Date: 20091204

Files: 566-34-2460 and 2461

Citation: 2009 PSLRB 160

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CORNELIUS J. COOPER AND DEREK WAMBOLDT

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Cooper and Wamboldt v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievors: Douglas Hill, Public Service Alliance of Canada

For the Employer: Anne-Marie Duquette, counsel

Heard at Charlottetown, Prince Edward Island,
October 29, 2009.

I. Grievances referred to adjudication

[1] Cornelius J. Cooper (PSLRB File No. 566-34-2460) and Derek Wamboldt (PSLRB File No. 566-34-2461) ("the grievors") are employed by the Canada Revenue Agency ("the employer") at the CR-02 group and level. On July 21, 2006, each of them filed a grievance claiming that they were entitled to acting pay pursuant to clause 64.07(a) of the agreement between what was then the Canada Customs and Revenue Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Services Group, expiry date October 31, 2007 ("the collective agreement"). They claim acting pay at the GS-STS-04 group and level.

[2] I must decide whether the requirement directing the grievors to unload mail and perform other associated duties at a loading dock located in Summerside, Prince Edward Island, requires the employer to pay acting pay. Specifically, clause 64.07(a) of the collective agreement states as follows:

> ***64.07***
>
> *(a)* *When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least three (3) consecutive working days or shifts, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.*

II. Procedural issue

[3] At the start of the hearing, counsel for both parties advised me that the evidence called with respect to Mr. Wamboldt's grievance would apply to both grievances.

[4] Additionally, the parties agreed to proceed only on the merits of the grievance. It was agreed that, if I were to conclude that the collective agreement had been violated, and the parties were unable to agree on an appropriate remedy, then a further hearing date would be set, where the appropriate remedy could be argued.

[5] The grievors submitted that any remedy should start from December 2006. The employer did not agree. It suggested that the collective agreement dictated a time

frame during which a grievance could be filed and that the Federal Court of Appeal had clearly enunciated on this issue. The parties agreed that the timeliness issue and determining the start of the remedy could form part of the overall argument on remedy if it were ultimately necessary.

III. Summary of the evidence

[6] Mr. Wamboldt was the only witness called in support of the grievances. The employer called Denise Murchison, presently a team leader for the employer's Registrant Identification Program, who at the time of the grievances was the team leader for administrative services, and Calvin Desroches, who for the last four-and-a-half years has been the manager of administrative services.

[7] Mr. Wamboldt was a mail services clerk at the CR-02 group and level. His evidence, as well as that of Ms. Murchison and Mr. Desroches, was that mail services clerks worked in the mailroom where they received, sorted and distributed mail to employees at the Summerside, Prince Edward Island site ("the site"). On a number of occasions, Mr. Wamboldt was assigned to work at the loading dock as an acting stores and distribution technician. On those occasions, Mr. Wamboldt received acting pay at the GS-STS-04 group and level.

[8] However, the more pertinent evidence, which relates to the grievances before me, was about certain early morning duties assigned to the grievors. Discrepancies arose in the evidence as to the extent of those duties. Having considered Mr. Wamboldt's evidence, it is my view that he often became confused between the duties that he performed as a mail services clerk and those that he performed while acting as a stores and distribution technician. As such, where there was a variance in the testimony, I was inclined to accept the testimonies of the employer's witnesses.

[9] In reaching that conclusion, I noted that Mr. Wamboldt forgot when he acted as a stores and distribution technician. During both direct examination and cross-examination, Mr. Wamboldt was unable to recall the dates of his acting assignments, was unable to clearly articulate exactly when he performed certain duties and generally did not respond with any specificity to the questions being asked of him. I wish to be clear that I am of the view that Mr. Wamboldt's confusion was entirely innocent and that he was in no way attempting to mislead me. I also would note that,

even had I accepted Mr. Wamboldt's evidence, my conclusion would not have changed, as I will discuss later in my reasons.

[10] In any event, at the time he filed his grievance, Mr. Wamboldt, as a mail services clerk, was required to report to work at 04:00 or 04:30. The other mail services clerks normally report to work at 05:00. Mr. Wamboldt, unlike the other mail services clerks who reported to the mailroom, started work at the loading dock, which is about 80 to 100 meters from the mailroom. Initially, a shipping employee was at the loading dock when the grievors reported for work at 04:00 but that later changed, after which the grievors were the only employees there at 04:00.

[11] Mr. Wamboldt was required to report to the loading dock before the other mail services clerks to unload the two mail trucks (one from Moncton, New Brunswick, and the other from Halifax, Nova Scotia) that were scheduled to arrive between 04:00 and 05:00. Mr. Wamboldt and his co-worker, now Mr. Cooper, were given keys to the loading dock.

[12] On arrival, the grievors would make certain that the loading dock area was cleared so that when the mail trucks arrived they could efficiently unload them. To clean the area, they could have used either a forklift or a walkie pallet truck. Mr. Wamboldt testified that he was qualified to use either piece of equipment. I conclude that on a balance of probabilities this work took about 15 to 30 minutes.

[13] Mail trucks carried two types of mail. I will refer to the first type as regular mail that, when unloaded, was simply transported to the mailroom. When the other mail services clerks arrived at around 05:00, they sorted and delivered it to employees throughout the site.

[14] I will refer to the second type as registered mail. This mail had to be verified by Mr. Wamboldt, who was responsible for reconciling it with the receipt from the mail truck. Once the reconciliation process was complete, Mr. Wamboldt would sign the receipt, which was eventually delivered to another mail truck that arrived later in the day to pick up outgoing mail. Then he would deliver the registered mail to the mailroom. At that point, he would assist the other mail services clerks in sorting and delivering mail to the site employees.

[15] I conclude that, based upon a balance of probabilities, depending on the volume delivered, processing regular mail could take from 30 to 60 minutes. Again, depending on the volume delivered, processing registered mail could take another 30 to 90 minutes. Mr. Wamboldt confirmed my conclusions about the time it took the grievors to perform the tasks. He testified that he would usually be at the loading dock from 04:00 to no later than 08:00.

[16] As for unloading the mail trucks, Mr. Wamboldt would normally use either the walkie pallet truck or the forklift. It would of course depend on the amount of mail that was in the mail truck and how it was contained. In addition, on occasion the mail in the truck might have tipped over, so Mr. Wamboldt would then have to use the manual pallet jack to free up the containers.

[17] During his testimony, Mr. Wamboldt was asked to compare the work he performed as a mail services clerk to the "Key Activities" of the stores and distribution technician position, which was at the higher classification level of GS-STS-04 (Exhibit 4, tab 2, page 2). Mr. Wamboldt testified that he performed most of the "Key Activities." However, it was at this point that it became evident that he was becoming confused as to when he might have done the listed tasks. For instance, the first task listed was the following: "Receives, inspects, verifies, quantities and condition, secures, warehouses and distributes materiel, including forms, office supplies, office furniture and other goods." By its very nature, distributing office supplies and furniture had to be done after 08:00, when the general office was open. However, Mr. Wamboldt's evidence was that his work as a mail services clerk on the loading dock normally was done by 08:00. Thus, he could not have performed that key activity as a mail services clerk.

[18] As I reviewed the list of the "Key Activities" of the stores and distribution technician, I noted that Mr. Wamboldt simply could not have done several others between 04:00 and 08:00. As a further example, one of the "Key Activities" was the following: "Plans and prepares photocopying and reproduction services for internal and public clients to provide forms and service." It is another task that simply could not and would not have been performed between the 04:00 and 08:00 timeframe.

[19] The testimonies of Ms. Murchison and Mr. Desroches confirmed that the early morning task assigned to Mr. Wamboldt, and indeed to other mail services clerks from time to time, was to unload the mail trucks. While there may have been an incidental

requirement to clear the loading dock to allow for efficient unloading, that was all it was.

[20] The witnesses referred to the part of the mail services clerk job description (Exhibit 4, tab 1) that states as follows: "Receives, processes and delivers departmental mail for all areas of the Taxation Centre." Under the title "Environment," it states that the mail services clerk may have "[e]xposure to cold and fumes when receiving mail on the loading dock."

[21] In his testimony, Mr. Wamboldt suggested that the employer hired two new employees as stores and distribution technicians to perform the tasks that he used to perform as a mail services clerk. However, no evidence was adduced to support his statement, and therefore, I do not accept it as a fact but rather as an unsubstantiated statement.

IV. Issue to be decided

[22] The issue before me is easily stated. I must determine if the employer's assignment of Messrs. Wamboldt and Cooper to loading dock duties falls within the purview of clause 64.07(a) of the collective agreement, thus entitling the grievors to acting pay.

V. Positions of the parties

A. The grievors

[23] The grievors take the position that being assigned to unload the mail trucks that arrived at the loading dock early in the morning was a requirement by the employer that the grievors ". . . substantially perform the duties of a higher classification level in an acting capacity . . . " namely at the GS-STS-04 classification and level. Because the assignment lasted for more than three consecutive "days or shifts," they are entitled to be paid acting pay in accordance with clause 64.07(a) of the collective agreement.

[24] The grievors' representative relied very much on a statement made in the third-level response to the grievance. Peter Estey, Assistant Commissioner, Regional Operations – Atlantic, stated the following: "Nonetheless, I am concerned that the requirement to use a forklift to unload the mail truck may fall outside the duties described in your CR-02 work description and will be asking management to review this assignment of duties by April 30, 2007" (Exhibits 1 and 2).

[25] Counsel for the grievors referred me to the following authorities: *Rice v. Treasury Board (Department of National Defence)*, 2004 PSSRB 128; *Lavigne et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 117; and *Bégin et al. v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File Nos. 166-02-18911 to 18917 (19900207).

B. The employer

[26] The employer, on the other hand, submits that these grievances should be dismissed for three reasons. First, the employer argues that the grievors did not substantially perform the duties of a higher classification level, as required by clause 64.07(a) of the collective agreement. The employer submits that at best the grievors may have incidentally performed some of the duties of the higher group and level and then only for a period of no more than the two to three hours per day that Mr. Wamboldt worked at the loading dock.

[27] In response to the grievors' submission concerning the third-level grievance response, counsel for the employer pointed out that the author used the word "may." According to her, that can in no way be considered an admission by the employer.

[28] Second, the employer states that the grievors did not perform the duties in an acting capacity, which is also required by clause 64.07(a) of the collective agreement. On that note, the employer acknowledges that there may have been overlapping responsibilities between the functions of a mail services clerk working on the loading dock and those of a stores and distribution technician but that it does not amount to the mail services clerk acting at a higher group and level.

[29] Finally, the employer suggests that, because the grievors were performing the duties only for two to three hours per day, even if all the other requisites of clause 64.07(a) of the collective agreement were met, the grievors could not have acted for a period of three "consecutive days or shifts."

[30] In support of the employer's testimony, counsel for the employer referred me to the following authorities: Ronald M. Snyder, *Collective Agreement Arbitration in Canada*, 4th Ed. (Markham ON: LexisNexis, 2009), at para 2.10; *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (F.C.A.); *Lamy and Pichon v. Treasury Board (Department of Public Works and Government Services)*, 2008 PSLRB 23; *Babiuk et al. v.*

Treasury Board (Department of Citizenship and Immigration), 2007 PSLRB 51; *Doiron v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 77; *Beaudry et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2006 PSLRB 75; *Moritz v. Canada Customs and Revenue Agency*, 2004 PSSRB 147; *Shearer v. Canadian Food Inspection Agency*, 2002 PSSRB 82; *Dufour v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-25151 (19950126); and *Armitage et al. v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File Nos. 166-02-17104 to 17109 (19880517).

VI. Analysis

A. The state of the law for interpreting clauses of a collective agreement

[31] Several courts have provided guidance to decision makers on contract interpretation.

[32] My first task is to determine the parties' true intent when they entered into the contract. To accomplish that task, I must first refer to the meaning of the words as used by the contracting parties (see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, and *Jerry MacNeil Architects Ltd. v. Roman Catholic Archbishop of Moncton et al.*, 2001 NBQB 135).

[33] In considering this issue, I must also take into account the context in which the words are used (see *Stenstrom v. McCain Foods Ltd.,* 2000 NBCA 13, and *Robichaud et al. v. Pharmacie Acadienne de Beresford Ltée et al.*, 2008 NBCA 12, at para 18).

[34] The use of that approach by adjudicators has found favour with many courts, especially the New Brunswick Court of Appeal. A judge of the New Brunswick Court of Appeal in *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 2002 NBCA 30, in a well-reasoned decision, stated as follows:

. . .

> *[10] It is accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts: see D.J.M. Brown & D.M. Beatty,* Canadian Labour Arbitration *(3rd Ed.), looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2001) at 4-35. In the contractual context, you begin with the proposition that the fundamental object of the interpretative exercise is to ascertain the intention of the parties. In turn*

> *the presumption is that the parties are assumed to have intended what they have said and that the meaning of a provision of a collective agreement is to be first sought in the express provisions. In searching for the parties' intention, text writers indicate that arbitrators have generally assumed that the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency with other provisions of the collective agreement: see* Canadian Labour Arbitration *at 4-38. In short, the words of a collective agreement are to be given their ordinary and plain meaning unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.*
>
> . . .

B. <u>Interpretation of clause 64.07(a) of the collective agreement</u>

[35] So, starting with the assumption that the parties intended what they said and that the meaning of the collective agreement is to be sought in its express provisions, I must determine the meaning of the following phrase:

> *When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least three (3) consecutive working days or shifts.*

[36] In determining the plain and ordinary meaning, the starting point is that the parties are presumed to have intended to mean what the document states. Occasionally, an arbitrator or adjudicator may be required to imply a term. However, that occurs only when it is necessary to give the collective agreement "business or collective agreement efficacy" and only if it is determined that the parties would have agreed to the implied term without hesitation had they been apprised of the deficiency (see Brown and Beatty, *Canadian Labour Arbitration*, at 4:2100).

[37] In my view, clause 64.07(a) of the collective agreement is not deficient and can be interpreted without the necessity of implying a term.

[38] It seems to me that clause 64.07(a) of the collective agreement by its very nature requires the grievors to establish that four things have occurred. They are as follows:

- There must be a requirement by the employer that the employee perform certain duties.

- The employee must be required to substantially perform duties at a higher classification level.
- The employee must perform those duties in an acting capacity.
- The employee must perform those duties for at least three (3) consecutive working days or shifts.

C. Did the employer require the grievors to perform the duties in question?

[39] Both parties acknowledged that the employer required the grievors to perform the duties in question. As a result, I have no hesitation in concluding that the first element of the test has been met.

D. Were the duties performed by the grievors substantially those of a higher classification level?

[40] In considering this question, I must first determine if the duties performed by the grievors were those of a higher classification level. There is no doubt unloading mail on the loading dock, in particular using the forklift and walkie pallet truck, would clearly fall within the job description of a stores and distribution technician at the higher classification level of GS-STS-04. However, this does not answer the question.

[41] Job descriptions are not mutually exclusive. Rather, unless otherwise stated, it can be expected that, to allow the employer to manage its workforce, two or more classifications may overlap. So, the question before me becomes whether the mail services clerk job description, classified at the CR-02 group and level, allows the employer to assign the tasks in question to materiel handling clerks.

[42] I have already concluded that, based upon a balance of probabilities, the tasks that the grievors performed as mail services clerks that were claimed to be those of a stores and distribution technician were incidental to their work. In reaching that conclusion, I reviewed the testimonies and the several job descriptions adduced into evidence.

[43] It is also my conclusion that, based upon the evidence adduced, the mail services clerk job description is sufficiently broad to allow the employer to require that the grievors attend work early in the morning to unload the mail truck(s). It is my view that using the different equipment at the loading dock was incidental to performing their duties.

[44] In addition, I conclude that the mail services clerk job description is broad enough to include the assigned tasks of unloading the mail early in the morning. I specifically note that the job description, under the heading "Physical Requirement," anticipates the use of walkie pallet trucks and that further, under the heading "Environment," it indicates that mail services clerks may have "[e]xposure to cold and fumes when receiving mail on the loading dock." In my view, it is only reasonable to conclude that the work in question is within the parameters of the work the employer could expect qualified mail services clerks to perform.

[45] In drawing this conclusion, I reject the submission of counsel for the grievors that the third-level response from Mr. Estey was an acknowledgement of a violation of the collective agreement. In my view, on a clear reading of the reply, the comment is no more than a concern.

[46] As a result of this conclusion, I could dismiss the grievances, but in case I am incorrect in my determination, let me continue with the analysis. In other words, even if I am incorrect in my conclusion, and the job assignment is within the higher classification level of a stores and distribution technician, did the grievors "substantially perform" the duties?

[47] The jurisprudence concerning what might be considered "substantially performed" is varied. I accept the grievors' proposition that an employee does not have to perform all the duties of the higher classification level to receive acting pay (see *Rice*, at paragraph 7).

[48] However, there is no consistency in the jurisprudence. Many tests have been established; for instance, performing the duties of the higher classification level for 100% of the time for one day has been decided as meeting the "substantially performed" test (see *Lavigne et al.*, at paragraph 54). Another case has concluded that 40% of an employee's time spent on the work of the higher classification level does not meet the test of "substantially performed" (see *Beaudry et al.*, at paragraphs 29 to 33). But, if the employee performs the work of the higher classification level 70% of the time, it meets the test (see *Bégin et al.*).

[49] Based on a balance of probabilities, if using the forklift and walkie pallet truck were duties within the higher classification level, I conclude that at most the grievors would have used those pieces of equipment for no more than two hours per day. This

would amount to, at most, 25% of their workday, which is well below any level that has been accepted by adjudicators in previous decisions. Thus, even if I am incorrect in my conclusion that the work in question is within the job description of the mail services clerk, the grievors do not meet the "substantially performed" criteria of clause 67.04(a) of the collective agreement.

E. Did the grievors perform the duties in an "acting capacity?"

[50] Although I do not need to apply this test, if I had to, I would not conclude that the grievors performed the duties in question in an "acting" capacity, as is required for clause 67.04(a) of the collective agreement to apply. In reaching that conclusion, I would adopt the rationale of the adjudicator in *Babiuk et al.* Essentially, if there is any merit to the grievors' concerns, then in my view they would more properly have been about classification and not acting pay.

F. Did the grievors perform the duties for at least three consecutive days or shifts?

[51] Again, given my conclusions above, I am not required to consider this question, but had I been, I would have accepted that the decision in *Dufour* (at page 5) is correct. In other words, I would not have been convinced that the grievors had satisfied the three-consecutive-day requirement of clause 67.04(a) of the collective agreement.

G. Does the interpretation of the collective agreement or its application lead to an absurdity?

[52] Having reached this conclusion, I now need to consider whether this interpretation leads to an absurdity or inconsistency with other provisions of the collective agreement. Put another way, is the interpretation of the words, read in their immediate context and in the context of the agreement as a whole, in conflict with other provisions of the collective agreement?

[53] Neither party suggested that this interpretation of clause 64.07(a) of the collective agreement would be in conflict with any other provision. Additionally, after my independent review of the collective agreement, I am convinced that my interpretation does not conflict with any other provision.

VII. Reasons

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

(The Order appears on the next page)

VIII. Order

[55] The grievances are dismissed.

December 4, 2009.

George Filliter,
adjudicator