SEP 27 1995

File: 166-2-26443

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN MICHAEL TONNER

Grievor

and

TREASURY BOARD (Transport Canada)

Employer

Before: Albert S. Burke, Board Member

For the Grievor: Catherine H. MacLean, Counsel for the Canadian Air Traffic Control Association

For the Employer: S. Maureen Crocker, Counsel

Heard at Gander, Nfld,
August 29, 1995.

SEP 27 1995

DECISION

This grievance, Board file 166-2-26443, was referred to adjudication by Mr. John Michael Tonner who is employed by Transport Canada as an air traffic controller, AI-OPR-05, at Gander, Newfoundland.

Mr. Tonner's grievance and requested corrective action read as follows:

> *I was called to work overtime July 12, 1994. Management has refused to pay the overtime I am entitled to in accordance with Article 12 of the Collective Agreement Code 402/91.*
>
> *CORRECTIVE ACTION REQUESTED*
>
> *I request that overtime be paid in accordance with Article 12.*

In her opening remarks, counsel for the grievor stated that the question before me is whether the grievor is entitled to receive call-back pay when he received a telephone call from his employer at home after his regular scheduled work hours requesting instructions on how to correct a problem with the computer system at the Gander Airport Tower.

Counsel said the employer seems to be refusing for three reasons: firstly, the grievor did not physically have to go back to the work area; secondly, the grievor would have had to work 15 minutes in order to qualify as per Article 15 of the collective agreement; and thirdly, the employer claimed that the telephone call was necessitated by the grievor's failure to complete some work prior to leaving his shift.

The grievor is covered by a collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (CATCA), effective date January 1, 1991 to December 31, 1993, Code: 402/91 (Exhibit G-1). Article 12 covers call-in and reads as follows:

ARTICLE 12

CALL-IN

> *12.01 When an employee is called in to work overtime that is not contiguous to the employee's scheduled shift, the employee is entitled to the greater of:*

(a) compensation at the applicable overtime rate,

or

(b) compensation equivalent to four (4) hours' pay at his or her straight-time hourly rate.

Counsel further said Article 15 of the grievor's collective agreement covers the overtime requirements. Article 15 reads as follows:

ARTICLE 15

OVERTIME

15.01 Time worked by an employee in excess or outside of his or her scheduled hours of work shall be considered as overtime.

**

15.02

(a) An ***operating*** *employee shall be paid for overtime worked by him or her at two (2) times his or her straight-time hourly rate.*

A ***non-operating*** *employee shall be paid for overtime worked by him or her at one and one-half (1 1/2) times his or her straight-time hourly rate except that if the overtime is worked by the employee on two (2) or more consecutive and contiguous days of rest, the employee shall be paid at two (2) times his or her straight-time hourly rate for each hour worked on the second and subsequent days of rest.*

An employee is entitled to overtime compensation for each completed fifteen (15)-minute period of overtime worked by the employee.

An employee at his or her request, shall be granted time off in lieu of overtime at the appropriate overtime rate. The employee and his or her supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated.

SEP 27 1995

Where an employee requests time off in lieu of overtime, the employee must indicate this to his or her supervisor prior to the end of the month in which the overtime occurred.

Where an employee has not utilized accumulated time off in lieu of overtime by the end of the fiscal year, the unused portion will be paid off at the appropriate overtime rate.

(b) Except as provided in clause 15.02(a) the Employer will endeavour to make cash payment for overtime in the month following the month in which the overtime was worked.

**

(c) Where an employee works in excess of the regularly scheduled hours of work on a day that is a holiday, the employee shall be paid at two (2) times his or her straight-time hourly rate for all hours worked in excess of his or her regularly scheduled hours.

15.03 The Employer will endeavour to keep overtime work to a minimum and shall assign overtime equitably among employees who are qualified to perform the work that is required at the location concerned.

15.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

Counsel said that physical displacement is not required to qualify for call-back in Article 12 of the collective agreement. Subclause 15.02(a) does not apply under the call-back provisions. Furthermore, if the employer felt that the grievor was responsible for not performing his duties, then it had the opportunity to discipline him but it chose not to.

Counsel for the employer said she would argue that in order for the grievor to get call-in pay, two things must apply: first, he must be called in to the workplace; and secondly, if called in, it must be for more than 15 minutes. Neither of these things happened.

Counsel further said the reason Mr. Tonner was called was due to his failure to complete work during his regular hours of work.

Counsel for the grievor then called the grievor as her witness, Mr. John Michael Tonner, and the following is a summary of his testimony.

The grievor has been an air traffic controller for 33 years. In 1963, he acquired his air traffic licence and in 1965, he completed his instrument flight rules (IFR). In 1980, he acquired the position of Data Systems Coordinator (DSC).

The witness said that as a DSC he is a go-between between the controller who uses the computerized data system and the technician who is required to maintain and repair it. To be a DSC you have to have your air traffic control licence and have completed Transport Canada's courses on the automated computerized system.

The witness said the DSCs work shifts which run from 7:45 a.m. to 4:00 p.m. and from 4:00 p.m. to midnight. There is also a shift that covers 11:45 a.m. to 8:00 p.m. and a shift from 7:45 p.m. to 4:00 a.m. Some of these shifts overlap. However, there is no DSC on shift from 4:00 a.m. to 7:45 a.m.

The witness said the air traffic is divided into different sectors which are monitored by the air traffic controllers. The jet stream has an effect on the traffic and its location. There is a planning section which designates the different flight sectors. There is also the high and low level air traffic space that has to be monitored. There is also a sector that covers ocean flights.

The witness said there could be a change in the sector structure at any time. The busy flight times for the Gander Tower are usually between 10:00 a.m. and 3:00 p.m. and from 9:00 p.m. to 3:00-4:00 a.m.

The witness said on July 11, 1994 he worked the 7:45 p.m. to 4:00 a.m. shift. On July 12, he was scheduled to work the 11:45 a.m. to 8:00 p.m. shift. He said prior to leaving each shift he would check the computer system concerning the air space and communications to ensure that they were correct. He said he always followed a procedure in doing this.

Following the July 11, 1994 shift, he went home and around 4:55 a.m. his father-in-law knocked on his bedroom door to tell him that there was a telephone call for him. He thought it might be a family emergency. When he answered the telephone it was Mr. Dylan Driscoll from the Gander Tower who told the witness that they could not collapse the systems for the ocean flights back into one system. The witness asked Mr. Driscoll to explain what response he was getting from the computerized system. He was told the system was showing "database in use". The witness said he explained to Mr. Driscoll that this could mean a malfunction in the system or that the escape button had not been pushed from his command keyboard which the witness used at work. The witness said he was told the system showed that it was his keyboard that was preventing the system from collapsing down to one sector.

The witness gave instructions to Mr. Driscoll by telephone on how to clear the system so that they could collapse the sectors down to one. The telephone call lasted from five to seven minutes and the problem was resolved. The witness stated that had he returned to work to correct the problem, it would have taken about 10 minutes to complete the task.

The witness identified a letter written July 12, 1994 by him to Mr. Earl Snow, General Manager, Gander A.N.S. (Exhibit G-2), which reads as follows:

> *When I left work this morning after my M shift I inadvertently left the sectorization task active at the DSC workstation. The effect of this was that when the controllers attempted to collapse the ocean into one sector later in the morning, they could not. They received an error message "database in use". This meant that, two ocean boards would have to remain open until the DSC arrived at 7:45 am.*

> ***However** the shift supervisor, Al Newhook, and the controller Dylan Driscoll found another solution. **They called my home at 4:57 am this morning!** My Father-in-law answered the phone and awakened both myself and my wife when he advised of the phone call. This was well outside my working hours and **completely unnecessary.** While the problem that I had created was a nuisance, it was not life threatening nor a danger to the operation.*
>
> *As a result neither myself nor my wife got much sleep for the remainder of the morning. I had to return to work at 11:45 am this morning. As I sit writing this letter to you I have probably had insufficient sleep to be performing my duties, but I am not qualified to make that decision.*
>
> *I consider this entire action to be one of very poor decision making and common sense on the part of your supervisor. In addition my wife was naturally very apprehensive about receiving a phone call at that hour of the morning and as is normal thought of all the disastrous things that must have happened. The call ruined the rest of the night's sleep for both of us. While I am responsible for the action that lead to the situation arising, there were other workable solutions. Direction should be given to this supervisor to refrain from such phone calls in the future.*
>
> *In addition **I demand that Mr. Newhook be directed to call my wife and apologize for the needless anxiety and worry that he caused her. I request to be advised of any action that is taken with respect to this matter.***
> (original emphasis)

The witness further identified a memorandum to him from Mr. Henry Ford, A/General Manager, Gander ACC (Exhibit G-3), in reply to his letter of July 12, 1994, which reads as follows:

> ***<u>Letter of Complaint</u>***
>
> *Reference your letter of July 12, 1994 concerning an early morning call to your residence which was work related.*
>
> *A thorough review of the circumstances which precipitated the call was conducted and the following is a summary of the events:*

> *The sectorization task was left in the active state at the DSC workstation when you completed your 1945 -0400 shift thus preempting any sectorization activity by the controller. The error was not detected until approximately 0415. Following an assessment of operational impact and other courses of action, the Team Supervisor on duty determined that DSC intervention was necessary and called your residence at 0445. You provided technical direction which rectified the problem and the call terminated at 0450.*

In consideration of the operational alternatives available, I have concluded that the decision to call your residence was reasonable and warranted. I am also satisfied that the Team Supervisor gave due consideration to the probable disruption to you and your family members when making his decision to contact you. In fact it is somewhat ironic that his attempts to resolve the problem through alternative means probably served to aggravate the situation. Had he not viewed a call to your residence as a last resort solution, he might very well have reached you before you were asleep.

The anxiety and disruption caused by such an untimely call is obvious and is certainly regrettable. However, I am confident that upon further consideration of the operational alternatives available to those on duty that morning, you will conclude as I have, that their actions were neither malicious nor unreasonable.

The witness then identified a letter he wrote to Mr. Ford on August 4, 1994 (Exhibit G-4), which reads as follows:

Subject: Response to Letter of Complaint

Dear Mr. Ford

To say that I am disappointed in your reply to my letter would be a gross understatement. I must say at the same time that I am ***NOT*** *surprised that management supported the poor decision made by Al Newhook! Other courses of action were available to him, such as leaving the two sectors open and forwarding the messages. However, I do not wish to either reopen or continue the dialogue concerning this matter.*

> *Since you stated in your reply that "the Team Supervisor on duty determined that DSC intervention was necessary" and the time worked was outside my hours of work, I am requesting payment of overtime in accordance with Article 12.01 of the Collective Agreement. I trust that you will agree with my request for payment of overtime and take the action necessary to have pay action initiated immediately.*
>
> *Thank you for your continued action with respect to this matter.*
> (original emphasis)

The witness further identified a memorandum addressed to him, dated September 16, 1994, from Mr. Wayne M. Lyon, Manager, ATC Operational Requirements, Gander Area Control Centre (Exhibit G-5), which reads as follows:

> *OVERTIME PAYMENT REQUEST*
>
> *Re your memos of August 4, 1994 and September 11, 1994 to the General Manager of this unit in which you requested overtime payment for the call you received after your shift on July 12, 1994.*
>
> *It is this unit's position that, after consulting with the managers involved and with Staff Relations office in Moncton, you do not qualify for overtime compensation in this matter. The reasons are as follows:*
>
> - *The call to your home following your 1945 - 0400 shift was made because you had failed to complete your duties before you proceeded home. Therefore, it is you who created the need for the call.*
> - *Article 12.01 of the Collective Agreement states, in part, "When an employee is called in to work overtime that is not contiguous to the employee's scheduled shift,...". As you were **not** called in to work (and in fact provided the resolution by phone), Article 12.01 does not apply in this case.*
> - *Article 15.02a, another article relating to overtime, states "An employee is entitled to overtime compensation for each completed fifteen (15)-minute period of overtime worked by the employee.". As the call lasted only five (5) minutes (0445-0550) according to the recorded information), compensation is not required.*

SEP 27 1995

> *Please do not hesitate to contact Earl or myself if you need further clarification.*
> (original emphasis)

During cross-examination by counsel for the employer, the witness identified his job description which was entered into evidence (Exhibit E-1). The witness said the job description, on page 2, identifies as part of his duties, being responsible for automated air traffic control system when on shift. In addition, he coordinates with the shift's supervisor to ensure that system configuration meets the changing needs for resectorization during a shift and ensures proper operational utilization of the automated system.

The witness said there may be a need to open or close sectors during shifts depending on the air traffic and this would be done from his keyboard position. He also said that when there is no DSC on shift, the ocean sector can be monitored from the air traffic controller's workstation. Prior to leaving work, he is responsible for leaving the ocean sector in a position so that the controller can operate it.

The witness said that in his letter of July 12, reproduced earlier, he is saying that due to his error the air traffic controller could not operate the ocean sector. The witness also said he does not have a computer hook-up at home and therefore cannot tie into the system from there.

ARGUMENTS

The following is a summary of counsel for the grievor's arguments.

The facts are not in dispute. The telephone call was made to the grievor while he was at home between two shifts. The telephone call came from the Gander Air Traffic Control Centre and concerned a problem they were having with the computer system. The grievor was asked to fix it; the controller could not solve the problem at the workplace.

The grievor did not have a keyboard at home so he could not tie into the system. He used his knowledge of the system and gave advice to the controller who pushed the buttons as directed and solved the problem. It is the same work he would perform while on shift. The telephone call took five to seven minutes. Had he chosen to, he could have returned to work, pushed the buttons himself and returned home. That would have taken approximately 10 minutes and that would have entitled him to call-back as per Article 12 of his collective agreement.

The employer said it was the grievor's error that caused the problem and it might well have been. He may have forgotten to push a button or accidently hit two buttons at once. However, employees are paid all the time if during their workday an error is made; their pay does not stop while they fix the problem. Therefore, the same should apply here.

Article 12 applies. The grievor was outside his regular scheduled hours. Article 15 does not apply because it was not time worked as described in clause 15.01 of the collective agreement. The grievor performed a service; he worked overtime not contiguous to his shift and Article 12 was inserted into the collective agreement to deal with such call-ins. The employee does not have to physically return to work to qualify for pay under Article 12 of the collective agreement.

Counsel referred me to the Federal Court of Appeal decision in the matter of Canada (Attorney General) v. Redden (1990), 124 N.R. 396 (F.C.A.) and to pages 4 and 5 of that decision, which read as follows:

> *I am of the view that the standby pay of $7. per shift is meant to compensate an employee merely for standing by in order to go to work if called to do so. It is not meant to fully cover this situation where the employee was required to, and actually did, work during the so-called standby period on the telephone, by giving information to the clientele of the employer. Nor, however, is the full overtime pay appropriate for the entire period, because the fact is that he was not working during the entire time. He was, however, working during the 19 calls he received over the period. (Although each of these calls lasted less than 15 minutes, article 26.08*

> *does not prevent compensation for them, as that section is meant to cover the way ordinary overtime is calculated, not to cover this situation.)*
>
> *I therefore hold that the appropriate compensation for the employee in this case, on the basis of this agreement, is as follows:*
>
> *1. He should, of course, be paid for his regular shift.*
>
> *2. In addition, he should be paid at the standby rate of $14. per 16-hour day for the 48 days.*
>
> *3. Also, he should receive the 4-hour minimum pay (see 30.04(b)) for each day on which he responded to a telephone call, whether he went to the office or not. In these circumstances, I am of the view that each time he answered a call he was "required to report for work" and should be paid accordingly. In the specific circumstances of this case I feel there is no need for the employee to physically attend at his office in order to "report for work"; the modus operandi adopted by the employer meant that each time he responded to a call, ready to give information in the same way as he did at the office, he was "reporting for work". In a sense, he was carrying his office with him via the cellular phone equipment, so that each time the phone rang and he answered, he was "required to report for work."*
>
> *I would, therefore, set aside the decision of the Board and remit the matter to the Board for reconsideration and disposition in a manner consistent with these reasons.*

Counsel said as in the Redden (supra) case, the grievor before me worked when answering the telephone; he did not physically have to return to his place of work.

Counsel also referred me to the decision in Burridge (Board file 166-2-21428) rendered by Adjudicator Thomas W. Brown. Counsel said that while in that case the employee had a computer at home and could log into the system, the adjudicator found that he did not have to physically report for work to qualify for the call-back pay. While the grievor in this case did not have a computer at home, he used the telephone to give another employee instructions on what procedure to follow and the right buttons to push so that the problem could be overcome. So it was his tools of knowledge and skills that were used to solve the problem.

Counsel further referred me to the decision in Séguin (Board file 166-2-23982) rendered by Adjudicator Marguerite-Marie Galipeau. Counsel referred me to the bottom of page 5 and to page 6 of that decision where the adjudicator gave her definition to qualify for call-back pay, and this reads as follows:

> *Place of Work*
>
> *To begin with, I believe that, during the time when Ms. Séguin was performing the work requested, her home became her place of work. By having Ms. Séguin perform work on the telephone, from her home, the employer was not asking her to return physically to her place of work. It implicitly waived the requirement that she physically return to her normal place of work and agreed that, for the duration of the telephone call, Ms. Séguin's home serve as her place of work. I share the view expressed by Ms. Séguin's representative that the decision of the Federal Court of Appeal in the Redden case can be relied on to argue that an employee's place of work can be somewhere other than its normal physical location, and in the present case, I believe that the employee's home became the workplace.*
>
> *"Called Back" and "Return to Work"*
>
> *Moreover, although the Redden case dealt with a standby payment, it seems to me that the justices recognized that there was no need for an employee to return physically to his/her normal place of work in order for one to be able to say that the employee "reports to work". It seems to me that the same reasoning applies in the present case.*
>
> *In fact, I believe that, even though Ms. Séguin did not leave her home, she was called back to work and returned to work.*
>
> *In my opinion, the words "call back" connote the action whereby the employer expresses to the employee its wish that the employee resume work.*
>
> *On the other hand, the words "returns to work" connote more the acceptance by the employee of this call back.*

SEP 27 1995

In the present case, the employer's call back took the form of a telephone call and the employee returned to work when, in response to the employer's call back, Séguin agreed to do the work requested and began doing the work on the telephone.

Simply put, call back is an action taken by the employer, whereas returning to work is an action taken by the employee.

Thus, if, in response to the employer's call back, Ms. Séguin had refused to perform the work requested, she could not claim that she returned to work. However, she did not refuse: in response to the employer's call back, she began working and therefore returned to work.

In clause M-29.01, the words "If an employee is called back to work...and returns to work" constitute two conditions: one condition is fulfilled by the employer, i.e., the "call back", and the other condition is fulfilled by the employee, i.e. "returns to work".

Counsel said that as in the Séguin (supra) case, the grievor used the telephone to perform his work and in this new technological age, such tools must be considered when granting call-back pay. Otherwise, the employer can call employees at home any time and have its problems solved for nothing.

Counsel said even if the grievor inadvertently caused the problem, if he had been at work he would have been paid while he corrected it. He should now be entitled to call-back pay as per Article 12 of his collective agreement. The grievance should be upheld.

The following is a summary of counsel for the employer's arguments.

The type of compensation paid to an employee depends on the language of the collective agreement and the word "call-back" or "call-in" must meet the meaning of these words. Counsel referred me to Webster's Third New International Dictionary and to the meaning of "call-back", which reads as follows:

> ***call-back 1:*** *a return call on a customer to transact unfinished business or give repair or maintenance service on goods sold* ***2 a:*** *a recall of an employee to work after a lay-off* ***b:*** *a summons back to work after regular working hours.*

Counsel said it is plain that these words mean movement and the employee must be called in from somewhere to the place to work, for a period of time not contiguous to his or her shift.

Counsel also referred me to Canadian Labour Arbitration, Third Edition, by Messrs. Brown and Beatty, and to section 8:3410:

> *Call-in or call-back clauses ensure that an employee who actually reports for work, as required, receives a certain guaranteed minimum compensation regardless of whether work is actually performed. In interpreting these provisions, the majority of arbitrators have taken the position that their underlying premise is to compensate employees for the inconvenience, disruption, and expense that is caused by them being required to come into work, and accordingly, to ensure that the employer will not require its employees to report for work unless there is sufficient work available to justify the costs implicit in the call-in provision. As stated by one board:*
>
>> *In the absence of an explicit definition of a call-in or call-back, we would accept the interpretation in the first group of cases of the objectives of such a guaranteed minimum, and agree that the provision should be applied in this light. What the provision does is to guarantee an employee a specified amount of minimum earnings in certain overtime situations, whether the company has enough work for this purpose or not. The reason why the parties negotiate this minimum is the recognition of the fact that being required to leave home and go to work usually involves significant disruption and expense for an employee and it is only fair that he should be guaranteed adequate compensation. It is also designed to ensure that the company, which gets the benefit of the employee being called to work at an irregular time, be encouraged to make use of its powers only when this is important enough to warrant the costs it will incur. It is vital to recognize that these guaranteed earnings, on overtime work outside regular hours, are not paid the employees*

SEP 2 7 1995

> *for overtime that follows continuously from the end of their shift. This is because the reason for the guarantee---the extra trip to and from work---did not obtain in this case. It is considered adequate compensation for the extra work outside the regular hours that the employee be paid the premium rate for the time actually worked. On this reasoning, an employee who is asked to come in to work overtime before and continuously up to the start of his shift should also receive only the overtime rate, and not the guaranteed minimum, because he has not been asked to make the extra trip to and from work.*
>
> *If this reasoning be valid, as we believe it is, then the essential characteristic of a call-back is not that the employee is somewhere else at the time that he is asked to return to work, but, rather, that his overtime work actually begins at a time when it is necessary for him to make an extra trip to and from work.*

Counsel also referred me to the award RE Leco Industries Ltd. and Oil, Chemical and Atomic Workers International Union, Local 9-819 (1980), 26 L.A.C. (2d), 80, and to page 84, last paragraph, which reads as follows:

> *I am also of the opinion that an employee who responds to a call from the device, does not thereby become "an employee who is called in and reports for work outside his regularly scheduled hours of work" within the meaning of art. 22.02. In my view this provision which has been generally referred to as "call in" clause applies only to an employee who is called in and then reports for work at the Company's premises and this is supported by the last sentence of this article.*

Counsel argued that in the Federal Court decision on Redden (supra), the circumstances were different than in the case before me. Mr. Redden had been supplied with a cellular telephone as part of his equipment to deal with calls during the 1988 Calgary Winter Olympics, which in that case extended his normal duties. The judge decided that due to the special circumstances, Mr. Redden in effect carried his office with him and each time he answered his cellular telephone it was as if he were in his office. That is not the case before me.

The grievor, Mr. Tonner, should have performed the duties prior to leaving his office. Because he failed to do so, he was called by telephone at home.

I was referred to the decision in Heath (Board file 166-2-25457) rendered by Adjudicator J. Barry Turner and to the decision in Burridge (supra). Counsel said in these cases, again due to the special equipment that was supplied to Messrs. Heath and Burridge, the adjudicators said it was as if they had returned to their work when performing these duties. That is not the case with Mr. Tonner.

Counsel did not agree with the adjudicator's interpretation in Séguin (supra) as the Redden (supra) decision was misinterpreted in that decision. She further said the case is being appealed to the Federal Court and, even if I accept the Séguin decision, I must remember that Mr. Tonner failed to complete his duties during his shift.

Counsel also referred me to the award Re Shell Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-848 (1974), 6 L.A.C. (2) 422, and the Trial Division decision in Ager v. The Queen, [1979] 1 F.C. 475. Counsel said these cases referred to additional work but in Mr. Tonner's case, there is no additional work. It was a telephone call to him so that the work he should have done during his shift could be completed. Even Mr. Tonner admitted this in his letter which was admitted into evidence as Exhibit G-2.

Counsel said the employer is concerned because Mr. Tonner did not complete his duties during his shift and should not now qualify for call-back pay due to a telephone call made to him to correct a problem he created. Counsel said the requirements of both Articles 12 and 15 of the grievor's collective agreement have not been met and therefore the grievance should fail.

DECISION

I have considered the evidence and argument before me and I must allow this grievance, although somewhat reluctantly.

SEP 2 7 1995

I do not agree with counsel for the employer when she states that an employee must physically move from a particular location to his or her workplace in order to receive call-in allowance. Nor do I agree that a problem solved by an employee by telephone to his place of work does not qualify for call-in pay. I accept that the absence of remote use of special equipment may be a factor relevant in determining whether a call-in situation has occurred. Nevertheless, the simple use of a telephone whereby an employee provides useful information or directions as a result of his or her knowledge and expertise can certainly qualify. I agree with Adjudicator Galipeau's determination on this issue in Séguin (supra). I note that the Federal Court Trial Division has since denied an application for judicial review of the Séguin matter. (See Attorney General of Canada v. Séguin, Federal Court File No.: T-1063-94.)

Furthermore, I disagree with counsel for the employer when she argues that Article 15 of the collective agreement applies to call-back. The only part of Article 15 that would apply is the rate of overtime compensation when subclause 12.01(a) on call-back is applied. Article 12 compensates the employee either at an overtime premium or at the equivalent of four hours' pay at straight-time pursuant to subclause 12.01(b). In my opinion, the employer and the bargaining agent inserted Article 12 in the collective agreement to cover circumstances where the employer needs the services of an employee after the employee's regular work hours in relation to an unexpected matter. The requirement of 15 minutes worked pursuant to Article 15 does not apply to call-back at Article 12.

The evidence establishes that the grievor's omission resulted in the call to him at home after his shift. The instructions the grievor provided over the telephone led to the grievor's omission being corrected. However, the evidence also establishes that his error was unintentional. On that basis, I cannot find that the grievor's request for call-in pay does not fit within the four corners of Article 12. I may have found otherwise if the evidence established that the grievor's omission was the result of intentional or careless actions or if the omission constituted gross negligence, as any of these scenarios may have rendered his request for call-in pay an abuse of his rights under the collective agreement.

I am mindful of the fact that in the end the grievor will receive premium pay for correcting a mistake of his own doing. However, the language of Article 12 does not allow me to find otherwise. Therefore, this grievance is allowed.

Albert S. Burke,
Board Member

OTTAWA, September 26, 1995.