File No.: 148-2-149

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

BETWEEN:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,

Applicant,

AND:

TREASURY BOARD
(Transport Canada)

Respondent.

Re: Application pursuant to Section 18 of the Act alleging a breach of Section 51 of the Act

Before: David Kwavnick, Board Member.

For the Applicant: Catherine H. MacLean, Counsel.

For the Respondent: Mylène Bouzigon, Counsel.

Heard at Vancouver, British Columbia, December 6, 1988.

## DECISION

The present application was made by the Canadian Air Traffic Control Association (CATCA) pursuant to Section 18 of the Public Service Staff Relations Act (PSSRA). CATCA is the certified bargaining agent for the air traffic control group. It alleges that the employer has violated paragraph 51(a) of the PSSRA. Paragraph 51(a) provides:

> 51. Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent, until such time as
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> (a) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to arbitration,
>
> (i) a collective agreement has been entered into by the parties and no request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor,

> has been made in the manner and within the time prescribed therefor by this Act, or
> (ii) a request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in accordance with this Act and a collective agreement has been entered into or an arbitral award has been rendered in respect thereof;

The parties do not dispute certain facts. Notice to bargain in respect of the AI group was given on 3 November 1986. As of that date and until June 1988, there was no scheduled overtime at the Vancouver Tower. All overtime shifts were filled by call-in.

That is, even when it was known in advance that a particular shift would have to be filled on an overtime basis, the employer did not assign that shift to any employee. Call-in overtime means that during the 24 hours immediately preceding the start of the overtime shift, the supervisor then on duty will call available employees and offer them the overtime shift.

Employees who were asked to accept an overtime shift were free to refuse it although, if no employee was willing to accept the overtime shift, an employee could be ordered to work it. Where overtime is assigned

on the monthly schedule, the employee has no choice but to work the shift and cannot avoid doing so except in accordance with the same rules which apply to regularly scheduled shifts.

Air traffic controllers at the Vancouver tower worked, and still work, a shift cycle of 5 days on, 4 days off, 5 days on, 3 days off repeating.

By memorandum dated 9 June 1988 (Exhibit C-4), the Vancouver tower adopted the overtime policy of the Area Control Centre. Thenceforth, all overtime requirements which were known in advance were allotted on the monthly schedule. Call-in overtime was thereafter used only to fill overtime shifts which were not known in advance; e.g. to cover sick leave.

Following the notice to bargain collectively the parties met for that purpose and, ultimately, certain matters were referred by them to a board of arbitration. An arbitral award in respect of those matters was made on 27 July 1987. However, the parties did not execute a collective agreement at that time and had not yet done so by the date of the present hearing.

As well, there was no request for arbitration in respect of this term or condition of employment (i.e. overtime) and the bargaining agent did not consent to the changes made in respect of overtime by the employer in June 1988 with respect to the schedule for July 1988.

Finally, on 1 November 1988, the bargaining agent served notice on the employer to bargain collectively.

It was agreed by the parties that the employer has always had the right to call an employee and order him to report for an overtime shift but that this was not done until December 1987.

Mr. Adrian Martin testified for the plaintiff. Messrs Jim Kaduhr, W. White and Richard Johannson testified for the respondent.

Mr. Adrian Martin testified that he is an operating air traffic controller (AI-3) employed at the Vancouver tower and he has been so employed since October 1985.

He said that prior to the changes of June 1988, an employee could sign a volunteer list in respect of available overtime shifts falling on his days of rest. It was, equally, open to an employee not to sign up for any overtime.

When a supervisor was attempting to fill overtime vacancies, he would first call the persons who had signed the volunteer list taking into account the amount of overtime already worked by each of them.

Only if none of the volunteers could be reached would the supervisor call an employee not on the list

and order him to work the overtime shift. However, it was very rare for a supervisor not to be able to fill an overtime vacancy from the volunteer list.

The supervisor attempting to fill an overtime shift would normally telephone employees within 24 hours of the start of the shift. An employee could be ordered to work overtime and could then avoid doing so only for the same reasons for which he could absent himself from a regularly scheduled shift. However, it is very rare for anyone to be ordered to work an overtime shift. He did not recall anyone being ordered to work an overtime shift from the time he arrived at the Vancouver tower in October 1985 until someone was ordered to do so in December 1987.

In cross-examination he said that he has volunteered for overtime shifts from time to time. Since March 1988, he has been more active in certain voluntary organizations and, consequently, he has had less time available for overtime work.

Mr. Jim Kaduhr testified that he is an air traffic control supervisor (AI-4) employed at the Vancouver control tower. He has been employed there since 1975 and has been a supervisor for two years. He is now employed as the Acting Unit Operations Specialist at the Vancouver tower.

As a supervisor, it is his responsibility to call controllers in order to fill available overtime

shifts. The supervisor of the evening shift is responsible for filling the vacant positions for the following day. He would begin by calling those on the volunteer list with the lowest number of overtime hours worked. If necessary, he could resort to mandatory overtime if no one was willing to work the available overtime.

In early 1988, he began to experience difficulty in filling all available overtime shifts with willing employees and was obliged to resort to mandatory overtime. By late spring of 1988, he found it difficult even to make contact with employees for the purpose of assigning mandatory overtime. Increasingly, he found that employees were using telephone answering machines and were not returning his calls.

The witness said that call-in overtime was not always assigned within 24 hours of the time the shift was to be worked. Sometimes, the assignment was made earlier. Between 1979 and 1981, there was a substantial amount of overtime available. Employees knew that they would be assigned overtime shifts and they wanted to know well in advance when they would be required to work. Scheduling of overtime was then done up to seven days in advance.

The witness identified a copy of the shift schedule for June 1988 (Exhibit E-1). Pink dots indicate the unmanned shifts. (A pink dot with an X through it indicates an unmanned shift which need not be filled).

This exhibit indicates that during June 1988, there were a total of 60 unmanned shifts of which 50 were required to be filled by employees working overtime.

In cross-examination the witness said that a significant number of air traffic controllers have transferred from the Vancouver tower to the Area Control Centre recently. A total of five controllers transferred in the spring of 1987, two more transferred during the winter of 1987-88 and a further three transferred in the spring of 1988. In addition, one controller went on maternity leave during this period and has not yet returned to work.

Since February 1987, only three new controllers have been added to the staff at the Vancouver tower. The result has been a reduction of eight in the number of controllers available for duty at the Vancouver tower (including the departure for maternity leave). He said that the present staffing requirement for the Vancouver tower is 27, while the actual number of controllers on staff is only 21.

With respect to mandatory call-in overtime, the witness said that at the time the notice to bargain was given in 1986 it was not always the case that the first employee called after the list of volunteers was exhausted would be ordered to work the overtime. If someone did not wish to work the shift, an attempt would be made to find someone else.

Mr. W. White testified. He has been employed by Transport Canada for 32 years. Between January 1985 and September 1988, he was manager of the Vancouver tower.

He said that prior to November 1986, it was rarely necessary to resort to mandatory overtime. Even when there was considerable overtime available, it was possible to meet all requirements from among volunteers. In November 1986, the approved staff level at the Vancouver tower was 23 controllers and there were 23 controllers on staff. By the end of July 1988, the approved staff level was 27 but there were only 18 or 19 on staff and three others on temporary duty from other facilities.

The witness said that from the time of recruitment of a controller until that controller is fully qualified to work at the Vancouver tower, approximately three years of training are required.

The witness said that the reduction in available controllers at the Vancouver tower has been only a part of the problem. The other part has been the increase in traffic. He submitted documents (Exhibit E-2) showing that total movements at Vancouver International Airport in 1986 were 317,054, this being an increase of 19.71% over the previous year. In the first 11 months of 1986, the number of movements was 293,232. In the first 11 months of 1988 the number was 342,256. This is an increase of 16.7% in two years following upon a very substantial increase in 1986.

The witness said that future requirements for controllers had been calculated upon the assumption of an average annual increase in traffic of 3%. In fact, traffic in recent years has been increasing at 8% to 10%. The result has been a substantial amount of overtime. By December 1987, it was no longer possible to fill all available overtime shifts with volunteers and recourse was had to mandatory overtime.

The witness said that part of the problem was the fact that very few employees were volunteering for overtime. Between April 1986 and November 1987, there was no lack of volunteers and there was no more than one day per month when there were no volunteers. He said that in November 1987, there were 23 days when volunteers were available and only seven days on which there were no volunteers. The figures for the following months were as follows:

| | | |
|---|---|---|
| December 1987 | - | 23 days without volunteers |
| January 1988 | - | 21 days without volunteers |
| February 1988 | - | 18 days without volunteers |
| March 1988 | - | 16 days without volunteers |
| April 1988 | - | 13 days without volunteers |
| May 1988 | - | 13 days without volunteers |
| June 1988 | - | 23 days without volunteers |

In addition, during this period, there was a substantial increase in the number of overtime shifts for which controllers had to be found. The witness gave the following figures:

| 1986 | Overtime Shifts |
|---|---|
| April | 5 |
| May | 22 |
| June | 17 |
| July | 53 |
| August | 52 |
| September | 26 |
| October | 22 |
| November | 20 |
| December | not available |

| 1987 | Overtime Shifts |
|---|---|
| January | not available |
| February | not available |
| March | 33 |
| April | 37 |
| May | 46 |
| June | 40 |
| July | 27 |
| August | 44 |
| September | 60 |
| October | 47 |
| November | 24 |
| December | 39 |

| 1988 | Overtime Shifts | |
|---|---|---|
| January | 37 | |
| February | 24 | |
| March | 32 | |
| April | 64 | |
| May | 86 | |
| June | 84 | |
| July | 112 | whole |
| August | 99 | or part |
| September | 72 | shifts |

As a result of the increase in overtime shifts and the decrease in the number of volunteers, it became necessary to have recourse to mandatory overtime. This resulted in certain difficulties. It was difficult to make telephone contact with the required number of controllers on the day immediately preceding the overtime

shift. Some controllers could never be reached with the result that the entire burden of overtime work fell upon those who could be reached. In order to ensure that the required number of controllers were always available and to ensure an equitable distribution of the overtime load, it was necessary to have recourse to scheduled overtime.

In the event that it became impossible to staff the tower adequately, it would be necessary to reduce service to the public. The witness identified a document entitled: "Traffic Exceeding Unit Capacity Contingency Plan" (Exhibit E-3). He said that this document outlined a contingency plan for the reduction of services.

In cross-examination the witness said that there was a shortage of qualified controllers because the great increase in traffic at Vancouver had not been foreseen. Given the lengthy training period required for new controllers, a deficiency cannot be quickly remedied. He said that he expects the situation to improve as newly trained controllers begin to take their places on staff in the spring or winter of 1989.

He admitted that by the winter of 1989 there may be further losses of trained staff from the tower to the Area Control Centre.

The witness said that the contingency plan outlined in exhibit E-3 had never had to be implemented.

Mr. Richard Johannson testified. He is employed by Transport Canada and since 1 April 1988 has been responsible for the Vancouver Area Control Center, the Vancouver tower and the regional training centre.

He said that he has set in motion a plan to bring the staffing of the Vancouver tower up to full strength. If certain assumptions prove to be correct, he expects that the tower will be within two controllers of being up to strength by September 1989.

In cross-examination he confirmed that his intention is to be within two controllers of the full staff of 27 by September. That is, there will be 25 controllers employed at the tower by September. He is not anticipating any increase in authorized totals before the end of 1989 or early 1990.

The witness said that prior to April 1988, the Vancouver tower had reported to the Superintendent of Air Traffic Control Operations for the Pacific Region and the Area Control Centre did the same. After April 1988, the tower reported to the Area Control Centre. He identified a memorandum entitled: "Overtime Policy (Amendment No. 1)" dated 5 February 1985 (Exhibit E-9). He said that this document set out the overtime policy at the Area Control Centre at the time that notice to bargain was given.

ARGUMENT FOR THE APPLICANT

Counsel for the applicant said that in order to establish a violation of Paragraph 51(a) of the PSSRA, it is necessary to answer five questions. These are:

> (1) What was the date on which notice was given to bargain collectively?
>
> (2) What term or condition of employment was in effect on that date which could be embodied in a collective agreement?
>
> (3) Have the conditions set out in subparagraphs 51(a)(i) or (ii) been met?
>
> (4) Has the term or condition of employment been changed?
>
> (5) If so, did the bargaining agent consent to the change?

In answer to the first question, counsel referred to exhibit C-1 and said that notice was given on 3 November 1986. An arbitral award was made on 27 July 1987. However, the term or condition of employment at issue here was not referred to arbitration and no collective agreement has been concluded between the parties.

In answer to the second question, counsel said that a term or condition of employment which was in effect on the day that notice was given to bargain was

that there was to be no scheduled overtime. All overtime shifts were to be filled by call-in approximately 24 hours in advance.

She said that a scheduled overtime shift is a shift like any other and must be worked unless an employee can arrange a shift exchange. Scheduled overtime differs significantly from even mandatory call-in overtime. Even with mandatory call-in overtime an employee can place himself beyond the employer's reach. An employee who has four days of rest can plan an out-of-town trip. He is then beyond the employer's reach and can enjoy his days of rest. On the other hand, if overtime is scheduled in advance on some of those days of rest the employee loses this flexibility.

This is the term or condition of employment which was in force when notice was given, that all overtime shifts, whether staffed by volunteers or by mandatory overtime, would be filled by means of call-in. It is a term or condition of employment which could be embodied in a collective agreement.

With respect to the third question, counsel said that subparagraph 51(a)(i) is applicable here. No request for arbitration was made in respect of the term or condition of employment at issue here and the parties have not entered into a collective agreement. Accordingly, subparagraph 51(a)(ii) is not applicable. The conditions set out in subparagraph 51(a)(i) have been met.

With respect to the fourth question, counsel said that exhibit C-4 and the testimony of the witnesses shows that a term or condition of employment which was in effect on 3 November 1986 namely, that there was no scheduled overtime, has been changed.

Finally, with respect to the fifth question, she said that the bargaining agent did not consent to this change.

Counsel cited the decision of the Federal Court of Appeal in the case of The Queen and Canadian Air Traffic Control Association [1982] 2 F.C. 80 (hereafter cited as CATCA Case) upholding, by a majority vote, the decision of Deputy Chairman Kates (Board file 148-2-61). She cited also the decision of the same court in the case of Public Service Alliance of Canada and Treasury Board (Court file A-557-86) (hereafter cited as PSAC Case) which set aside the decision of Deputy Chairman Nisbet (Board file: 148-2-124).

Dealing with the CATCA Case, she cited the decision of Urie J to the effect that the voluntary nature of overtime in that case, although not included in the collective agreement was, nonetheless, a term or condition of employment which was in force on the day that notice was given to bargain collectively and which, therefore, was continued in force by virtue of Section 51 (pages 89-90).

She said that a term or condition of employment need not be included in a collective agreement in order

to be continued in force under the provisions of Section 51.

Turning to the decision of the Federal Court of Appeal in the PSAC case, she said that the mere fact that an arbitral award had been made did not lift the "freeze" imposed by Section 51. The "freeze" continued in respect of any item not disposed of by the arbitration board. The "freeze" continues until a collective agreement has been concluded regardless of how long that may take.

Turning to the matter of a remedy, counsel asked, first, for a declaration to the effect that the employer had breached Section 51 of the PSSRA.

She asked, second, for an order to the employer to cease and desist from this breach by rescinding Vancouver Control Tower Staff Memorandum 88-15 dated 9 June 1988.

She asked, third, that the term or condition of employment which prohibits scheduled overtime be deemed to have been in effect on 1 November 1988 and, therefore, be deemed to have been "frozen" by the notice to bargain collectively which the bargaining agent served upon the employer on that date.

ARGUMENT FOR THE RESPONDENT

Counsel for the respondent said that there are two distinct matters involved here and it is necessary to keep in mind that they are distinct.

First, there is the question of mandatory overtime as opposed to voluntary overtime. The employer has never given up its right to impose mandatory overtime where necessary. Although efforts have been made to accommodate the wishes of the employees, the evidence shows that the employer has at all times reserved the right to order an employee to work on overtime shift when necessary.

Second, there is the question of scheduled overtime as opposed to call-in overtime. The question here is whether the employer can exercise its undoubted right to assign mandatory overtime by simply listing on the monthly schedule the names of employees to whom such shifts have been assigned. The alternative is to call around to available employees the day before the shift is to be worked and make an assignment at that time if a volunteer cannot be found.

Counsel said that only the distinction between scheduled and call-in overtime is at issue here.

She said that there are three perspectives from which this question may be approached. First, it may be said that there was no change in the employees' terms and conditions of employment. The employer has always retained its right to assign mandatory overtime and that is precisely what it is doing by scheduling overtime shifts on the monthly shift schedule. The only change is that employees are now given longer notice of the overtime shifts which they will be required to work.

Second, even if there was a change, that change was dictated by Article 15.03 of the collective agreement. This provision requires that mandatory overtime be assigned equitably. The evidence shows that it is difficult to assign this overtime equitably by call-in, some employees simply cannot be reached and the burden then falls upon those who can. By scheduling overtime in advance, the employer can ensure an equitable distribution.

Third, it is necessary to consider the nature of the Section 51 "freeze". It is not absolute. It permits the employer to conduct business as usual and this includes the right to make changes which are necessary to meet changed conditions subject to the proviso that such changes must not be in violation of the collective agreement.

Speaking to the first of these points, counsel said that the employer has not gone from voluntary overtime to mandatory overtime. Rather, it has gone from mandatory overtime on approximately 24 hours notice to mandatory overtime on at least 15 days notice. She said that an employee can continue to avoid mandatory overtime when the employer is using the call-in method, however, the opportunity to make oneself scarce or the use of a telephone answering machine cannot be said to be a term or condition of employment which is protected by Section 51.

Turning to the second point, she said that if any employee does not want to work overtime it is not difficult to find a way to be unavailable when the employer starts calling. The mere fact, for example, that an employee has a telephone answering machine and can therefore avoid speaking to the employer ought not to mean that that employee can escape overtime duty. Scheduling overtime in advance helps to ensure an equitable distribution.

Turning to the third point, the nature of the Section 51 "freeze", counsel said that its purpose is to maintain a stable relationship in the workplace while the parties are negotiating a new collective agreement. Section 51 was not intended to be used as a negotiating tool for the purpose of permitting either party to pressure the other.

Under a collective agreement, the employer has the right to carry on its business subject only to the restrictions contained in that agreement. This right, to carry on business as usual, continues after notice is given to bargain collectively. The employer retains those rights to manage the enterprise which it has under the collective agreement. If the conditions under which the business operates happen to change after notice has been given to bargain collectively, the employer is entitled to respond to those changes in precisely the same way that it would have responded prior to the giving of notice. That is to say, the employer is entitled to have recourse to any of the rights which

it enjoys under the collective agreement. Subject only to the limitations of good faith and the absence of an ulterior motive the employer is free, within the limits of the collective agreement, to respond to changed conditions.

Counsel then cited a number of cases in support of her position. In the case of Gagné and Purolator 1987 CLLC 16,053 (Canada Labour Relations Board), the employer changed hours of work and times of shifts in response to changed business conditions. The complaint of the bargaining agent was dismissed by the Board on the grounds that there was no evidence of an anti-union animus but, rather, the evidence showed that the employer had acted in response to business conditions and for the purpose of carrying on its business as usual.

In the case of Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and Simpsons Limited 1983 CLLC 16,036 (Ontario Labour Relations Board), the employer reorganized and reduced staff after notice to bargain had been served. The Board found that reorganizing and reducing staff in response to changed economic circumstances does not violate the statutory "freeze".

On the meaning of the term "business as usual", counsel cited the decision of the Canada Labour Relations Board in the case of Bank of Nova Scotia and Retail Clerks International Union 1982 CLLC 16,158 (Canada Labour Relations Board) and the decision, under the

same name, of the Federal Court of Appeal on review: 1983 CLLC 14,007.

In summary, counsel said that the employer is entitled to carry on its business as usual during a Section 51 "freeze". Where the employer acts in good faith, within the terms of the collective agreement and in response to changed business conditions, it does not violate the provisions of Section 51.

REPLY FOR THE APPLICANT

Counsel for the applicant said that prior to June 1988, it was a term or condition of employment for air traffic controllers at the Vancouver control tower that until notified otherwise by a supervisor, they could do what they liked with their days off. With a system of call-in overtime in place, an employee could go away for a few days. This would place him beyond the reach of his employer.

With a system of scheduled overtime in place, employees have no alternative but to work the shifts assigned to them, there is no way they can get out of it other than to arrange a shift exchange.

Turning to the question of the nature of the "freeze" imposed by Section 51 of the PSSRA, counsel said that it is useless to attempt to rely upon jurisprudence developed under the Canada Labour Code and the Ontario Labour Relations Act. The applicable

provision in the PSSRA (Section 51) is worded differently. Section 51 provides that "any term or condition of employment ... shall remain in force". Thus, there is no room in the PSSRA for a "business as usual" principle.

Counsel said that a term or condition of employment was created at the Vancouver control tower when management, by establishing a call-in system for overtime, gave up its right to schedule overtime.

REASONS FOR THE DECISION

On 3 November 1986, the bargaining agent served notice upon the employer to bargain collectively for the purpose of concluding a new collective agreement (Exhibit C-1). At that time, the assignment of overtime was governed by Staff Memorandum 86-08 dated 21 April 1986 (Exhibit C-2). On 9 June 1988, management issued Staff Memorandum 88-15 which had the effect of changing the manner in which overtime was assigned.

Until 9 June 1988, all overtime requirements were met by means of call-in overtime. That is, during the 24 hours prior to the commencement of an overtime shift, a supervisor would telephone those employees who had volunteered to work the overtime shift and arrange for one of those employees to do so. In the event that a volunteer could not be found to cover off the shift, the supervisor could assign it as mandatory overtime to any employee whom he was able to reach.

After June 9, 1988, staffing by means of call-in was continued in respect of overtime created on short notice, e.g. sick calls. However, what may be called "known overtime" was thenceforth to be staffed by means of scheduled overtime. That is, the names (or call letters) of employees to whom overtime shifts had been assigned would be listed in the appropriate slots on the monthly schedule which, by operation of clause 13.04 of the collective agreement, must be posted at least 15 days in advance.

It is common ground between the parties that under the collective agreement, the employer has the right to assign mandatory overtime either by call-in or by scheduling.

It is the contention of the applicant-bargaining agent that by resorting to scheduled overtime after notice had been given to bargain collectively, the employer changed a term or condition of employment which was in force on the day that notice was given and thereby violated Section 51 of the PSSRA.

In argument, counsel for the applicant relied heavily upon the decisions of the Board and of the Federal Court of Appeal in the CATCA Case (supra) and the decision of that court in the PSAC Case (supra).

The ratio decidendi in the PSAC Case (supra) is not, in my view, at issue here. There, an arbitral award had been made. However, the board of arbitration

ruled that it lacked jurisdiction to make a determination in respect of a term or condition of employment which had been referred to it.

The court had two questions before it. First, had the Board rendered an arbitral award in respect of that term or condition of employment when it found that it lacked jurisdiction to make a determination in respect of it? Second, does the Section 51 "freeze" continue indefinitely in the absence of a concluded collective agreement or is there some point in time after which the employer is free to make changes?

Neither of these questions is relevant here. The alleged term or condition of employment at issue here was never referred to a board of arbitration. As to the limits of the freeze, the arguments relating to the "business as usual" doctrine, if they are applicable here, are not time bound. That is, the "business as usual" doctrine, if applicable, would be equally applicable on the day after notice to bargain has been served and on some day several years later. The determining factor in the "business as usual" doctrine is changed business conditions not time elapsed since the start of the "freeze".

The CATCA Case (supra) is of greater relevance here. In that case it was found that resort by the employer to compulsory overtime during the "freeze" period did have the effect of changing a term or condition of employment which was in effect on the day that notice to bargain was served.

Under the collective agreement there, the employer had the undoubted right to assign mandatory overtime. How then did it come to pass that it became a term or condition of employment that the employees not be required to accept mandatory overtime?

The answer to this question may be found in the decision of Deputy Chairman Kates and in the decision of the Federal Court of Appeal. As summarized in the headnote to the reported version of the court's decision, that reason is stated in the following terms:

> At the date of the notice to bargain and prior thereto, there existed a voluntary overtime policy arrived at through consultation between the employer and the respondent Association...

That is, the parties consulted and agreed that all overtime at the Montreal Control Centre was to be voluntary overtime. This agreement, informal and unwritten though it was, was held to have created a term or condition of employment. The employer was thus bound to observe that term or condition of employment after notice to bargain was served.

The fact that the parties there consulted and came to an agreement is of crucial importance. It means that the parties had turned their minds to the question of the employer's right to assign mandatory overtime. When the employer gave up that right, it did so with

its eyes wide open and in the full knowledge of what it was doing. On this basis, it was possible to argue later that a term or condition of employment had been created.

There is no evidence in the present case that the parties had consulted on the matter of the employer's right to assign scheduled overtime. The evidence does show that the employer issued two staff memoranda on the subject of overtime.

The first (exhibit C-2) is dated 21 April 1986 and is capable of being understood to mean that all overtime assignments are to be made by call-in. While it does not specifically prohibit scheduled overtime, it does not mention it as a means of staffing overtime shifts. All discussion of staffing for overtime shifts is in terms of call-in only.

Can the employer's failure to mention scheduled overtime be deemed to be an assurance to employees that it will not have recourse to its right to schedule overtime? That is, can the omission of any mention of scheduled overtime by the employer be taken to mean that the employer had given up its right, under the collective agreement, to schedule overtime?

After considering this question, I have concluded that it cannot. To understand why, it is only necessary to consider the consequences of a decision to the opposite effect. If the mere failure on the part of the employer

to mention in a staff memorandum some right or prerogative secured to it under a collective agreement was capable of being understood to mean that the employer was waiving that right or prerogative, it would then follow that the employer would thenceforth take especial care to protect its rights and prerogatives. How? By ensuring that every staff memorandum covered every employer right or prerogative exhaustively and to the fullest possible extent. Staff memoranda would have to be drafted with the same degree of precision as statutes.

It is my finding that the staff memorandum of 21 April 1986 (exhibit C-2) did not hold out any promise to employees respecting scheduled overtime nor can it be read to mean that the employer was giving up its right to have recourse to scheduled overtime. This document consisted of instructions to the local managers on the way in which the employer's rights were to be exercised. It was based upon conditions as they were at that time and could be withdrawn or amended at any time in the face of changing conditions. It cannot be held to have created a term or condition of employment which was subject to a Section 51 "freeze" when notice was served to bargain collectively.

In the present case, the employer relied solely upon call-in overtime throughout the life of the collective agreement until notice to bargain was served upon it and, indeed, for a year thereafter. Can this reliance upon call-in overtime be said to have created a term or condition of employment which was subject to the Section 51 "freeze"?

This question may be restated in the following terms: Can it be said that the rights or prerogatives of the parties to a collective agreement can atrophy through disuse so that a right or prerogative to which recourse has not been had during the life of a collective agreement down to the day that notice to bargain is served becomes unavailable during the "freeze" period?

It takes only a moment of reflection to conclude that this question must be answered in the negative. An affirmative answer would mean that during the life of a collective agreement, prior to the serving of notice to bargain collectively, the parties would be obliged to have regular recourse to every right or prerogative secured to them by the agreement, regardless of whether or not such recourse was warranted by circumstances, simply to keep that right or prerogative current in the event that it turned out to be needed during the "freeze" period.

One would, thus, be obliged to conclude that in the hypothetical case where there was no need whatever for overtime work during the life of the agreement the employer would, nevertheless and at regular intervals, order employees to work unnecessary overtime shifts merely to keep current its right to have recourse to overtime in the event that a need for overtime arose during the "freeze" period. In my view, this conclusion smacks of a reductio ad absurdum.

In the present case, the evidence shows that throughout the life of the collective agreement and

until June 1988, the employer did not resort to scheduled overtime. The evidence also shows that until December 1987, the number of employees volunteering to work overtime shifts and the number of overtime shifts available were such that it was not necessary to have recourse to scheduled overtime. The evidence also shows that beginning in December 1987, the number of volunteers declined substantially while, beginning in April 1988, the number of available overtime shifts increased substantially. As a result, the employer found it necessary to have recourse to its right to schedule overtime.

In summary, the employer has always had the right to schedule overtime and there is no evidence to show that it ever knowingly gave up that right. So long as it was not necessary to have recourse to that right, the employer relied exclusively upon call-in overtime. When circumstances changed and exclusive reliance upon call-in overtime proved to be inadequate or inconvenient, the employer had recourse to scheduled overtime. I can see nothing in all of this which can be construed as a violation of Section 51 of the PSSRA.

Accordingly, the present application must be dismissed.

David Kwavnick,
Board Member.

OTTAWA, January 19, 1989.