File No.: 166-2-17201

No. 256

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

BETWEEN:

EDWARD G. HOPKINS,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Thomas W. Brown, Board Member.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: Mylène Bouzigon, Counsel.

CODE 402/85
ART 13
SHIFT EXCHANGES

Heard at Calgary, Alberta, June 23, 1988.

DECISION

This is yet another grievance referred to adjudication involving an exchange of shifts between an air traffic controller and another qualified employee under the auspices of clause 13.05 of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code 402/85). In the instant case, the exchange of shifts was not completed because the employee, a Mr. Hall, who was to replace the grievor in the exchange was unable to report due to illness and the grievor, who had already fulfilled his part of the bargain by substituting for Hall on March 16, 1987, was not informed that Hall could not report in his place on March 21, 1987, a Saturday, and so did not report on that date.

From the evidence given by the grievor, it is uncontradicted that on March 21, he was offered by phone, in the morning, an opportunity to work on an overtime basis on the shift commencing at 0700 hours on that day, which was his normally scheduled shift. He stated that he did not know that it was Hall who had called in sick causing the need to fill his position on an overtime basis but admitted that he had speculated, as he left on holidays for the day, that it might have been his substitute Hall who had called in sick. He did not consider, however, that there was any need for him to enquire or to replace Hall on a straight-time basis when Hall could not report due to illness. Although the employer knew of Hall's illness prior to the commencement of the shift, the grievor was not advised of Hall's inability to report for work but was offered an opportunity to

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work overtime. Later, the grievor was deducted one day's pay for failing to report for work as scheduled on March 21, 1987, and this in spite of the fact that he had not received extra pay for working in Hall's place on March 16 under the shift exchange arrangement. He grieves that the employer breached the provisions of clause 13.05 when it unlawfully deducted one day's pay from him for failing to report for work on March 21, 1987.

Following the reference of this grievance to adjudication, the bargaining agent advised this Board that it wished to enlarge the corrective action requested in the grievance as follows:

> I request an order directing the Employer that in the future the Employer cease deducting wages from employees when the Employer has approved a shift exchange and the individual who is to replace the employee in question is unable to report for work.

This request was made, it was explained by a witness on behalf of the bargaining agent, because the employer had continued to breach the provisions of clause 13.05 of the collective agreement by continuing to apply its own unilaterally established guidelines governing the exchange of shifts allowed by clause 13.05. This practice continued in spite of the decision rendered by Adjudicator Muriel Korngold Wexler in McGill (Board File 166-2-17159) where the facts were identical to those

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in the instant grievance and there were some eight other grievances of a like nature already referred to adjudication under the Act.

Counsel for the employer objected to the proposed amendment to the corrective action requested, citing the provisions of sections 90 and 91 of the Act and the fact that this adjudicator had jurisdiction to hear only grievances which had been heard and processed in the grievance procedure. In the instant case, the employer had not had the opportunity to hear and decide on the corrective action requested in the grievor's suggested amended corrective action. In any event, counsel argued, the facts in this case are not identical to those in the McGill case and the adjudicator in that case had also decided not to take into account the decisions of Adjudicator Cantin and the Federal Court of Appeal in Stuart (Board File 166-2-14687 and Federal Court No. A-1430-84) respectively, because the facts in McGill (supra) were found by the adjudicator to be different in nature to those found in Stuart. The instant case, counsel for the employer argued, is identical to that in Stuart (supra) and for that reason it is incorrect to allege that the employer is shopping around for a more favourable decision than that in McGill by refusing to apply the decision in McGill to the instant case. The circumstances in the two cases are not at all identical.

I reserved on the employer's objection to the amendment to the corrective action requested by the bar-

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gaining agent with a view to dealing with the objection, if need be, at a later moment.

ARGUMENT FOR THE GRIEVOR

Counsel for the grievor reviewed the facts in this case and argued that, in keeping with the clear wording of clause 13.05, the grievor and Mr. Hall exchanged shifts with the result that each became proprietor of the other's shift which they had assumed. She referred to the wording in sub-clause 13.05(e), where it is stated that:

> 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.

This wording clearly shows that in exchanging the March 21 shift with Mr. Hall, the grievor had no further obligation to report for duty on that date. She acknowledged, however, that if any valid reason developed in the meantime prior to the exchange being completed, the employer could withdraw its approval and the exchange would be cancelled, with the requirement that the grievor, in this case, report for duty as previously scheduled on March 21. In the present case, a situation developed which would have allowed the employer to cancel the exchange and require the grievor to report for work on March 21. Mr. Hall had called in sick and was unable to work on March 21. The grievor was contacted alright but he was

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not advised that Hall was sick and that the exchange was cancelled but was instead offered to work on an overtime basis. Why the employer did not tell him of the developments and cancel the exchange and require the grievor to report to work as previously scheduled is not known but that is what happened. The grievor did not know of Hall's illness and inability to report for work. He did not, under clause 13.05, have any obligation to verify that Hall could report for work on the day in question and replace him if need be, as the exchange of shifts had been approved and it was, in keeping with sub-clause 13.05(e), the responsibility of Hall to report for duty and not the grievor's duty to verify that Hall could report for work.

Counsel for the grievor referred to the decision of the Federal Court of Appeal in Stuart (supra) where, she argued, her proposition that an exchange of shifts between employees, once approved by the employer, effects a change in the scheduled hours of work of the employees concerned, was not set aside by the Court. In fact, the wording of that decision, she argued, supports her position that when there is an exchange of shifts between employees there results a change in the shift schedule. She argued further that the Court's decision is not supportive of the holding by Vice-Chairman Cantin in Stuart (supra) that the exchange of shifts under clause 13.05 is a "private arrangement" between employees and that the employees involved in such a private arrangement must ensure the fulfillment of the arrangement or suffer the consequences themselves. In addition, counsel for

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the grievor argued, because the grievor received an annual salary, it was not open to the employer to deduct one day's pay from him when he did not report for duty on March 21, 1987.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer based her entire argument on the findings by Vice-Chairman Cantin in Stuart (supra) that the exchange of shifts between employees under clause 13.05 is a "private arrangement". These findings were not set aside by the Federal Court and Adjudicator Cantin's decision that the exchange of shifts constitutes a "private arrangement" remains intact. This being so, it was up to the grievor and not to the employer to "police" the arrangement. It was up to the grievor to ensure that Mr. Hall fulfilled his part of the bargain. Counsel distinguished the McGill (supra) decision by stating that that decision was, perhaps, an equitable decision, having regard to its peculiar facts. She noted that Adjudicator Wexler had distinguished the Stuart (supra) decision because it "... dealt with a different issue". The issues in the instant case are identical to those in Stuart (supra) and cannot similarly be distinguished and should be applied.

Counsel for the employer argued, additionally, that clause 13.05 is a permissive clause. It allows the grievor to exchange shifts. There is no advantage for the employer in a shift exchange. It should not, therefore, have to assume some burden of ensuring that

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it is fulfilled. Overtime cannot result from a shift exchange. It is so provided in sub-clause 13.05(d). Yet, in circumstances such as the present case, the employer would, if it had the duty of policing the exchange, often have to pay another employee at overtime rates if it could not cancel in time the exchange when the substitute employee cannot report due to illness or some other reason and the employee who had originally been scheduled to work could not be contacted and advised to report. The employer would, through accommodating an employee's request, be placed in jeopardy and be forced to pay a substitute at overtime rates.

REASONS FOR DECISION

The facts in this case are not in dispute. The grievor exchanged shifts with another qualified employee, Mr. Hall. He agreed to work for Hall on March 16, 1987. Hall agreed to take the grievor's shift on March 21, 1987. The grievor worked for Hall on March 16. On March 21, however, Hall could not work due to illness. The employer, it is agreed by counsel for both parties, could have cancelled the shift exchange arrangement and the grievor would have had to work on March 21, as originally scheduled. The employer did not in fact take any steps to cancel the shift exchange and actually offered the grievor the opportunity to work on that day at overtime rates. The grievor needed the day off and so refused the offer to work overtime. He did not know that Hall had called in sick but speculated that that may have been why he was offered an opportunity to work overtime.

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Later, the employer deducted one day's pay from the grievor because neither he nor his substitute covered the shift on that day.

The question before me becomes one, therefore, of determining the legal obligations of the parties under clause 13.05 where there has been a failure to complete the exchange of shifts for one reason or the other. Clause 13.05 reads:

> "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.

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Counsel for the grievor argued that the exchange results in a change in shifts and no obligation whatsoever for the employees involved to ensure that the exchange is completed, by each of the employees involved actually substituting for the other and reporting for work. It is sufficient that the employees involved report for work or absent themselves from work for valid reasons on the exchanged shift. In the instant case, for instance, Mr. Hall, who could not report for work on the day he assumed in the exchange with the grievor because he was sick, should have been deducted one day of sick leave. The grievor was no longer scheduled to work on that shift and had no obligation to report on that day, even if there was no good reason why Mr. Hall did not report. Discipline, in such circumstances, against the substitute, Mr. Hall, would likely have been appropriate. The grievor could not in such circumstances be deducted pay for not reporting. He had already worked for Mr. Hall on March 16 without receiving extra pay for that day.

Counsel for the employer, on the other hand, argued that clause 13.05 merely provided an opportunity for employees to exchange shifts. There was no advantage in such an exchange for the employer. Accordingly, the employer should not assume responsibility for policing the arrangement. In the instant case, the private arrangement between the grievor and Mr. Hall came to an end when Mr. Hall could not fulfill his end of the bargain. It is no more than interesting that the employer erroneously offered the grievor the opportunity to work at overtime rates when Mr. Hall failed to report for work. In any

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event, the grievor did not accept any offer made. The fact is that the private arrangement came to an end when Mr. Hall could not report for work. The employer was not under any obligation to take any action to cancel the private arrangement and the grievor was under an obligation to see that his substitute completed the bargain and showed up for work.

Clause 13.05 of the collective agreement allows equally qualified employees to exchange shifts, subject to certain conditions. Firstly, the employer must agree to the exchange by giving its approval, (which shall not be unreasonably withheld). Secondly, the exchange will not require the payment of overtime. Clause 13.05 also provides that once the exchange has been approved, the employees involved have the responsibility of reporting for duty in keeping with the approved revision.

The condition that the exchange under clause 13.05 "... will not require the payment of overtime" can only be understood to mean that a desired exchange which would automatically result in overtime because the employee who is to substitute for the applicant under clause 13.05 would, under the collective agreement, be entitled to overtime if he did, would not be a proper request under clause 13.05. Such a request could be refused with impunity by the employer as it would not constitute an approval unreasonably withheld. This, I consider, is the extent of the meaning of this provision referring to overtime. Overtime which results because at the last

minute one or the other of the employees involved in the exchange cannot report for work and it becomes necessary to replace him by someone else, who would, if he worked, be entitled to overtime, is not contemplated by clause 13.05. On the other hand, as both parties agree, the employer could, if it was able in time, cancel the exchange and require the originally scheduled employee to work.

I have reviewed the decisions in McGill and in Stuart (both at adjudication and in the Federal Court of Appeal). I find that the exchange of shifts under clause 13.05 results in a change of schedule for the employees involved. In keeping with sub-clause 13.05(e), the employees involved, once the exchange is approved, assume the responsibility to report for duty in accordance with the approved revision. Accordingly, in the instant case the grievor did not have any responsibility to report for duty on March 21, 1987, and should not have been penalized for not reporting. His grievance is thus allowed and he must be reimbursed the day's pay deducted by the employer.

As regards the request to enlarge on the corrective action, above referred to, I find that the employer was acting in good faith in pursuing the course of action of denying the instant grievance, based on a plausible interpretation of the decisions of the Federal Court of Appeal, the adjudicator in Stuart (supra) and the adjudicator in McGill who had found that the decision

in Stuart dealt with a different issue. For this reason, I find that it is not necessary for me to deal with the request to enlarge the corrective action demanded.

Thomas W. Brown,
Board Member.

OTTAWA, September 19, 1988.