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*Public Service Staff
Relations Act*

Before an adjudicator

BETWEEN

ROBERT HUPÉE, PAUL MAILLOUX AND PIERRE MAUGER

Grievors

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as:

Hupée et al. v. Treasury Board (Correctional Service of Canada)

In the matter of grievances referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Sylvie Matteau, adjudicator

For the grievors:

Chantal Homier-Nehmé, Public Service
Alliance of Canada

For the employer:

Eric De Santis, counsel

Heard at Montréal, Quebec,
May 3, 2006.
(P.S.L.R.B Translation)

Grievances referred to adjudication

[1] These are grievances filed by three grievors that the parties have agreed to join for adjudication purposes. The grievors work for the Correctional Service of Canada (CSC) at Leclerc Institution in Laval, Quebec. Mr. Hupée and Mr. Mailloux, both handler/drivers, each filed grievances on August 11, 2003. Mr. Mauger, institutional services worker, filed an identical grievance on September 2, 2003.

[2] All are contesting the employer's decision not to pay them the monthly allowance provided for in clause 6.01 of Annex C of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Operational Services group (termination date: August 4, 2003). This clause provides for the payment of an allowance to an employee certified pursuant to the *Transportation of Dangerous Goods Act, 1992 (TDGA)*, who is assigned the responsibility for packaging and labelling of dangerous goods for shipping.

[3] The employer argues that the grievors are not entitled to this allowance because it has not assigned them the responsibility for packaging and labelling of dangerous goods for shipping and because their duties do not meet the conditions of the clause in question.

[4] The parties filed an Agreed Statement of Facts and the three grievors testified at the hearing. The employer called three witnesses: Sylvain Maurice, storekeeper at Leclerc Institution, Pierre Gauthier, Assistant Warden, Management Services, Leclerc Institution, and David Alexander, Regional Coordinator, Occupational Safety and Health.

[5] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

Summary of the evidence

[6] The "Agreed Statement of Facts" signed by the parties on May 1, 2006 reads as follows:

[Translation]

...

1. *At the time when their grievances were filed, Robert Hupée and Paul Mailloux were working as handler/drivers at the Management Services division of Correctional Service Canada, at Leclerc Institution in Laval, Quebec (employer). When his grievance was filed, and to date, Pierre Mauger was employed as institutional services worker for the same employer.*
2. *Paul Mailloux has been retired since February 26, 2005.*
3. *Mr. Hupée, Mr. Mailloux and Mr. Mauger are part of the General Services GS-TS-04 classification and are covered by the agreement between the Treasury Board and the Public Service Alliance of Canada for the Operational Services group (Collective Agreement).*
4. *At the employer's request, Mr. Hupée, Mr. Mailloux and Mr. Mauger (employees) participated in the training on the transportation of dangerous goods offered by Transport Canada and have a valid training certificate pursuant to the Transportation of Dangerous Goods Act, 1992, S.C. c. 34. [Tab 1]*
5. *On August 4, 2003, the employees informed their immediate supervisor, Sylvain Maurice, that they had been certified to ship dangerous goods and requested payment of the monthly allowance provided for in clause 6.01 of Appendix C of the collective agreement. [Tab 2]*
6. *Clause 6.01 of Appendix C of the collective agreement provides that an employee certified pursuant to the Transportation of Dangerous Goods Act and who is assigned the responsibility for packaging and labelling of Dangerous Goods for shipping in accordance with the Act shall receive a monthly allowance of seventy-five dollars (\$75) in a month where the employee maintains such certification.*
7. *On August 6, 2003, Sylvain Maurice informed the employees that they were not entitled to the monthly allowance for the shipping of dangerous goods because they had no responsibility for packaging and labelling of dangerous goods. [Tab 3]*
8. *Further to the employer's refusal to pay the monthly allowance, Mr. Hupée and Mr. Mailloux each filed a grievance on August 11, 2003 under clause 18 of the*

collective agreement. Mr. Mauger filed an identical grievance on September 2, 2003. [Tab 4]

9. *The three grievances state:*

[Translation]

"I am contesting the decision received on August 8, 2003."

"I am asking to be paid the allowance under clause 6.01 Appendix C of my agreement."

10. *On August 25, 2003, Roger Ménard, a representative of the employer, dismissed Mr. Hupée's and Mr. Mailloux's grievances on the ground that they had no responsibility for the packaging and labelling of dangerous goods for shipping. [Tab 5]*

11. *On September 16, 2003, Pierre Gauthier, employer representative, dismissed Mr. Mauger's grievance on the ground that he had no responsibility for the packaging and labelling of dangerous goods for shipping. [Tab 6]*

12. *On October 10, 2003, Richard Watkins, Regional Deputy Commissioner, Quebec Region, dismissed the employees' grievances at the second level. [Tab 7]*

13. *On June 30, 2004, Simon Coakeley, Assistant Commissioner, Human Resource Management, dismissed the grievances at the final level. [Tab 8]*

14. *On March 16, 2005, the three grievances were referred to adjudication before the PSSRB. [Tab 9]*

...

[Sic for the entire original quote]

[7] In addition to the three grievors, Pierre Gariépy, Supervisor of Institutional Services and Mr. Mauger's supervisor, took the same training on the transportation of dangerous goods and was certified pursuant to the *TDGA*. According to Mr. Gauthier, he was the only employee to whom the employer assigned such responsibilities. According to the employer, this was because dangerous goods needed to be handled only once or twice a year.

[8] The three grievors described their day-to-day duties, referring to their respective work descriptions (Exhibits G-1, G-2 and G-6). Mr. Hupée and Mr. Mailloux (until his

retirement) performed the same duties, while those of Mr. Mauger were different. Mr. Mauger was nonetheless called upon to replace Mr. Hupée and had also replaced Mr. Mailloux in the past.

[9] Mr. Hupée has been a handler/driver at Leclerc Institution for the past six years. Mr. Mailloux worked at that same institution from January 8, 1996, to February 26, 2005. As for Mr. Mauger, he has worked at Leclerc Institution since May 1999 and has been performing his current duties for more than three years. He was a handler/driver during his first years of service.

[10] Among the handler/drivers' primary responsibilities are ordering supplies for the store and on behalf of inmates and employees, receiving goods, checking them, labelling them for storage purposes, monitoring inventories and distributing goods to people who have ordered them.

[11] They contact suppliers in the event of problems with goods. They also supervise the inmates working at the store and the warehouse. They have two trucks available to them for shipping and delivering goods. They occasionally ship empty oxygen canisters to have them filled or to have them replaced by the supplier, and they bring back full canisters. These canisters are shipped from the institution's thermal plant to a shop specializing in underwater diving, which fills them. They do the same with the fire extinguishers as well as the canisters of propane and gasoline for lawnmowers and snowblowers.

[12] A number of the products they transport are cleaning products, including corrosive products such as bleach and window cleaners. In addition, there are various types of glue, paint remover, detergent and scouring powder as well as wax, germicidal agents, pesticides and soap concentrates.

[13] Sometimes the goods arrive damaged, which may mean that they have to be poured into other containers and labelled. They are then stored or returned to the supplier. Suppliers are always notified when goods are defective.

[14] Mr. Hupée stated that there had been a spill because of a defective container from the window cleaner supplier. He therefore had to pour the product into smaller containers and labelled them all appropriately.

[15] Furthermore, the handler/drivers are responsible for transporting bodily substances, namely inmates' blood, urine and saliva samples, on a daily basis. These substances are administered at CSC's three infirmaries at Leclerc, Sainte-Anne-des-Plaines and Montée St-François Institutions, respectively. They are subsequently shipped in a container similar to a small cooler to Cité de la Santé hospital in Laval.

[16] In performing this task, the grievors sometimes have to empty the container in which the samples are shipped upon arrival at Cité de la Santé, when the hospital orderlies are unable to do so. They then place the samples in a hospital container themselves.

[17] According to the grievors, in one instance a urine sample spilled during shipping. The spill made a mess in the truck. The employee to whom this incident happened had to clean it up himself and notify his supervisor. According to the witnesses, the employer did not inform them of any specific measures to take in the event of a spill. On another occasion, one of the grievors refused to load a container because it was in poor condition. The container was then replaced by the orderly at the infirmary and the grievor was given a new container.

[18] Any goods that are shipped must be accompanied by a bill of lading, which is the employees' responsibility. The employees are also responsible for posting the appropriate safety marks on the truck during shipping.

[19] As for Mr. Mauger, his main activities are to coordinate and provide services relating to procurement, maintenance and cleanliness of the buildings and grounds, pest control, moving and waste recovery for the institution for which he is responsible. He also supervises the inmate handlers and cleaners assigned to his area. He can be asked to replace the handler/drivers if the employer requires this.

[20] Mr. Mauger's responsibilities also include cleaning cells when they have been soiled by bodily substances such as blood. A specific procedure directed by the employer must then be followed to ensure the cleaning takes place safely. Mr. Mauger's work description also refers to a requirement for knowledge of the provisions governing the handling of hazardous substances used in the workplace, namely the Workplace Hazardous Materials Information System (WHMIS). He has received training and holds a certificate with respect to this requirement.

[21] His duties also entail shipping and pouring gasoline for the lawnmowers and snowblowers. He shipped bodily substances when he was a handler/driver and performed this task a number of times afterwards when he replaced the other two grievors.

[22] On April 26, 2006, Mr. Mauger wrote to his supervisor Mr. Gariépy (Exhibit G-3) to ask him to clarify his work description with respect to his obligation to replace the handler/drivers, to package and return damaged or incorrect goods to suppliers, and to pour products into dispensers and other containers. Mr. Gariépy confirmed all of these duties.

[23] The grievors explained that they were required to take the training on the transportation of dangerous goods because of their duties. They had performed these duties before the training. Their duties did not change in any way after the training. They now have manuals to help them identify the dangers that the goods they handle present and to help them label them appropriately if necessary. According to the grievors, this was a new requirement on the employer's part. After this training, they all expected to receive the allowance provided for in clause 6.01. Since they still were not receiving it several weeks later, despite their written requests, they each filed a grievance.

[24] Mr. Maurice received the grievors' request to be paid the allowance. He stated that he had taken down the information and engaged in consultations in order to prepare a response to the grievors' request. Mr. Gauthier confirmed that the consultations that were carried out in response to this request showed that the grievors were not packaging and labelling dangerous goods within the meaning of the *TDGA*. Mr. Gauthier relied on Mr. Alexander's expertise and analysis and Mr. Gariépy's statement that the grievors performed such duties only once a year.

[25] According to Mr. Maurice, the grievors knew that Mr. Gariépy was the only one who had been clearly assigned by the employer to package and label dangerous goods. The three grievors were responsible for shipping them only. Mr. Gariépy received the transportation-related training and is certified pursuant to the *TDGA*. He receives the allowance provided for in clause 6.01. Mr. Gauthier testified to the same effect. According to him, because these circumstances occurred so infrequently, there was no need for more than one employee to be designated accordingly.

[26] Mr. Maurice acknowledged in cross-examination that the grievors shipped bodily substances such as blood and urine on a daily basis. He also acknowledged that spills were possible and the products could be damaged when they arrived at the store and that the grievors had to pour them out and label them.

[27] Mr. Alexander has been working for the federal government for over 25 years. He was appointed to his current position in 2001. Since 1985 he has served as co-chair of a health and safety committee at the local and then the regional level. His experience with the *TDGA* dates back to 2002. According to Mr. Alexander, the purpose of the legislation is to inform employees of the inherent risks in using and handling dangerous goods; this is the reason behind WHMIS. According to him, labelling for transportation purposes means affixing the appropriate marks on the vehicle used to transport dangerous goods and not labelling the goods themselves.

[28] According to Mr. Alexander, the grievors essentially ship dangerous goods; they do not package or label containers. Each institution has its own internal procedures. At Leclerc Institution, for example, the designated person is Mr. Gariépy. At the infirmaries it is the orderlies or the nurses who are designated.

[29] In the case of a spill, there are different instructions depending on the amount spilled. The *TDGA* provides that the Canadian Transport Emergency Centre (CANUTEC) must be contacted when more than a certain amount is spilled. This is the only entity that can remove and clean up major spills. In other cases, there are internal instructions. Mr. Alexander stated that he himself occasionally ships dangerous goods and does not receive the allowance provided for in clause 6.01. According to him, other employees in the same group are in the same situation.

Summary of arguments

For the grievors

[30] The grievors are seeking payment of the allowance provided for in their collective agreement effective August 4, 2003, with interest and any other redress deemed appropriate. Alternatively, they are seeking a ruling on the appropriate interpretation of the clause in question and a direction to the employer to comply with it in future.

[31] According to them, they all perform all of the duties described in clause 6.01 and meet all of the criteria set out therein. Their work descriptions support their argument. Their daily tasks described in evidence also support their request. The evidence indicates that certification is necessary to perform their duties.

[32] The grievors maintain that the wording of the provision in question does not require a specific designation on the employer's part. It is sufficient that the employees perform the duties in question and be duly certified to be entitled to the allowance automatically, even if they handle such dangerous goods only rarely during the year.

[33] The grievors referred me to section 2 of the *TDGA*, which sets out what they consider to be important definitions for the terms *means of containment*, *safety mark*, *handling* and *dangerous goods*. They note that all of the goods they handle on a daily basis and that have been referred to in the testimony are found in the schedules to the *TDGA* as corrosive, explosive or infectious substances.

[34] The grievors also referred me to a conciliation board report (PSSRB File No. 190-02-336 (2004)) that examined the issue of the allowances in question.

[35] According to the grievors, it would be a mistake to find that clause 6.01 does not apply because spills are not frequent. Furthermore, the grievors were never directed not to perform these duties. I was also asked to draw a negative inference from the fact that the employer did not call the grievors' supervisor to testify.

[36] Lastly, I should interpret the wording of the collective agreement according to its ordinary meaning and within the meaning of the legislation to which it refers.

For the employer

[37] The employer's position is that the criteria for clause 6.01 to apply are not present in this case. Although it acknowledges that the three grievors received training on the transportation of dangerous goods, and are all certified pursuant to the *TDGA*, the employer has not specifically assigned such responsibility to them.

[38] The definition in the *Petit Robert* dictionary of the French term "confier" found in clause 6.01 ("assign" in the English version) indicates that something is handed over to a third party. The employer alone is responsible for assigning a particular

responsibility to an employee. The grievors cannot take on any tasks whatsoever without the employer's active consent. Since the employer had never assigned these responsibilities to the grievors, they cannot seek payment of the allowance. On the contrary, they were informed numerous times between August 6, 2003, and June 30, 2004, that these duties were not theirs, which the grievors admit to in paragraph 7 of the Agreed Statement of Facts. As well, the work descriptions are silent with respect to the packaging and labelling of goods.

[39] The employer argues that the wording of clause 6.01 is very clear and unambiguous. Therefore, the adjudicator is not required to interpret it. To that effect, it submitted the following case law: *Alexis Nihon Cie Ltd. v. Dupuis*, [1960] S.C.R. 53, *Doyon v. Public Service Staff Relations Board and The Queen*, [1978] 1 F.C. 31 and *Turgeon v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File Nos. 166-02-15624 to 15639 and 166-02-15775 (1988).

[40] According to the employer, the grievors' only responsibility is to ship these goods, which are already packaged and labelled. The employer has not assigned them the task of packaging or labelling within the meaning of the *TDGA*. The onus was on the grievors to prove this and they did not do so. Instead, the evidence revealed that the grievors were in possession of samples that had already been packaged and labelled by the orderlies at the infirmaries. If the container was damaged, they asked the orderlies to replace it. There is no evidence that the grievors had to label or package goods for shipping.

[41] At the same time, the employer submits that, if there was some ambiguity for the grievors, it ended once they were informed in Mr. Maurice's memo of August 6, 2003, that they did not have these responsibilities.

[42] Accordingly, the allowance can be paid only from the time when the grievors were certified until, at the latest, August 6, 2003, the date on which they were notified that they had not been assigned such duties.

[43] Furthermore, under clause 18.10 of the collective agreement, the only period during which they would be eligible for the allowance is the 25-day period starting August 11, 2003, the date on which they learned that the employer was refusing to pay them. As for Mr. Mauger, he would not be entitled to the payment because he filed his grievance more than 25 days later. To that effect, the employer filed the decisions in

Canada (National Film Board) v. Coallier (F.C.A.), [1983] F.C.J. No. 813 and *Horvath v. Treasury Board (Royal Canadian Mounted Police)*, PSSRB File Nos. 166-02-21133 and 166-02-21134 (1991).

[44] The employer nonetheless did not raise the timeliness of Mr. Mauger's grievance. It argued instead that Mr. Mauger filed his grievance more than 25 days after the employer had informed him, on August 6, 2003, that he had not been assigned the responsibilities in question.

Reasons

[45] The issue to be resolved in this instance is whether the grievors are entitled to be paid the allowance provided for in clause 6.01 of Annex C of the applicable collective agreement. According to this clause, two conditions are required for the allowance to be paid:

- 1) certification pursuant to the *Transportation of Dangerous Goods Act*, 1992; and
- 2) being assigned responsibility for packaging and labelling dangerous goods for shipping, in accordance with the *Act*.

[46] The first condition is not in dispute. It is acknowledged that the three grievors hold valid certificates. The second condition presents a problem, because the employer refuses to pay the allowance, arguing that it has never assigned such responsibilities to the grievors. According to the employer, such responsibility must be assigned specifically and unequivocally. In other words, it claims that it must specifically give its authorization for such activities as well as payment of the allowance.

[47] I therefore must determine whether or not the employer assigned responsibility to the grievors for packaging and labelling dangerous goods. The employer is correct in stating that the clause of the collective agreement is clear and that I am not required to interpret it. Rather, my role is to apply this provision to the situation before me and to determine whether or not this allowance will need to be paid.

[48] The extrinsic evidence, namely the conciliation board report submitted by the grievors, is not relevant in the circumstances.

[49] The grievors all received special training in documentation, safety marks for dangerous goods, and safe shipping and handling practices, with characteristics of dangerous goods as specified on their certificates (exhibits attached to the Agreed Statement of Facts under Tab 1).

[50] The evidence showed that the grievors handle and ship goods that are considered dangerous under the *TDGA*: infectious substances, corrosive liquids, and inflammable and explosive substances. Furthermore, the employer acknowledged in the handler/drivers' work description (Exhibits G-1 and G-2, page 1) that their primary activities consisted in "[Translation] packaging, preparing and completing documents relating to the items, for storage or shipping to users."

[51] According to those same documents (Exhibits G-1 and G-2), the grievors also perform "[Translation] the delivery of supplies and materials." As part of the working conditions set out with regard to risks to health (point 3.2 of the substantiating information attached to Exhibits G-1 and G-2), the employer indicates that the employees in question are required to "[Translation] handle chemicals and dangerous goods." In terms of the requirements pertaining to knowledge of legislation and regulations (4.2), the grievors are required to have "[Translation] knowledge of regulations pertaining to dangerous goods, in order to handle them with precaution."

[52] As for Mr. Mauger, his duties also include handling goods (Exhibit G-6). His working conditions (point 3.2 of the substantiating information attached to Exhibit G-6) include health risks related to the handling of "[Translation] toxic, chemical and inflammable substances." He must be familiar with "[Translation] the WHMIS legislation and the structure of the institutional program" (point 4.2 of the substantiating information attached to Exhibit G-6).

[53] According to the *Transportation of Dangerous Goods Regulations*, "handling" "means loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation and includes storing them in the course of transportation." Loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation are activities included in the grievors' duties. Thus, transportation includes handling of the products.

[54] Affixing safety marks to the various goods consists of labelling them for the purposes of transportation under the *TDGA* to indicate either the risks they present or their compliance with regulatory standards.

[55] The evidence also showed that these three employees were the only ones called upon to perform these duties, and, specifically, that Mr. Mauger, who was also certified to that effect, had to replace the other two grievors at the employer's request.

[56] The employer assigned the responsibility for shipping dangerous goods to the three grievors through their work descriptions. The evidence shows that the duties in question were performed by Mr. Hupée, as they were by Mr. Mailloux before his retirement. As for Mr. Mauger, the employer expects him to replace Mr. Hupée upon request. In this case, and during his own daily activities, the latter handles dangerous goods.

[57] I therefore find that the employees in question are entitled to payment of the allowance provided for in clause 6.01 of Annex C, since they hold the certificate in question and since the employer assigned to them responsibility for packaging and labelling dangerous goods for shipping under the *TDGA*.

[58] In terms of payment of the allowance, I cannot accept the employer's argument regarding the payment period. The evidence shows that the allowance is to be paid monthly on the basis of the two conditions referred to earlier, as set out in clause 6.01. This is therefore a recurring failure on the employer's part.

[59] Because the evidence has shown that the grievors were already performing these duties before receiving their training and being certified, they should be paid the allowance from the time when they were certified, on June 18, 2003. The allowance is also payable for each month they were certified and were performing their duties. The Board case law is well established with regard to an ongoing breach on the employer's part; the grievor is not required to file a new grievance every 25 days. *Moyes v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-2-24629 speaks to this point.

[60] For these reasons, I render the following order:

(The order appears on the following page).

Order

[61] The grievances are allowed. The employer shall pay the allowance provided for in clause 6.01 to Mr. Mailloux for the period from June 18, 2003, to February 26, 2005, and to Mr. Hupée and Mr. Mauger retroactively to June 18, 2003.

May 26, 2006.

**Sylvie Matteau,
adjudicator**