File 166-2-2891 Robertson Grievance

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THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

WILLIAM J. ROBERTSON

Grievor,

AND:

TREASURY BOARD,
(Department of Transport)

Employer.

DECISION

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

For the Grievor: J. Livingston , Canadian Air Traffic Control Association.

For the Employer: W. Corbett, counsel.

ART 13
CODE 402/76

Heard at Ottawa, March 21, 1977.

CHANGE IN SHIFT SCHEDULE - LESS THAN 15 DAYS

DECISION

Mr. William J. Robertson is an Air Traffic Controller, AI-4, at the Toronto International Control Tower. By his grievance he alleges a breach of article 13 of the Air Traffic Control (all employees) collective agreement, code 402/76, in which 13.03 reads as follows:

> " 13.03 Shift schedules shall be posted at least fifteen (15) calendar days in advance in order to provide an employee with reasonable notice as to the shift he will be covering. The shift as indicated in this schedule shall be the employee's scheduled hours of work. If it is necessary to amend the posted schedule, the Employer will make every reasonable effort to contact the employee affected by the amendment to advise him of the change at the earliest possible opportunity. If the employee has serious objections to the amendment, the Employer shall make every reasonable effort to accomodate the employee."

He further requests overtime payment under the following clause:

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

Two witnesses appeared at the hearing, held in Ottawa: Mr. Robertson himself and Mrs. Teresa Pasternak for the Employer.

The facts of this case, although not complex, require some background explanation as to the scheduling and posting practice at the Toronto control tower. The scheduling process is partially computerized; during the first or the second week of every month the officer in charge of the scheduling receives a computer print-out form, headed "Detailed Schedule," which indicates the various positions and shifts, and the employees assigned thereto, for the following month. The form also shows the days off and annual leaves.

Some alterations are then made on the form to record changes such as days off, leave for union business, or changes requested by the employees themselves. A copy stays in the office, and the original is posted in compliance with the requirements of paragraph 13.03 of the collective agreement. Other changes may also be made in the schedule after the posting.

Mr. Robertson testified that on his last tour of duty preceding the month of October, i.e. on September 18, 1976, he checked the tower shift schedule to ascertain his next tour of duty and read it to be the 0645-1500 shift (day shift) on October 1, 1976. Mr. Livingston, representative of the employee, produced as exhibit 3 a copy of Mr. Robertson's October diary, on which various symbols and acronyms appear. These the grievor explained as follows: "D" for day shift; "M" for midnight shift; "A" for afternoon shift; "AL" for annual leave, "SC" for shift covered. The October 1 box shows a "D".

Mr. Robertson left Toronto on the 19th of September and was away, either on leave or attending a conference of an International Association in Mexico. He did not receive any notice of change except those he requested himself, for which he received immediate oral approval.

The grievor reported for work at 6.45 on October 1, 1976, and, since he was the first controller to report, relieved the midnight controller (a Mr. Gordon Fox) as was the accepted practice. It was only around 7.10 that Mr. C.R. Vasey, his supervisor, advised him he was scheduled for the evening shift. Mr. Vasey brought the grievor the October schedule: the grievor's initials which originally appeared on the day shift ("spare" position) had been opaqued and moved to the evening shift ("tower" position).

A certain confusion as to who was working then arose, since another employee (Mr. Brook) also reported for work at 6.45. It was

agreed that Mr. Robertson remain until matters could be straightened out with the office staff. Shortly after 9.00, the grievor was advised that he was actually scheduled for the evening shift; he left and came back that afternoon to perform his duties in the "tower" position.

Mr. Robertson also testified that since the incident which led to the present grievance, the controllers are advised by notes in their mail boxes when changes occur in their schedule.

Upon questioning by the undersigned, Mr. Robertson asserted that the employer knew he was away on union business for the remainder of the month. The employer also knew that the employee could have been contacted through his answering service. He found no message on his return from Mexico.

On cross-examination by Mr. Corbett, the grievor reaffirmed that he did not notice any changes in his schedule on September 18, and added that he was certain that the schedule he consulted was that for October.

On behalf of the employer, Mrs. Pasternak, C.R.4, testified that she had been in charge of preparing and posting the shift schedules involving approximately 200 employees for some three years. She explained the scheduling and posting process and was of course cross-examined.

Early in September, Mrs. Pasternak received the print-out form for October and proceeded to make the necessary changes. She could not remember the exact date on which such amendments were made, but said that in any event they were done before the 15th of September in view of the 15 days' advance notice required by the collective agreement.

When Mrs. Pasternak received the print-out form she noticed several necessary changes. For greater clarity, the following diagram illustrates the situation as shown on the schedule both before and after the corrections.

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| | | Before | After |
|---|---|---|---|
| DAY | | | |
| | RDR | ST | ST |
| | TWR | JM | JM |
| | GND | KD | KD |
| | CLC | KP | KP |
| | Spare | BR | - |
| EVENING | | | |
| | RDR | DC | DC |
| | TWR | CW | BR |
| | GND | - | DS |
| | CLC | DT | DT |
| | S/S | DS | CW |

It should be explained here that the initials used in the print-out form do not necessarily correspond to the actual employee's initial. For example, here the initials "BR" stand for Mr. William Robertson, the grievor; "CW" stands for Mr. Wayne Chant; "DS" for Mr. D. Storey. The other acronyms refer to various specific positions and duties i.e., Radar, Tower, Ground, Clearance Delivery, Swing-shift.

The corrections were explained as follows. Mr. Wayne Chant, instead of being assigned to the evening "tower" position, should have been on swing shift ("S/S") since he had just completed three midnight shifts on the 27th, 28th and 29th of September. He was thus moved into Mr. Storey's stead. In turn, Mr. Robertson was moved from the day "spare" position to the evening "tower" position.

Mrs. Pasternak further said that most changes are made before posting, and that changes made <u>after</u> posting show in ink on the schedule since in most cases after posting changes are made without

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removing the schedule, by opening the sliding plexiglass door of the cabinet. She did not give notice in writing of the late changes for October 1, 1976.

On cross-examination by Mr. Livingston , the witness admitted that there was no strict procedure adopted in making corrections after the posting of the schedule. Depending on the circumstances, she could make the corrections herself on the schedule, or the schedule could be taken to the office by her or the supervisors to record the changes. Mrs. Pasternak also admitted that there was no way of knowing when the changes were made, or who made them. The only information apparent on the face of the schedule would be whether a correction had been made before or after the posting, without further degree of certainty.

Mrs. Pasternak further testified that the only record kept of shift exchanges was a record of those made on request of employees.

Submissions for the Grievor

On behalf of the grievor, Mr. Livingston argued that up until 15.00 of September 18, 1976, the schedule posted in the cabinet showed Mr. Robertson was to work the day shift ("spare" position) on October 1, and that he was correct in reporting for that shift.

The grievor's representative also submitted that the employer does not maintain an adequate system to record the time of amendments.

Mr. Livingston further argued that the 2½ hours worked by the grievor on the day shift of October 1, 1976, were hours "in excess of his scheduled hours of work" as contemplated by section 15.01 of the agreement, and that the eight hours worked on the evening shift of the same day were hours "outside of his scheduled hours of work", within the meaning of the same clause, thus giving rise to a claim for overtime payments in respect of both.

Submissions for the employer

For the employer, Mr. Corbett circumscribed the issue as being a mere question of fact , namely, whether or not the amendment to Mr. Robertson's schedule was in fact shown on the tower copy at the date of posting.

Counsel for the employer submitted that the changes involved three persons, not one, and that the other two reported for work as indicated on the schedule. Mr. Robertson was the only man to report for the day shift; Mr. Corbett suggested that in view of his numerous and demanding activities, the grievor might have made a mistake in recording his October schedule on his personal diary.

Mr. Corbett argued that the testimony of the employer's witness made it clear that the amendments relating to Mr. Robertson had been made on the schedule before the posting, and that the Employer complied with the requirements of section 13.03 in the agreement.

Reply

Mr. Livingston implicitly admitted that the whole issue was a question of fact; he reaffirmed that the change in Mr. Robertson's schedule did not appear up until the time of his departure. The grievor's representative also submitted that as to the possibility of an error Mr. Livingston was concerned with only one schedule --- his own --- while the officer in charge of scheduling had to look after the scheduling of approximately 200 employees.

Reasons for Decision

I agree with counsel for the employer that the present case turns simply upon a question of fact. It is not disputed that the schedule was posted within the time limit fixed in the agreement. Nevertheless, the schedule is subject to amendments after being

posted. It is true, as Mr. Livingston pointed out, that the clause 13.03 in the new agreement embodies new provisions, and requires the Employer to make every reasonable effort to contact the employee in situations where it is necessary to amend the schedule. Thus, the obligation owing to the employee arises only "if it is necessary to amend the posted schedule." However, the gist of the Employer's argument is that no amendment to Mr. Robertson's schedule for October 1, 1976 was necessary, since at the time of the posting the corrections had already been made.

The conflicting versions of the witnesses do not facilitate a finding, since both witnesses are equally credible. The grievor as well as the employer's witness were as positive as one could be. The late O'Halloran J.A. made the following remarks in Faryna v. Chorny (1952) 2 D.L.R., 354 at page 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

On considering the balance of probabilities, it must be said that the evidence as a whole is equally consistent with the two versions given by the two witnesses, Mr. Robertson and Mrs. Pasternak. Relevant documents give some support to each version, inconclusive in respect of both.

Mr. Corbett relied heavily on two documents, the tower copy, Exhibit 5, of the October schedule, which was posted, and the office copy, Exhibit 6.

On the tower copy, Exhibit 5, it is apparent that the initials which originally appeared opposite "Spare" for the day shift have been erased, and no other initials appear. It is also apparent that the initials originally opposite "Twr" have been erased and the initials BR (for Mr. Robertson) substituted over the opaque erasure. The new initials are faint and, according to Mrs. Pasternak, this indicates that the change was made before posting. By contrast, the initials BR opposite "Twr" on the evening shift of October 4 and opposite "Rdr" on the evening shift of October 6 are in very prominent ink which, Mrs. Pasternak explained, indicates amendments made after posting.

One difficulty in accepting the test suggested by Mrs. Pasternak is that differences in the appearance of the inking appear throughout the whole of the month of October, from October 1 to

October 31. Indeed, there are scores of amendments involving most, if not all employees, some in faint ink and others in very prominent ink. Another difficulty is that the office copy, Exhibit 6, is not exactly the same, at least in appearance, as the tower copy, Exhibit 5. The former has some entries which do not appear at all on the tower copy, and *vice versa*. Of course, the entries in the diary for October 2 to 4 inclusive could have been made after Mr. Robertson's return on October 1. But Mr. Robertson testified he does not recall seeing any changes in the schedule for him when he studied it on September 18. Changes were undoubtedly made, but it has not been proved exactly when they were made.

As evidence of time, written entries and amendments made by either party must be regarded with caution. In this connection, it was said in Article 1225 of the Quebec Code of Civil Procedure that "private writings have no date against third persons ...." and in 1227 that "family registers and papers do not make proof in favour of him by whom they are written." Similar principles, with appropriate exceptions, have long been recognized by the common law.

The documents being inconclusive, the Board is asked to choose between the testimony of Mr. Robertson and that of Mr. Pasternak, both of whom were of course relying on their memories, with what they considered to be some support from their own writings. The Board is not prepared to disbelieve either of the two witnesses.

The Board is therefore forced to rely on the general rule stated in Halsbury's *Laws of England*, (3rd edition) vol. 15 at page 267:

> In legal proceedings the general rule is that he who asserts must prove; this proposition is sometimes more technically expressed by saying that the burden of proof rests upon the party who substan-

> tially asserts the affirmative of the issue. This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.

Of course the affirmative of the issue may be negative in form, involving the proof of a negative, such as here the fact that the amendment to Mr. Robertson's schedule had not been made when the schedule was posted. The law of labour-management relations places on the grievor the onus of proving an alleged breach of the collective agreement. The rule is summarized at 3:2400 by Brown and Beatty in the recently-published Canadian Labour Arbitrations, as follows:

> In allocating the burden of proof the general principle is that "the onus of proof in all cases rests primarily on him who asserts a claim to establish and prove it and not on the other side to disprove the claim". And in grievance arbitrations, except in cases of discharge, where a prima facie case may be considered to be made out by proving the collective agreement, the fact of employment and the dismissal, it is generally accepted that the grievor has the ultimate burden to make out a breach of the collective agreement.

The grievor has alleged a breach of the collective agreement. The burden of proving the essential facts was upon him --- perhaps an impossible burden in the circumstances. The Board does not reject his testimony. The evidence, however, falls short of conclusive proof and thus the grievance cannot be upheld.

For the Board,

Edward B. Jolliffe,
Deputy Chairman.

Ottawa,
March 31, 1977.