FEB 09 1988

File No.: 166-2-17159

No. 31

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

BETWEEN:

DONALD A.G. McGILL,

Grievor,

and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Muriel Korngold Wexler, Board Member.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: Robert Lee, Counsel.

Code 402/85
Art 13
Shift differentials

Heard at Ottawa, Ontario, September 29, 1987 and January 15, 1988.

DECISION

This grievance arises from the exchange of shifts between Mr. Donald A.G. McGill and another qualified employee. The point in issue is the application and interpretation of clause 13.05 of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association, signed on February 22, 1985, and in effect from January 1, 1985 to December 31, 1986 (Code: 402/85). The question in issue is what happens when the employer approves the shift exchange between qualified employees and the one who was to cover, as a result of the exchange, was unable to report for the shift. In this case, the employer deducted a day's pay from Mr. McGill's pay cheque because he was the employee originally scheduled for the shift. Mr. McGill grieved the employer's one-day pay deduction.

THE FACTS

Mr. Donald McGill has been a team supervisor at the Edmonton Area Control Center since 1984. He is an operating AI-05 and he has been employed with Transport Canada for a period of 16 years. He explained that the Edmonton Area Control Center operates 24 hours a day. The cycle is five days on, four days off; five days on, four days off; and six days on, three days off. The 24-hour period is divided into three shifts. The shift schedule is posted 15 days in advance. Mr. McGill was scheduled to work the evening shift of April 5, 1987, and he was off April 9, while Mr. Raphael was scheduled off on April 5, 1987, and he was to work the midnight shift of April 9, 1987. Mr. McGill decided to go on

.../2

a five-day ski trip during the March break week of March 30 to April 5. On March 25 he, therefore, asked Mr. Raphael to work the evening shift of April 5 while he would work Mr. Raphael's midnight shift of April 9, 1987. They agreed to exchange the shifts and this agreement was noted in the log book. All shift exchanges must be approved by a shift manager and Mr. Fitzpatrick, the shift manager, did approve the exchange of April 5. Mr. McGill approved the shift exchange of April 9 in consultation with Mr. Fitzpatrick. The two shifts were exchanged and entered in the log book on March 25.

On March 31, Mr. McGill left his residence in Leduc for a three-day skiing holiday. He returned late April 5. When he returned to work at 7:00 a.m., April 6, he was advised that he would probably lose a day's pay because Mr. Raphael had not worked the April 5 evening shift and another employee, Mr. Lomow, had been called in on overtime. The same day, April 6, Mr. Raphael came into the Area Control Center, covered with bruises, his face in scabs with a dislocated left elbow and his arm in a cast. He had had a skiing accident. He reported in to advise that he could not work three cycles. Mr. McGill was ready and willing to work the April 9 shift as agreed to with Mr. Raphael, but Mr. Hamilton, Chief, Center Operations Manager West, advised him that he would not work this shift. The exchange was cancelled on April 8. Mr. McGill explained to Mr. Hamilton that he was prepared to work the shift of April 9. He owed it to management and it would not cost any overtime. However, Mr. Hamilton refused the offer and cancelled the exchange of shifts (Exhibit 4). On April 8,

.../3

Mr. Hamilton officially advised Mr. McGill that one day's pay would be deducted from his pay cheque (Exhibit 3). On April 9, Mr. Raphael was on sick leave and another employee was called in to work the midnight shift on overtime.

During the presentation of the evidence, Ms. Catherine MacLean, counsel for the grievor, argued that even though in her submissions clause 13.05(e) of the collective agreement was unambiguous, she wished, however, to introduce extrinsic evidence to prove the practice of the parties and the intention and the understanding of the parties at the bargaining table on the interpretation and application of clause 13.05(e). She argued that there was a latent ambiguity.

Mr. Robert Lee, counsel for the employer, objected to the submission of extrinsic evidence. Mr. Lee argued that clause 13.05(e) was clear and the extrinsic evidence was not admissible. At the adjudication hearing, I reserved my decision on the admissibility of the extrinsic evidence and allowed the extrinsic evidence to be introduced subject to my final decision on its admissibility. Ms. MacLean called Messrs. James Livingstone and Peter Dawson to relate the discussions at the bargaining table leading to the collective agreement under consideration. Mr. Carl Fisher testified as to the change in the employer's practice on shift exchanges as a result of the Stuart decisions (Board File 166-2-14687 and Federal Court of Appeal No. A-1430-84). Mr. Lee called Mr. Joe Potter to explain the bargaining agent's proposals

.../4

at the 1986 bargaining table which resulted in the 1987 arbitral award. Ms. MacLean objected to the relevancy of the 1986 negotiations since they were subsequent to the collective agreement at issue. I also reserved my decision on this matter and let Mr. Lee introduce Mr. Potter's evidence subject to my decision on its relevancy and admissibility.

REASONS FOR DECISION ON THE ADMISSIBILITY OF THE EXTRINSIC EVIDENCE

I have carefully considered the evidence and arguments on this issue and I have found that clause 13.05(e) of the relevant collective agreement is clear and unambiguous. In view of this finding, I have decided that the extrinsic evidence is inadmissible.

ARGUMENTS ON THE MERITS OF THE GRIEVANCE

Ms. MacLean argued that the problem is very simple. The facts are clear and not in dispute. She reiterated the issue raised by this grievance which questions what happens when the employer approves a shift exchange and the employee, who agreed to the exchange and to cover the shift, does not cover the agreed exchanged shift. Ms. MacLean asked whether, in such a case, the employer was entitled to deduct a day's pay from the employee who had originally been scheduled to work this shift.

Ms. MacLean argued that a clear application and interpretation of clause 13.05(e) leads us to conclude

that in such a case the employer is not entitled to deduct a day's pay. She submitted that it is only logical and common sense that the responsibility be on the employee who agreed to exchange his shift and who was committed to work it.

Ms. MacLean cited the Stuart decision (supra). She concluded that this decision has no application to Mr. McGill's grievance. It is irrelevant.

Mr. Lee replied that we must consider carefully the facts in the case of Mr. McGill. He detailed the evidence. Mr. Lee argued that we must read clause 13.05 in conjunction with clause 14.02 which provides that an employee is entitled to be paid for services rendered. Since Mr. McGill did not provide any services on April 5, he is not entitled to be paid. Mr. Lee relied heavily on the Stuart decision (supra) and pointed out that the shift exchange is a private arrangement between two employees.

Mr. Lee argued that on April 5, Mr. McGill was considered to be at work. He was not on a day of rest. Hence, he was responsible for this shift. Mr. Lee submitted that clause 13.03 is very important and that since the shift cycle cannot be changed, Mr. McGill was considered to be on a working day on April 5. Mr. Lee added that clause 13.05(e) involves a risk and Mr. McGill should assume it and it is not the employer who should bear the risk. Mr. Lee referred me to the Federal Court of Appeal decision in Justinen and Neilson (Court File

.../6

A-171-86) to which Ms. MacLean replied that the Justinen and Neilson (supra) decision was not relevant. Ms. MacLean explained that clause 13.03(a) allows for a temporary change in the shift cycle. Hence, a shift exchange would fall under this provision. In addition, Ms. MacLean pointed out that air traffic controllers are paid on an annual basis.

REASONS FOR DECISION ON THE MERITS OF THE GRIEVANCE

The facts are not in dispute. Mr. McGill wanted to go skiing on April 5, a day he was scheduled to work. For this reason, he asked Mr. Raphael to exchange shifts with him so that he could be off on April 5. In exchange he would work the shift of April 9 for which Mr. Raphael was scheduled. They agreed to exchange shifts on March 25. The employer, under the signature of Mr. Fitzpatrick, Shift Manager, approved this exchange. On March 31, Mr. McGill left his residence in Leduc for the three-day skiing holiday. On his return to work, April 6, he was advised that he would lose a day's pay and on April 8, the shift exchange was cancelled (Exhibit 3).

On April 6, Mr. McGill learned that on April 5, while he was away skiing, Mr. Raphael did not work the shift because he himself had had a skiing accident. The employer had to call Mr. Lomow to work this shift and he was paid overtime for it.

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Mr. McGill was ready and willing to work the April 9 shift but the employer did not permit him to do so. The employer instead called another employee to work this shift and he was paid overtime for it.

The issue is who is responsible for the April 5 shift, Mr. Raphael or Mr. McGill? The employer claims that Mr. McGill is responsible for this shift because it is his originally scheduled shift. The grievor claims that it is Mr. Raphael because he agreed to exchange the shift, and once the employer approved the exchange, the shift of April 5 was Mr. Raphael's responsibility.

The employer is relying on the Stuart decision (supra) in its submission that Mr. McGill is responsible for the April 5 shift. The grievor, on the other hand, argues that Stuart (supra) is not applicable to his situation.

The Stuart case (supra) dealt with a different issue.

> The grievor and another employee agreed to exchange shifts. Both were air traffic controllers and equally qualified employees. The grievor worked the other employee's shift on July 10, 1983. The other employee had undertaken to work for and instead of the grievor on October 10, 1983, which was Thanksgiving Day. He however was involved in a serious accident on September 27, 1983.

.../8

> The grievor was then advised by the employer that the exchange was cancelled and that he would have to work as originally scheduled. He did work on October 10, 1983 and he is now claiming overtime.
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> Although this issue of overtime seemed at one point to have been settled, such is not the case and I am asked to decide it.
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> (pages 9 and 10)

Vice-Chairman Cantin decided that:

> The evidence is to the effect that on October 10, 1983, the grievor was scheduled to work on the evening shift (see exhibit G-2). There was, between the grievor and the other employee, a "private arrangement", to quote the grievor's own words. It was also an arrangement entered into on a voluntary basis. It was, I submit, the two employees' responsibility after the exchange was approved to see to it that the agreement would be respected.
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> (page 11)

The Federal Court of Appeal (supra) agreed with Mr. Cantin's interpretation and decided:

> Assuming without deciding that Ms. MacLean is correct in her submission that an exchange

> between employees approved by the employer pursuant to clause 13.04 of the Collective Agreement effects a change in the scheduled hours of work of the employees concerned, we are satisfied that such approval may subsequently be withdrawn. This is made clear not only by the employer's right to withhold approval on reasonable grounds (paragraph 13.04(c)) but also by his right to change the shift schedule (clause 13.03). There is no question in the present case of the reasonableness of the employer's actions since the previously approved exchange was cancelled and the approval withdrawn several days ahead of the relevant date and as a consequence of the exchanged employee having suffered an accident which made it impossible for him to work on that day.

In the case of Mr. McGill, the situation was different. Mr. McGill was willing and able to work the April 9 shift. Mr. Raphael had an accident and he did not work the April 5 shift. However, it is only on April 8 (Exhibit 4) that the employer cancelled the shift exchange with the result that another employee was paid overtime to work the April 9 shift which Mr. McGill had agreed to work at a straight-time rate. Hence, the Stuart decision (supra) did not deal with the problem raised by the grievance of Mr. McGill.

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We must find the answer to the problem in the wording of clause 13.05. Clause 13.05 provides:

> 13.05 Equally qualified employees may exchange shifts provided:
>
> (a) the provisions of clause 13.06(a) or clause 15.04 are not violated,
>
> (b) the employees shall make every reasonable effort to provide a minimum of twenty-four (24) hours' advance notice of the change,
>
> (c) the shift change receives the approval of the Employer, which shall not be unreasonably withheld,
>
> (d) it will not require the payment of overtime,
>
> (e) once such an exchange of shifts has been approved, it will be the responsibility of the employees involved to report for duty in accordance with the approved revision.

The key elements of this clause are that the employer must approve the shift exchange, the employees must provide at least 24 hours' advance notice and this exchange will not require the payment of overtime. Furthermore, and most importantly, once the exchange has been approved,

it will be the responsibility of the employees involved to report for duty in accordance with the approved revision. In the case of Mr. McGill, the shift exchange was approved March 25. It, therefore, met the first three conditions of the clause.

When we examine sub-paragraph (e) of this clause, we find that once it is approved, the responsibility to report for duty falls on the employee as it is now indicated on the revised shift schedule. The language of clause 13.05(e) is clear. It says that once approved, there is a revised schedule. The responsibility of the employees is affected by the revision and the responsibility to report for duty is directly related and in accordance with the new revision which is the exchanged shifts.

In addition, such an exchange will not require the payment of overtime. In the case of Mr. McGill, there would have been no requirement to pay overtime for the April 9 shift had the employer been reasonable and logical in its application of this clause. The sole reason the employer had to pay overtime for the April 9 shift was because the shift exchange was officially cancelled on April 8 and the employer did not allow Mr. McGill to work the April 9 shift even though Mr. McGill was willing and able to work it.

With respect to the April 5 shift, the employer had not cancelled the exchange and by virtue of clause 13.05(e), Mr. Raphael was responsible for reporting

for duty. Once the exchange of shifts was approved and not cancelled by the employer, prior to its happening, Mr. McGill was absolved from any responsibility for the April 5 shift.

For these reasons, the grievance of Mr. Donald McGill is hereby allowed.

Muriel Korngold Wexler,
Board Member.

OTTAWA, February 4, 1988.