that some employees residing outside the Perimeter Highway enjoyed easier access to the airport than did some employees residing within the Perimeter Highway.

Accordingly, beginning in July 1985, the grievor began to submit claims for mileage allowance in respect of his non-contiguous overtime (Exhibits G-3, G-4 and G-5). His first two claims were paid without question. His third claim was questioned by the Centre Operations Manager, a Mr. Emil Bryksa, and he was asked to submit a written justification. He did this (Exhibit G-6) and the claim was eventually paid.

On 16 July 1985, Mr. Bryksa, in his capacity as acting manager, issued the following memorandum (Exhibit G-7, the paragraphs have been numbered for ease of reference):

1. Para 7.1.1 of the Treasury Board Administrative Policy manual states that "In a situation involving authorized overtime which is contiguous to the employees normal hours of work and, as a direct consequence of the time of travel, the employee's normal mode of transportation is precluded, or which requires the employee to report to work for a period of time not contiguous to normal hours of work, and the employee is required to use transportation services other than normal and reasonable public transportation, the use of a taxi or, when a private vehicle is available, the payment of a kilometric (mileage) rate as set out shall be authorized from the employee's home to the workplace and/or return if necessary".

2. For those employees residing within the Perimeter Highway, it is assumed that normal and reasonable public transportation is available. If this is not so, the employee when assigned overtime is to advise what is the earliest possible time of arrival at work considering a reasonable departure time from home and the length of time en route by bus. If this is acceptable the employee

may claim the mileage but will lose the overtime from the commencement of the shift until they arrive. If it is not acceptable, and the employee is required for the beginning of the shift then mileage, or taxi if approved by the Shift Manager, will be paid. In this latter case current bus schedules are required to be appended to the claim or on file with the Shift Manager or a taxi receipt attached in order for the claim to be justified and processed.

3. Shift Managers are responsible for assessing whether the time an employee could arrive if public transportation is used is acceptable under the circumstances and approve any claim submitted.

4. A reasonable distance to walk to public transportation is 1 km. and a reasonable time to depart for work is ½ hour prior to the time the employee would normally leave if a PMV was used.

5. Travel expenses for overtime that is contiguous before a normal shift will be assessed according to above criteria, travel expenses for overtime contiguous following a normal shift will not. Such expenses for the trip home following a shift are not acceptable unless a taxi is taken.

6. Travel expense claims for overtime for those living beyond the Perimeter Highway will continue to be processed as before.

On 11 September 1985, the grievor submitted a claim for mileage allowance in respect of non-contiguous overtime shifts worked on 21, 22 and 23 August 1985. This claim was refused, a grievance was presented and the matter is now before me for adjudication.

The overtime shifts worked on 21 and 23 August were scheduled overtime, the grievor had been informed the previous May that he would be working those shifts. With respect to the shift of 22 August, the grievor said that he received a telephone call from the shift supervisor at 0740 hours on that day asking him if he could take a shift beginning at 0900 hours.

With respect to the availability of public transportation, the grievor said that travelling to work in that manner would require that he walk 1.3 kilometers from his home to the nearest bus stop. The trip by public transportation would take between one and one-half to two hours. Travel by private automobile took approximately 25 minutes. He admitted that for a period of over one year, it had been necessary for his wife to have the use of the family car and he had travelled to and from work by public transportation.

The grievor admitted that he had not followed the prior approval requirements as set out in the second

paragraph of Mr. Bryska's memorandum of 16 July (Exhibit G-7, reproduced above). He said that his refusal to seek prior approval of mileage allowance was based upon the principle that he has a right to that allowance under the terms of his collective agreement and that right comes into play when the employer assigns him to work a non-contiguous overtime shift.

Mr. Allan L. Sutherland testified for the employer. In August 1985, and until July 1986, he was the manager of the Winnipeg Area Control Centre. Mr. Bryksa was the Centre Operations Manager and reported to him. It was while he was on annual leave and Mr. Bryksa was acting in his place that the memorandum of 16 July (Exhibit G-7) was issued. On 10 December 1985, he revoked that memorandum and issued another which is the same in all respects except that paragraph 4 of the memorandum of 16 July was deleted.

Mr. Sutherland said that he became involved in this matter after the grievor had presented his grievance. He met with the grievor in December 1985, and refused to grant the remedy requested. He said that his refusal was based upon the view, which he still holds, that mileage allowance is not payable because the grievor resides within the Perimeter Highway. He said that in the case of an employee who resides within the Perimeter Highway, it is assumed that normal and reasonable public transportation is available. This is a rebuttable presumption and, in his view, the grievor has failed to rebut it.

With respect to the pre-authorization procedure set out in paragraph 2 of the memorandum of 16 July, he said that an employee who is called in for non-contiguous overtime must inform his supervisor of the additional time that would be required to use public transportation. If the employee is unable to get to work at the start of the shift, it would then be up to the supervisor to decide whether or not the employee is, in fact, needed for the full shift.

If the employee's presence is required for the full shift, mileage allowance would be authorized. But if the supervisor decides that the employee's presence is not necessary from the start of the shift, mileage allowance would not be authorized and the employee would be permitted to report for work after the start of the shift. The employee would not be paid for the time which elapsed between the start of the shift and his arrival.

Mr. Sutherland admitted that despite the wording of the second paragraph of the memorandum of 16 July -- "the employee when assigned overtime is to advise what is the earliest possible time of arrival" -- it is not possible in May to determine whether or not an employee's presence will be required from the start of an overtime shift which will be worked in August. Such a decision can only be made a short time prior to the commencement of the shift as there is always the possibility of sudden illness or changes in traffic volume.

Mr. Sutherland admitted that the presumption of the availability of reasonable public transportation within the Perimeter Highway is not always borne out in fact. He further admitted that in the case of the grievor he had assumed that because the grievor resided within the Perimeter Highway reasonable public transportation was available to him.

He said he was also aware that the grievor does not, in fact, use public transportation. If, as in the case of the present grievor, an employee normally uses his own automobile to get to work, then the whole question of public transportation and its availability becomes moot. He said that he did not give much attention to the question of the time the grievor would have had to travel to come to work by public transportation because he knew that the grievor would not use public transportation in any case.

ARGUMENT FOR THE GRIEVOR

On behalf of the grievor, Ms. MacLean said that under the provisions of Article .7.1.1 of travel regulations, which form part of the collective agreement, it is sufficient to trigger the payment of mileage allowance if "the employee is required to use transportation services other than normal and reasonable public transportation.

Thus, if "normal and reasonable" public transportation is not available, the employee is entitled to be paid mileage allowance. It is irrelevant whether

he actually uses public transportation and he is not required to enter into negotiations with the employer in respect of a starting time.

She said that the second paragraph of the memorandum of 16 July was simply an attempt to intimidate employees and thereby discourage requests for mileage allowance. She explained that an employee who requested mileage allowance ran the risk of being told to report for work an hour after the start of the shift. The result would be that the employee would not be paid mileage allowance and would lose one hour of pay at overtime rates.

She said that in the present case there is scheduled bus service and, therefore, the requirement of "normal" service has been met. However, the mere availability of service does not mean that the service is "reasonable". If the use of public transportation involves an overly lengthy trip or long walks then it fails to meet the requirement to be "reasonable".

In the present case, the use of public transportation would have required the grievor to walk 1.3 kilometers to the nearest bus stop. The time required to travel to work would have been increased by one to one and one-half hours. She maintained that this made the use of public transportation unreasonable. The fact that the grievor may himself have chosen to use public transportation to get to work for his regular shifts is entirely irrelevant. Article.7.1.1 of the Travel Directive states that getting to work for regular shifts is the concern of the employee. But overtime

is a different matter and an entirely different set of principles applies.

Referring again to the memorandum of 16 July (Exhibit G-7) she said that even if the employer could require prior authorization, that requirement could not be enforced in respect of the overtime shifts worked on 21 and 23 August 1985. Those shifts were assigned in May 1985. The memorandum provides that the employee is to discuss mileage allowances with his supervisor "when assigned overtime". Since the memorandum was not issued until July, that provision cannot apply to overtime assigned the previous May.

With respect to the overtime shift worked on 22 August 1985, the shift supervisor had asked the grievor: "Can you be here for nine o'clock". Under the circumstances, the grievor was entitled to assume that his presence was in fact required at nine o'clock. Since it was clearly impossible for him to get to work by nine o'clock using public transportation, he was entitled to assume that he was authorized to travel by private motor vehicle and that the appropriate mileage allowance would be paid.

Ms. MacLean then questioned the employer's right to require an employee to obtain prior authorization in order to be eligible to receive a mileage allowance. She said that the employer purports to rely upon Article .2.1 and following for its authority. Article .2.1 reads:

> .2.1 Pre-authorization to travel
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> **All travel and travel arrangements shall be pre-authorized by the employer** in accordance with the authorizing instructions contained in this policy. It remains the prerogative of the employer to determine whether, when, by whom and by what means travel shall be undertaken and to select the accommodation to be used, subject to article .5.1.1.

She said that this provision, and those which follow it, are clearly not intended to apply to employees going to their normal place of work for the purpose of working overtime and this for two reasons.

First, it is clear from the words of Article .2.1, and from that of the following provisions, that what is contemplated here is travel away from an employee's normal headquarters area. This is made clear by the reference to accommodation in article .2.1 and by other references, such as in Article .2.1.3, to such matters as "purpose and duration of the trip", "the locations to be visited", "the dates and times of arrival and departure" and so on.

Second, the specific over-rides the general. Article .2.1 and following are general provisions. Article .7 deals more specifically with one aspect of travel: "Travel expenses within headquarters area". Article .7.1 is more specific still. It deals with

"Travel to and from home". Finally, Article .7.1.1 deals with travel to and from home for the purpose of working overtime and it provides an automatic triggering provision -the absence or availability of normal and reasonable public transportation.

Finally, Ms. MacLean said that it is inequitable of the employer to treat employees differently simply because they happen to live on one or the other side of the Perimeter Highway. The grievor lives only 500 metres inside the Perimeter Highway and on that basis he is denied mileage allowance while another employee, who may live a very short distance to the west is granted mileage allowance. She urged that this alleged inequity be corrected.

ARGUMENT FOR THE EMPLOYER

For the employer, Mr. Henderson said that there is more at issue than the availability of "normal and reasonable" public transportation. There is the fact that an employee is required, by the terms of the memorandum of 16 July 1985, to activate the provisions of Article .7.1.1 of the Travel Directive. The employee must request pre-authorization of mileage allowance. If he fails to do this, the employer is entitled to assume that there will be no request and to refuse payment if a request is made later.

He said that the grievor is proceeding upon the assumption that all he need do to receive mileage allowance is work non-contiguous overtime and meet the requirements of Article .7.1.1.

He asked if travelling time of one and one-half to two hours is reasonable and concluded that it is. He said that in the present case the employer was not given the opportunity to determine whether the grievor's circumstances were reasonable until after the overtime had been worked. Had it been faced with that decision beforehand, it might have offered the overtime opportunities to another employee.

With respect to the use of the Perimeter Highway as a rough-and-ready cut-off point, he said that a comparison of the conditions of employees resident inside and outside that line is not before me. In any case, the decision to use the Perimeter Highway as a cut-off point was the result of an agreement between the employer and the bargaining agent.

In summary, he said that the point at issue is the right to automatic mileage allowance under certain circumstances. The employer's position is that such an expenditure requires pre-authorization and that the employer is entitled to demand such pre-authorization under various provisions of article .2 of the Travel Directives.

With respect to the availability of "reasonable" public transportation, he said that the grievor bears the onus of showing that the public transportation available to him is not reasonable. He has not discharged this onus. The grievor has not put forward any objective test which would distinguish reasonable from unreasonable.

REPLY FOR THE GRIEVOR

Ms. MacLean said that the grievor's point is, precisely, that pre-autorization is not required under the collective agreement. It is irrelevant that the employer may authorize him to report for work after the start of his shift. The only question is whether or not reasonable public transportation is available to him.

As for the employer having the opportunity to consider whether or not to offer the grievor an overtime opportunity in light of his request for mileage allowance, she said that the grievor had already made his position clear. He had claimed mileage allowance in July 1985. On 27 July 1985, he had submitted to the employer a detailed memorandum setting out his position with respect to mileage allowance (Exhibit G-6). The employer cannot claim that it had no opportunity to decide whether or not it wished to pay him mileage allowance or that it might have offered the overtime opportunity to someone else had it known that he intended to claim such allowance.

She reported that the problem is not that the grievor is unable to get to work in time for an overtime shift and, therefore, requires authorization to arrive after the start of the shift. The problem is that the grievor is faced with public transportation which is not reasonable. The point is not whether he can get to work on time, but the length of time it would take him to do so.

REASONS FOR THE DECISION

The point at issue is whether or not the grievor is entitled to be paid mileage allowance in respect of non-contiguous overtime shifts worked by him on 21, 22 and 23 August 1985. The remedy requested by the grievor also includes a prospective declaration in respect of the same matter.

The employer has attempted to base its case, in part, upon the grievor's failure to seek prior authorization for payment of mileage allowance in accordance with the second paragraph of the memorandum of 16 July 1987. The employer alleges that it is entitled to require prior authorization under the provisions of article .2.1 of the Travel Directives. In reply, the grievor argued that article .2.1 is intended to apply only to travel away from an employee's headquarters area.

Although the wording of article .2.1, and especially that of article .2.1.1, appears to me to support the grievor's argument, it is not necessary that I make a finding on that point.

Contrary to what was argued on the employer's behalf, article .2.1 of the Travel Directive does not deal with prior authorization for the payment of travel expenses. The heading of article .2.1 reads:

"Pre-authorization to travel", and that is precisely its subject matter. Once an employee has been authorized to travel, the payment of necessary travel expenses, in accordance with the various standards promulgated by the employer for these purposes, follows automatically. In short, if an employee is authorized to travel, he is authorized to claim, and be paid, the appropriate expenses.

It is my finding that in authorizing the grievor to work non-contiguous overtime shifts the employer was authorizing him to travel from his place of residence to his place of work. Whether or not the grievor is entitled to be paid mileage allowance for this travel will depend entirely upon whether or not his circumstances meet the requirements of Article .7.1.1 of the Travel Directive.

Article .7.1.1 of the Travel Directive makes the payment of mileage allowance dependent upon the availability, or otherwise, of "normal and reasonable public transportation". It was conceded by the grievor that "normal" service is available. The point at issue is whether or not that service is "reasonable".

What is reasonable? On 16 July 1985, the Acting Manager of the Winnipeg Control Centre issued instructions respecting the use of public transportation when reporting to work for non-contiguous overtime (Exhibit G-7). The fourth paragraph of this document defined "reasonable":

> A reasonable distance to walk to public transportation is 1 km. and a reasonable time to depart for work is ½ hour prior to the time the employee would normally leave if a PMV [private motor vehicle] was used.

The evidence before me shows that the bus stop nearest the grievor's residence requires a walk of 1.3 km. and that using the bus would require him to leave home approximately one to one and one-half hours earlier than usual. Thus, in respect of both distance walked and time traveled the grievor qualifies for mileage allowance in accordance with the definition in the memorandum of 16 July 1985.

The evidence before me indicates that the memorandum of 16 July 1985 was superceded on 10 December 1985 (Exhibit E-1). Accordingly, during this period, from 16 July to 10 December 1985, the grievor was entitled to be paid mileage allowance in respect of the non-contiguous overtime shifts worked by him. The present grievance is, therefore, sustained in respect of the overtime shifts worked on 21, 22 and 23 August 1985. That is the extent of my jurisdiction in this case since the actual grievance statement dealt only with work on these three dates. I have no jurisdiction to deal with similar events involving the same employee which may have occurred after the present grievance had been presented. However, in view of the fact that the matter was raised and strictly by way of obiter, I now turn to the question of a prospective

declaration with respect to non-contiguous overtime shifts with a view to providing the parties involved some guidance towards the resolution of this issue. As such, I must deal with the question of a standard of reasonableness since the employer has not provided one.

Neither party provided me with any basis upon which I might base a finding on what constitutes reasonable public transportation. The only evidence from which I might draw any conclusion is an admission by the grievor to the effect that he had used public transportation to travel to work for a period of over one year when it was necessary for his wife to have the use of their family car. During that time, the grievor may well have found the level of public transportation available to him to be inconvenient and time-consuming. However, in view of the fact that he used it for over one year, I am not prepared to find that it is not reasonable.

Ms. MacLean suggested that transportation which is reasonable when an employee is travelling to work for his regular shifts may not be reasonable when that same employee is going to work an overtime shift. I am unable to accept this argument. The reasonableness of any transportation arrangement is dependent entirely upon the quality of that arrangement and is independent of whether the employee will be working a regular shift or an overtime shift.

In any case, even if I did accept Ms. MacLean's principle and agreed that the reasonableness of public transportation might depend upon whether the employee was going to work a regular shift or an overtime shift, my inclination would be to apply this principle in a manner precisely opposite to that proposed by her. I would argue that travel arrangements which are unreasonable in respect of regular shifts might well be reasonable in respect of overtime shifts. Overtime work is, after all, compensated at premium rates. It is not unreasonable to assume that for the sake of such rates an employee might be willing to accept transportation arrangements which he would not be willing to accept for the sake of straight time rates.

Finally, I come to Ms. MacLean's request that I find the use of the Perimeter Highway as a reference point to distinguish between employees who qualify for automatic mileage allowance and those who must justify their claims to be inequitable to the latter. I would note that this arrangement was instituted in response to a previous grievance. I would note, further, that this arrangement was negotiated between the employer and the bargaining agent. Having negotiated and accepted an agreement, the bargaining agent cannot now be heard to say that its terms ought to be altered because they are inequitable in respect of some members of the bargaining unit.

In any case, even if I did find that the agreement is inequitable, the only possible result would be that

employees who are resident outside the Perimeter Highway and who do have "normal and reasonable public transportation" available to them would be deprived of their mileage allowances. Those employees who are now eligible for mileage allowance under article .7.1.1 of the Travel Directive, regardless of their place of residence, would remain eligible while section 95(2) of the Public Service Staff Relations Act would prevent the extension of eligibility to employees who do not qualify under the terms of article .7.1.1 of the Travel Directive.

In short, I do not have authority to order payment of mileage allowance to employees who do not qualify under the terms of the collective agreement, the most I could do would be to deny payment to employees who do not qualify under the terms of the collective agreement but who are paid such allowance none the less. I doubt that this is the remedy Ms. MacLean had in mind.

In summary, the present grievance is sustained to the extent that the grievor is entitled to be paid mileage allowance in respect of non-contiguous overtime shifts worked by him on August 21, 22 and 23, 1985.

David Kwavnick
Board Member.

OTTAWA, July 27, 1987.