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Public Service Staff Relations Act

Before an adjudicator

BETWEEN

CHERYL SCANLON AND RANDY CHRISTIANSON

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Scanlon and Christianson v. Canada Revenue Agency

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

REASONS FOR DECISION

Before: John Steeves, adjudicator

For the Grievors: Arlene Francis, Professional Institute of the Public Service of Canada

For the Employer: Chris Bernier, Counsel

Heard at Vancouver, British Columbia,
October 8 to 10, 2008.
(Written submissions filed November 12 and December 1 and 8, 2008.)

REASONS FOR DECISION

Grievance referred to adjudication

[1] This grievance is about whether the Canada Revenue Agency's ("the employer" or CRA) decision to remove Cheryl Scanlon and Randy Christianson ("the grievors") from the standby Help Desk list, during off-hours and weekends, was reasonable and otherwise consistent with the collective agreement and arbitral jurisprudence.

[2] The collective agreement in force for these grievances is the "Agreement between the Canada Customs and Revenue Agency (the name of the employer has subsequently been changed to Canada Revenue Agency) and the Professional Institute of the Public Service of Canada", which expired December 21, 2003.

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

Summary of the arguments

[4] The bargaining agent submits that the removal of the grievors from the standby Help Desk list meant that they could not receive the overtime they had in the past. This resulted in a significant loss of income and it is contrary to two provisions of the collective agreement, articles 9 and 11. Read together, according to the bargaining agent, the employer's decision to remove the grievors was not equitable and it was arbitrary. As well, the grievors were never given any explanation as to the reasons for their removal from the standby Help Desk list.

[5] The employer submits that articles 9 and 11 of the collective agreement must be read separately and there was no inequitable distribution of overtime. Its decision to remove the grievors from the standby Help Desk list was a reasonable exercise of management rights, based on cost savings and efficiency, according to the employer.

Background

[6] The employer had broad responsibility for the collection of revenue for the Government of Canada, including responsibility over customs and excise. The events giving rise to this grievance arose in the British Columbia region of the employer.

[7] Within the employer's operations was an information technology (IT) component and within that component there was a Regional Help Desk. The employees working at the Help Desk were available to respond to various technical questions from other employees of the employer. For example, a common complaint from employees was the inability to obtain access to computers and passwords may need to be changed.

[8] The Help Desk was available to employees during the day, Monday to Friday. During this period, when employees had a problem, they phoned the Help Desk and spoke directly to a person. The person receiving the call either fixed the problem or passed it on if the person receiving the call could not resolve the problem. The term "escalates" is used to describe this passing on.

[9] The situation was different during the off-hours and weekends. There was a list of people who were selected to be members of a standby list for the Help Desk and they were assigned specific times to be available. On call employees had a pager and a laptop computer. If someone had a technical problem after hours, he or she phoned the same help number as during the day but the call was forwarded to the pager of the person on standby. If the person receiving the call could not fix the problem, it was escalated to a different level, often in Ottawa. Unlike during the day, the standby technical person was responsible for monitoring the problem and making sure that it was dealt with in some way, even though it may have been escalated to a different level.

[10] When an employee is on standby, article 11 of the collective agreement provides that he or she shall be compensated at the rate of one-half hour for each four-hour period or portion for which the employee is designated as being on standby duty. Further, when a standby employee actually takes a call, article 11.04 provides for the payment of a minimum of three hours at the overtime rate, once during the overtime period.

[11] The off-hours work of the Help Desk began in the middle 1990's by servicing primarily the customs work of the employer because work at airports and at the borders was done at all hours and on all days of the week. The precise details of the beginnings of the standby Help Desk are not available but it is clear that there was a preference, if not a need, for employees to have a background in customs because customs has particular computer systems. The standby help service has now expanded from the customs area into a broad service available to many different aspects of the employer's operations.

[12] Two classifications are primarily at issue in these grievances. One is called an Information Technology Analyst or CS-01 and the other is an Information Technology Technical Specialist, or CS-02. The CS-02 position is paid at a higher rate than the CS-01 position.

[13] The grievors previously worked at the CS-01 level but in 2000, Mr. Christianson became a CS-02 and in 2001, Ms. Scanlon also became a CS-02. Both grievors have a background in customs and they testified that they started in the early days of the standby Help Desk (in the mid 1990s) when customs was the primary focus of the standby desk. The evidence is that the grievors worked on the standby list about five or six times a year, on rotation with other employees, and they earned $1000 to $1500 net per week for being on standby. The bargaining agent estimates annual earnings for this work at about $10,000, and the employer does not dispute this figure.

[14] In April 2003, the grievors were told by telephone that they were no longer going to be placed on the standby Help Desk list. The precise date of that call is not available and neither are the details of the conversation. However, it is clear that the reason that the grievors were taken off the standby list was that they were at a CS-02 level and the employer decided that only CS-01 employees would be placed on the list. As noted above, it is agreed that CS-01s are paid less than CS-02s and this change resulted in a cost saving for the employer.

[15] According to the employer, the change to using only employees classified as CS-01 from the standby list was only one of many changes. Mr. Stephen Elliott, Senior Manager, CRA, testified that there were a number of pressures at the time. While the focus was on efficiencies, Mr. Elliott said that the objective was also on saving money. These changes affected all parts of the IT component of the employer. Mr. Elliott testified about a number of meetings in early 2003 and about the same time, the

employer was required to implement a budget cut of about ten percent. These changes were discussed at a high level at an Economies Committee, at "horizontal reviews" and at something called "A-9".

[16] Both grievors acknowledged in their testimony that there were economic pressures on the employer in 2003. However, they are skeptical that these pressures resulted in their removal from the standby Help Desk. They are also concerned that no one really explained to them the reason for their removal. When they were told that they were removed from the standby desk, the grievors made a number of inquiries as to why. Specifically, they challenged the employer's assertion that the change would result in savings of $7000 per year (and they continue to challenge that figure). There was an email exchange between the grievors and their supervisor at the time on this issue, and it is discussed below.

[17] Therefore, within the context of the collective agreement and management rights generally, these grievances challenge the reasons for the employer's decision to remove the grievors from the standby Help Desk list, as well as the process around that decision.

Preliminary Issue

[18] At the commencement of the hearing into these grievances, the employer raised a preliminary objection. It submitted that the grievances related only to article 9 of the collective agreement and, in particular, they did not relate to article 11. The bargaining agent's position was that both articles were included in the grievances.

[19] I heard the parties' oral submissions during the hearing and decided that the grievances included both articles 9 and 11. My reasons for that decision follow.

[20] Both grievances include the following language:

> *I have been denied the opportunity to work overtime on the on-call schedule in violation of Article 9.03 (b) of the current CCRA-AFS collective agreement.*

[21] According to the employer, the reference to article 9 means that only that provision is at issue (i.e. clause 11.02 is not part of the grievance). Clause 9.03(b) of the collective agreement is as follows:

> *9.03(b) Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*

[22] With regards to remedy, each of the grievances request that the grievors be "restored to the on-call schedule". It is agreed that "on-call" refers to standby. I take this opportunity to set out all of article 11 because it describes the on-call or standby procedures as follows (as noted above, clause 11.02 is particularly at issue in these grievances, specifically the last sentence):

> *11.01 When the Employer requires an employee to be available on standby during off-duty hours an employee shall be compensated at the rate of one-half (1/2) hour for each four (4) hour period or portion thereof for which he has been designated as being on standby duty.*
>
> *11.02 An employee designated by letter or by list for stand-by duty shall be available during his period of stand-by at a known telephone number and be able to return for duty as quickly as possible if called. In designating employees for stand-by duty the Employer will endeavour to provide for the equitable distribution of stand-by duties.*
>
> *11.03 No standby duty payment shall be granted if any employee is unable to report for duty when required.*
>
> *11.04 An employee on stand-by duty who is required to report for work shall be paid, in addition to the stand-by pay, the greater of:*
>
> *(a) the applicable overtime rate for the time worked;*
>
> *or*
>
> *(b) the minimum of three (3) hours' pay at the applicable rate for overtime; except that this minimum shall only apply once during a single period of eight (8) hours' stand by duty.*
>
> *11.05 Other than when required by the Employer to use a vehicle of the Employer for transportation to a work location other than an 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.*
>
> *11.06 Compensation earned under this Article shall be compensated in cash except where, upon application by the employee and at the discretion of the Employer, such*

> *compensation may be taken in the form of compensatory leave in accordance with clauses 9.04 and 9.05 of Articles 9, Overtime.*
>
> ***Alternate Provisions***
>
> ***Clauses 11.07 and 11.08 apply to employees classified as CS only.***
>
> *11.07 When an employee on stand-by duty is called back for work under the conditions described in clause 11.04 and is required to use transportation services other than normal public transportation services, he shall be compensated in accordance with clause 10.04 of this Agreement.*
>
> *11.08 The Employer agrees that in the areas and in the circumstances where electronic paging devices are both practicable and efficient they will be provided without cost to those employees on standby duty.*

[23] The evidence on this preliminary issue also included the employer's responses at various levels of the grievance procedure. At the Level 1 response, dated May 21, 2003, the employer discussed the grievance including a reference to "creating an on-call schedule which will offer overtime work on an equitable basis" among employees as part of the grievance. The Level 2 and 3 responses also refer to and discuss "on-call support", "stand-by duties" and "on-call duties" as part of the grievance. As well, the final reply from the employer, on October 10, 2006, stated that the employer had "found that although your grievance pertains to clause 9.03(b) on overtime, this matter is one of Standby duties".

[24] From the above evidence, it is evident that the grievances do not specifically refer to article 11 of the collective agreement. However, the grievances do refer to the "on-call schedule" and this is clearly a reference to article 11. Further, there seems little doubt that the employer knew that the grievances were about overtime and on-call or standby schedules, i.e. articles 9 and 11, since all the employer's responses to the grievance discuss both of those issues.

[25] In these circumstances I confirm my previous decision that the grievances are sufficiently detailed on their faces about the issue of on-call/standby schedules and the employer had notice of the nature of this issue at all levels (*Shneidman v. Canada (Customs and Revenue Agency)*, 2007 FCA 192, at para 27). Standby schedules under article 11 of the collective agreement are, therefore, part of the grievances before me, as is the issue of overtime under article 9.

Decision and Reasons

[26] To begin, there is something of an interpretive issue between the parties that is necessary to resolve. The bargaining agent submits that these grievances are to be decided under clause 9.03(b) of the collective agreement and I set out that provision again for convenience:

> *9.03(b) Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*

[27] The bargaining agent submits that this is "mandatory" language and it disputes that the employer has presented any evidence of "operational requirements" in this case. Therefore, according to the bargaining agent, the employer was required to offer overtime "… on an equitable basis among readily available qualified employees" such as the grievors and it was "mandatory" to do so. Since the grievors were not offered any overtime (by means of work on the standby Help Desk), the employer has violated clause 9.03(b), according to the bargaining agent, and they rely on the decision in *Zelisko and Audia v. Treasury Board (Citizenship and Immigration Canada),* 2003 PSSRB 67, among others.

[28] On the other hand the employer relies on clause 11.02 of the collective agreement and I also set out that provision again:

> *11.02 An employee designated by letter or by list for stand-by duty shall be available during his period of stand-by at a known telephone number and be able to return for duty as quickly as possible if called. In designating employees for stand-by duty, the Employer will endeavour to provide for the equitable distribution of stand-by duties.*

[29] According to the employer, clause 11.02 permits them, as a matter of management rights, to decide which employees will be on "standby duty" as long as the decision is not made arbitrarily, capriciously or without any reason. In this case, the employer submits that its decision to remove the grievors from the standby list was made for valid economic reasons and therefore there was no violation of clause 11. 02.

[30] In my view, clause 11.02 is the more specific provision and the one requiring primary consideration in this case (Brown and Beatty, *Canadian Labour Arbitration*, Fourth Edition, paragraph 4:2120). It is true clause 9.03(b) discusses overtime but it

does not specifically refer to overtime while working at the standby Help Desk. Therefore, it applies to overtime generally, not just to overtime while working on the standby Help Desk. In contrast, article 11 speaks directly to the issue of the standby Help Desk. This includes overtime while doing that work as set out in clause 11.04. As above, it states that the rate paid to an employee on the standby list who is required to report to work shall be paid the greater of "the applicable overtime rate for the time worked" or a minimum amount set out in clause 11.04. Overall, clause 11.02 is the starting point for issues involving the standby Help Desk in this case (although, as will be seen, I have considered both provisions as a basis for an interpretive issue).

[31] Turning to the specific interpretation of clause 11.02 of the collective agreement, I note the last sentence, "In designating employees for standby duty the employer will endeavour to provide for the equitable distribution of standby duties." This is somewhat indirect language, but it is nonetheless clear that the employer has the contractual right to designate or select employees for the standby list. However, that right is fettered by the requirement that the employer "… will endeavour to provide for the equitable distribution of standby duties. [emphasis added]". The word "endeavour" is defined as meaning "to exert physical and intellectual strength toward the attainment of an object. A systematic or continuous effort"(*Black's Law Dictionary,* Fifth Edition (1979), at page 473). A similar meaning is "an undertaking or effort directed to attain an object" or "an earnest or strenuous attempt" (*The Canadian Oxford Dictionary*, Oxford University Press (1998), at page 460).

[32] An important element in these definitions is the idea of "attempt" or "toward attainment." I say this because clause 11.02 does not require the employer to provide for the equitable distribution of standby duties. Rather, in order to satisfy this provision, the employer must exert a significant effort to attain the object of equitable distribution of standby duties. Further, there may be reasons that prevent the employer from attaining this objective. However, as long as those reasons are not arbitrary (i.e. they are rationally connected to a legitimate business objective), discriminatory or made in bad faith, and significant effort was made to overcome the reasons not to distribute standby duties equitably, there may still be compliance with clause 11.02. Turning to the reference to "equitable distribution" of standby duties this is obviously intended to distribute the benefit of the time-and-one-half rate while on standby equitably among employees. Therefore, the employer must also apply the opportunity for employees to work on the standby list equitably.

[33] Applying this analysis to the grievances before me, clause 11.02 cannot be read to require the employer to designate employees for standby duty on an equitable basis in any circumstance. Specifically, it is undisputed that the grievors are qualified and have the experience to work at the standby Help Desk but, as a matter of interpretation of this contractual provision, this does not mean that the employer must assign them that work on an equitable basis.

[34] Significantly, I also note that article 11 does not address the issue of removing employees from the standby Help Desk list; it only describes in clause 11.02 how employees are designated for standby work or get placed on the standby list with the phrase, "In designating employees for standby duty… [emphasis added]". On the other hand, it cannot be said that this language prevents the employer from removing employees from standby duty. Indeed, it may be more logical to conclude that the right to put employees on the list includes the right to remove employees from the list, but neither party raised that issue. In addition, there is no evidence to explain the bargaining history of this provision and, in particular, there is no evidence to explain why the removal of employees from the list was not addressed.

[35] Another approach to determine the parties' intention about the removal of employees from the standby Help Desk might be to read clause 11.01 together with clause 9.03(b). That has some initial attraction since the latter includes operational requirements and it could be considered as a basis for removal of employees from the standby Help Desk. However, clause 9.03(b) is directed at "excessive overtime" and the "offer" of overtime, rather than the denial of overtime through standby work. The result is the same: the parties have not expressly addressed the removal of employees from the standby Help Desk.

[36] Therefore, the issue is one about the exercise of management rights and I conclude that, in the absence of a provision about the removal of employees from the standby Help Desk list, the employer has a discretion about whether someone should be removed from that list. The arbitral jurisprudence requires that this discretion be exercised reasonably and for a business purpose (Brown and Beatty, at paragraph 4:2300). Implicit in this standard of reasonableness is that my inquiry, as an adjudicator of the grievances in this case, is not into the correctness of the employer's decision. There may be more than one result that is a reasonable exercise of

management rights and the fact that I might have made a different decision is not the test.

[37] In this case, no one takes the position that the employer is prohibited from removing an employee from the list under any circumstances – the issue is whether the employer can remove the grievors in the circumstances of this case. Therefore, in terms of the above analysis, the issue is: was the employer's decision to remove the grievors from the standby Help Desk unreasonable or made without a legitimate business purpose?

[38] The facts in this case are that the grievors had the opportunity to be on the list for a number of years and then were removed from the list. The reason they were removed was that they were classified as CS-02 and the employer wanted to save money by using employees classified at the lower paid classification of CS-01. Clause 11.02 is not particularly helpful to the grievors here because it goes no further than requiring that the employer must make a significant effort to distribute equitably the work on the standby list. It does not say that the employer is required to distribute the standby work equitably to, for example, "all employees." As well, such an interpretation is problematic because, for example, it does not permit consideration of whether employees are qualified to be on the standby list. Therefore, the decision as to what group of employees the employer draws on for the standby list also appears to be a discretionary one, again subject to a reasonableness standard.

[39] The issue of whether the removal of the grievors from the standby Help Desk list actually resulted in any cost savings was very much an issue in the evidence. Broadly speaking, it is clear that there were a number of budgetary pressures on the employer and specifically on its IT functions at the material times. The evidence is that these pressures resulted from a 10 percent reduction in the budget and that reduction followed a significant review of IT operations including cost. According to the employer, this situation resulted in a number of cost-saving decisions, including eliminating CS-02s from the standby list as well as reductions in training, travel and other matters. This is not in dispute since both grievors testified that they knew of the budgetary pressures on the employer.

[40] The grievors specifically challenge whether their removal from the standby Help Desk list resulted in a significant savings to the employer. As a result of their inquiries

on this issue, Mr. Oke Millett, Assistant Director, CRA, wrote an email on April 14, 2003. Among other things Mr. Millett stated the following:

[…]

> *Darlene has re-examined the figures, and arrived at the following:*
>
> *Where CS-1 staff are at the top of their payscale, the salary difference between them and a CS-2 at the 4th increment is small. Savings between a level 4 CS-2 and a level 15 CS-1 amount to only $200.00 per year (if the CS-1 and the CS-2 incur the same number of hours of OT – an assumption we made for this model). However – where CS-1 staff are at the midrange (level 9), savings are much more tangible – approximately $2500 per year. Furthermore, if we were to continue the practice of allowing CS-2 personnel participating in the on-call, CS-2 staff being paid beyond the 4th pay increment would incur incrementally greater expenses again. Our current CS-1 staffing profile (6 individuals) at the helpdesk ranges between CS-1 staff at between the 9th and 15th increments.*
>
> *When we couple the expected savings with plans to reduce (where feasible) the volume of afterhours calls received, our cost-savings increase exponentially using CS-1 personnel. Therefore, our estimated savings of $7000 per year is in my opinion, justified based on a combination of lower salary costs and reduced call volume.*
>
> *I anticipate continuing to use CS-2 personnel after hours for emergency site visits/problem resolution, where such a callout is justified based on priority/severity. These callouts would not be on a formal 'on-call' basis, but on an as-needed and as-available basis. (For example – if a CS-2 were called after hours and asked to report to a site to resolve a problem, there is no contractual requirement for this person to be available for contact, and they would be within their rights to decline the work. This is because they are not officially 'on-call', nor are they receiving on-call pay under to the collective agreement).*
>
> *There were no compelling differences in the frequency of escalated calls to the CS-3 or MG-6 level when comparing CS-1 to CS-2 personnel. Essentially the only calls escalated are ones where there is a question whether to attend the site in person after hours – and EACH of these situations requires escalation, no matter if the call is taken by a CS-1 or a CS-2.*
>
> *The bottom line is that there are real, measurable cost savings in no longer having CS-2 personnel perform on-call*

> *duties. This will place an emphasis on training and development of our CS-1 staff to deliver high-quality support during after-hours, and the nature of the work we expect to be performed after hours is at the CS-1 level. Furthermore, these plans fit in with our continued work to better structure the helpdesk, move to better scripts/knowledge base functions, and to better formalize the number of staff in the on-call 'pool', and to better structure the problem resolution expectations when working on-call.*
>
> […]

[41] The grievors rely on the reference to a savings of $200.00 per year and they submit that this was not a significant enough reason to remove them from the standby rotation list in April 2003. However, a reading of Mr. Millett's email indicates that was a minimum amount of savings based on what might be described as very conservative figures. As he stated, Millett's view was that the estimated savings was in the range of $7000.00 per year. I might note at this point that it is not for me to second-guess the employer about the details of their budgetary situation; my role is to consider whether there was a reasonable exercise of management rights.

[42] I conclude that the decision in this case to remove the grievors from the standby Help Desk list was based on genuine economic pressures and it cannot be said to be unreasonable or based on an illegitimate business purpose. The grievors acknowledge the financial situation of their employer at the material times and the dispute is down to whether taking CS-02s from the standby Help Desk was significant or not. Implicit in the grievors' testimony is that a savings of $7000.00 per year would have been significant and there is evidence that this amount was the basis of the employer's decision.

[43] By way of summary, I have concluded above that the primary provision of the collective agreement that is applicable to these grievances is clause 11.02. I acknowledge that clause 9.02(b) is about overtime and the offering of overtime on an equitable basis, but I do not agree with the bargaining agent that clause 9.02(b) is determinative. I accept that the grievors were available and qualified but that is not the end of the matter. The requirement to make every "reasonable effort" to offer overtime on an equitable basis does not require the employer to offer standby duties on a similar basis and, therefore, it has some similarity with the requirement in clause 11.02(b) that the employer "will endeavour" to provide for the equitable distribution of standby duties. This is not a case where there is a specific right to work on the

standby Help Desk. It is, therefore, unlike other cases where a unilateral financial decision by the employer operates to deny a right under the collective agreement such as in *Tremblay v. Treasury Board (Employment and Immigration Canada),* PSSRB File No. 166-02-17538 (1989) (QL), at para. 31. In any event that decision was decided as a matter of the employer's application of "operational requirements".

[44] I have noted above that the bargaining agent relies on clause 9.03(b) and I have concluded that these grievances are primarily a matter under another provision, clause 11.02. Therefore, the analysis in *Zelisko and Audia* has no application since that decision is based only on language equivalent to clause 9.03(b). I say "primarily" because clause 9.03(b) has general application to overtime and overtime is the rate paid while working on the standby Help Desk. As above, I have considered the two provisions as a way to resolve the interpretive question discussed above but that approach is not helpful. Furthermore, I do not agree with the bargaining agent that clause 9.03(b) is "mandatory" in the sense of requiring the employer to offer overtime on an equitable basis as long as employees are readily available and qualified.

[45] There remain to be resolved some factual issues that arose from the evidence.

[46] There was some dispute in the evidence as to the differences between a CS-01 and a CS-02 classification. It is not disputed that a CS-02 is generally a more senior employee with more responsibility and is, therefore, paid at a higher level. However, this is complicated by the fact that the higher levels within the CS-01 classification are paid more than the lower levels within the CS-02 classification. For example, in May 2003, the highest level of a CS-01 was paid $55,127 and the lowest level of a CS-02 was paid $50,981. This is not particularly unusual since it simply reflects the common structure of wage schedules and for these grievances, no significance can be attached to the different pay levels within each classification.

[47] The dispute over the nature of the CS-01 and CS-02 positions also extended to what work was performed on the standby Help Desk. During the day, a CS-01 employee invariably took the first call and that person could escalate (or pass on) the problem to a CS-02. Before the change that is the subject of these grievances, CS-01s and CS-02s worked on the Help Desk after hours. However, the effect of the change at issue in these grievances was that only CS-01s were available to take calls after hours. The grievors question the quality of service that was provided without CS-02s on the Help Desk.

[48] To some extent, the grievors' positions are that a CS-02 is necessary in order to provide adequate service after hours. Of course, it is not my role to investigate and decide whether the employer's level of service is adequate or not; my role is to decide whether the employer's decision to remove the grievors from the standby Help Desk was a reasonable exercise of management rights or otherwise consistent with the collective agreement. Having said that, if the service issues raised by the grievors are somehow relevant, I do note that there is no evidence of any difficulties as a result of having only CS-01 employees working at the standby Help Desk since spring 2003.

[49] As a final matter, the grievors and the bargaining agent have been consistent in their criticism of the process used by the employer leading to the decision to remove the grievors from the standby Help Desk list. They rely on a previous decision that found, in similar circumstances, that the employer "must explain and prove that it acted in a reasonable and non-arbitrary manner" (*Cardinal and Leclerc v. Treasury Board (Public Works and Government Services Canada)* 2001 PSSRB 133, at para 43). Other than this statement I am not aware of a legal requirement that an employer must not only act reasonably but also provide an explanation and "prove" to employees that they acted reasonably. Ultimately, as a legal matter, an employer is required to prove the reasonableness of its decision to an adjudicator and not the employees at the worksite. An explanation to employees about the reasons for a change may be important for the morale of a workplace, but it is not something that involves the Board.

[50] As well I do not think this statement from *Cardinal and Leclerc* should be taken to mean that somehow the burden of proof in this case is on the employer; it is well established that the burden of proof is on the bargaining agent and the grievors in an interpretation case such as this. Nonetheless, it is often the case that the development of evidence in a case requires an employer to provide evidence about the reasons for its decisions. In technical terms this means the evidentiary burden has shifted, although the onus of proof never changes and, again, it rests with the grievors. On the evidence before me, I conclude that the employer's decision to remove the grievors from the standby Help Desk was made for valid economic reasons and it was not arbitrary or otherwise unreasonable. Further, considering clause 9.03(b), the economic pressures at the material times were a valid operational requirement. Briefly put, the grievors have not proven to the required standard that their removal from the standby Help Desk was unreasonable or based on illegitimate business reasons.

[51] Specifically, the grievors submit that they have never been given an explanation of the employer's decision. In fact, they were given an explanation in the emails from Mr. Millett discussed above; the reasons are for economic pressures and to streamline work processes. It is true some of the explanation was given during the grievance procedure but that is not unusual.

[52] Having said that, the grievors make valid points about some of the evidence in this case. For example, Mr. Millett and other people directly involved with the employer's decision were unavailable; one was in Afghanistan another was not called as a witness. To some extent, this is explained by the passage of time since 2003. However, as above, it is not disputed, as shown by the grievor's own evidence, that there were economic pressures on the employer at the material times. Moreover, while the amount of the savings achieved by removing CS-02s from the standby list is controversial, there is no dispute that the decision saved money, probably more than the amount estimated by the grievors. The grievor's primary submission was that clause 9.03(b) made it mandatory to offer them work on the standby Help Desk and I disagree with that submission for the reasons given above.

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

(The Order appears on the next page)

Order

[54] The grievances are denied.

April 7, 2009.

John Steeves,
adjudicator