File Grievance Toronto ~~Toronto~~ Overtime

File: 169-2-80

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

copy Council Board to board

BETWEEN:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,

Bargaining Agent,

AND:

TREASURY BOARD
(Ministry of Transport),

Employer.

Before: Edward B. Jolliffe, Q.C., Deputy Chairman.

For the Bargaining Agent: A. O'Brien, counsel.

For the Employer: W.L. Nisbet, counsel.

ART 13

Heard September 20, 1976, at Ottawa.

DISTRIBUTION OF OVERTIME

DECISION

This is a reference to adjudication under section 98 of the Public Service Staff Relations Act. The Canadian Air Traffic Control Association alleges that a certain obligation arises out of subsection 15.03 of the Air Traffic Control collective agreement made on August 22, 1974, alleges also that there has been a breach of that obligation, and seeks its enforcement.

The clause reads as follows:

> 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.

In its notice of reference, filed on February 19, 1976, the Association complained that:

> The Employer has changed the method of distribution of overtime at the Control Tower at Toronto International Airport. Such change has resulted in a change of working conditions in that there is no longer an equitable distribution of overtime, contrary to section 15.03 of the collective agreement.
>
> We therefore request that the employer reverts to the previous system used at that Centre, in accordance with Article 15.03 of the collective agreement.

Attached to the reference was the following addendum:

> It is alleged that there has been a failure to observe or to carry out the said obligation, the particulars of which are as follows:

J. Kilburn

For approximately the past two years, the method used to determine the equitable assignment of overtime to the employees working in the Control Tower at Toronto International Airport has been as follows:

- On a calendar yearly basis (January through December inclusive); updated on a calendar monthly basis within that year; a record of each employee's accrued hours of overtime worked, converted to straight-time hours, has been maintained on a roster. This roster has been kept at the Super - visors' work position. Whenever an employee(s) was/were required for overtime duty, the Supervisor on duty would contact the employees available to work the shift (i.e., those on days of rest) commencing with the person whose record indicated the least number of straight-time accrued hours and progressing to the person with the most number of straight-time accrued hours in numerical ascending sequence offering the employees in turn the opportunity to provide the shift coverage required until he had recruited the number of people that he needed.

- Only if the employee(s) contacted reported for duty were the additional converted straight-time hours added to their "accrued" record.

- No record was made if an employee could not report for overtime duty nor were straight-time hours added to the "accrued" roster for such an employee.

- This procedure had been agreed to by Unit Management, the employees working in the Unit, and CATCA.

As of November 6, 1975, I was advised by one of my Supervisors that effective immediately a new procedure was in effect whereby:

1. A log book record will be kept of any employee who is contacted and requested to work overtime and is unable to report for duty for whatever reason; and

2. Any employee who is contacted to work overtime and is unable to report for duty, for any reason, will have those hours that he would have accrued had he been able to work overtime, converted to straight-time hours, added to his record on the roster as though he had actually worked the overtime shift.

In addition, I have been advised by Mr. T.D. Moores, one of the Shift Supervisors at Toronto Tower, that as I have a telephone answering service at my residence, he has been, and the other Shift Supervisors will be instructed by the Tower/Terminal Manager to leave a message with my answering service whenever he is unable to contact me personally to request my services for overtime duty. I have been advised that I will have thirty minutes to return the call and that if I fail to do so within that allotted time period, I will have the straight-time hours added to my accrued overtime record as though I had been contacted personally and been unable to work the shift in question.

Needless to say, all of the straight-time hours added to the accrued over-

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> time record of those employees unable to work overtime when contacted and requested to do so, will be fictitious and the employees will not be paid for them.
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> All of the preceeding has been instigated by Mr. L. Middlestadt, the Tower/Terminal Manager, without any consultation with the effected employees or their CATCA representatives. After he introduced these new procedures he advised CATCA of its inception."

A statement almost identically the same appeared thereafter under the name of Mr. W.J. Robertson.

On March 9 1976, counsel for the Employer submitted the following statement of position:

> The Employer submits that the Bargaining Agent's reference concerning Clause 15.03 of the Air Traffic Control (all employees) collective agreement (Code: 402/74) is not a reference which may be brought under Section 98 of the Act since it raises an obligation, the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the Air Traffic Control collective agreement applies.
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> More particularly, the obligation raised by this reference was the subject of separate grievances of Messrs. J. Kilburn and W.J. Robertson, employees in the Air Traffic Control bargaining unit to which the collective agreement applies, received at the first level on November 8 and November 7, 1975, respectively. The Employer replied to these grievances up to and including the final level. The final level replies are dated January 23, 1976. Copies of the grievances of Messrs. Kilburn and Robertson and replies

> at all levels of the grievance procedure are attached.
>
> Further, as of the date of the reference (February 17, 1976), the Grievors were entitled under Section 91 of the Act to proceed to adjudication on their grievances.

On March 22, 1976 counsel for the bargaining agent submitted the following reply:

> The Bargaining Agent submits that this Reference is proper under Section 98 of that Act in that the change in the method of distribution of overtime is a change in the terms and conditions of employment affecting every controller at the control tower at the Toronto International Airport.
>
> The Reference further involves a complaint (as indicated in the original Grievances of Messrs. J. Kilburn and W.J. Robertson) that such a change was done without proper consultation. Such consultation is an obligation owing by the employer to the Bargaining Agent alone and not to the individual employees.
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> If Messrs. Kilburn and Robertson had proceeded to adjudication under Section 91 as suggested by the employer, their Grievances would have been dismissed since the employer had no obligation to the employees (Ref: Morabito 166-2-771).
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> The Bargaining Agent therefore submits that the Section 98 Reference is proper.

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At the outset of the hearing held on September 20, 1976, I emphasized that it was restricted to the sole question of my jurisdiction to hear this case under section 98 of the Act.

Representations of the bargaining agent

Mr. O'Brien submitted that, starting November 6, 1975 the employer began to implement a change in the method used to assign overtime to the members of the bargaining unit at the Toronto airport, thus affecting both the "Tower" and the "Terminal" staff. These are two separate organizations whose activity is coordinated by one administrator.

Mr. O'Brien further submitted that the old system must have been equitable since nobody objected in the past, and requested a reversion to the previous system. He then referred to the Morabito case (166-2-771), and quoted several paragraphs which in his opinion apply to this case.

As to the objection mentioned in the letter of March 9, 1976, from the employer, namely that the obligation had already been the subject of an individual grievance by the two employees, Mr. O'Brien submitted that the mere fact that individuals grieved does not deprive an adjudicator of his jurisdiction under section 98 of the Act. He also admitted that section 24 of the agreement was not mentioned in the reference.

Representations for the employer

Mr. W.L. Nisbet expressed the view that there is some confusion as to what the issue is. He said that it is not clear whether there is a complaint about a failure to consult, or about a breach of the agreement affecting Messrs. Kilburn and Robertson.

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Mr. Nisbet submitted that the situation here is exactly the reverse of that in Morabito, where collective redress was sought under section 91, and rejected for want of jurisdiction.

He then proceeded to distinguish between articles 15.03 and 24 of the agreement. Article 24 creates an obligation to consult before the introduction of changes in the conditions of employment or working conditions, but article 15.03 deals with the obligation resting on the employer to assign overtime equitably among employees. Mr. Nisbet strongly emphasized that the key word in section 15.03 is "equitably." Whether the results of the method elected by the employer are equitable, is to be determined by reference to effects on employees, here Messrs. Kilburn and Robertson. But the method used is left to the Employer to decide.

As to the obligation of consultation provided in Article 24, Mr. Nisbet argued that the method used to assign overtime is neither a working condition nor a condition of employment but purely an internal matter of no concern to the employees, and thus that no obligation to consult existed.

Reasons for Decision

As already mentioned, I have to decide whether the reference made by the Canadian Air Traffic Control Association is adjudicable here under section 98 of the Public Service Staff Relations Act which since the 1975 amendments reads as follows --- with certain lines underlined by myself:

> 98.(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and
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> (a) the employer or the bargaining agent

> seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and
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> (b) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board, which shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.
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> "(2) The Board shall hear and determine any matter referred to it pursuant to subsection (1) as though the matter were a grievance, and subsection 95(2) and sections 96 and 97 apply to the hearing and determination of that matter."

It follows that not every dispute between a bargaining agent and the Employer may be referred to adjudication under section 98. Paragraph 98(1) (b) for instance, establishes a condition precedent to such a reference, i.e. that the alleged obligation should not be one "the enforcement of which may be the subject of a grievance of an employee . . ." It is therefore necessary to determine what is the exact nature of the obligation whose enforcement is sought.

As mentioned earlier, in its original reference of February 19, 1976 the bargaining agent alleged a breach of section 15.03, and requested that the Employer revert to the previous system of assigning overtime "in accordance with article 15.03 of the collective agreement." It is only at a later stage, by way of reply to the Employer's state-

ment of position that an issue was raised in respect of consultation as to contemplated changes in conditions of employment.

It is assumed that in so doing, counsel for the bargaining agent refers implicitly to article 24 of the agreement, although that clause was never mentioned specifically in the material filed. The two relevant articles read as follows:

> 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.
>
> ARTICLE 24
>
> PRESENT CONDITIONS AND BENEFITS
>
> Wherever possible, the Employer shall consult with representatives of the Association, at the appropriate level, about contemplated changes in conditions of employment or working conditions not governed by this Agreement.

It is obvious that these two provisions are of a different nature. Section 15.03 creates for the Employer an obligation to assign overtime equitably, whereas article 24 imposes on the Employer an obligation to consult with the bargaining agent about changes in conditions of employment or working conditions.

As I have often said, the substance of a grievance is more important that the precise language used. The nature of the relief sought here clearly indicates that the bargaining agent complains of a breach of section 15.03. I will therefore restrict myself to considering the reference as it stood at the date of its filing, since it would

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not be proper to permit at this late stage, an amendment of the grievance. The rationale of the decision in the Presley case (166-2-442) applies here.

It is quite clear that only one obligation owing to the employees arises from section 15.03, namely, that the Employer must assign overtime work equitably among employees. As counsel for the Employer aptly put it, the important word in that section is "equitably;" it describes the result which must be sought by the Employer when assigning overtime. In the context, equity is not an abstract concept to be measured against some hypothetical situation. Whether the distribution of overtime is actually equitable or not could only be determined with respect to a factual situation, where for example an employee is by-passed for overtime, thus contravening the obligation imposed by article 15.03. This type of grievance could undoubtedly be referred to adjudication under paragraph 91 (1) (a) of the Act, and would be entertained according to its own merits.

Article 15.03 however, does not create an obligation owing to the bargaining agent to assign overtime work according to a certain procedure or scheme, and its breach, if any, cannot be the subject of a reference under section 98,whose language is highly restrictive so far as a bargaining agent is concerned. In the Professional Association of Foreign Service Officers case (169-2-7), I have already indicated that an adjudicator can go no further than what he is authorized to do by the words of the statute from which he derives jurisdiction, for mere reasons of convenience, no matter how unduly legalistic it may appear in certain circumstances. In that case I declined to accept jurisdiction on the ground that the issue could have been raised equally well by an individual grievance under section 91, although I did express an opinion for the assistance of the parties as to the appropriate result.

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In this case it is apparent that if any employee felt aggrieved by the change or changes specified in the reference, it was open to such an employee or employees, relying on the applicable language, if any, in the agreement, to carry his grievance to adjudication under section 91 (1) (a) of the Act. Such a case is not before me. The only grievances under section 98 which may be adjudicated upon by the Board are those involving obligations between the employer and the bargaining agent and alleged violations thereof which could not be the subject of individual grievances. This reference, involving as it does a dispute as to the legitimacy of certain changes in respect of certain individuals, is not adjudicable under section 98, whether it refers to Article 15.03 or Article 24 of the agreement, or both.

Edward B. Jolliffe,
Deputy Chairman.

Ottawa,
November 2, 1976.