Date: 20100126

File: 166-02-36947

Citation: **2010 PSLRB 13**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

DARREN TODD SUETTA

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Suetta v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

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

For the Employer: Neil McGraw, counsel

Heard at Lethbridge, Alberta,
November 5, 2009.

I. Grievance referred to adjudication

[1] The grievor, Darren Todd Suetta, is a border services officer with the Canada Border Services Agency ("the employer"). He is employed at the port of entry at Roosville, British Columbia. When he filed his grievance, he was employed at the port of entry at Coutts, Alberta, as a customs officer with the Canada Customs and Revenue Agency (CCRA). The grievor is represented by his bargaining agent, the Public Service Alliance of Canada ("the union")

[2] On November 21, 2000, the grievor filed a grievance alleging that the employer had refused to compensate him for 10 hours for a travel day on November 5, 2001, contrary to articles 25 (Hours of Work) and 32 (Travel Time) of the collective agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada (expiry date: October 31, 2000) ("the collective agreement"). On November 1, 2005, the grievance was denied at the final level of the grievance procedure.

[3] The grievance was referred to adjudication on January 30, 2006.

[4] The issue before me is whether the grievor is entitled to be compensated for 10 hours at straight time on a day of travel according to his regular shift of 10 hours or whether the grievor should be compensated for a shift of 7.5 hours and overtime for any travel time in excess of 7.5 hours.

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

II. Summary of the evidence

[6] The grievor's evidence is the following. He was selected to attend officer power training from October 29 to November 4, 2000, in Huntington, British Columbia. October 28 and November 5, 2000 were scheduled as travel days to and from the training centre.

[7] The grievor is covered by a variable shift schedule agreement (VSSA) enacted in accordance with the provisions of the collective agreement, which modifies the hours

of work as provided in the collective agreement. The grievor was paid for a 10-hour shift while travelling to the training program. However, he was paid for 7.5 hours plus 1 hour of overtime for the travel day when returning from the training.

[8] The grievor filed in evidence the minutes of a union-management meeting dated October 13, 2000, which read as follows:

. . .

> ***Issue:***
>
> *The length of a work day while participating in officer powers training was changed to deviate from the VSSA. The first travel day was set as a 10 hour day and all subsequent days were set as 7.5 hour days. Meetings between the Union and Management over the past week were to have addressed the issue prior to the next participants departure for the course. An officer scheduled to leave for B.C. tomorrow October 14, 2000 has refused to attend unless a decision is made regarding the length of a day during the training.*
>
> ***Union Position:***
>
> *That the original ad hoc meeting of August 4th, 2000 be honored and the employee be allowed to choose the length of his/her shift. Regardless of the choice, that all hours worked in excess of 300 per 56 day schedule, or all days worked in excess of 30 days per 56 day schedule be compensated at the applicable overtime rate.*
>
> ***Management Position:***
>
> *The schedule remains as posted on the original Y106. <u>The first day of travel to the course and the last day of travel back from the course will be credited as 10 hour days.</u> The remaining 7 days will be considered 7.5 hour days and the employee will be expected to make up the 2.5 hours per day upon their return to the port of Coutts. There will be no hours credited to an individual for any study / travel time incurred during the course. Since the staff were originally canvassed for any volunteers to participate in the Officer Powers Initiative and Management received 100% involvement on the part of the Inspectors, if an officer now wishes to refrain from participating in the Officer Powers Initiative, they must indicate in writing their desire to be removed from the training.*
>
> *Daryl Bourgon* *Keon Woronuk*
> *Management Rep.* *Management Rep.*

[Emphasis added]

[9] According to the grievor, the minutes of the ad hoc meeting constituted an agreement between the employer and the union. They were posted on the union bulletin board.

[10] The grievor testified that this agreement was unilaterally modified on October 26, 2000, when Scott MacCumber, Chief, Customs Operations, sent an email to employees attending the training, including the grievor, which modified the agreement so that the day of travel to return home would be compensated at 7.5 hours instead of at 10 hours, which appeared in the minutes of the ad hoc union-management meeting of October 13, 2000. Mr. MacCumber's email reads as follows:

. . .

> *We have been debating the issue of study time for a while now and have come to a resolution after several local Union/Management meetings.*
>
> . . .
>
> *The issue of study time was reviewed at the local, regional and HQ level and the national policy is that all training days should be compensated for at 7.5 hours with no time or overtime allowed for additional study time. It appears that the amount of study time required varies according to the training site. As a result, no overtime is authorized for study time after class is dismissed.*
>
> *Overtime is authorized for those employees who spend more than 7.5 hours travelling on any day other than the trip out to Huntingdon* [*sic*].
>
> *The hours which are being used to balance your hours on the 56 day schedule are as follows:*
>
> *Day 1 = 10 hours*
> *Day 2 through 9 = 7.5 hours*
>
> *Your timesheet should reflect those hours.*
>
> *If you have any questions or concerns, please speak to your Superintendent, myself or any of your Union representatives.*

. . .

[11] The grievor described the day of his return home from Huntington as not much different from his day of travel to Huntington. He checked out of the hotel, returned

the rented van in which employees travelled to and from the training facility at the airport, took a flight to Calgary, retrieved an employer vehicle parked at the Calgary airport, and drove home. The grievor declared a total travel time of 8.5 hours. He received 7.5 hours at straight time and an extra hour at the overtime rate (1 3/4 time).

[12] In cross-examination, the grievor admitted that the issue of daily scheduled hours to attend the officer power training program continued to be discussed. He acknowledged that two further meetings had been held between October 13, 2000 and Mr. MacCumber's email of October 26, 2000. In the grievor's opinion, the minutes of those meetings were not binding because the union and management had not agreed on another form of compensation.

[13] For the ad hoc meeting of October 17, 2000, the employer prepared its minutes, and the union prepared its own. The parties did not agree on the outcome of the meeting, other than that the employer's proposal would be taken to the union membership. In brief, the employer proposed that all days while on course would be paid for 7.5 hours of class time and that an additional 10 hours of straight time would be worked out as a day off on return from the training between employees and their superintendents. On the day of travel home, any hours in excess of 7.5 hours would be compensated at overtime rates. The union's view was that employees should be compensated for all the time to which they were entitled. Neither version of the minutes was posted.

[14] The grievor disagreed that the employer's minutes modified the agreement reached at the union-management meeting held on October 13, 2000.

[15] The employer's evidence is the following. When the officer power training took place, Mr. MacCumber was the district training coordinator. In 1998, the CCRA introduced personal protection training for customs officers and then more formal training in 2000. Any customs officer who had completed the personal protection training was eligible to take the follow-up officer power training. The course was voluntary, but most officers showed an interest in attending. The training schedule was created around the availability of the customs officers. The training schedule set out the training dates in Huntington but not the travel days to and from the training facility. All the officers attending the program were on a variable shift schedule agreement, which provided for 10-hour working days. Variable shift schedules are based on 300 hours of work over 56 days. The shift rotation is 4 days of work followed

by 4 days off, with one rotation being 5 days of work and 3 days off to achieve the balance of 56 days.

[16] As the training schedule did not fit the shift schedule, the employer decided that the shift schedule needed adjustment to accommodate the training. To reflect the fact that classroom training was not scheduled for 10-hour days, the employer changed the shift schedule for the duration of the training to 7.5-hour days, meaning that employees would have to make up the 2.5 hours per day on their return from the training program. For the first day of training, the employer was prepared to pay for a 10-hour day because the duration of the travel to an unknown destination was difficult to estimate, as it included travel time, renting a vehicle, finding the hotel, checking in and so on. Mr. MacCumber was of the view that the employer was ultimately being fair by taking this approach to the first travel day and by not requiring employees to remit any time, if the total travel time turned out to be less than 10-hours.

[17] The employer proposed that all custom officers attending the course would receive a 10-hour shift compensation in the form of a day off on their return for any time used for study, travelling and so on. This proposal was not accepted by a majority of union members as they felt that this compensation would be difficult to account for on their schedules. In the end, the employer took the position that only one travel day would be paid as a 10-hour work day and that all other days would be paid as 7.5-hour days. On the last day of the course, any travel time in excess of 7.5 hours would be compensated at the applicable overtime rate.

[18] Mr. MacCumber testified that a further ad hoc union-management meeting was held on October 23, 2000, during which the union and the employer did not agree on the terms of travel time for employees attending the training in Huntington, which is reflected in his email of October 26, 2000, and the signed minutes. The minutes read as follows:

. . .

> *ISSUE: Compensation for Officer Powers Training Hours*
>
> *UNION POSITION*
>
> *A consensus was not reached among staff as how they should be compensated for their training time. About half of the staff thought that a re-balancing of travel time in the*

> *amount of 10 hours was sufficient, while others felt that they should be properly compensated. There were many different opinions amongst the members. There was also concern amongst employees over the coding on their timesheet should they accept the proposal.*
>
> *MANAGEMENT POSITION*
>
> *Given that a number of staff did not agree with the proposal for extra travel time, all staff should account for their travel and training time as follows: Day 1 would be a 10 hour travel day and the remaining 7 days training and 1 travel day would be at 7.5 hours. Any travel in excess of 7.5 hours on the last day would be compensated for as overtime hours. Scott would issue a letter to all applicable staff.*
>
> *Al Cody* *Gina Martin-Ivie*
> *Management Representative* *Union Representative*

[19] In cross-examination, Mr. MacCumber stated that paying a 10-hour day on the return travel day would have created an imbalance in the total number of shift hours over the 56-day period. He agreed that on the day of return, trainees would have to check out of the hotel, return the rental vehicle, take a flight and so on, but in his view, it would take less time than when arriving at an unknown location. Mr. MacCumber agreed that some flexibility had been built into the first travel day for unforeseen circumstances. He admitted that not all employees were comfortable with the idea of taking a day in lieu to compensate for study time and any other time spent attending the course. He stated that another reason for not paying a 10-hour day on the return travel day was to avoid having to ask employees to return to work after their travel to complete their shifts on that day.

[20] Mr. MacCumber was of the view that the variable shift schedule was meant to address the scheduling of hours of work and not the scheduling of training hours. The variable shift schedule agreement is silent on that point. Training days had to be accommodated within the 300-hour, 56-day schedule, which could be achieved only through 7.5-hour days and by applying the “no work, no pay” rule. For each day of training, an employee typically works 7.5 hours and therefore owes the employer 2.5 hours. To avoid a situation where an employee owes time as a result of being on training, the hours of work are scaled back for that period.

III. Summary of the arguments

A. For the grievor

[21] The grievor argues that clause 32.06a) of the collective agreement stipulates that, where an employee travels but does not work, he or she is entitled to receive regular pay for that day. The grievor was required to travel on a day of work on November 5, 2000 and therefore grieves that he did not receive his regular pay of 10 hours for that day.

[22] The grievor argues that he was paid for 10 hours on his first day of travel to the training course. On October 13, 2009, the employer was also prepared to pay for 10 hours on the second day of travel for the return home from the training course. The employer exhibited some flexibility in applying clause 32.06 of the collective agreement.

[23] The grievor takes the position that the employer was prepared to consider the travel day to be 10 hours and that it posted that intent on October 13, 2000. The VSSA defines a day as being 10 hours, and employees were compensated for 10 hours on the first travel day.

[24] The grievor disagrees with the employer's position that the second travel day was not anticipated to be as lengthy as the first travel day and states that the second travel day required the same steps as the first (i.e. checking out of the hotel, travelling to the airport, returning the rental vehicle, flying to the destination, picking up a vehicle and driving home). A working day is a working day. There is no provision in the collective agreement about balancing hours, and the employer was not justified in modifying the workday for such a reason. Employees were under no obligation to accept a substitution of a paid 10-hour shift in lieu of being compensated for a regular 10-hour workday.

[25] The grievor also objects to the employer's interpretation of clause 32.06 of the collective agreement that it could have required the employees to complete their 10-hour work day on the second travel day if it did not take them 10 hours to get home. The grievor argues that the employer cannot have it both ways, which is having a VSSA that defines a day as 10 hours and having the flexibility to change the workday as it chooses. The grievor asks that I establish the right to be paid a 10 hour day for time travelled as provided by clause 32.06.

[26] The grievor cited as precedents *King and Holzer v. Canada Customs and Revenue Agency,* 2001 PSSRB 117, and *Canada (Attorney General) v. King,* 2003 FCT 593.

[27] The grievor asks that his grievance be allowed.

B. For the employer

[28] The employer argues that clause 32.06(a) of the collective agreement must not be read in isolation. There is no minimum number of hours that must be travelled to be paid for travelling time, and the employer is entitled to have an employee work the hours during which the employee did not travel.

[29] In this case, the employer came to a reasonable accommodation by not requiring employees to come to work at the end of their travels but by paying overtime for any time travelled beyond 7.5 hours. The collective agreement provides for a variation in schedule as needed for operational requirements within a VSSA which does not necessarily result in overtime. In this case, there is no evidence that the grievor worked 10 hours. In fact, he declared 8.5 hours of travel time.

[30] Rather than require an employee to report to work after his or her trip home, the employer decided to pay overtime for any time travelled in addition to the scheduled hours of work. Employees were not deprived of any pay. The employer disagrees with the grievor's position that the employer's flexibility with respect to one travel day in order to simplify employees' schedules should have consequences on the hours of work for another travel day.

[31] The employer emphasizes that the grievor received remuneration for 9.25 hours of work, or almost the full 10 hours that he grieved. The employer is allowed to change the hours of work. The employer, in consultation with the union, established on October 17, 2009 how it would treat the second travel day.

[32] The employer asks that the grievance be dismissed.

IV. Reasons

[33] This grievance concerns the interpretation of the collective agreement with respect to the establishment of Variable Shift Schedule Arrangements at the local level

as it applies to travel time to attend a training course. The relevant clauses read as follow:

. . .

Shift Work

25.13 *When, because of the operational requirements, hours of work are scheduled for employees on a rotating or irregular basis, they shall be scheduled so that employees, over a period of not more than fifty-six (56) calendar days:*

(a) on a weekly basis, work an average of thirty-seven and one-half (37 1/2) hours and an average of five (5) days;

(b) work seven and one-half (7 1/2) consecutive hours per day, exclusive of a one-half (1/2) hour meal period;

(c) obtain an average of two (2) days of rest per week;

(d) obtain at least two (2) consecutive days of rest at any one time, except when days of rest are separated by a designated paid holiday which is not worked; the consecutive days of rest may be in separate calendar weeks.

. . .

25.23 Variable Shift Schedule Arrangements

(a) Notwithstanding the provisions of clauses 25.05 and 25.13 to 25.22 inclusive, consultation may be held at the local level with a view to establishing shift schedules which may be different from those established in clauses 25.13 and 25.17. Such consultation will include all aspects of arrangements of shift schedules.

(b) Once a mutually acceptable agreement is reached at the local level, the proposed variable shift schedule will be submitted at the respective Employer and Alliance Headquarters levels before implementation.

(c) Both parties will endeavour to meet the preferences of the employees in regard to such arrangements.

(d) It is understood that the flexible application of such arrangements must not be incompatible with the intent and spirit of provisions otherwise governing such arrangements. Such flexible application of this clause must respect the average hours of work over

the duration of the master schedule and must be consistent with the operational requirements as determined by the Employer.

(e) Employees covered by this clause shall be subject to the Variable Hours of Work provisions established in clauses 25.24 to 25.27, inclusive.

Terms and Conditions Governing the Administration of Variable Hours of Work

25.24 *The terms and conditions governing the administration of variable hours of work implemented pursuant to clauses 25.09, 25.10 and 25.23 are specified in clauses 25.24 to 25.27, inclusive. This Agreement is modified by these provisions to the extent specified herein.*

25.25 *Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the terms of this Agreement.*

25.26

(a) The scheduled hours of work of any day as set forth in a variable schedule specified in clause 25.24, may exceed or be less than seven and one-half (7 1/2) hours; starting and finishing times, meal breaks and rest periods shall be determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.

(b) Such schedules shall provide an average of thirty-seven and one-half (37 1/2) hours of work per week over the life of the schedule.

(i) The maximum life of a shift schedule shall be six (6) months.

(ii) The maximum life of other types of schedule shall be twenty-eight (28) days, except when the normal weekly and daily hours of work are varied by the Employer to allow for summer and winter hours in accordance with clause 25.10, in which case the life of a schedule shall be one (1) year.

> *(c) Whenever an employee changes his or her variable hours or no longer works variable hours, all appropriate adjustments will be made.*
>
> ***25.27 Specific Application of this Agreement***
>
> *For greater certainty, the following provisions of this Agreement shall be administered as provided herein:*
>
> ***(a) Interpretation and Definitions (clause 2.01)***
>
> *"Daily rate of pay" – shall not apply.*
>
> . . .
>
> ***(d) Overtime (clauses 28.06 and 28.07)***
>
> *Overtime shall be compensated for all work performed in excess of an employee's scheduled hours of work on regular working days or on days of rest at time and three-quarter (1 3/4).*
>
> . . .
>
> ***(f) Travel***
>
> *Overtime compensation referred to in clause 32.06 shall only be applicable on a work day for hours in excess of the employee's daily scheduled hours of work.*
>
> . . .

[34] Those clauses of the collective agreement establish the following general principles for shift work:

- the employer may establish work shifts in accordance with the conditions specified in clause 25.13 and VSSAs in accordance with clause 25.23;
- the average weekly work period on is 37.5 hours; the average workday is 7.5 hours;
- the union must be consulted to establish VSSAs;
- the arrangements are flexible and must respect the average weekly hours of work over the duration of the master schedule;

- the schedule must be consistent with the operational requirements as determined by the employer;
- VSSAs do not prohibit the right of the employer to schedule any hours of work in accordance with the terms of the collective agreement;
- overtime is compensated for all work performed in excess of an employee's scheduled hours of work on regular working days; and
- in the case of travel, overtime compensation is applicable to a workday for hours in excess of the employee's daily scheduled hours of work.

[35] In this case, the employer established a work shift for the purposes of the officer power training course that conformed to the average workday of 7.5 hours, which is the average day of the average workweek provided in the collective agreement. The union was consulted and accepted that the usual 10-hour day schedule would be modified to 7.5 hours for the duration of the training course. Modifying the work schedule was within the employer's rights and was consistent with operational requirements.

[36] Because it was the first time that the course was given outside the grievor's usual place of work, the employer decided that it should allow some extra time for the unpredictability of the first travel day. The employer decided that 10 hours was a reasonable amount of time and applied this decision to all employees who attended the course, whether or not they used the full 10 hours to reach their destination. Whether the purpose of setting a uniform travel time for all attendees on the first travel day was for convenience of administration or for any other reason is not really relevant. The grievor does not dispute that 10-hours was satisfactory. Neither party argued that the 10 hours provided for travel time on the first travel day was to be considered part of the regular work schedule. The evidence is that all days set aside for training were to be 7.5-hour days except for the first day, which was extended because of travel considerations.

[37] For the second travel day, the return trip, the employer decided that, instead of establishing an arbitrary period for travel, it would pay employees overtime at time-and-three-quarters hourly rates for any travel time in excess of the scheduled 7.5-hour day. Each employee declared his or her travel time, including the

grievor, which the employer accepted without question. Where travel time exceeded 7.5 hours, the employer paid the overtime rate. In the grievor's case, remuneration amounted to 9.25 hours for that day, instead of the 10 hours that he claims he should rightfully have been paid.

[38] The collective agreement specifically states that, for travel, overtime is paid for hours in excess of the employee's daily work schedule, which is what the employer did. The employer offered employees an alternate form of compensation in the form of a 10-hour day-in-lieu to compensate for study time and any overtime incurred in travelling back home. As a majority of employees did not favour this option, the union declined it.

[39] Under the circumstances, I fail to see how the employer breached the provisions of the collective agreement. The *King* decision is not helpful in deciding this matter as it deals with leave for family-related responsibilities. The adjudicator in that case determined that such leave should be calculated on the basis of days and not by a conversion into hours. Therefore, a day of leave was to be calculated in accordance with the grievor's regular shift hours. That is not the case here. The grievor was scheduled for 7.5 hours of work. The employer paid him overtime in accordance with the additional hour required for travel on that day, which is clearly in keeping with clause 24.27(f) (Travel) of the collective agreement.

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

(The Order appears on the next page)

V. Order

[41] The grievance is dismissed.

January 26, 2010.

Michele A. Pineau,
adjudicator