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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DON BEESE, RICHARD STARCOK, DIANE MORRISEAU, MAUREEN PAPPAS, PETER DUDA, PATRICK O'KEEFE AND JOHN DEPTUCK

Grievors

and

TREASURY BOARD
(Canadian Grain Commission)

Employer

Indexed as
Beese et al. v. Treasury Board (Canadian Grain Commission)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Margaret Shannon, adjudicator

For the Grievors: Christopher Shulz, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard at Thunder Bay, Ontario,
June 26 and 27, 2012.

I. Individual grievances referred to adjudication

[1] Don Beese, Richard Starcok, Diane Morriseau, Maureen Pappas, Peter Duda, Patrick O'Keefe and John Deptuck ("the grievors") are all full-time employees of the Canadian Grain Commission (CGC) in Thunder Bay, Ontario. They are all members of the Primary Products Inspection (PI) Group, part of the Technical Services Group. At the relevant time, their employment was subject to the collective agreement between the Treasury Board and the Public Service Alliance of Canada, Technical Services Group (all employees), which expired on June 21, 2007 ("the collective agreement").

[2] The grievors filed individual grievances on November 12, 2008, alleging that the Canadian Grain Commission ("the employer") breached Article 28, "Overtime" of the collective agreement by refusing to reimburse them the meal allowance when they worked on November 11, 2008, a designated paid holiday listed in the collective agreement. As a remedy, the grievors seek the reimbursement of the meal allowance for that designated paid holiday. Mr. Beese sought to be paid retroactively to August 4, 2003.

[3] The grievances were referred to adjudication on September 16, 2009 and were heard jointly on June 26 and 27, 2012.

II. Summary of the evidence

[4] All the grievors were scheduled to work the week of November 10, 2008 to November 14, 2008 at several grain elevators on the Thunder Bay waterfront. That workweek included a designated paid holiday (November 11) on which the employees were not expected to work unless the elevator to which they were assigned was operating. The hours of operation of the grain elevators are controlled by their third-party owners. Four elevators operated on November 11, 2008.

[5] Don Beese and Rick Starcok testified on behalf of the grievors. They explained the process for allocating the hours available to be worked on designated paid holidays. An employee, scheduled to work at a particular elevator, advises his or her inspection supervisor (classified PI-04) of his or her availability to work that designated paid holiday. If no CGC employee assigned to that elevator expresses an interest in working, the supervisor consults the list of employees from other elevators who indicated that they were available to work overtime. If no one on that list is available,

then who last touched the grain is required to work the hours, whether or not he or she indicated not available to work the designated paid holiday. The same process is used for distributing overtime hours among members of the PI Group at the grain elevators on days other than designated paid holidays, as is evidenced in the employer's own Overtime Allocation Procedure (Exhibit E-1).

[6] Both witnesses worked the designated paid holiday in question, as did the other grievors who appear on the Daily Attendance Records for November 11, 2008 submitted as Exhibit G-3. Mr. Beese worked a total of 12.5 hours and was compensated for 7.5 hours at time and one-half and 5.5 hours at double time. Mr. Starcok worked 7.5 hours at time and one-half and 1/2 an hour at double time at the Vitera 1B elevator and an additional 5 hours at double time at the Cargill elevator. Both employees also were paid 7.5 hours at straight time for the designated paid holiday, in accordance with Article 32 Designated Paid Holidays of the collective agreement. Neither received a meal allowance, nor did any of the other grievors, despite having worked in excess of 3 hours beyond their normal 7.5-hour workday.

[7] Both witnesses received their work schedules for the week of November 10 to 14, 2008 on Friday, November 7, 2008, as was the practice. There was no indication on the schedule that November 11 was to be excluded or that it was not a normal workday. It was understood that, unless the elevators required the employees to work on that day, they were not to report to work and would be paid 7.5 hours at straight time. They were notified on Monday, November 10, 2008 at around 15:00 that some of the elevators would be operating on the next day, at which time the supervisors began the task of ensuring that the next day's shifts would be covered. The process for filling the shifts was the same as that used to fill any other overtime shift. It was just another overtime day to the grievors, according to Mr. Starcok, who is a terminal supervisor (classified PI-04), it was scheduled in the same manner as any other overtime day.

[8] The grievors submitted into evidence a CGC form used to track overtime hours worked at various elevators, which are billed to the elevator owners according to the rates specified in the CGC regulations. That form is used for all overtime, regardless of whether it is worked on a regular weekday, a weekend or a designated paid holiday. It is not used for normal hours of operation, i.e., 7.5 hours per day, Monday to Friday. (See Exhibit G-3, Daily Attendance Records for all grievors.)

[9] Jim Ball testified on behalf of the employer. Mr. Ball is Operations Manager, Central Region, CGC. The employees at the ports, including the grievors, report to Operations Services. The PI-04 is the frontline supervisor in the operations chain for those employees working in inspection, entomology, weighing and grading of all product unloaded. The normal hours of work for these employees are 7.5 hours per day, Monday to Friday. Frequently, their hours are expanded to match the 8 hours of operation of the elevators, requiring a daily payment of one half-hour of overtime. Designated paid holidays are not scheduled as part of normal working hours but are scheduled consistent with the process described in Exhibit E-1 Overtime Allocation Procedures. In this case, the hours were scheduled only after 15:00 on November 10, 2008.

[10] According to Mr. Ball, no allowances are paid to employees on designated paid holidays as they are paid an "extreme premium" rate. Employees working weekends receive the mileage allowance but not the meal allowance, as the rate of pay for weekends is less than for designated paid holidays. Normally, if an employee works 7.5 hours in a day and then works an additional 3 hours of overtime that day, he or she is entitled to the meal allowance, which compensates employees for missing supper.

[11] A separate assignment sheet was prepared for employees working on November 11, 2008 that identified the elevators and the services that would be offered and who was required to work. The list was prepared based on information from the elevator operators and supervisors and from the list of employees who volunteered to work on that day.

[12] The "Requisition for Overtime" form that the grievors submitted as Exhibit G-6 is filled out by the PI-04 at a given elevator. It accompanies time sheets and attendance records, which are submitted for payment. The rate of pay listed on it indicates whether the hours worked were overtime. Designated paid holidays are coded differently, as the first 7.5 hours are paid at time and one-half, while overtime is paid at double time. The form is used to track services provided by the CGC outside normal hours of operation.

[13] Employees working on weekends receive a mileage allowance, not a meal allowance. The CGC used to pay mileage to employees on designated paid holidays, but

that practice was stopped after the Treasury Board was consulted and directed the CGC to stop. No explanation was provided as to why the Treasury Board did so.

[14] Dennis Caruso, CGC Operations Supervisor in Thunder Bay, corroborated that the system used to staff hours on designated paid holidays was the same as that used to staff overtime hours on other days. No one is ordered to work on designated paid holidays. However, if there are no volunteers, he stated the "last one to touch the grain" is responsible to either find a replacement or work the hours. He conceded on cross-examination that, at first glance, it appears that November 11 was included in the schedule for the week of November 10 to 14, 2008. However, the scheduling for November 11, 2008 did not occur until November 10, 2008, when CGC Operations were advised by terminal operations what the designated paid holiday schedule was to be and what services would be required. There was no distinction in how the hours worked on November 11, 2008 were recorded. The only indication that it was a designated paid holiday was the pay rate charged.

III. Summary of the arguments

A. For the grievors

[15] The question is whether the employees who worked the designated paid holiday of November 11, 2008 were entitled to a meal allowance. The grievors worked at least 3 hours beyond their 7.5-hour shifts as shown in Exhibit G-3. They were paid an "extreme premium" rate of double time for those hours. According to the employer, those hours were not worked in addition to the regular scheduled shift and do not qualify for the meal allowance reimbursement.

[16] The grievors submitted that that is not consistent with how hours are staffed or the intention of the collective agreement. No one is scheduled to work on a designated paid holiday, yet holidays are included in the workweek. The method of staffing hours to be worked on designated paid holidays is identical to that used to staff regular overtime hours. The employer considers the meal allowance as an extra benefit for working overtime on a regular workday. Its interpretation puts a greater hardship on those who work on designated paid holidays and results in an anomalous interpretation of the collective agreement and unreasonable results.

[17] An arbitrator will often examine such matters ". . . because the presumption is that parties do not intend such results to ensue" (see *Nova Scotia (Department of Transportation and Communications) v. Canadian Union of Public Employees, Local 1867* (1996), 58 L.A.C. (4th) 11, at paragraph 39). In cases with two linguistically permissible interpretations, arbitrators are guided by the purpose of the particular provision, the reasonableness of each possible interpretation, the administrative feasibility and whether one of the possible interpretations results in an anomaly, see *Kootenay-Columbia School District No. 20 v. Canadian Union of Public Employees, Local 1285 (Salsiccioli Grievance),* [2009] B.C.C.A.A.A. No. 153 (QL) at paragraph 33. The appropriate interpretation best harmonizes with the entire collective agreement (see *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)* (2004), 130 L.A.C. (4th) 239).

[18] The meal allowance fits well into the overall scheme of benefits available in the collective agreement in addition to payment for hours worked, such as "Call-Back" (article 29), "Standby" (article 30) and "Reporting Pay" (article 31). Nowhere in the collective agreement does it expressly exclude payment of the meal allowance on designated paid holidays. Excluding a benefit without clear language is not appropriate and not in harmony with the entire collective agreement. Paying the meal allowance on a designated paid holiday avoids that anomaly.

[19] The grievors seek a determination that their interpretation is appropriate and an order directing the payment of the meal allowance for all of them for November 11, 2008.

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

[20] The grievances should be dismissed. The employer properly applied the collective agreement consistent with the intentions of the parties and as directed by Treasury Board Secretariat. Article 28.10, "Meal Allowances," is not a stand-alone like article 32, Designated Paid Holidays. Article 32 is the overriding article, and it does not mention meal allowances. Paying meal allowances on a designated paid holiday would have to have been within the intention of the parties to the collective agreement. The cardinal presumption when determining the intention of the parties is that they are assumed to have intended what they said. The meaning of the collective agreement is to be sought in its express provisions (see *Canadian Labour Arbitration*, (4th Edition),

Brown and Beatty, at 4-39). Words must be given their ordinary meanings. The collective agreement must be read and interpreted as a whole.

[21] The grievors work regularly scheduled weekdays from 08:00 to 16:00. They are not regularly scheduled to work on designated paid holidays or on their days of rest, although they can be called upon to do so. Employees know not to report to work on designated paid holidays unless called in. Those employees whose elevator was closed on November 11, 2008 did not report for work unless they chose to accept hours at another elevator. Members of the bargaining unit who worked at headquarters did not work on November 11, yet that date showed on their schedule as well. The schedule (Exhibit G-3) was to inform employees where they would be working over the next week. It was not an indication that they were to report for work on the designated paid holiday.

[22] Article 32, Designated Paid Holidays, of the collective agreement, is different from article 28, Overtime. Hours worked on a designated paid holiday are treated differently from ordinary overtime. Article 32 is a stand-alone article not to be read in conjunction with any other articles in the collective agreement so as to add other benefits found in the collective agreement. Article 65.09 specifically prohibits pyramiding of benefits. The premium rates paid for work performed on a designated paid holiday are a penalty imposed upon the employer for requiring the employees to work on a designated paid holiday. Payment of a meal allowance amounts to an additional penalty on the employer for the same demand and constitutes pyramiding of benefits. For an adjudicator to require the employer to pay a meal allowance on a designated paid holiday would require an amendment to the collective agreement which is *ultra vires* the authority granted under section 229 of the *Public Service Labour Relations Act*. If employees are entitled to a meal allowance on a designated paid holiday, they would likewise be entitled to one on their day of rest when they also receive a mileage allowance, once again resulting in pyramiding of benefits which is prohibited by article 65.09.

IV. Reasons

[23] Counsel for the employer referred me to Brown & Beatty for guidance to help me interpret the collective agreement and resolve the issues before me. Counsel for the grievor referred me to several decisions that discussed the manner of interpreting collective agreements. I found the decision in *Communications, Energy and*

Paperworkers Union, Local 777 very helpful in my consideration of the issues before me. Paragraphs 39 through 47 of that decision contain a lengthy discussion of the modern Canadian approach to interpreting collective agreements, adapted from the Supreme Court of Canada rules for interpreting legislation in *Re Rizzo and Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27, at page 41. Unlike the rule in *Halsbury's Laws of England* which relies heavily on "the intention of the parties", the modern principles of interpretation focus on the words, in their grammatical and ordinary sense, within the entire scheme of the agreement, its object and the intention of the parties. The modern principles of interpretation are a method of interpretation rather than a rule and encompass many well-recognized interpretation conventions. The modern principle directs interpreters to consider the entire context of the agreement, read its words in their entire context and in their grammatical and ordinary meaning, harmoniously with the scheme and object of the agreement and the intention of the parties.

[24] To understand the entire context of the collective agreement, one provision cannot be understood without understanding its connection to the whole agreement. What is written in one provision is often qualified or modified elsewhere. In this case, the grievors claimed a violation of article 28, Overtime, in particular that part of the article that entitles an employee to a meal allowance.

ARTICLE 28

OVERTIME

. . .

Meal Allowance

28.10 To Apply to PI Group Only

An employee who works three (3) or more hours of overtime:

(a) immediately before the employee's scheduled hours of work and who has not been notified of the requirement prior to the end of his/her last scheduled work period,

or

(b) immediately following the employee's scheduled hours of work

> *shall be reimbursed for one (1) meal in the amount of ten dollars ($10.00), except where free meals are provided. When an employee works additional overtime continuously extending three (3) hours or more beyond the periods provided for in (a) and (b) above, the employee shall be reimbursed for one (1) additional meal in the amount of ten dollars ($10.00) for each additional three (3) consecutive hours worked, except where free meals are provided.*
>
> *Reasonable time with pay, to be determined by management, shall be allowed the employee in order that the meal break may be taken either at or adjacent to the employee's place of work. This clause shall not apply to an employee who is in travel status which entitles the employee to claim expenses for lodging and/or meals.*
>
> . . .

[25] Clearly, on the plain reading of Article 28.10 of the collective agreement, members of the PI Group are entitled to a meal allowance if they work an additional three hours of overtime beyond their scheduled hours of work. What then are their scheduled hours of work? Normally, according to article 25 as outlined in Appendix M (the PI Group is explicitly excluded from the article 25 contained in the body of the agreement), the daily hours of work for members of the PI Group are 7.5 hours per day or 37.5 hours per week for an average of 5 days per week.

[26] What then are the scheduled hours of work for these grievors? There is no definition of "scheduled hours." Indeed, in Appendix M, there are only three references to that exact phrase and several references to other, similar-sounding phrases. Clause 25.02 refers to "schedule of working hours" and "the schedule", while clause 25.04 refers to "the normal workweek" and "workday" while clause 25.09 uses yet another term, "normal working day". The term "scheduled hours of work" reappears in clause 25.13(a) but in particular reference to "the scheduled hours of work of any day" in the context of a variable shift agreement. What is to be made of this? I take it to mean that there is no indisputable definition of the term and that it must therefore be given its ordinary meaning, one that is harmonious with the scheme and object of the agreement and the parties' intentions.

[27] The employer argues that the phrase "scheduled hours of work" needs to be applied in a manner consistent with the intention of the parties as well as the practice over the years. No evidence of intention was submitted to me. As for what the employer refers to as a practise, this reference is contradicted by the evidence of both

the grievors and the employer. The evidence indicates that the practice was in fact to pay employees the meal allowance in situations such as this one but that, as a result of a recent re-evaluation of the collective agreement language, a policy change was mandated by the Treasury Board, giving rise to these grievances. I find that this is insufficient evidence of any past practice of the parties which is sufficient to constitute any assistance in interpreting the collective agreement provisions at play in this case.

[28] In giving "scheduled hours of work" its ordinary meaning, I find that it refers to the hours that an employee is normally, usually, typically scheduled for work and for the grievors that is Monday to Friday, 37.5 hours per week. Therefore, I can conclude that a PI working on a designated paid holiday would be paid at time and one-half his rate of pay for up to 7.5 hours, after which he or she would be paid at double time.

[29] Overtime is defined as follows in the definition section of the collective agreement:

> **"overtime"** (heures supplémentaires) means:
>
> *(a) in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work,*

[30] On the day in question, the grievors were scheduled according to the normal process for distributing overtime. The employer put into evidence as an exhibit (E-1) the CGC "Thunder Bay Overtime Allocation Procedures" dated April 15, 2004. In that exhibit, a specific process is detailed for allocating overtime on weekends or designated paid holidays. That process was utilized to staff the hours at the various grain elevators in Thunder Bay on November 11, 2008. Employees interested in working that designated paid holiday were scheduled on November 10, 2008 according to the Thunder Bay Overtime Allocation Procedures. The evidence is also that the grievors all worked in excess of 7.5 hours that day.

[31] On weekdays and weekends, a premium is paid for work done beyond the 7.5 hours, ie an overtime rate applies. This same overtime rate applies to all hours worked on a designated paid holiday as the first 7.5 hours are paid at time and one-half and all hours thereafter are paid at the double-time rate. The "extreme-premium" rate paid on designated paid holidays is in recognition of the hardship

caused by working on a day when other members of the bargaining unit are not required to work.

[32] Having established that all seven of the grievors worked at least three hours in excess of their regular scheduled hours on November 11, 2008, the first qualifier for an entitlement to a meal allowance under article 28 of the collective agreement has been met. The employer argued that, even if the grievors were entitled to a meal allowance, article 65.09 would prevent that payment. That clause reads as follows:

> *65.09 Payments provided under the Overtime, Reporting Pay, Designated Paid Holiday, Call-back and the Standby provisions of this agreement shall not be pyramided, that is an employee shall not receive more than one type of compensation for the same service.*

[33] I would agree with the employer's argument if that clause did not go on to state that an employee ". . .shall not receive more than one type of compensation for the same service [emphasis added]" Compensation is defined in the *Canadian Oxford Dictionary* as a salary or wages. The language used for meal allowances calls for reimbursement, not compensation. The purpose of the payment of a meal allowance is to ensure that an employee working overtime to obtain a meal is reimbursed for the expense of purchasing one. I am convinced that that is its purpose given the language in the meal allowance article, which precludes the entitlement if the employer provides a meal. Reimbursement is not compensation. Therefore, no pyramiding of benefits occurs, and clause 65.09 does not apply.

[34] I am also guided by *Julien v. Treasury Board (Canada Border Services Agency),* 2008 PSLRB 67. That case dealt with the question of whether the grievor was entitled to a meal allowance after working 3 hours following his scheduled 10.72 hours of work on a paid holiday. The employer's reason for its denial was identical to the one it made here, that the meal allowance language did not apply to overtime worked on a holiday because that time was paid under a different article of the relevant collective agreement.

[35] The employer argued that the *Julien* decision should be distinguished from this case as *Julien* included an agreed statement of facts wherein the employer agreed, unlike here, that the hours worked in that case were scheduled hours of work. There is no agreed statement of facts in this case, yet the argument put forward by the employer was the same as in *Julien*. The grievors were not entitled to the meal

allowance as the designated paid holiday was compensated under article 32 and not article 28 of the collective agreement.

[36] At paragraph 20 of *Julien,* the adjudicator stated that "[i]f the parties to the collective agreement had wanted to exclude payment of the meal allowance for overtime performed on a holiday, they would have made note of that in either clause 28.09 or 30.08. They did not do so." That statement is particularly probative to this case as throughout the collective agreement, the parties took great pains to exclude the application of certain provisions to the PI Group. Had they intended to exclude the payment of meal allowances on designated paid holidays, why did they not take the same pains to exclude the application of clause 28.10 to the designated paid holidays listed in article 32? The conclusion is that the intention of the parties was that it would apply to overtime hours worked on a designated paid holiday.

[37] Counsel for the employer cautioned me that should I decide that meal allowances are payable on designated paid holidays, they would then become payable on weekends. That question is not before me.

[38] Counsel for the employer also argued that I am prohibited by section 229 of the *PSLRA* from making a decision that would require amending a collective agreement or an arbitral award. My determination that employees of the PI Group who work at least 10.5 hours on a designated paid holiday qualify for the meal allowance does not amend the collective agreement. It is based on the agreement's context and plain meaning. To find that an employee who worked at least 10.5 hours on a designated paid holiday is not entitled to a meal allowance merely because he or she was paid at an "extreme-premium" rate is not supported by the language of the collective agreement and would in my opinion be an unreasonable interpretation of the collective agreement, read in its entire context. If the employer is dissatisfied with the language to which it agreed, it has the right to seek an amendment via negotiation.

[39] Mr. Beese claimed payment of the meal allowance for all designated paid holidays on which he worked, retroactive to 2003. No evidence was adduced supporting his claim. In addition, I am unable to hear any claim that extends past the 25 days allowed by Article 18 of the collective agreement for filing a grievance. I will not entertain any claim that predates his claim for November 11, 2008. He is entitled to the payment of the meal allowance for November 11, 2008 because he worked 3 hours or more beyond his regular or normal 7.5-hour shift on that day.

[40] Grievors Starcok, Morriseau, Pappas, Duda, Deptuck and O'Keefe all worked 3 hours or more beyond their regular or normal 7.5-hour shifts on November 11, 2008 and are entitled to the payment of the meal allowance.

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

(The Order appears on the next page)

V. Order

[42] The grievances of Richard Starcok, Diane Morriseau, Maureen Pappas, Paul Duda, John Deptuck, and Patrick O'Keefe are allowed. The employer will pay forthwith to the grievors a sum equal to the meal allowance as set out in clause 28.10 of the collective agreement.

[43] The grievance of Don Beese is allowed in part. The employer will pay the grievor a sum equal to the meal allowance as set out in clause 28.10 of the collective agreement for the November 11, 2008 designated paid holiday. The grievor's claim for retroactive payment of meal allowances prior to that date is dismissed.

[44] I will retain jurisdiction to deal with any matters that arise related to the implementation of this order.

September 25, 2012.

Margaret Shannon,
adjudicator