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Citation: 2007 PSLRB 87

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

TONY GASBARRO

Grievor

and

TREASURY BOARD
(Canadian Transportation Accident Investigation and Safety Board)

Employer

Indexed as
Gasbarro v. Treasury Board (Canadian Transportation Accident Investigation and Safety Board)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Dan Fisher, Public Service Alliance of Canada

For the Employer: Renée Roy, counsel

Heard at Ottawa, Ontario,
November 23, 2005, October 24, 2006, and June 12 and 13, 2007.

I. Grievance referred to adjudication

[1] In a grievance filed May 3, 2001, Tony Gasbarro ("the grievor") contested the failure of his employer to grant standby pay in accordance with the terms of the Technical Services Group collective agreement between the Treasury Board ("the employer") and the Public Service Alliance of Canada that expired June 21, 2003 ("the collective agreement"). As corrective action, the grievor sought standby pay for all periods, including weekends, when he was required to be available to return to duty outside normal work hours.

[2] Article 30 of the collective agreement outlines the entitlement to, and the conditions for granting, standby pay:

> ***Article 30 Standby***
>
> ***30.01*** *Where the Employer requires an employee to be available on standby during off-duty hours, such employee shall be compensated at the rate of one-half (1/2) hour for each four (4)-hour period or part thereof for which the employee has been designated as being on standby duty.*
>
> ***30.02*** *An employee designated by letter or by list for standby duty shall be available during his or her period of standby at a known telephone number and be available to return for work as quickly as possible if called. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.*
>
> ***30.03*** *No standby payment shall be granted if an employee is unable to report for work when required.*
>
> ***30.04*** *An employee who is required to report for work shall be compensated in accordance with clause 29.01.*
>
> ***30.05*** *Other than when required by the employer to use a vehicle of the Employer for transportation to a work location other than the employee's normal place of work, time spent by the employee reporting to work or returning to his or her residence shall not constitute time worked.*

[3] Following the employer's final level reply of May 20, 2003, denying his grievance, the grievor referred the matter for adjudication on July 17, 2003, under paragraph 92(1)(*a*) of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*").

[4] 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 former *Act*.

[5] The parties were not available for a hearing of this case prior to November 2005. Then, regrettably, the hearing stretched over three calendar years. Twice following the initial hearing date, I granted requests for adjournment due to last-minute hospitalization of witnesses. Difficulties in finding dates for the continuation of the hearing when both parties were available further delayed the process.

II. Summary of the evidence

[6] The grievor's representative called three witnesses, including the grievor. The employer's representative, for her part, called two witnesses. The parties filed 25 exhibits.

[7] At the time of his grievance, the grievor occupied the position of Multi-Media Specialist, at the GT-04 group and level, in the Multi-Media Section of the Engineering Branch of the Canadian Transportation Accident Investigation and Safety Board (CTAISB) in Ottawa. In July 2004, the grievor was promoted through reclassification to the GT-05 level as Senior Multi-Media Investigation Services Specialist, retroactive to April 1, 2001.

[8] The grievor testified that his primary responsibility since 1990 has been to provide a formal photographic and videographic record of transportation sector accidents within the CTAISB's jurisdiction for purposes of its investigations (Exhibit G-5 is a detailed job description for the Multi-Media Specialist position). The grievor also contributed multimedia training, advice, instruction and materials to and for his colleagues at the CTAISB. As an adjunct to his work, he delivered courses in aircraft accident investigation photography at the University of Southern California (Exhibit G-3).

[9] The key work element giving rise to the grievance was the requirement to deploy on an urgent basis to a major accident site anywhere in the country, most often without prior notice and frequently outside normal work hours (Exhibits G-10 and G-12). Deployments followed a contact from the grievor's supervisor, from more senior managers in the grievor's reporting line or from investigation leaders in the CTAISB's

operational sectors. Standing pre-authorization to travel facilitated the grievor's rapid deployment (Exhibit G-9). On-site, the grievor assumed lead responsibility for the photographic and videographic elements of the official investigation record, as confirmed in writing as early as January 1994 by the grievor's manager, Donald J. Langdon, in response to a memorandum prepared by the grievor (Exhibit G-8). The grievor's work was, at times, both physically taxing and psychologically stressful and was performed under emergency conditions and in uncomfortable or hazardous circumstances.

[10] Lists prepared by the employer during the period from 1999 through 2003 identified the grievor as a member of the Major Occurrence Investigation Teams for the aviation, rail/pipeline and marine sectors (Exhibit G-7). Documents submitted during the hearing attested to the scope and quality of the grievor's work and the appreciation of colleagues for his contribution to major accident investigations (for example, Exhibits G-13 and G-20). The employer stipulated that the grievor's work performance was not at issue.

[11] In 2003, Engineering Branch co-worker Mark Wallis, with assistance from the grievor, collected historical information describing the frequency and distribution of deployments to major accidents for the period starting in 1990 (the first year of the CTAISB) through 2002 (Exhibit G-18). According to the grievor, Mr. Wallis submitted these data to a Standby and Callback Committee established in 2003 under the leadership of the Executive Director, with a mandate to ". . . review the TSB's current application of standby and call back provisions and to propose an internal application framework . . ." (Exhibit G-22).

[12] The data compiled for the Standby and Callback Committee established that the grievor's section accounted for approximately 55 deployments over a 13-year period, or 32 per cent of the Engineering Branch's total. Of these deployments 46 involved the grievor, substantially more than any other branch employee.

[13] The grievor detailed his experience with deployments using personal travel and overtime records. The resulting list profiled 55 "Multi-Modal Investigation responses" where the grievor deployed immediately to accident investigations in the field or to the Engineering Laboratory in Ottawa (Exhibit G-19). According to the grievor, this information confirmed that his deployments began both during and after his normal duty hours. Once on-site, the grievor's work lasted for periods varying from five to seven hours to a number of days, sometimes with long periods of overtime. On one

occasion, back-to-back deployments to Moose Jaw and to the Welland Canal spanned nine days without a break.

[14] The grievor's normal working hours began either at 07:30 or 08:00 and ended at 15:30. The employer paid him overtime for hours travelled and worked outside these regular hours. When a deployment began outside normal hours, the grievor received overtime compensation beginning the moment he acted on the call to deploy. The grievor confirmed that he always deployed immediately after being called.

[15] The small size of the Multi-Media Section contributed to the number of deployments assigned to the grievor. Throughout the period in question, only two persons were normally available to represent the section at an accident site. The grievor shared this requirement with Manuel Soberal, his supervisor, who delegated the majority of deployments to the grievor. During Mr. Soberal's involvement in the lengthy investigation of the Swissair accident outside Halifax beginning in 1998, the burden of responding to emergency situations elsewhere fell almost exclusively to the grievor. The grievor's manager, Mr. Langdon, acknowledged in writing the personal impact on the grievor of ". . . doing the work of two people for over a year . . ." during the Swissair episode, as well as the grievor's "admirable" performance in ". . . keeping the section going . . ." (Exhibit G-10).

[16] Later, in cross-examination, the grievor agreed that several field investigators outside the Multi-Media Section were trained in photography and videography and were available to, and did, perform multimedia duties on minor accident sites, either where a multi-media specialist could not deploy or in addition to a multi-media specialist. The grievor also confirmed the rare use of external photographers and videographers.

[17] The grievor testified that the frequent requirement to deploy and, more particularly, the constant need to be ready to deploy at any time seriously affected his personal life. He felt constantly "on a leash", restricted in what he could do with his personal time, and was never really away from the workplace. He could not commit to other activities, such as setting up a personal photography business, because he was ". . . always one call away from having my life interrupted." Even when out of town for the weekend for personal purposes, calls to respond disrupted his life.

[18] Beginning in late 1999 and continuing through June 2004, the grievor carried a pager to receive urgent deployment and other calls. The grievor contended that he only accepted a pager as a compromise after his director, James Hutchinson, asked him to carry a cellphone following a rail accident when there had been a delay in finding the grievor. In January 2000, Mr. Langdon noted in an email that ". . . I now have [the grievor] equipped with a pager so that I can get a hold of him at any hour, anywhere . . ." (Exhibit G-10). According to another email from Mr. Langdon, the pager was ". . . the answer to locating [the grievor] in emergencies . . ." since Mr. Langdon was ". . . calling Tony out for support to rail accidents, which always seem to be in the middle of the night . . ." (Exhibit G-11).

[19] The grievor testified that he objected to the pager and to being required to be available at all times to deploy. He recalled expressing frustration with the pager on at least three occasions to Mr. Langdon and also to Mr. Hutchinson. The grievor questioned Mr. Langdon as to how he could be required to be contacted at any time while off-duty to deploy yet not receive any compensation for this requirement. He testified that Mr. Langdon replied that the requirement ". . . was part of your job . . .", that it was ". . . in your job description . . ." and that he ". . . would have to deal . . ." with the grievor if the latter had a problem with this requirement. In later testimony, the grievor indicated that these conversations occurred at six- to nine-month intervals, particularly during the period when Mr. Soberal was away on the Swissair investigation, but that he could not recall the exact dates. The conversations occurred at his desk and were brief and to the point. Mr. Langdon's comments were always to the effect that ". . . this is it . . ." (i.e. the requirement to be able to deploy without notice), that ". . . this is your job . . ." and that ". . . we would have to deal with you . . ." if there was resistance. The grievor reported that Mr. Langdon stated on different occasions that the grievor would be "blackmarked", "reprimanded" or that he would "lose his job" if he was not available to respond immediately to a call.

[20] The grievor indicated that he never felt that he had an option to refuse a deployment call or be unavailable to take a call. Management never offered this option. He could never say "no" to Mr. Langdon and that ". . . people jumped high . . ." when Mr. Langdon gave them instructions. In cross-examination, the grievor stated that Mr. Langdon told him that a refusal to respond could lead to discipline. When asked what the consequences would have been if management had been unable to contact him, the grievor replied that he had never been unavailable. Pressed whether he in fact

knew what would happen in such a situation, the grievor replied that he had "zero flexibility" with Mr. Langdon in these situations.

[21] In further cross-examination, the grievor agreed that he would not be surprised to learn that other employees in the Engineering Laboratory had been unavailable to take a deployment call on occasion. He also agreed that he did not know of a case where an employee unavailable for a call had been disciplined. He did report that management had questioned the grievor and other employees about delays in responding to a Via Rail accident in Stewiacke, Nova Scotia, in April 2001 (Exhibit G-15).

[22] Asked why he had not grieved prior to 2001, the grievor stated that he had been afraid to grieve. Mr. Langdon had "engrained it" into his head that he must respond to all deployment calls.

[23] Mr. Langdon denied the grievor's grievance on the grounds that the employer had not requested him to be on standby. Mr. Langdon appended to the grievance reply the following "Information for Mr. T. Gasbarro" outlining his understanding of the situation (Exhibit E-2):

. . .

Information for T. Gasbarro

1. *There is no requirement for you to carry a cell phone on your person or in your car, other than at the accident site.*
2. *If you do not wish to have a cell phone, it can be stored in your section and issued as part of your investigation equipment.*
3. *Response to an accident call-out during duty hours is a requirement of your position.*
4. *If personal reasons preclude immediate response to an accident call-out received during off-duty hours, you may refuse to respond until normally on-duty.*
5. *You should only respond to a call-out received from the Director of Engineering, your Chief, or your Supervisor, M. Soberal.*
6. *You are not on Standby (Article 30) during off-duty hours so you do not have to be at a known telephone number, at your residence, or at a known location.*

> *7. Keeping your employer informed as to where and how you can be reached during off-duty hours is a courtesy rather than an obligation. You are under no obligation to do it.*
>
> . . .

[24] The employer's representative suggested to the grievor that this statement contradicted the grievor's testimony as to what had been happening. The grievor replied that the statement was a "joke" and that it contradicted everything he had known and experienced. After receiving the statement, the grievor continued to believe that he had not been released from the requirement to carry a pager. He knew what Mr. Langdon's real requirements were, and he feared repercussions if he did not carry the pager. On the possibility of seeking recourse from higher levels, he stated that he felt unable to go to Mr. Hutchinson to address the "disconnect" between Mr. Langdon's written statement and what Mr. Langdon said or did in practice.

[25] The grievor understood that CTAISB management contacted Treasury Board officials for clarification as part of its preparation for the first level reply to the grievance. A Human Resources representative at the CTAISB summarized for the grievor the advice she received (Exhibit G-16):

> . . .
>
> *. . . According to the agreement, to be designated by the employer as being on standby duty, the employee would be required to be available to report for duty as soon as possible. From the information below, the employer has not imposed any such requirement - for example, there is nothing to prevent the employee from leaving town for example for personal business.*
>
> *Unless the employer has made it an obligation for the employee to be available to report to work immediately upon receiving a call, he is not on standby . . . .*
>
> . . .
>
> [Emphasis in the original]

[26] The Standby and Callback Committee final report, eventually released in 2004, provided no relief, from the grievor's perspective. While he felt that the report addressed concerns of the marine and rail/pipeline sectors by offering "24/7 standby" to employees there, nothing changed in the Engineering Branch. Call-back requirements were to operate as before with no standby compensation for Engineering

Branch employees. The CTAISB as a whole spent over $500 000 annually on standby pay, and all investigation branches received it. There were, however, no funds allocated for standby in the budget of the grievor's branch.

[27] The 2004 letter of offer to the grievor for the position of Senior Multi-Media Investigation Services Specialist, retroactive to April 1, 2001, contained the following sentence (Exhibit G-4):

. . .

> *. . . Another condition of employment for this position also involves a willingness to respond and travel on short notice during and after normal working hours and on holidays.*

. . .

The grievor asked a Human Resources representative at the time whether this reference constituted a standby requirement, and the response was in the affirmative. He asked the representative to remove the reference because he had not been receiving standby compensation and because responding immediately when called was not a condition of his employment. Although the representative consulted with management, the reference remained. The grievor signed the letter of offer despite completely disagreeing with the reference.

[28] The employer's representative asked the grievor to distinguish between standby and call back in his own words. The grievor replied that a standby situation exists if you are required to respond immediately to carry out your work. Call back occurs only where an employee is brought back to the workplace and does not apply where the employee is deployed to an accident site away from the workplace. Receiving a call asking him to go to Vancouver for an accident investigation, for example, was not a call back in the grievor's estimation. Asked whether he believed that he had been on standby before receiving the pager in 1999, the grievor stated that he had always been on standby because he had immediately deployed on every occasion when contacted. Taking an example from the record of 55 deployments he had compiled (Exhibit G-19), the grievor indicated that he was not on standby during normal work hours on the day in question but that hours worked after 15:30 on that day as part of a deployment did represent standby.

[29] Mr. Soberal, the grievor's supervisor from 1990 through 2004, reviewed his experience with deployment requirements. He reported that instructions to deploy would usually come from the Director of the Engineering Branch or from Mr. Langdon, Mr. Soberal's immediate supervisor. On one occasion, a director of another branch contacted the grievor about a deployment but this has never happened to Mr. Soberal. As a courtesy, Mr. Soberal was normally given the option of deploying himself or asking the grievor to deploy. His practice was to discuss the decision with the grievor. He and the grievor arranged their schedules and periods of leave to ensure that one of them was always available. In September 1998, both had attended a trade show and conference in Toronto when a call came to respond immediately to an accident in Ottawa. After this event, management told Mr. Soberal and the grievor not to be away at the same time again. If the grievor was away, Mr. Soberal had no option but to respond to a deployment request himself, but this situation never came up.

[30] Mr. Soberal testified that he always assumed that the job required him or the grievor to be available. During his 14 years supervising the grievor, the latter never refused a deployment request. He confirmed that the grievor responded to the other deployment requests received by the Multi-Media Section during the three-and-a-half years of the Swissair investigation. Mr. Soberal never received call-back compensation and understood that call-back pay was not an option for him or for the grievor.

[31] Mr. Soberal understood that it was part of the job to carry a cellphone. He never turned it off at the end of the day in case he received a deployment call. His contact details appeared on the Major Occurrence Investigation Team list.

[32] In cross-examination, Mr. Soberal testified that he did not know what would have happened had he refused a deployment request because it never came up. He did not recall being told directly that he always had to be reachable on weekends but felt that it was implied and that he had interpreted the work situation as requiring it. He agreed with the employer's representative that this interpretation might have come out of a strong personal sense of duty. As to vacations, Mr. Soberal said that no one had ever told him that one person from the section always had to be available.

[33] Mr. Soberal replied in the negative to each of the following three questions: Were you ever told not to consume alcohol on the weekends in case of a deployment? Were you ever told that you would be disciplined if you did not carry a cellphone? Were you ever told that you had to be available to be reached at all times?

[34] Mr. Wallis was the grievor's final witness. An employee of the CTAISB for more than 14 years, he started as a failure analysis engineer and then was promoted to the position of Senior Engineering Specialist, Mechanical. His principal role was to analyze fractures and collect evidence about component failures. He was required to deploy to the field for accident investigations and did so on a number of occasions.

[35] Mr. Wallis reported that he initially received deployment requests from his own manager. Later, his name appeared on a list and he understood that investigators-in-charge could contact him directly if the Director of the Engineering Branch or Mr. Wallis' manager was unavailable. On receiving a call, the majority of which occurred after hours, Mr. Wallis often had to return to the Engineering Laboratory to collect equipment before travelling to the accident site. There was always a sense of urgency on these occasions as deployments requiring Engineering Branch staff were usually "higher level" situations.

[36] Mr. Wallis never received call-back pay and stated that call-back pay ". . . never fit the situation for deployments in the Engineering Branch." He became aware of standby pay at the CTAISB when, during an investigation of a rail-sector accident, he heard some investigators mention that the employer had cut back the midnight through 08:00 portion of their standby coverage and pay. Later, as a result of a grievance from rail-mode employees, the CTAISB set up the Standby and Callback Committee to assess arrangements throughout the CTAISB. Mr. Wallis became the representative of Engineering Branch employees on this Committee. He approached his involvement with the objectives of achieving recognition of the increasing requirement to deploy in his branch and of clarifying expectations and requirements. In his view, his branch always responded to deployment requests in an *ad hoc* fashion, with no clear sense of what was expected. The increasing incidence of deployments had led to an unreasonable situation that affected the personal lives of employees. Other parts of the CTAISB had set up rosters or rotational arrangements and had provided standby compensation to address the problem. In Mr. Wallis' view, there was clearly a double standard at the CTAISB.

[37] Mr. Wallis referred to data collected for the Standby and Callback Committee depicting deployment requests in the Engineering Branch (Exhibit G-18). These data were not included in the Committee's final report (Exhibit G-22) as there was

disagreement between employees and management about the data and, particularly, about the criteria used by management to identify deployments.

[38] In the course of the Standby and Callback Committee's work, Mr. Wallis learned that both the marine and air modes of the CTAISB provided full standby coverage on a "24/7" basis. The rail mode maintained standby coverage for 16 hours each day. The Engineering Branch did not employ standby arrangements, but the expectation to respond was the same. This led to references to the existence of "*de facto* standby" in the Committee's report, although the final version of the report recommended only that the CTAISB ". . . should strive to eliminate . . ." *de facto* standby, a softer version than what had appeared in an earlier draft. Mr. Wallis understood that "*de facto* standby" referred to a situation where an employee was expected to deploy immediately, or felt expected to deploy immediately, without any formal compensation for being on standby.

[39] Mr. Wallis only refused a deployment once, for medical reasons. Casual discussions over the years led him to believe that there was a very strong expectation that employees were to respond if called. If comments were ever made about the requirement, the typical response from management was that ". . . this is your job . . ." and ". . . you're expected to go." Mr. Wallis judged that a refusal to deploy would have a negative impact on his performance appraisal or that he would be grilled by his manager. His feelings on this point were cemented when, as part of his preparations for the Standby and Callback Committee, he visited Mr. Hutchinson and asked him what would happen if someone refused a deployment request. Mr. Hutchinson replied that ". . . if it happened once, there would be a black mark beside the name . . ." and if it happened again, ". . . they'd be looking for a new job."

[40] After the Standby and Callback Committee issued its report, the employer removed the names of Engineering Branch employees from the contact lists used by investigators-in-charge for deployment purposes, only including information for the Branch Director and his managers. Mr. Wallis testified that, in reality, the situation did not change. Expectations remained the same and, with increasing numbers of deployments and no staffing depth, employees were still basically on duty all of the time.

[41] The employer's representative asked Mr. Wallis in cross-examination whether the employer had ever disciplined a person in the Engineering Branch who could not be

reached for a deployment. He replied that he had personally been questioned several times about why his cellphone was not on. He agreed, however, that the employer could probably reach someone else in the event that the first person on a list could not be contacted. Mr. Wallis was never told not to go away for the weekend but understood that he was expected to have his cellphone with him at such times. He agreed that employees did decide to deploy on their own in rare circumstances when a manager could not be contacted.

[42] Mr. Hutchinson testified on behalf of the employer. Now retired, he worked for the CTAISB and its forerunners for 30 years and was the director of the CTAISB's Engineering Branch from 1992 to 2003.

[43] Mr. Hutchinson described the procedures used to initiate deployments in the event of an accident, which typically began with the initial involvement of regionally-based investigators and then moved up the organization to headquarters, as required. He outlined that there were some differences from mode to mode and between minor, major and "mini-major" occurrences. He understood that there had been situations where employees like the grievor had received direct deployment contacts from investigators-in-charge or from other persons, but that the protocol in the Engineering Branch provided that the Director or one of his managers was to assess the requirements, determine who should deploy and make the necessary contacts. In the case of major accidents, Mr. Hutchinson outlined that it was his practice to convene a large meeting of staff after learning of an accident to discuss and strike the investigation team before finalizing deployments. He identified the "Major Occurrence Investigation Checklist" that detailed expectations for Mr. Soberal and the grievor as part of this larger process (Exhibit E-1).

[44] Mr. Hutchinson stated that no employee of the Engineering Branch, including the grievor, was on standby. The grievor was not on a standby roster. To Mr. Hutchinson's knowledge, no one told the grievor that he had to be available outside work hours. Mr. Hutchinson did not specifically require the grievor to provide a telephone number when away on weekends, although the grievor, like other employees, might have chosen to do so. Later Mr. Hutchinson repeated that the grievor did not have to be available by telephone on a "24/7" basis.

[45] Mr. Hutchinson reported his impression that the grievor liked to be deployed and that the grievor found on-site investigations to be one of the more interesting

aspects of his work. Several times, the grievor had asked Mr. Hutchinson why he had not been called to deploy to an accident site. Mr. Hutchinson judged the grievor to be a very skilled and dedicated employee whose interest in deployments attested to his professionalism and desire to be involved.

[46] Mr. Hutchinson never imposed a requirement to carry a cellphone or a pager on the grievor or on any Engineering Branch employee. He had a different recollection than the grievor on how the latter came to use a pager. He did not recall speaking with the grievor directly about it but, rather, he recalled learning from Mr. Langdon that the grievor had asked to be provided with a pager. Mr. Hutchinson authorized the purchase. In every case where an Engineering Branch employee carried a cellphone or pager, there had been an employee request to this effect. Mr. Hutchinson viewed provision of this equipment as a "win-win" situation.

[47] Mr. Hutchinson denied ever telling an employee that there would be a "black mark" associated with the employee's name or that the employee would be disciplined if unavailable for a deployment, although ". . . what I could have said might have been taken out of context." The policy of the Engineering Branch was to try to accommodate staff as much as possible. In situations where an employee was not willing to respond for personal or workload reasons, the branch arranged to handle the situation in another way. All of the regional investigators were trained in accident investigation photography by Mr. Soberal and the grievor. Investigators also had access to photographers from other agencies such as the Royal Canadian Mounted Police, but the CTAISB had never needed to rely solely on external assistance from such sources.

[48] Had an employee systematically refused to deploy without valid reasons after having been asked on a number of occasions, Mr. Hutchinson stated that management, at some point, would have had to take disciplinary measures because deployment to accidents was a requirement outlined in employees' job descriptions.

[49] Mr. Hutchinson explained that the grievor's primary responsibility was to provide support to specialists in the Engineering Laboratory, a requirement that, on average, accounted for 80 per cent of his time. Deployments represented the other 20 per cent of the grievor's time. Multi-Media Section staff participation in deployments did not always need to be immediate. Regional investigators were often already on-site and could begin the documentation process. Sometimes, the grievor attended an accident site a week or more after the occurrence.

[50] Mr. Hutchinson reviewed the grievor's deployment data since 1990 (Exhibit G-19). According to Mr. Hutchinson, 35 per cent of the responses listed by the grievor were deployments that occurred at least one week after an accident and, in one case, five months later. Some of the cases listed such as "Air India", "Swissair" and "Crossair Saab" were not deployments but, instead, were situations where the grievor worked overtime at the Engineering Laboratory. The grievor wrote at the beginning of the exhibit that ". . . I have spent over 2100 hours or 286 extra business days on field investigations which have always required an immediate response . . . [emphasis in the original]" but Mr. Hutchinson found that this total included some normal hours as well as non-deployment overtime hours. He did not agree that the listed cases all required an immediate response without prior notice.

[51] Mr. Hutchinson's interpretation of the term "*de facto* standby" was consistent with the interpretation provided earlier by Mr. Wallis. He testified that his communications with the grievor and with other Engineering Branch staff never gave the impression that there was a requirement to be on *de facto* standby.

[52] Looking at Exhibit G-6, a list of contact details for members of the Major Occurrence Investigation team, Mr. Hutchinson stated that many of the individuals named were not on standby. The list, like other similar documents, was an administrative tool to facilitate contacts with persons who might be required for deployments. Other branches maintained separate standby rosters to meet their own operational needs. There was no such requirement for the Engineering Branch.

[53] In cross-examination, Mr. Hutchinson agreed that the ability to respond to an immediate situation was crucial to the work of the Engineering Branch and that there was a sense of urgency. He reconfirmed that it was not always the case that another branch director or chief investigator contacted him every time the grievor deployed. The grievor did receive direct contacts, but Mr. Hutchinson had told the grievor to talk to him when this occurred. Mr. Hutchinson recalled the grievor calling him in those circumstances but was aware that, at other times, the grievor had decided to deploy himself when no manager was available. Mr. Hutchinson never chastised the grievor for this, nor was the grievor ever disciplined for a breach of the deployment process protocol.

[54] Mr. Hutchinson agreed that the grievor had been given standing authority with respect to travel arrangements for deployments (Exhibit G-9) but described this

authorization as an administrative tool to allow an employee to ". . . get the process going . . ." in off-hours when administrative staff normally responsible for travel arrangements might not be available. Mr. Hutchinson acknowledged that the job description for the grievor's Senior Multi-Media Investigation Services Specialist position (Exhibit G-4) contained the statement that "[a]nother condition of employment for this position also involves a willingness to respond and travel on short notice during and after normal working hours and on holidays." Mr. Hutchinson reiterated that an employee could always refuse a deployment request, that there was always an effort to accommodate employees if they could not deploy and that there was no situation where punitive action was ever taken or implied for a refusal to deploy. Mr. Hutchinson disagreed with the testimony of Mr. Soberal and the grievor and suggested that, if staff members felt that there was no option, they were misled.

[55] Pressed by the grievor's representative to remember one instance where the grievor attended a pre-departure team meeting, as described by Mr. Hutchinson, the witness said that he could not recall a major investigation that had involved the grievor. Asked again about conversations regarding a cellphone for the grievor, Mr. Hutchinson repeated his recollection that the request came from the grievor as communicated through Mr. Langdon. He remembered that the grievor had a pager at the time and wanted a cellphone instead. Mr. Hutchinson maintained this answer when the grievor's representative referred him to Exhibit G-11, an email that showed Mr. Langdon as the person who was suggesting that the grievor should have a pager. Mr. Hutchinson testified that discussion of a pager had occurred earlier than the conversation about a cellphone.

[56] Mr. Hutchinson allowed that it was possible that the only time the grievor had talked to him about not being asked to deploy was in the case of the Swissair accident and that the grievor may have instead asked why his name was not part of the staff rotation assigned to that matter. Asked whether witnesses had either exaggerated the employer's requirement that they respond to deployment requests or had misread the requirement, Mr. Hutchinson stated that it was more likely that they had misread the level of urgency required. Once more, Mr. Hutchinson denied ever using the term "black mark", saying that this reference was ". . . not in my nature." Mr. Hutchinson identified workload concerns, sickness, family matters and other personal reasons such as social outings as possible reasons for refusing a deployment request. The validity of the reason " . . . would depend on the situation."

[57] The grievor's representative referred Mr. Hutchinson to the reference to "*de facto* standby" in the final report of the Callback and Standby Committee (Exhibit G-22). Mr. Hutchinson indicated that he had not previously seen the final version of this report because it was issued after his retirement, but had read earlier drafts. He maintained his position that standby was not an operational requirement for the Engineering Branch. He accepted the proposition that "the grievor might have felt that he always had to be available, including on off-duty hours," but he never conveyed this as a requirement to the grievor. It was reasonable for the grievor to think he could be contacted while away from work, but the grievor would always be asked when contacted whether he was available for a deployment.

[58] In re-examination, the employer's representative referred to the following excerpt from the Standby and Callback Committee final report (Exhibit G-22):

> . . .
>
> *Appendix 2*
>
> . . .
>
> *Perceived Weaknesses*
>
> . . .
>
> 9. *One or two Engineering Branch personnel feel that they always have to respond if called. They feel they would receive disciplinary action if they failed to respond when called. Notwithstanding this perception, personal circumstances have always been considered legitimate reason not to respond, and there is no record of any disciplinary action being taken in the past against an employee who refused to respond.*
>
> . . .

Mr. Hutchinson testified that this excerpt reflected his understanding of the situation in the Engineering Branch.

[59] Mr. Langdon was the second and final employer witness. He outlined his duties at the CTAISB as Chief Systems Engineer, including his responsibility for the Multi-Media Section. Mr. Langdon noted that he became the grievor's supervisor after the grievor's promotion within the section to the same classification level as Mr. Soberal. Previously, the grievor reported to Mr. Soberal who, in turn, reported to Mr. Langdon.

[60] Mr. Langdon testified that the grievor was not a first responder to accident sites, although he may have responded initially. The first responder was the CTAISB investigator-in-charge of the accident.

[61] Mr. Langdon maintained that employees under his supervision were never on standby during his tenure. The cost of operations would have skyrocketed had this been the case. Employees were subject to call-back requirements but were not required to return to duty if they had a personal reason for refusing. Employees did not have to be reachable at all times, were never asked about their whereabouts while off-duty, were never told to refrain from consuming alcohol while away from work and were never threatened with discipline if they could not be reached.

[62] Mr. Langdon denied that the grievor carried a pager at the former's request. He gave the grievor permission to carry the pager when the grievor requested it, ". . . more to make him feel like a member of the team than anything else" and to appease him. Mr. Langdon further denied ever saying to the grievor ". . . it's your job and we'll have to deal with you if you don't carry a pager . . . ." Regarding his November 26, 1999 email, in which Mr. Langdon wrote that he now had the grievor ". . . equipped with a pager so that [Mr. Langdon] could get a hold of him at any hour . . ." Mr. Langdon maintained that this did not mean that the grievor was on standby, only that it was possible to contact him (Exhibit G-10).

[63] Mr. Langdon indicated that the grievor deployed directly to accident sites on a number of occasions without either Mr. Langdon's approval or that of Mr. Hutchinson. He recalled the grievor stating that he liked attending accidents and that he was interested in becoming an accident investigator. Mr. Langdon found that the grievor was proud of his work, that he never complained about deployments and that he never tried to decrease the number of accident call backs.

[64] The employer's representative referred Mr. Langdon to the reference in his first-level grievance reply (Exhibit E-2) that "[r]esponse to an accident call-out is a requirement of your position." Mr. Langdon stated that this reference did not mean that the grievor had to go regardless of circumstances. Personal reasons might preclude a deployment, and there would be no adverse affects if that happened. Mr. Langdon confirmed that he had never indicated, intimated or suggested any arrangement other than what was outlined in the first-level reply. "What I said [there] is what we lived by, except where the grievor deviated on his own initiative."

[65] In cross-examination, Mr. Langdon agreed that there was a sense of urgency in responding to accident deployment calls but reiterated that the employer did not require the grievor to be part of the initial response. In Mr. Langdon's words, ". . . attending immediately was not a requirement of [the grievor's] job."

[66] Asked whether he recalled any email or letter to the grievor, prior to the June 27, 2001, first-level grievance reply (Exhibit E-2) where he made clear that standby was not a requirement, Mr. Langdon indicated that he did not. Equally, he could not recall any earlier message to the grievor telling him that he required express authorization from Mr. Hutchinson or Mr. Langdon prior to deploying to an accident. He was nonetheless sure that the grievor ". . . got the idea I wanted him to have my approval." Regarding those instances where the grievor deployed without this approval, Mr. Langdon confirmed that management did not impose discipline.

[67] Mr. Langdon characterized the statement in the 2004 appointment letter (Exhibit G-4) that responding and travelling on short notice was a condition of employment as a standard clause found in dozens of other similar documents. He stated that ". . . everyone knew that there was a requirement to go out." He was not aware that other CTAISB branches paid standby and expressed doubt that any standby arrangement would have applied to a whole branch. He did, however, report that the Engineering Branch paid for call backs and that ". . . we all got overtime when we were working."

[68] The grievor's representative asked Mr. Langdon whether he had said to the grievior ". . . this is your job, this is why you are paid", in a heated conversation about deployments. Mr. Langdon answered that he could not recall saying it and maintained that he would never have threatened the grievor. Asked whether it was fair to say that certain employees felt that they were expected to respond and did not have a choice, Mr. Langdon replied that he could not say what was in the mind of employees. Whether they felt this way ". . . depended on the employee."

[69] In re-examination, Mr. Langdon reiterated that the stated requirement to deploy to an accident as a condition of employment (Exhibit G-4) did not mean that the grievor had to be reachable at all times.

III. Summary of the arguments

A. For the grievor

[70] The grievor's representative took the position that the conditions outlined in clause 30.02 of the collective agreement (i.e. designation ". . . by letter or by list for standby duty . . ." and availability ". . . at a known telephone number . . . to return for work as quickly as possible . . .") need not be satisfied to trigger an entitlement to standby pay. Clause 30.01 creates an entitlement to compensation even if the conditions of clause 30.02 are not met. As a question of evidence, however, the grievor's representative argued that the parameters of clause 30.02 were satisfied in this case.

[71] According to the grievor's representative, the evidence established that the employer required the grievor to be available for immediate deployment to accident investigation sites, both in practice and according to the Multi-Media Specialist job description. The grievor had always conformed to the employer's expectations. He was available for deployments, was reachable and had altered his lifestyle to do his job. Even were I to find that the employer did not formally require the grievor to be on standby duty, it was clearly a *de facto* requirement. The grievor genuinely read the work climate as expecting him to deploy on an urgent basis when contacted. He did so diligently and with great professionalism. The employer benefited from the grievor's behaviour and depended on it. At the very least, there was confusion between the grievor's interpretation of what workplace practice obliged him to do and management's interpretation of the formal requirements of his position. The grievor believed that responding to deployment calls was non-negotiable, a requirement widely understood and later explicitly stated (Exhibit G-4) as a condition of employment. In such a situation, fairness demands that the employer compensate the grievor for what was actually expected of him on an ongoing basis.

[72] The grievor, Mr. Soberal and Mr. Wallis all testified that time was of the essence in deployments. The sole purpose of the standing authorization for travel (Exhibit G-9) was to facilitate rapid deployments. The employer's Major Occurrence Investigation Team lists (Exhibits G-6 and G-7) confirmed the grievor's role as a responder. Notably, only the grievor's name appears for the Multi-Media Section. While the employer suggested that management could have called someone else, who else was available, especially during the Swissair investigation?

[73] The grievor's representative noted the confusion in the evidence as to whether it was management or the grievor who initiated the request for a pager. He argued that the pager was symbolic of the employer's expectations. The employer would not have furnished the grievor with the pager if it was not needed and necessary. There was also uncontradicted evidence that Mr. Langdon thought that the pager was useful (Exhibit G-12).

[74] In the Stewiake situation (Exhibit G-15), senior management called employees to account, including the grievor, about a delay in deployment. That action reinforced the message of urgency to employees that they were to deploy to an accident site as soon as possible on being contacted. Both the grievor and Mr. Wallis testified about the risk of a "black mark" against them if they did not respond once contacted.

[75] The grievor's representative referred me to the following decisions: *Beaulieu et al. v. Canada Customs and Revenue Agency*, 2002 PSSRB 3; *Angers et al. v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-02-21622 to 21624, 21751, 21752, 21763 to 21766, 21759 and 21760 (19920131); *Parcells v. Treasury Board (Revenue Canada – Customs & Excise)*, PSSRB File No. 166-02-15060 (19851104); *Kosmider v. Treasury Board (Transportation Safety Board)*, PSSRB File No. 166-02-26233 (19950831); *Bélanger et al. v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-02-21257, 21258 and 21300 to 21302 (19910702); *Litkowich v. Treasury Board (Revenue Canada)*, PSSRB File No. 166-02-12952 (19830201), and *McMurray v. Treasury Board (Health and Welfare Canada)*, PSSRB File No. 166-02-12349 (19821117).

[76] For purposes of corrective action, the grievor's representative took the position that the grievance constituted a continuing and ongoing matter and that the grievor was "always on standby" and should have been compensated accordingly. In the alternative, and recognizing the direction given in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.) (QL), the grievor's representative argued that I should grant standby pay for the 25-day period preceding the filing of the grievance. He noted as well the April 1, 2001, effective date of the statement of conditions of employment provided to the grievor on his reclassification. The grievor's representative also referred me to the grievor's April 12, 2001, deployment to the Via Rail accident at Stewiacke (Exhibit G-19).

[77] According to the grievor's evidence, confusion remained about standby requirements as of the hearing, thus justifying a remedy that continues well beyond

the grievance's filing date. The grievor's representative noted, however, that the employer might take the position that Mr. Langdon's first-level reply of June 27, 2001 (Exhibit E-2), ended the confusion.

B. <u>For the employer</u>

[78] The employer's representative argued that the grievor bears the onus of proving his entitlement to standby pay under the terms of the collective agreement. The grievor did not meet this burden.

[79] At the CTAISB, employees in the Engineering Branch provided services, such as photographic and videographic support, at the request of an investigating branch. When the request involved deployment to an accident site, individual employees from the Engineering Branch left on the same day as the responsible investigators, within a few days or within a week. The Engineering Branch, however, never maintained a standby system because its employees were not first responders. There was always time to contact someone to provide the required support. If particular persons were unavailable, other options existed.

[80] The employer's representative contended that the grievor did not understand the distinction between standby pay and call-back pay. The grievor believed that he was on standby because he received calls outside of working hours and attended accident investigation sites out of town as a result. He felt aggrieved because he had to cancel or postpone personal activities when contacted and, once contacted, had to respond. None of these elements, however, demonstrated that the grievor was on standby. None of the testimony showed anything other than that the grievor's work required him to respond once he was contacted for call-back purposes.

[81] The employer never instructed the grievor to sit by a telephone during off-duty hours. It never told him to refrain from consuming alcohol while away from work. It never told him that he could be disciplined if he could not be reached for a call back. The grievor did carry a pager but, as demonstrated by the testimony of both employer witnesses, the employer did not impose this requirement on the grievor. Instead, the employer provided a pager at the grievor's request.

[82] The bottom line, according to the employer's representative, was that management could make alternate arrangements if the grievor was unavailable for a

deployment. Both employer witnesses explicitly recognized that there were legitimate personal reasons why the grievor, or other employees, might not be able to respond. Unlike the situation described in *Beaulieu et al.*, there was no evidence that the employer required the grievor to be willing to be "on call" at all times or that the employer placed restrictions on the grievor's time while away from the workplace.

[83] The fact that the grievor was required to respond when called back to duty, either as stated in a job description or as expected by the employer in practice, does not prove that a standby situation existed. The employer did expect the grievor to respond when it contacted him. In this sense, call back did entail a mandatory requirement to work, as recognized in *Lantic Sugar Ltd. v. Bakery, Confectionery & Tobacco Workers International Union, Local 443* (1995), 51 L.A.C. (4th) 257. According to the arbitrator in that case, there was no indication in the jurisprudence ". . . that a call-out is a voluntary matter that the employee has a right to refuse." The employer pays extra compensation in a call-back situation ". . . for the disruption that occurs when an employee is called out."

[84] Critically, mandatory call back does not automatically trigger standby. The adjudicator in *Roach v. Treasury Board (Department of National Defence)*, 2006 PSLRB 3, observed:

. . .

> *[77] I am also of the view, found in the jurisprudence submitted by the employer, that there is a distinction between standby and call-back. A mandatory call-back does not necessarily entail the payment of standby pay. The requirement to report to work if reached, although it may lead to discipline, does not by itself allow a grievor to claim standby pay.*

. . .

[85] If the grievor seeks to argue that the employer imposed a standby requirement in some indirect fashion (i.e. that there was a *de facto* standby requirement), the evidence needed for such an argument must be very clear, according to the case law. The grievor's representative adduced no clear evidence proving an indirect or *de facto* standby requirement.

[86] The employer's representative also referred me to *Parcells*, *Kettle v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-21941 (19920413); and *Mullins v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17752 (19890202).

[87] Once he received the employer's first-level reply to his grievance on June 27, 2001 (Exhibit E-2), the grievor could not have continued to believe that he was still on standby, as he stated in his testimony. Before the first-level reply, any confusion about a standby requirement was not caused by the employer, but rather by confusion in the grievor's understanding of what standby meant. Notably, if there was earlier confusion, the grievor never sought clarification from the employer prior to submitting his grievance, nor did he grieve at an earlier date. He took action only after he learned on-site for the Stewiacke Via Rail accident in April 2001 that employees in other branches received standby compensation.

[88] No documents that predated the grievance provided any indication of a standby requirement. If the grievor was ". . . just following orders," as the grievor's representative contended, who issued the orders? The answer, according to the employer's representative, was no one.

[89] In conclusion, the employer's representative urged that I must deny the grievance because the grievor did not meet his onus to prove a breach of the collective agreement. In the alternative, if I find that there was a breach, I must limit any retroactive remedy to the 25-day period prior to the date of the grievance, as stipulated in *Coallier*. Moreover, given the June 27, 2001, first-level reply to the grievance in which the employer unequivocally instructed the grievor that he was not on standby, the grievor cannot be entitled to a remedy beyond that date.

C. Grievor's rebuttal

[90] Contrary to the employer's argument that there was no evidence of a *de facto* standby requirement, Mr. Wallis provided testimony that *de facto* standby did in fact exist in the Engineering Branch.

[91] The grievor's representative also disputed the employer's denial that there was confusion about standby requirements. He quoted the employer's final-level reply to the grievance (on file) as evidence to the contrary:

. . .

> *. . . You have implied that TSB employees who are not on official standby believe they must be able to respond as if they were or there might be negative repercussions. None of what I have seen written would substantiate that concern . . . . Nevertheless, I have become aware that potential confusion on this issue exists . . . .*

. . .

IV. Reasons

[92] The issue in this decision is the proper application of the provisions of article 30 (Standby) of the collective agreement to the facts of the case. The grievor bears the onus to demonstrate that, on a balance of probabilities, the employer violated that article's standby provisions.

[93] My reading of the case law cited by the parties leads me to several general observations about standby requirements and entitlement to standby pay, particularly as the latter arises under contract provisions of the type at issue here. The normal and most obvious ground for standby pay is evidence of a direct written or oral order from an employer to an employee that he or she must be available outside normal working hours to receive a contact that requires him or her to return to work on an immediate or urgent basis. By imposing the standby requirement, the employer obliges the employee to be available for work on short notice during off-duty hours. In so doing, the employer places restrictions on the off-duty freedom of the affected employee. Standby pay compensates the employee for modifying his or her conduct while away from the workplace to ensure his or her availability to return to work and for the inconveniences and disruptions that this may entail.

[94] Standby requirements are often formalized by a letter or list of the type contemplated under clause 30.02 of the collective agreement:

> ***30.02*** *An employee designated by letter or by list for standby duty shall be available during his or her period of standby at a known telephone number and be available to return for work as quickly as possible if called. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.*

[95] *Beaulieu et al.*, *Parcells* and other decisions recognize, however, that the existence of a standby letter or list is not a necessary requirement to trigger an entitlement to standby pay. In this sense, I concur with the grievor's representative that an entitlement to standby pay can arise independently of the conditions outlined in clause 30.02 of the collective agreement. The *raison d'être* for clause 30.01, it seems to me, is to state the general entitlement to standby pay wherever ". . . the Employer requires an employee to be available on standby during off-duty hours . . .":

> ***30.01*** *Where the Employer requires an employee to be available on standby during off-duty hours, such employee shall be compensated at the rate of one-half (1/2) hour for each four (4)-hour period or part thereof for which the employee has been designated as being on standby duty.*

[96] Clause 30.01 of the collective agreement and other provisions similar to it suggest the possibility that different types of evidence, direct or indirect, can be adduced to prove the grounds for standby pay. The case law demonstrates that an adjudicator may find evidence of a *de facto* standby arrangement in the practical requirements or operations of a workplace where no official standby authorization exists. It may even be possible, as in *Beaulieu et al.*, to discern a substantive standby requirement in a situation where there is confusion about the employer's standby expectations in the workplace, whether intentionally or unintentionally caused. On the other hand, an employee may not, on his or her own initiative, act as if there were a requirement to be available at all times and then hold the employer liable for standby compensation.

[97] I note that the employer's representative argued that a higher threshold of proof ("very clear evidence") of a standby requirement is necessary in situations other than the "normal" model described in clause 30.02 of the collective agreement. I take this argument as an appropriate caution to take care in examining alternate evidence tendered as proof of a *de facto* standby arrangement. I do not believe, however, that the case law urges a different, formal standard of proof. Whether the proposed evidence of a standby requirement is direct or indirect, formal or *de facto*, the grievor's burden remains, in my view, to prove grounds for the entitlement to standby pay within the terms of the collective agreement, on a balance of probabilities.

[98] As it is important in this case, I also note that the case law is clear in distinguishing between standby and call-back situations. In both cases, payment of compensation recognizes, in part at least, a disruption to the employee's life. Beyond that, the two situations are different. Call back triggers an entitlement to pay — normally at a premium overtime rate for a minimum number of hours — because an employee actually returns to duty and performs work during what would otherwise have been off-duty hours. The employee may or may not have been on standby duty at the time. This requirement to return to work is normally mandatory, as characterized in *Lantic Sugar Ltd.* Being required on a mandatory basis to return to work when contacted, however, does not necessarily prove a standby requirement, a point emphasized in *Roach* at para 77.

[99] With these observations in mind, I turn to the evidence in this case. The grievor's representative argued that, in the first instance, the evidence satisfied the conditions expressed in clause 30.02 of the collective agreement. On a balance of probabilities, did the evidence prove that the grievor was ". . . designated by letter or by list for standby duty . . ." to be ". . . available during his . . . period of standby at a known telephone number and be available to return for work as quickly as possible if called . . ."?

[100] To satisfy clause 30.02 of the collective agreement, there must be evidence of a designation ". . . by letter or by list for standby duty . . . ." Here, we are looking for direct, or relatively direct, proof of a standby requirement in written form ("by letter or list") authored by the employer.

[101] According to the grievor, the evidence disclosed two main sources for such a written designation: the lists of contact persons on Major Occurrence Investigation Teams for the air, marine and rail/pipeline sectors (primarily in Exhibit G-7) and the grievor's 2004 letter of appointment (Exhibit G-4). I am unable to accept Major Occurrence Investigation Team lists as satisfactory proof of a standby requirement. Those lists do not refer to standby, and there are no other supporting documents before me that express the expectation that employees on those lists must hold themselves available to return to work. The lists were certainly used for call-back purposes. It may also be true that the grievor believed that the lists were the equivalent of a standby roster. This belief, however, did not necessarily make it so. Corroborating evidence would be needed to establish that the Major Occurrence

Investigation Team lists were used, or were intended to be used, for the specific purpose of standby, which I am not satisfied that the grievor has proved. To the contrary, there was evidence, offered by Mr. Wallis, that other branches of the CTAISB set up separate standby rosters in addition to the Major Occurrence Investigation Team lists. If those lists relied upon by the grievor were a standby designation within the meaning of the collective agreement, it seems unlikely that other branches, who also used those lists, would have found it necessary to implement separate standby rosters.

[102] The second source cited by the grievor's representative is also problematic. The grievor's 2004 letter of appointment (Exhibit G-4) stated that ". . . a willingness to respond and travel on short notice during and after normal working hours and on holidays . . ." comprised a condition of employment. This statement reflected the reality that the grievor's job included a significant call back component for which there was abundant evidence adduced at the hearing. The employer could have determined that the best way to ensure compliance with this condition of employment was to require the grievor to be on standby. However, there is no direct evidence that the employer took this further step in connection with the 2004 letter, nor can the statement expressing the condition of employment itself stand as proof, on a balance of probabilities, that the employer did so. If I am wrong on this point, Exhibit G-4 remains problematic given that it was composed and issued by the employer three years after the date of the grievance. While the reclassification decision conveyed in the document could, and did, have retroactive effect to the time of the grievance, it can hardly be argued that a statement of conditions of employment issued in 2004 proves the existence of a standby designation three years earlier, at the time of the grievance. I note, parenthetically, that I also reviewed the grievor's position description dating back to 1996 (Exhibit G-5) for evidence that might constitute the equivalent of a written standby designation, but found none.

[103] The grievor's representative offered several alternative arguments. He submitted that the facts of the case, and particularly the grievor's record of responding to call-back contacts, established the existence of a *de facto* standby requirement. He argued that various actions and statements attributed to management over the years created a reasonable expectation on the grievor's part that standby was a requirement of his position. The grievor's representative also suggested, essentially in the further alternative, that there was a climate of confusion about standby in the workplace such

that the grievor acted in good faith on the belief that the employer required standby. Those arguments led me to search for less direct evidence of a standby requirement, under the purview of clause 30.01 of the collective agreement.

[104] At this point, I must offer several cautionary observations about the evidence. A significant portion of the testimony of the grievor's witnesses and of the evidence that emerged during cross-examination of the employer's witnesses focussed on the behaviour of the grievor and other employees once called by the employer to deploy for an accident investigation. While this information provided useful context to understand the work of accident investigation, it was, in my view, primarily relevant to the subject of call-back procedures and call-back compensation, rather than standby. As noted above, call back is distinct from standby. Call-back procedures and call-back compensation are mandated by article 29 of the collective agreement, which is not at issue in this grievance. While there can be an important link between standby and call back — a link expressly stated in clause 30.04 — it is not a necessary link. The employer may place an employee on standby status but not call him or her back to work. Similarly, the employer can subject an employee to a call-back requirement whether or not it has required that employee to be on standby.

[105] From the evidence, there is no question in my mind that the grievor did receive a substantial number of requests to deploy to accident investigation sites and that he did deploy as requested. Although Mr. Hutchinson's testimony questioned the accuracy and validity of all of the deployments listed by the grievor (Exhibit G-19), I do not doubt that he was called back by the employer to perform work on a variety of occasions, either at an accident site or at the Engineering Laboratory. The grievor's testimony that he did not receive call-back compensation for those requirements stands unchallenged, but the grievance before me does not allege a failure of the employer to respect the call-back pay provisions of the collective agreement. I note that there was also testimony — non-determinative of the issue before me — that the grievor did receive overtime pay for the hours he worked outside his regular work day on deployments and when called back.

[106] None of this evidence in itself allows me to decide the separate issue of the employer's alleged misinterpretation or misapplication of article 30 of the collective agreement. Indeed, the grievor's own testimony revealed that he may not have understood, and may continue to misunderstand, the distinction between standby and

call-back requirements. I refer here to the evidence summarized at para 28. The key misunderstanding in the grievor's mind appears to be that the fact of responding proves standby, rather than the requirement to be available to respond when and if contacted. Because ". . . he had immediately deployed on every occasion when contacted . . .", the grievor argues that he was always on standby. The collective agreement is clear on that point. Standby pay results from a situation "[w]here the Employer requires an employee to be available on standby during off-duty hours . . . ." Whether or not an employee does respond when contacted is relevant to standby compensation only in the context of clause 30.03 of the collective agreement:

> ***30.03*** *No standby payment shall be granted if an employee is unable to report for work when required.*

That is to say, being unavailable when there is a call to respond while on standby duty is a bar to standby compensation under article 30. Actually responding, on the other hand, fulfills a condition of the entitlement to standby compensation under either clause 30.01 or 30.02, but only if the employee is on standby duty. Otherwise, the employee's response is potentially pertinent to the issue of call-back compensation, but not standby.

[107] The grievor's apparent confusion was accentuated when he stated:

> *Callback occurs only where an employee is brought back to the workplace and does not apply where the employee is deployed to an accident site away from the workplace. Receiving a call asking him to go to Vancouver for an accident investigation, for example, was not a callback . . . .*

On the contrary, receiving a call to deploy to Vancouver is exactly what constitutes call back, presuming that the call in question occurred when the employee was off duty.

[108] At the end of the day, I cannot know whether, and to what extent, the grievor's problematic understanding of the meaning of standby and call back contributed to his disagreement with the employer. As a practical matter for this decision, it is not crucial to know. The task at this point remains to determine whether any other evidence offered at the hearing revealed a *de facto* standby requirement.

[109] The testimonies of Mr. Soberal, Mr. Wallis and the grievor about the environment of expectations at their workplace offered potential evidence of a *de facto* standby requirement. Mr. Soberal always assumed that the job required him to be available. He felt that it was implied that he had to be reachable on weekends even if he was not told directly to do so. He understood that it was part of his job to carry a cellphone to receive contacts. Mr. Wallis reported that being unavailable to respond would have had a negative impact on his performance appraisal. He testified that Mr. Hutchinson led him to believe that refusing a deployment request would result in a black mark beside his name and potential peril to his job security. Mr. Wallis' experience with the Standby and Callback Committee exposed him to the formal practice of standby in some parts of the CTAISB and to the perceived existence of a *de facto* standby requirement elsewhere — one that the CTAISB ". . . should strive to eliminate . . . ." He concluded that ". . . employees were still basically on duty all of the time," despite the Committee's efforts. He also indicated that he had been questioned several times as to why his cellphone was not switched on during off-duty hours. The grievor, for his part, testified to at least three encounters with Mr. Langdon where he felt that the latter made it abundantly clear that being reachable at any time was part of the job and that management ". . . would have to deal . . ." with the grievor if he had a problem with this requirement. He left those conversations with the strong conviction that he had no option but to be available and that the consequences of not being available included being black marked, reprimanded or even losing his job. In the Stewiacke situation, when the employer had difficulties contacting him, the grievor reported that he was called to account for his delay in responding, along with other employees.

[110] This testimony suggests an environment where at least some employees in the Engineering Branch reasonably formed the conviction that management expected them to be available during off-duty hours for deployment contacts even though the Branch did not maintain a formal standby roster. The employer's representative argued, in contrast, that any such expectation existed primarily in the minds of employees and was never the intent of Branch management. He suggested it was, instead, the employees' professionalism and strong sense of duty that led them to make themselves available to respond. Additionally, the employer's representative submitted that, in the grievor's case, it may also have been his interest in being involved in on-site work coupled, perhaps, with his aspiration to become an accident investigator. If

employees interpreted statements from management as requiring them to be on standby, the employer's representative suggested that they were misunderstanding the situation. According to the employer, management never specifically told the grievor or others to keep themselves available for a call-back contact. Management never, for example, told the grievor or others to refrain from consuming alcohol during off-duty hours so that they would be fit to return to work on short notice. The employer's representative stressed that management never disciplined anyone for refusing a deployment request and that personal reasons were always a possible justification for refusing a call-back contact. The employer's witnesses, moreover, denied making statements attributed to them by the grievor's witnesses that they had threatened black marks, discipline or firing if the latter resisted the requirement to be available for contacts.

[111] I obviously have before me two contrasting depictions of the expectations concerning standby in the everyday practice of the grievor's workplace. Both perspectives have some resonance in the evidence; neither is immune from challenge. On certain elements, I find that the rival interpretations advanced by the grievor and the employer were equally probable. An example is the question of how the grievor came to carry a pager. Here, in my view, the evidence was not sufficiently clear to establish that it was more likely than not that management obliged the grievor to carry a pager. I find, accordingly, that this aspect of the testimony does not contribute to proving a *de facto* standby requirement.

[112] I have reached a different conclusion about the statements that Mr. Hutchinson and Mr. Langdon were alleged to have made to several of the witnesses about the requirement to be reachable while off duty. While both of the employer witnesses denied that they had made any threats or had otherwise referred to black marking or disciplining employees who resisted making themselves available for deployment contacts, there were intimations in their recollection of events, or lack thereof, of a different possibility. Mr. Hutchinson qualified his denial by stating that ". . . what I could have said might have been taken out of context." He suggested later that the grievors might have misread the level of urgency attached to being available to respond to a contact during off-duty hours. He accepted the proposition that ". . . the grievor might have felt that he always had to be available . . . ." For his part, Mr. Langdon admitted that he could not recall sending any email or letter to the grievor instructing him that standby was not a requirement prior to the first-level

grievance reply in June 2001 (Exhibit E-2). Mr. Langdon professed that he had no knowledge that other CTAISB branches paid for standby, revealing a lack of knowledge about practices among colleague investigating sectors that seems difficult to explain. He could not recall with any precision a "heated" conversation with the grievor about deployments. When asked whether it was fair to conclude that some employees felt that they did not have a choice to respond or not to a deployment request, he replied that he ". . . could not say what was in the mind of employees."

[113] On a balance of probabilities basis, I find the evidence of the grievor's witnesses about the expectations in the workplace concerning standby more in 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 . . ." (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357). While it may be possible that Mr. Soberal, Mr. Wallis and the grievor all misread to some degree what was expected of them, something in the workplace brought them to the common belief that the employer required them to be available for off-duty contacts. While their management may never have told them explicitly to be on standby, or explicitly that they had to be available at all times, I judge it more likely than not that what management said and did from time to time contributed, at the very least, to a climate — perhaps an uncertain climate — where the employees' perception that they were required to be on standby was reasonable and understandable in the circumstances. What is certainly the case is that management benefited from the employees' belief that they were on standby given that the employees were almost always available to be contacted and that they did in fact respond almost invariably when contacted. The evidence also shows that, on occasions when employees were not available for immediate employment, they were called to account by the employer.

[114] Is the finding that it was reasonable for the grievor, among others, to believe that the employer expected him to be available for deployment contacts while off-duty sufficient proof, within the meaning of clause 30.01 of the collective agreement, of a *de facto* standby requirement? Admittedly, this is not a case where the evidence of the *de facto* standby requirement was as concrete as, for example, in *Beaulieu et al.* In my view, the evidence nonetheless does tip the balance in favour of the grievor, albeit narrowly, and permits me to reach a similar conclusion. Having found that there was evidence that the employer ". . . require[d] [the grievor] to be available on standby during off-duty hours . . ." by its actions, its statements or its failure to address the

confusion that may well have existed concerning the requirement (prior to the first-level grievance reply), the basic condition for compensation set out in clause 30.01 was satisfied, at least in a general sense. The employer's failure to provide standby compensation was, therefore, a breach of clause 30.01.

[115] I turn finally to the question of remedy. Under clause 30.01 of the collective agreement, an employee on standby is entitled to compensation ". . . at the rate of one-half (1/2) hour for each four (4)-hour period or part thereof for which the employee has been designated as being on standby duty."

[116] A significant problem in this case is that the nature of the evidence adduced makes it very difficult to fashion a specific remedy tied to specific events. The grievor tendered a range of information about the situation he experienced over many years at the CTAISB. Some of this information dated as far back as 1990. Some of it described situations that occurred after he filed his grievance. As remedy, the grievor requested standby pay for all periods, including all weekends, during which he was required to be available to return to duty outside normal work hours.

[117] I cannot grant the grievor's request in this expansive form. It is simply not reasonable to presume, for purposes of fashioning a remedy, that a standby requirement was constantly in place at all times over a wide span of years, even if the grievor felt that he was always operating under the expectation that he had to be available. The evidence suggested, for example, that there were times when Mr. Soberal or others could have provided the required off-duty coverage. Nor, on a very practical level, is it possible with the evidence placed before me to uncover the grievor's actual pattern of on-duty and off-duty hours for any but a small number of dates within what was an arbitrary time frame for the data presented on his behalf.

[118] I believe that the grievor's representative well recognized the difficulties of the grievor's position on corrective action when he chose to offer comments in the alternative about more limited corrective action. There are clear reasons that any remedy in this case should apply only to a much more limited period. At any point during his time in the Multi-Media Section, the grievor could have, but did not, submit a grievance contesting the employer's failure to provide compensation for standby. His grievance was filed on May 3, 2001. I find no reason to depart from the guidance given in *Coallier* that limits the retroactive application of a remedy to the contractual time

frame for submitting a grievance. In the collective agreement in this case, that time frame was 25 days:

. . .

> ***18.10*** *An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause 18.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

. . .

[119] I find, therefore, that corrective action cannot apply earlier than the 25th day preceding the date of the filing of his grievance. I also find that the employer's first-level reply to the grievance, dated June 27, 2001, eliminated any pre-existing confusion about the standby requirement by clearly stating that "[y]ou are not on Standby (Article 30) during off-duty hours . . ." (Exhibit E-2). Corrective action cannot apply after this date.

[120] What, then, should happen for the period starting 25 days prior to May 3, 2001, and ending June 27, 2001? Here, too, there was scarcely any information in evidence that would allow me to define what the grievor's actual off-duty hours were between those dates and what proportion of those off-duty hours should be identified as attracting an entitlement to standby compensation. I do not know, for example, whether the period included any days on which the grievor applied, and was authorized, to take paid leave. I also do not know whether the standby requirement would reasonably have been shared among more than one employee in the Multi-Media Section during this period, as is often typical in standby situations. The lack of information from the grievor along these lines is troubling.

[121] I believe that I am left with three options: (1) conclude that the lack of specific information relevant to corrective action precludes me from ordering a remedy; (2) fashion a specific remedy based on my own assumptions about what occurred over the period starting 25 days prior to May 3, 2001, and ending June 27, 2001; or (3) state a remedy in general terms and remain seized of the matter, on my own initiative, in the event that the parties are unable to work out the specific details of its implementation.

[122] Given that I have found a breach of the collective agreement, the legal principle "*ubi jus ibi remedium*" — where there is a right, there is a remedy — should apply, if at all possible. See, for example, *Waltec Components (Machining Plant) v. United Steelworkers of America, Local 9143* (1998), 69 L.A.C. (4th) 144. For this reason, I have not chosen the first option.

[123] The second option has the attraction of bringing an already protracted process to a firm conclusion. Unfortunately, in the absence of clear evidence, there are obvious risks associated with making assumptions about what occurred over the period starting 25 days prior to May 3, 2001, and ending June 27, 2001. For this reason, I have not chosen the second alternative even though I believe that the former *Act* affords an adjudicator considerable latitude in determining an appropriate order of corrective action.

[124] The third option, in my view, is the most appropriate and prudent approach to the question of remedy in the circumstances before me. Having established the explicit time frame during which corrective action shall apply — the period starting 25 days prior to May 3, 2001, and ending June 27, 2001 — I direct the parties to examine the available work records and make every effort to agree on payment of standby compensation to the grievor for this time frame. In the event that the parties are unable to agree on this payment, I will remain seized of the issue for a limited period of time.

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

(The Order appears on the next page)

V. Order

[126] I declare that the employer has breached the provisions of clause 30.01 of the collective agreement.

[127] I declare that the grievor is entitled to standby pay during the period beginning on the 25th day prior to May 3, 2001, until and including June 27, 2001. The parties are directed to consult and make every effort to agree on the amount of standby compensation owed to the grievor for this time frame. I will remain seized of the issue for a period of 60 days from the date this decision is issued in the event that the parties are unable to agree on the amount owed to the grievor and require my intervention.

August 16, 2007.

D. Butler,
adjudicator