Hours of Work
Exchange of Shifts

File: 166-2-775

PUBLIC SERVICE STAFF RELATIONS ACT

DECISION

BETWEEN:

WILLIAM ALEXANDER McLEOD,

Grievor,

AND:

TREASURY BOARD
(Ministry of Transport),

Employer.

Before: Perry Meyer, Adjudicator.

ART 13

For the Grievor: J.P. Nelligan, Counsel.

For the Employer: Pierre Delage, Counsel.

Heard at Ottawa, June 28, 1973.

DENIAL OF EXCHANGE OF SHIFTS BETWEEN EQUALLY QUALIFIED CONTROLLERS

The grievor is an Air Traffic Controller employed in the East Enroute Section of the Toronto Area Control Centre, Air Traffic Control. Like the other Air Traffic Controllers, he works on a rotating shift basis. The present reference to adjudication arises from the fact that the employer denied the grievor's request for an exchange of shifts with a fellow employee for March 14 and 15, 1973. The grievor claims that the employer is in breach of clause 13.04 of the collective agreement governing the Air Traffic Control Group, which reads as follows:

> "Provided it will not require the payment of overtime, equally qualified rotating shift employees at the same Air Traffic Control Unit may exchange shifts with forty-eight (48) hours' notice to and permission of the Unit Chief."

The evidence at the hearing established that normally in each month each Air Traffic Controller is required to be on approximately eight day shifts, eight evening shifts and three midnight shifts. From the evidence it would appear that in the grievor's case however, for the period commencing January 1, 1972 and terminating at the end of February, 1973 approximately ninety-two per cent of the grievor's shifts were evening shifts, as a result of a very large number of exchanges between him and fellow employees. It would appear that the grievor has a pronounced preference for evening shifts, presumably for valid reasons, and that the grievor made his preferences well known to all of the staff, informed them that he was available in the evening at any time should someone wish to change with him, solicited volunteers for

such exchanges, and up to late 1972 would see the shift scheduler in order to change as many of his shifts to evening shifts as possible in the original schedule. As a result of the grievor's example a number of other employees began to attempt to obtain their preferences as well but the grievor's case was the first and most important of such instances. The employer has at no time denied any requests for shift exchanges by the grievor or by any other employee whatsoever in this Unit, either before or after the incident giving rise to the present reference to adjudication, with the one exception of the request for March 14 and 15 which was denied by the employer. In fact since April 1, the grievor has made exactly fourteen requests for shift exchanges and all of these have been granted by the employer.

The scheduling of the Air Traffic Controllers is programmed by a computer so that each Controller will rotate in a prescribed sequence among all the available positions, and apparently this is an important measure for the purpose of ensuring that no Controller loses competence by being on any one position too long or away from any one position for too long a time. The positions involved can be roughly divided into three groups in the grievor's particular section. The first group are data board positions, of which there are four, in which Controllers communicate by telephone with adjacent control units; the second group of positions are the four positions known as Pilot-Controller radio positions,

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in which the Controller moves traffic through the sector with reference to information on the associated data board and with some reference to the overhead scan radar presentation; the third group of positions is composed of two radar positions where the function is to operate on the basis of shrimp boat information from the supervisor or the data board (these are small markers) utilizing the horizontal radar display by which the Controller sees the entire area for which he is responsible. Because of different functions and different kinds of control for each type of position the Controller must work these positions in a prescribed sequence on a regular basis for the purpose of maintaining his competency.

Prior to April 1, 1973 the practice for exchanging shifts under clause 13.04 was as follows: the employee who desired to change shifts would have to find another equally qualified employee who would agree to the shift change, and the employee would then submit his request to any one of the supervisors in order to have the request approved, the supervisor who approved the request then being responsible for making the change on the schedule. The employer recognises the need and desirability of permitting shift exchanges wherever possible and the evidence discloses that in fact the employer has at all times approved such requests except in the present case. Since April 1, 1973 the employer has implemented a new policy which is apparently much more satisfactory than the old one, involving the introduction of the crew system where

the same crew supervisor will work with the same group of employees and rotate with them from shift to shift as a group, which approach embodies a number of distinct advantages from every point of view. Since the crew system was introduced, the new policy, as per a memo of March 27, 1973, is that the employee's own crew supervisor must approve his request for a shift exchange, and the second employee who consents to exchange shifts must get the signature of his own crew supervisor as well. This makes it much easier to keep track of employees who exchange shifts and make sure that they are still properly rotating from position to position and not spending too long or too little time in any one spot. Under the old system it was virtually impossible to keep track of the grievor's changes or of those of the other employees with whom he made the exchanges, and perhaps particularly of the latter since a group of employees were involved. The new policy, in force since April 1, requires that employees accompany all requests for a change of shift by a valid reason, and suggests that they normally make such requests for a single shift at a time only. It was argued at the hearing by the grievor's representative that this change in policy constitutes a derogation from and violation of the relevant clause 13.04 of the collective agreement.

In the case of the grievor, because of what the employer considered to be his abuse of the shift exchange provisions contained in clause 13.04, and because another employee and possibly two had already begun to get involved

in the same kind of utilisation of this procedure, a staff meeting of the grievor's section was held on January 11, 1973 at which the subject of shift exchanges was discussed, and it was agreed that the practice of constant requests for multiple shift changes because employees did not care for particular shifts should be discontinued. Thereafter, up to April 1, the Unit Chief continued to delegate responsibility for approval of shift exchanges to the supervisors except in the case of the grievor, where he reserved to himself or his deputy, the Operations Supervisor, the responsibility for approving or denying shift exchange requests. Thus the requests made by the grievor on February 16, 1973 for shift exchanges on March 14 and 15 were referred to the Unit Head and denied by him, whence the present grievance. Since April 1, 1973, however, with the implementation of the crew system which has been implemented to the extent of approximately eighty per cent, probably the maximum possible within the present structure, the grievor is in exactly the same position as any other Controller, and his shift exchange requests are submitted to his own crew supervisor and to that of the employee with whom he proposes to exchange shifts, and as already noted, in all fourteen instances of such requests since April 1, these have been approved without exception. Under the new system it is of course much easier for the crew supervisor to keep track of the requests made by the members of his crew and some of the problems which resulted in the grievor's requests having to be approved by the Unit Chief no longer exist. Prior to

April 1, since any supervisor could approve a request, and since the supervisors rotated on a different basis from the individual employees, without any set crews being established, it was almost impossible to control and verify who was requesting changes, and how frequently these changes in shifts were being made for each individual employee. The grievor's case was singled out for requiring approval by the Unit Chief on the basis that he was the one person who was known to be requesting shift exchanges more than anyone else.

The evidence discloses a number of reasons which in the employer's opinion justify the refusal of the requests made by the grievor in the present case. The first reason involves the numbers of persons operating on a rotating shift basis in the Toronto Centre, approximately one hundred and forty in all, excluding trainees. The computer is programmed to deal with the entire group and to rotate everyone on what is considered a rational basis, and it was felt that the grievor's requests caused substantial disruptions to the shift scheduling both for the grievor and for the others who would change as a result of exchanging shifts with the grievor. (These reasons would of course apply to all demands for shift exchanges which were considered excessive by the employer). The second reason advanced through the evidence is that frequently, and especially under the former system prior to April 1, there would not be any one supervisor having enough contact with the Controller who exchanged a great many shifts, to evaluate the latter's performance and

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ability, and in fact a Controller who might wish to avoid a particular supervisor who was familiar with his weaknesses and was trying to follow them up might deliberately exchange shifts in such a manner as to avoid having any contact with that supervisor. This reason is of course not nearly as cogent under the new system. The third reason advanced by the employer is that excessive working on one particular shift, the evening shift in the case of the grievor, tends to disrupt the rotation through the various control positions for the employee concerned, as well as for the second employee involved in the switch, and that these two employees may therefore not be rotating properly through all positions. The fourth reason which arises from the evidence on behalf of the employer is that persons taken off the evening shift, which is the busiest and most difficult, may lose a certain degree of competence, as a result of agreeing to exchanges with someone like the grievor who is always willing to take the evening shift. In addition the employer took the position that, considering the likely future projection of this kind of behaviour with regard to shift exchanges, many more people might wish to do the same thing as the grievor, namely exchange shifts so as to work most of the time on their preferred shift, whether this be the day shift, the evening shift, or the midnight shift. There are substantial variations between the shifts with regard to traffic density, routes, carriers, weather, etc., and it is important that all Controllers be fully qualified for all shifts so that they are, for example, available and

competent to fill in for another Controller in the case of illness, unforeseen absence, etc.

As it happens, in the case of the grievor the exchanges requested by him had not apparently resulted, in the view of the employer, in any loss of competence on his part, but the employer claims that although he may have succeeded in going through the positions on a fairly regular basis, in spite of his many shift exchanges, the employer has no way of determining whether this is true of the other employees with whom he exchanged shifts throughout the period ending April 1, 1973. In fact the employer advanced the view that the fact that the grievor was basically working only the evening shift may very well have caused other Controllers to lose a certain amount of expertise by being constantly displaced from the evening shift, and the employer felt it needed to stop the trend of possibly weaker Controllers opting for day shifts where the traffic was lighter; the only way the employer felt it could control this, at least up to April 1, was via the method employed, namely clamping down to some extent on the grievor as the most flagrant example of someone who consistently changed shifts to enable him to work on basically one shift only. So that it would appear that probably one of the principal motivations resulting in the employer's decision to deny the grievor's requests in this particular case was the fear of a general trend which might be bad for operations, rather than the individual case of the grievor

himself. The employer felt that a generalisation of the grievor's practice would cause substantial problems, and already one other employee had objected and implied that he would like to do the same thing.

In argument for the grievor the following points were advanced: The parties had bargained for the privilege of shift exchanges resulting in article 13.04 of the agreement. There are only three prerequisites as conditions precedent to permission from the Unit Chief under this clause, namely, that no overtime pay should be involved, that an equally qualified employee should be willing to exchange shifts, and that notice be given at least forty-eight hours in advance. According to the grievor, once these three conditions are met, no discretion whatsoever exists in the employer to deny the request, and permission must be granted. The grievor does concede that the practice of delegating the permission from the Unit Chief to a supervisor was perfectly permissible. However, it was argued that if a supervisor could arbitrarily refuse to grant permission, even if the three criteria mentioned in clause 13.04 are satisfied, there would be no purpose whatsoever to the clause, and that the clause cannot be interpreted to provide a pure discretionary power to the employer, as this would put the parties in the same position they would be if no clause 13.04 existed at all. The grievor can find qualified volunteers to replace him when he is scheduled for a shift other than the evening shift which he prefers. What happened in this case is that the employer decided the grievor was going too far and that his wide use of his privilege granted under the agreement

might lead others to do the same thing, but this was not the legitimate concern of the employer, who should only have been concerned to see that the three criteria were met, and particularly that a qualified substitute was available and willing to make the exchange. The grievor's representative conceded that if someone was going to work constantly on the midnight shift then this might result in some loss of expertise and competence, but this could not be the case on the evening shift which is the busiest and most difficult shift, giving a fair representation of all kinds of traffic. It is true that the employer was very concerned about the other employees who did not get the evening shift, rather than the grievor, but the employer could not even check out whether these substitutes had really been deprived of any experience, because they constitute a large group, and there is no evidence that any of this group of employees is losing any competence because he is not on any particular position or function for a considerable period of time; the employer is merely saying that the grievor has gone to the well too often. If the employer does not like clause 13.04 it will have to negotiate changes in the next contract and provide, for example, a limitation on the number of exchanges which can take place in a given period. In clause 13.04 the word "shifts" is used rather than the singular "shift" which obviously includes a block of shifts, and by its memorandum of March 27, 1973, the Unit Chief has effectively unilaterally rewritten clause 13.04 which is ultra vires. According to the grievor, the Unit Chief has no right to request a reason as

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this is not provided in clause 13.04, nor can he restrict the requests to requests for single shifts as suggested by the memorandum of March 27. If he delegates his responsibilities to a supervisor, all he delegates is the responsibility for seeing that the three criteria are met, but no discretion exists in him in the first instance and therefore no discretion can be delegated to any supervisor to refuse a request where the three criteria are met. There has been no evidence that the qualifications of the personnel involved have been affected in any way by the grievor's requests, nor that these are disruptive of morale or the operational efficiency of the Unit. The employer had never requested reasons for requests for shift exchanges prior to April 1, and had no right to introduce this practice by the memorandum of March 27, 1973; moreover past practice of granting all requests would clearly support the grievor's interpretation of the relevant clause of the agreement. The grievor's counsel suggests that in my decision I find that the employer's denial of the grievor's requests regarding March 14 and 15 was improper, that the grievor and all others are entitled to shift changes if they so request as soon as the three requirements of article 13.04 are met, as a matter of right, and that no discretion remains in the employer to refuse a request when these criteria are met; and that the Unit Chief exceeded his jurisdiction by modifying clause 13.04 in his memorandum of March 27, 1973 by requiring reasons for requests. The grievor's representative urged that I make a firm declaration of the rights existing under this clause in the light of the employer's attempt

to modify it through a change in policy on March 27, 1973.

Should I refuse to declare that the employees have a right to have their requests granted, as long as the three criteria mentioned are met, the grievor's representative suggests that if any discretion remains to the employer this would be minimal and would only be with respect to the operational requirements of the service involving a virtual emergency. Thus even if the employer has any discretion in the present case, the grievor pretends that the employer has failed to show that this discretion was properly exercised, in view of the lack of solid grounds for the denial of shift exchanges on March 14 and 15, 1973.

On behalf of the employer it was argued that clause 13.04 uses the word "permission" and is not at all ambiguous, clearly implying a right to grant or refuse such a request when made. Thus there were not three conditions precedent in the clause, according to the employer, but rather four conditions, including that of the exercise of the employer's discretion in favour of the request. The power to grant permission must include the power to withhold such permission. If the parties had intended to remove the employer's discretion where the three criteria have been satisfied, the language used would have been far clearer, such as that employed in clauses 10.02, 10.03(a), 10.03(c), etc., and in these clauses it is made perfectly clear that an employee

shall be granted special leave when certain criteria have been satisfied, shall be entitled to bereavement leave under certain conditions, and is entitled to special leave in the event of the death of certain persons, etc. The evidence discloses that the employer will in fact always accept valid reasons and has only refused one request, namely that which is the object of the present reference to adjudication. The employer had a perfect right to modify its procedures for granting permission under clause 13.04, which does not in any way involve a modification of or derogation from the said clause, and the employer has not exceeded its jurisdiction by reason of the memorandum of March 27, 1973 and the new methodology which includes the statement of reasons by the employee requesting a change of shifts.

After careful consideration of the evidence and of the arguments made at the hearing, I have come to the conclusion that the grievance should be denied. In my view a limited discretion is conferred on the employer by clause 13.04, and the refusal by the employer to grant a request under this clause should not, it seems to me, be interfered with where it was a reasonable decision, taken as a prudent administrator, because of the operational requirements of the service, even if these operational requirements do not involve an emergency situation. I believe that an adjudicator would have the right to interfere with such a decision if the employer's permission has been unreasonably withheld, but I do not think that the evidence in this case discloses that this particular refusal,

in fact the only refusal which ever occurred, was based on improper reasons and on criteria which a reasonable and prudent man could not have adopted for the purpose of arriving at his decision. As contended by the employer, the word permission must imply some discretion, although the fact that the clause exists at all clearly removes a considerable portion of the employer's discretion and provides certain limits within which that discretion must be exercised. By analogy, we might refer to clause 10.04 which provides that at the discretion of the employer a male employee may be granted special leave on the occasion of the birth of a child. Similar wording is used in clause 10.05 where at the discretion of the employer, special leave with pay may be granted. Clauses 10.07 and 10.08 dealing with educational and other leave without pay also expressly speak of the employer's discretion in granting such leave, and I think that the word "permission" in clause 13.04 has an analogous purpose. Perhaps the discretion granted to the employer is somewhat less in clause 13.04, and more akin to that granted to the employer in clauses 11.01, 11.02, 11.03(a), (b), and (d), 11.04(a), 11.05, 11.06 and 11.07. All of these clauses state that the employer must grant certain requests where operational requirements permit, a criterion not very different from that which I feel should be applied in cases of requests for shift exchanges. I think the evidence has established that the operational requirements of this particular service do not permit, in the view of the employer,

that an employee make so many exchanges of shifts that in effect he is working on one shift only. Perhaps some other person might have concluded otherwise, but I do not think that the opinion of the Unit Chief or Operations Supervisor in the present instance can be said to be unfounded, nor do I think that such view ought to be interfered with or overruled by an adjudicator when it seems to be a reasonable one. I think that if the parties had intended to remove the employer's discretion to grant exchanges of shifts where the first three criteria of the article have been satisfied, they would have used different words in the article, and would have said something like "shall have the right to exchange shifts" rather than "may exchange shifts", as was done in other articles of the collective agreement where this was the parties' intention. The fact that the clause uses the word "shifts" rather than the singular "a shift" does not in my view mean that the parties intended to prohibit the kind of policy introduced in the memorandum of March 27, 1973, namely, that normally a request would be for a single shift change. I think that the plural was used in this case because there are two employees involved and one employee is changing his shift with another employee's shift resulting in two shifts being involved. I believe it would be unduly restricting the remaining limited discretion available to the employer under this clause to state that this discretion is limited to operational emergencies, and I think some intermediate ground must be found between an unlimited discretion and a discretion

so fettered as to be virtually meaningless and as to compromise the operations of this service to some extent. Past practice and present practice of the employer do not in my view support the grievor's interpretation of the clause but rather support the view that the employer has been exercising its discretion in a reasonable manner and in accordance with the kind of criteria I have mentioned above, with the result that virtually every request for exchange of shifts is granted and with the recognition by the employer of the desirability of granting such requests to the maximum possible extent, in the interest of the employees and in the interest of the service. Should the employer deviate from its present policy, and its present practice as disclosed by the evidence, then it would of course be open to any employee to grieve and such a grievance might well be successful, were the facts somewhat different from those in the present case. However I think that each case would have to be considered on its merits in order to determine whether, in a particular case, the employer's discretion has been properly exercised, or whether the employer's consent has been unreasonably withheld. A problem which I fortunately do not have to deal with in the present case is whether the employee's recourse under such circumstances might not well be illusory, in the sense that the particular occasion on which a breach of the agreement occurred by the employer has already passed, and it may be difficult to apply an appropriate sanction for such a breach by the employer because of the very nature of the breach.

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However this is not something which I need consider for the purpose of the present decision. In so far as the memorandum of March 27, 1973 is concerned, I agree with the grievor that this would constitute an illegal derogation from clause 13.04 if the employer intended by the memorandum to prohibit or deny all requests for more than a single shift change at a time on that basis alone, and I think that it would be perfectly permissible for an employee under clause 13.04 to request more than one shift change at the same time. However I think it would be perfectly permissible for the employer to request valid reasons as provided in the memorandum, since it would presumably be on the basis of such reasons that the employer could properly exercise its limited discretion and determine whether such a request ought, in rare instances, to be refused.

For all of the foregoing reasons the grievance is denied.

Montreal, this 27 day of July, 1973.

Perry Meyer
Adjudicator.