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File: 166-02-36346

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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

GARY BURROUGHS

Grievor

and

**TREASURY BOARD
(Department of Fisheries and Oceans)**

Employer

EXPEDITED ADJUDICATION DECISION

Before: Sylvie Matteau, adjudicator

For the Grievor: David J. Jewitt, counsel

For the Employer: Jeff Laviolette

Note: The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.

Heard at Ottawa, Ontario,
June 23, 2006.

REASONS FOR DECISION

[1] This is a grievance filed on February 28, 2005, by Gary Burroughs (“the grievor”). He alleged a violation of article 20, “Appendix J” of the current agreement between the Treasury Board and The Canadian Merchant Service Guild in that the employer would have incorrectly calculated his cash out of vacation leave credits.

[2] 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*, this reference 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”).

[3] Whereas the parties have agreed to handle this matter by way of expedited adjudication, the parties jointly agree in the “Agreed Statement of Facts” that:

1. *Mr. Burroughs became a Ship's Officer under the Ships' Officer Collective Agreement in 1983.*
2. *From 1983 to 1989, Mr. Burroughs worked in Hay River under the conventional system under the collective agreement as an MA05.*
3. *As in the case with all Ships' Officers, his Certificate of Appointment was stated to be on a conventional forty (40.0) hour a week system. In 1989, Mr. Burroughs was appointed to a vessel covered by Appendix “J” namely, the Point Henry. He worked under the Appendix “J” compensation system on the Point Henry from 1989 through until 2000.*
4. *In 2000, Mr. Burroughs remained under Appendix “J” but was assigned to Campbell River and attached to the vessel Point Race.*
5. *Since 1989, Mr. Burroughs has never left the Appendix “J” system and he has not worked under the conventional system except for the first six (6) years of his employment.*
6. *Mr. Burroughs remains assigned to a vessel that operates on the On-Call System Average Forty-Six Point Six (46.6) hours, provided for under Appendix “J” of the collective agreement (see tab 7). A factor of 1.6275 is applied to factor up earned vacation leave as per article 20 of Appendix “J” under this system.*

***Facts regarding the request for cash-out of unused
Vacation Leave Credits***

7. On January 21, 2005, Mr. Burroughs requested a voluntary cash out of earned but unused vacation leave credits in excess of the equivalent of fifteen days credit in accordance with the new article 20.10(f) of the collective agreement (see tab 11).
9. Mr. Burroughs was informed at the time of his request that the cash out would be calculated as per tab 9. The Department based this on the language of article 20.10(f) that states "...earned but unused vacation leave credits in excess fro the equivalent of fifteen (15) days credits may be paid in cash at the Officer's daily rate of pay as calculated from the classification prescribed in the certificate of appointment of the Officer's substantive position on March 31st of the previous vacation year".
10. Mr. Burroughs was advised that he would receive more money if he waited for the mandatory cash-out of excess leave (20.10(a)) on March 31st in accordance with article 20.10(c), at which point the excess hours would not be reduced by the factor.
11. Mr. Burroughs proceeded with a request pursuant to article 20.10(f) i.e. a voluntary cash-out. He received his payment in February, 2005.
12. Mr. Burroughs submitted a grievance on February 28, 2005 pertaining to the calculation of the cash payout of earned but unused vacation leave credits in excess of the equivalent of fifteen (15) days in accordance with article 20.10(f).
13. Mr. Burroughs' grievance was denied at first, second and third level.

**History regarding introduction of Article 20.10(f) -
Arbitral Award August 18, 2004**

14. Article 20.10(f) was introduced into the collective agreement as a result of an arbitral award of an Interest Board chaired by Mr. Morton Mitchnick on August 13, 2004 (see document #10).
15. Prior to the introduction of this language, there was no ability in the collective agreement for an Officer to individually request payout of excessive leave under Article 20 except for the mandatory payout set out in Article 20.10(a).
16. The Employer proposed a new clause and made submissions regarding the rational behind this proposal

at pages 36 and 37 in its Interest Brief to the Interest Board (the Employer's submissions are attached as document #7, pages 36 and 37).

17. Nowhere in the Employer's submissions before the Interest Board was any indication given to the Interest Board that the payout at the Officer's own request would be in any different manner than the payout which was currently provided under Article 20.10(a).
18. The Guild's response to these proposals is found at documents #8 and #9. In document #8 found at pages 3 and 4, the Guild's proposal was to actually remove Article 20.10 on the grounds that it encouraged under staffing and required Officers to work at straight time rates when their vacation was denied. As an alternative, the Guild also proposed at pages 5 and 6, that "where management opts to pay out scheduled leave within a vacation year, such payout would have to be at double time or overtime premium rates in order to provide an economic disincentive to the Employer to continue its abuse of these provisions" (see page 6 of the submissions).
19. At document #9, the Guild responded to the Treasury Board's submissions with regards to individual payout.
20. In none of these submissions by either the Guild or the Treasury Board to the Interest Arbitration Board is there any suggestion that an Officer employed under the various appendices, Appendix "H", "I" or "J", i.e. the non-conventional systems, would be required under the Employer's proposal to cash out excess vacation leave at a rate other than what they were being paid under the existing language providing for mandatory payment in excess of a particular cap.
21. The Board's award is included as document #10 and at page 3, it awards the Employer proposal based upon the submissions of the parties. At no time was any information provided to the Board to the effect that virtually all of the Ships' Officers Certificates of Appointment will state it is based upon the conventional work system. This is the case within the Ships' Officers bargaining group regardless of promotions or advancements which a Ships' Officer or Engineer undergoes during the life of their career.
22. In Mr. Burroughs case, since 1989, he has always either taken his vacation or received payout in excess of the cap at the Appendix "J" rates. This is the same situation for

all Officers under the other averaging systems, i.e. Appendix "I" or "H".

23. *Appendix "J", Article 20, has a specific clause dealing with the circumstances as to when an Officer's credits will be converted back to conventional credits. See page 133 of the Collective Agreement which reads as follows:*

Should an Officer leave the Ships' Officers group on the Appendix "J" operating system the Officer's credits will be converted to hours by applying the formula in reverse.

24. *Mr. Burroughs, since 1989, has never left the Appendix "J" system.*

[Sic throughout]

[4] Only in the event that a disposition of an agreement is unclear should an adjudicator interpret the text based on extrinsic documents, such as proposals to an interest board mandated to deliver an arbitral award, or based on the history of the negotiations between the parties. In the present case, although the result of the application of subclause 20.10(f) (payment at the request of an employee) is different than the result of the application of subclause 20.10(a), (automatic liquidation of excess vacation leave), the text is clear, and I cannot give subclause 20.10(f) the interpretation the grievor is seeking.

[5] The rate at which excess vacation leave credits are paid out is established by subclause 20.10(c). The fact that subclause 20.10(f) was added to the collective agreement after the inclusion of subclause 20.10(c) and contains the phrase ". . .the rate of pay specified above shall be. . ." is significant and I cannot ignore its clear instruction. Furthermore, subclause 20.10(f) is clear as to the rate of pay to be used in the calculation when an employee applies for the cash-out of unused vacation leave credits before the end of the vacation year. It is to be paid ". . .at the Officer's daily rate of pay, as calculated from the classification prescribed in the certificate of appointment of the Officer's substantive position on March 31st of the previous vacation year".

[6] I have found that the provision in issue is clear. Therefore, I cannot speculate on the different intentions of the parties. The disposition should be applied as it appears in the collective agreement.

[7] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[8] The grievance is denied.

June 30, 2006.

**Sylvie Matteau,
adjudicator**