SEP 2 1988

File: 166-2-17560
166-2-17561 No. 047

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

BETWEEN:

RALPH K. JOHNSON,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: P. Chodos, Deputy Chairman.

For the grievor: A. Carl Fisher, Canadian Air Traffic Control Association.

For the employer: Roger Rhéal Lafrenière, Counsel.

MILEAGE
WORKING
OVERTIME

Heard at Winnipeg, Manitoba, July 14, 1988.

DECISION

The grievor, Mr. Ralph Johnson is an AI-4 Operational Air Traffic Controller employed by Transport Canada at the Winnipeg Area Control Centre. At the time of the grievance his place of work was located at the Winnipeg International Airport in the Administration Building.

Following the completion of non-contiguous overtime work as requested by the employer, the grievor submitted claims for transportation expenses pursuant to paragraph 7.1.1 of chapter 370 (Travel) of the Treasury Board Administrative Manual. The travel policy has been incorporated by reference as part of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code: 402/85) pursuant to article 29 of that agreement. The relevant provision of the policy reads as follows:

> 7.1 TRAVEL TO AND FROM HOME
>
> It is emphasized that as a general rule, the employer expects all employees to present themselves at their workplaces on their own time and at their own expense. The cost of transportation to and from an employee's home, therefore, is not generally reimbursed, except where there is no suitable residential community within 16 kilometres of the workplace...

The following are additional exceptions:

> 7.1.1 Transportation costs - overtime

> In a situation involving authorized overtime:
>
> . . .
>
> - 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 workplace and/or return if necessary. Necessary parking charges will also be reimbursed. (underlining added)

The employer rejected the various travelling expenses claims submitted by the grievor pursuant to this provision. As a consequence the grievor filed and ultimately referred to adjudication the two grievances which are the subject-matter of this decision.

The grievor testified that at the time of the events giving rise to the grievances he was residing at 94 Waterhouse Bay Street, which is a short distance inside a roadway known as the Perimeter Highway. Mr. Johnson stated that the distance from his home to the closest bus stop is 1.3 kilometres, and the total distance from his home to his place of work is

approximately 16 kilometres. He stated that this distance can be travelled by car in 20 to 25 minutes. However by public bus, depending on the time of day, the amount of travelling time required is between 1 1/2 to 2 hours.

The grievor referred to a staff memorandum signed by Mr. A.L. Sutherland, the manager of the Winnipeg Area Control Centre, dated December 10, 1985. This memorandum reads as follows:

> 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".
>
> 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 enroute 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.

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.

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.

Travel expense claims for overtime for those living beyond the Perimeter Highway will

> continue to be processed as before. (Exhibit G-4)

The grievor also identified a memorandum dated February 5, 1986 on the same subject, which was signed by Mr. E. Bryksa, the acting manager, Winnipeg Area Control Centre (Exhibit G-5). This memorandum is identical to exhibit G-4 with the exception of the second paragraph which reads as follows:

> For those employees residing within the Perimeter Highway, it is assumed that normal and reasonable transportation is available. If this is not so, the employee when assigned overtime, is to advise the Shift Manager of his earliest time of arrival at work considering a reasonable departure time from home and the length of time enroute by bus. If the time of arrival at work, given by the employee, is not operationally acceptable to the Shift Manager then the Shift Manager may approve mileage or taxi. The employee will be responsible for appending bus schedules with the claim to justify the mileage payment.

The grievor stated that he did not follow the procedures outlined in both memoranda in respect of obtaining prior approval of payment of mileage. He explained that it was his view, that the requirements imposed by these memoranda were not in accordance with the travel policy.

An earlier memorandum on the subject of public transportation for overtime, dated July 16, 1985, was also identified (Exhibit G-8). It was noted that this memorandum was in essence the same as the memos referred to above, except that it contained the following paragraph:

> A reasonable distance to walk to public transportation is 1 kilometer 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.

In cross-examination the grievor admitted that prior to the filing of the grievances he had taken the bus on a regular basis for a period of one year, and the transit system service was approximately the same then as it is now.

The grievor also stated that it was normal practice for overtime scheduling to be posted in advance, usually in the form of written notices (Exhibit G-10), and that he would receive those notices several days, and sometimes as much as a month or more, before the scheduled overtime. The grievor acknowledged that he was given ample notice to arrange suitable transportation and that is was possible for him to travel by bus on these occasions. However he continued to insist that the time required to travel by public transportation was unreasonable and in his view therefore he was entitled to mileage allowance pursuant to paragraph 7.1.1. of the Travel Policy. He also maintained that it was

inequitable to pay mileage allowance to employees who live on the other side of the Perimeter Highway and yet deny it to someone who lives very close to that "borderline"; those persons who live on the other side of the Perimeter Highway have access to the same bus service as he does, although they do have a longer walk to the bus stop.

The grievor's representative testified in his capacity as vice-president of the Association. Mr. Fisher stated that one of his responsibilities is to be a member of joint union-management committees which have input into policies on public service-wide terms and conditions of employment. In the discharge of these responsibilities he became a party to discussions between the various public service unions and the Treasury Board concerning the recovery of parking costs. Following approximately 2 1/2 years of negotiations a circular letter was issued (Exhibit G-11) which established a fee structure to be charged to employees utilizing government parking lots. This circular letter, which was incorporated into the Treasury Board Administrative Policy Manual as chapter 170, Parking Policy, provided in paragraph 2.7.2 that if an office is more than 500 metres from the nearest bus stop an employee will be provided with parking space without charge, notwithstanding that the work location is within a "Peripheral Area" and therefore normally subject to parking charges, although at a reduced rate. According to Mr. Fisher this provision in the Parking Policy reflected the view that if available services are more that 500 metres away it was not considered as reasonable public transportation.

The employer chose to call no evidence.

ARGUMENT

On behalf of the grievor, Mr. Fisher argued that there was no evidence put forward by the employer as to the rationale for modifying the criteria set out in the staff memo of July 16, 1985 (Exhibit G-8) for conferring the mileage allowance. In that memo the employer determined that a distance to public transportation of more that 1 kilometre, and total travelling time of more than one half hour than would be required if a private motor vehicle is used is not reasonable transportation. In an earlier decision of the Board involving the same parties and similar issues (R.K. Johnson Board File 166-2-16366) Board Member Kwavnick upheld the grievance on the basis that the grievor had met the criteria stated in the above noted memorandum. The employer has not attempted to explain what if any circumstances had changed to warrant a new view as to what constitutes reasonable transportation.

As in the afore-mentioned decision, the issue here again is what constitutes normal and reasonable transportation pursuant to paragraph 7.1.1. The grievor is not disputing that the public transportation available to him was "normal"; however it is the grievor's position that this transportation was not reasonable given the time and distance involved. In all other respects it is beyond dispute that the grievor met the criteria which would entitle him to the mileage allowance under paragraph 7.1.1 - that is, the overtime shift which he was required to perform was not contiguous and, in

accordance with Mr. Kwavnick's decision, when the employer authorizes such overtime, it is also authorizing him to travel from his place of residence to his place at work.

Mr. Fisher also referred to his own evidence respecting the circular letter on parking policy. In effect, the employer itself has determined what constitutes a reasonable distance to public transportation by virtue of paragraph 2.7.2 of that circular letter. That distance is a half kilometre from the nearest bus stop, whereas Mr. Johnson is required to walk a distance of 1.3 kilometres. Therefore by the employer's own standards this distance is unreasonable.

Accordingly Mr. Fisher submitted that the proposed corrective action be granted, including a declaration that Mr. Johnson be paid a mileage allowance for all future non-contiguous overtime shifts until May 29, 1988, when the Control Centre was moved.

On behalf of the employer Mr. Lafrenière submitted that the intent of paragraph 7.1.1 is revealed at the beginning of clause 7.1 where it refers to "... on their own time and at their own expense". Therefore, it is clear that unless an employee falls within the narrow exception provided in 7.1.1 the employee is responsible for getting to work without travel compensation. The only evidence concerning the unreasonableness of the public transportation available to the grievor is the grievor's own conclusion to that effect. As Mr. Kwavnick

concluded in his obiter dicta in the Johnson decision, supra, the fact that public transportation available to the grievor may have been inconvenient and time consuming does not mean that it is unreasonable. Moreover, the fact that the employer has chosen to compensate employees outside the Perimeter Highway should not be held against the employer, nor does it lessen the obligation on the part of the grievor to prove the unreasonableness of the public transportation with respect to his circumstances. It should also be noted that the overtime was assigned to the grievor well in advance; he had ample opportunity to arrange transportation and was obliged to do so at his own expense.

With respect to Mr. Fisher's reference to the employer's parking policy, Mr. Lafrenière noted that this has nothing to do with the reasonableness of public transportation. Mr. Lafrenière also noted that the French version of paragraph 7.1.1 refers to "transport ... normal", and makes no reference to reasonableness. He cited the text Canadian Labour Arbitration by Brown and Beatty, second edition, at page 193 where the authors stated that "where there are French and English versions the interpretation to be sought is one which is coherent in both texts." In Mr. Lafrenière's view a consistent interpretation of both versions would require that the employee show the manifest unreasonableness of public transportation. He also cited a definition of "reasonable" found in the Canadian Law Dictionary. Finally, Mr. Lafrenière referred to the decision of the Federal Court of Appeal in The Queen for the Treasury

Board v. Benoît Charland et. al. [1982] 1 F.C. 455 as support for his submission that the employer's past practice with respect to its determination as to reasonable transportation should have no bearing on the interpretation of clause 7.1.1.

REASONS FOR DECISION

The parties are in agreement that this grievance turns on the proper interpretation of paragraph 7.1.1, and in particular the meaning of the phrase "reasonable public transportation". Both parties are also relying on the decision of Board Member Kwavnick in the earlier Johnson decision dated July 27, 1987. Not surprisingly, the parties diverge as to what parts of Mr. Kwavnick's decision have significance in respect of the instant grievance. Mr. Lafrenière relied in particular on the statement on page 19 of that decision (which Mr. Kwavnick characterized as being "obiter") which states:

> 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 use of their family car. During that time, the grievor may well have found the level of public

> transportation available to him 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.

While the matter of the grievor resorting to the bus for one year was also in evidence before me. I do not attach any particular significance to it. The fact that Mr. Johnson found it necessary to fall back on public transportation for a period of a year does not, per se, allow a conclusion to be drawn that the public transportation that was available to him was "reasonable" as that term is used in paragraph 7.1.1.

In my view, the question of time and distance required to use public transportation is an appropriate basis for assessing whether that transportation was "reasonable". Indeed, this is precisely the criteria that the Department is currently using to grant mileage allowance to employees living outside the Perimeter Highway.

Neither party proffered a standard by which to assess the reasonableness of public transportation. However, considering Mr. Johnson's circumstances and the fact that employees are generally expected to commute daily to their place of work, a one-way commuting trip of one and a half to two hours duration is a sufficiently protracted period of time to warrant the conclusion

that the available public transportation is unreasonable. While I am not finding that the employer is bound to follow the guidelines contained in the July 16, 1985 memo which it had withdrawn prior to the performance of the overtime shifts in question, nevertheless it is noteworthy that management had itself established criteria as to a reasonable duration of travel and distance from public transportation - criteria which persons in the grievor's circumstances would clearly meet.

In all other respects there is no dispute that the grievor brought himself within the terms of paragraph 7.1.1. Accordingly, for the above-noted reasons the grievor has satisfied me that he has met the criteria which entitle him to mileage allowance pursuant to paragraph 7.1.1 of the Travel Policy. In the result these grievances are allowed. The grievances were filed on April 30 and June 3, 1986 in respect of travelling expense claims for non-contiguous overtime shifts worked on February 4, 13 and 23 and March 21, as well as May 1 and 30, 1986. Accordingly the grievor is entitled to the appropriate mileage allowance for his travel in respect of those shifts.

I am in agreement with Mr. Kwavnick's view as expressed in the Johnson case, supra, that the adjudicator has no jurisdiction to deal with claims for mileage allowance in respect of events which occurred after the instant grievances had been presented. Accordingly,

I cannot accede to the grievor's request to adjudicate on any mileage allowance claims which arose subsequent to the grievance currently before me.

P. Chodos,
Deputy Chairman.

OTTAWA, September 1, 1988.