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File: 566-02-5653

Citation: 2013 PSLRB 34



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

JOHN BURGESS COHOON

Grievor

and

**TREASURY BOARD
(Department of National Defence)**

Employer

Indexed as

Cohon v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

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

For the Employer: Léa Bou Karam, counsel

Heard at Halifax, Nova Scotia,
February 26, 2013.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, John Burgess Cohoon, is a member of the Public Service Alliance of Canada (“the union”) and a civilian employee of the Department of National Defence (“the employer”). The union and the employer agreed for the purposes of this grievance that they are parties to a collective agreement between the Treasury Board and the union for the Program and Administrative Services Group), with an expiry date of June 20, 2011 (“the collective agreement”).

[2] On January 12, 2010, the grievor filed a grievance under the collective agreement. The grievor is a freight forwarder shipper/receiver (FFSR) classified CR-04. He has worked for years at the 14th Wing Air Base in Greenwood, Nova Scotia (“14th Wing”). He stated that he is required to handle and label dangerous goods and that, accordingly, he is entitled to the daily allowance of \$3.50 (to a maximum of \$75.00 per month) provided under article 61 (Dangerous Goods). Clause 61.01 provides as follows:

61.01 An employee certified pursuant to the Transportation of Dangerous Goods Act and who is assigned responsibility for packaging and labelling dangerous goods for shipping in accordance with the above Act shall receive a daily allowance of three dollars and fifty cents (\$3.50) for each day he or she is required to package and label dangerous goods for shipping, to a maximum of seventy-five dollars (\$75) in a month, for each month where the employee maintains such certification.

[3] On the other hand, the employer’s position was that the grievor was entitled to the daily allowance only on those days when he stepped into the shoes of a storesperson/packer and performed his or her job of packaging and labelling dangerous goods. When working in his normal FSSR position, he was not so entitled.

[4] The facts and issues in this matter are narrow. The evidence consisted of the grievor’s testimony, the collective agreement (Exhibit U1), and the FFSR (Exhibit U2) and Storesperson/Packer (Exhibit U3) work descriptions. There was no dispute between the parties with respect to the material facts. The basic issue centred on the interpretation of clause 61.01 of the collective agreement and its application to those facts.

[5] The grievor testified that he works in an old hanger at the 14th Wing that is now called “the warehouse”. He works out of a small office attached to the main building.

The packaging department is just outside the office. He testified that “we do all the paperwork in the office.” Basically, his group is responsible for moving aircraft parts and other items from the base to the repair or other facilities. It handles a wide variety of items, ranging from aircraft parts to military clothing to compressed gases to, on occasion, different types of ammunition.

[6] The grievor is a civilian. Ordinarily, he reports to a master corporal, who in turn reports to a sergeant. Two trainee corporals also work with the group to gain experience and training in shipping and receiving. The grievor explained that, generally, the people working in his group were himself, two trainees, the packer, a sergeant and a master corporal.

[7] The grievor, the storeperson/packer (whose name is Leaman Jones) and the two trainees all have dangerous goods certification under the *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34 (*TDGA*).

[8] The grievor explained that the majority of dangerous goods that pass through his group are class 2 (compressed gases). Class 1.4 explosives (bullets) and class 1.3 and 1.1 explosives sometimes pass through. He added that “the packer does not pack bullets, there are ammo techs that pack bullets, but we verify the marking on the boxes.”

[9] The grievor testified that the storeperson/packer completes a form – he called it a “DND 1798” – which identifies all the steps that he or she took. The package is sealed. It then moves to the grievor. If he sees something wrong with the package or its labelling, he does one of two things. If it is minor, such as a label that has been affixed upside down, or in the wrong spot, he prints a new label and places it in the correct position. If it is something more than that – for example, if he shakes it and it “sounds” wrong – he sends it back. As he explained, “if the issue is with the contents, the package would be sent back to the packer to resolve it.” The storeperson/packer would then “fix it, or the client might have to fix it.” An example of the latter would be certain aircraft parts that have to be mounted inside the box that contains them that were mismounted. In those cases, the package or box has to go back to a specialist to repackage the parts correctly.

[10] It was agreed by the parties that, on days on which Mr. Jones is not able to come to work, the grievor steps into his shoes and packages and labels any dangerous goods

that Mr. Jones would otherwise have packaged and labelled. On those occasions, the grievor receives the daily allowance provided for under clause 61.01 of the collective agreement. He does not receive it when he works in his regular FFSR position.

II. Work descriptions

[11] The work descriptions for Mr. Jones and the grievor were put into evidence. They are long and detailed. I will cite only the material passages as well as those the grievor stressed as supporting his claim for the daily allowance under clause 61.01 of the collective agreement.

A. FFSR

[12] At the very beginning of the work description is the following description of the “client-service results”; “Transient warehousing, receiving, receipting and shipping of materials and personal effects for 14 Wing and its integral and lodger units”.

[13] Immediately after that are listed the “key activities,” which are as follows:

- a. *Inspecting, verifying, consolidating of material and personal effects received from clients and Wing Supply sections - 11%*
- b. *Selecting and arranging mode of transport - 7%*
- c. *Drafting, processing and typing all pertinent shipping documents and related correspondence - 30%*
- d. *Payment of transportation charges using Transportation Payment Vouchers (TPV's) - 2%*
- e. *Loading/Unloading of trailers, vans, sea containers, etc. in the receiving and shipping of material and personal effects - 9%*
- f. *Operating and maintaining all material handling equipment (MHE) - 4%*
- g. *Using hand tools, sealing and strapping machines and weight scales - 3%*
- h. *Responding to client and transportation carrier queries - 20%*
- i. *Daily filing [of] all documentation and preparing statistics weekly and monthly - 1%*

- j. *Supervising and training new section members in proper procedures - 12%*
- k. *Provides emergency first aid - 1%.*

[14] Under “Work Characteristics: Responsibility: (6) Ensuring Compliance”, among other things, is the following:

In accordance with the Transportation of Dangerous Good Act ensures that the dangerous goods the clients are shipping are properly packaged and prepared for shipment. If required sending back the goods to the client with instructions on how to properly prepare the item. Example of this is that it could have serious impact on operations to fix broken aircraft away from home base as the item can't be shipped until compliance to the applicable regulations for the mode of transport chosen.

[Sic throughout]

[15] Under “Work Characteristics: Responsibility: (7) Job Content Knowledge”, among other things, is the following:

Transportation of Dangerous Goods Act and Regulations in relation to preparing a legal dangerous goods shipment. Possession of a current dangerous goods certificate is required and re qualification [sic] is necessary every two years.

B. Storeperson/Packer

[16] At the very beginning of the work description is the following description of the “client-service results”; “Warehousing, receive, receipt, package for shipment and ship in accordance with published guidelines and regulations and issue of a variety of items for 14 Wing Greenwood and its integral and lodger units”.

[17] Immediately after that are listed the “key activities,” which are as follows:

- a. *Perform all packaging, weighting and documentation of material, including dangerous goods to be shipped are required - 40%*
- b. *Perform shipping duties including drafting, processing and typing all pertinent shipping documents and related correspondence - 20%*

- c. *Receiving, receipting, counting, recording, issuing and storing of CFSS material received from outside agencies and customers to consolidate for shipping - 10%*
- d. *Loading/unloading of trailers, vans, sea containers, etc in the receiving and shipping of material and personal effects - 5%*
- e. *Performs various warehouse and office maintenance functions such as housekeeping duties (general cleanliness), maintaining temperature control packaging items, and reporting material discrepancies - 8%*
- f. *Operates warehouse equipment (Mobile handling equipment MHE; ie. Forklift, pallet movers) utilizes computer terminals (local and networked), business machines and scales - 5%*
- g. *Accurately answers client and supplier queries with regard to packaging and shipment of materials including dangerous goods - 8%*
- h. *Training new section members and Supply personnel in proper packaging procedures - 3%*
- i. *Provides First Aid/CPR to clients and colleagues - 1%*

[Sic throughout]

[18] Under “Work Characteristics: Responsibility: (6) Ensuring Compliance”, among other things, is the following:

In accordance with the Transportation of Dangerous Good Act ensures that the dangerous goods the clients are shipping are properly packaged and prepared for shipment. Has latitude to return the goods to the clients with instructions on how to properly prepare the item. Example of this is that it could have serious impact on operations to fix broken aircraft away from home base as the item can't be shipped until compliance to the applicable regulations for the mode of transport chosen.

[Sic throughout]

[19] Under “Skills: (7) Job Content Knowledge”, among other things, is the following:

Transportation of Dangerous Goods Act and Regulations in relation to preparing a legal dangerous goods shipment. Possession of a current dangerous goods certificate is required and re qualification [sic] is necessary every two years.

[20] With that information in hand, I will now turn to the parties' submissions.

III. Submissions

A. For the grievor

[21] The representative for the grievor submitted that an employee is entitled to the daily allowance provided for under clause 61.01 of the collective agreement if he or she meets the following criteria:

- a. he or she is certified pursuant to the *TDGA* and its regulations;
- b. he or she is assigned the responsibility for packaging and labelling dangerous goods for shipping in accordance with the *TDGA* and its regulations; and
- c. he or she is required to package and label dangerous goods for shipping on the day or days for which the allowance is claimed.

[22] In making his submission, counsel for the grievor relied heavily upon *Anderson et al. v. Treasury Board (Department of National Defence)*, 2009 PSRLB 93, in which the adjudicator considered an identically worded provision. The criteria are set out in that decision.

[23] There was no dispute that the grievor met the first criterion. Hence, the only question was whether he satisfied the second and third criteria.

[24] The representative for the grievor submitted that the grievor met the second condition because his work description responsibilities include the following: “. . . ensures that the dangerous goods the clients are shipping are properly packaged and prepared for shipment.” In his submission, “ensuring compliance” with the *TDGA* was the same as “being assigned” the responsibility for packaging and labelling goods under the *TDGA*. It was, for all intents and purposes, the same responsibility found under the storeperson/packer’s work description. If an FFSR has the same responsibility to ensure compliance as a storeperson/packer, then the FFSR must be considered as having been assigned the responsibility of ensuring that the packing was done properly.

[25] In support of his submission, the representative for the grievor relied upon the decision in *McKay v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 17.

In that case, the adjudicator concluded that, if a work description outlined tasks that the employee was expected to perform and those tasks included packing and labelling dangerous goods, then he or she could be considered to have been assigned those tasks; see paragraph 98 of *McKay*.

[26] The representative for the grievor also relied upon the decision in *Hupée et al. v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 62, which dealt with a similarly worded provision. In his submission, *Hupée et al.* stood for the proposition that an employee did not have to be expressly assigned the specific responsibility of packaging and labelling goods; it was enough that he or she did it in actual fact as part of his or her daily duties. He also relied upon the decision in *Lessard v. Treasury Board (Department of Transport)*, 2009 PSLRB 34, for the proposition that a grievor's training and experience were relevant when determining whether he or she met the qualifications that were required in a work description, although counsel acknowledged that that was relevant only to the first *Anderson et al.* criterion, which the employer had already conceded was met.

[27] Accordingly, the grievor's representative submitted that the grievor met all three of the criteria set out in *Anderson et al.*, as follows:

- a. the grievor was certified under the *TDGA* and its regulations;
- b. his work description included the responsibility of ensuring that dangerous goods had been properly packaged and labelled, which assigned him that responsibility; and
- c. he was required to discharge that responsibility each and every time he acted in his capacity as an FFSR.

[28] Accordingly, the representative for the grievor submitted that I should make the following order:

- a. allow the grievance;
- b. order that the grievor be paid the monthly maximum under clause 61.01 of the collective agreement for the period commencing 21 days before the grievance was filed to the date of the order (minus any days he was actually paid the allowance when he filled in for Mr. Jones); and

- c. declare that the grievor is entitled to be paid the premium under clause 61.01 as long as his FFSR responsibilities include ensuring that dangerous goods are properly packaged and labelled.

B. For the employer

[29] The representative for the employer agreed that the grievor had to satisfy the three conditions set out in *Anderson et al.*, and that the grievor met the first condition. However, she did not agree that he satisfied the second or third condition.

[30] Dealing with the second condition, the employer's representative submitted that the grievor had to be assigned the task of packaging and labelling dangerous goods. She submitted that the focus had to be on who had the responsibility of performing that task. Comparing the work descriptions of the Storeperson/Packer with that of the FFSR, it becomes clear that the responsibility of packaging and labelling is with the storeperson/packer, not the FFSR. With respect to the "ensuring compliance" provisions for each work description, she noted that the storeperson/packer had the "latitude" to send goods back, while the FFSR could do so "if required." The difference supported a conclusion that the storeperson/packer is responsible for packaging and labelling dangerous goods.

[31] The representative for the employer submitted that the key duties and responsibilities of a storeperson/packer were different from those of an FFSR. It was clear that the two were very different jobs. The storeperson/packer's core duty was packaging and labelling; the FFSR's was shipping the packaged items to their destinations. Hence, if a work description could be said to "assign" duties, then it was clear that only the storeperson/packer work description "assigned" the work of packaging and labelling dangerous goods.

[32] Turning to the third condition, the representative for the employer submitted that the grievor had to demonstrate (and had the onus of doing so) on a balance of probabilities that he actually packaged and labelled dangerous goods for the days for which he claimed the allowance under clause 61.01 of the collective agreement. Even if he was assigned the duty, he still had to actually perform it before he could claim the allowance. There was no evidence that - other than the days on which he substituted for the storeperson/packer - he actually packaged any dangerous goods. Indeed, his evidence was, when acting as an FFSR, if he encountered a dangerous good that had

not been packaged properly, he sent it back. There was no evidence that he repackaged any such items himself. Absent such evidence, his grievance must fail.

[33] Counsel for the employer distinguished *Anderson et al.* on the grounds that its facts were different from this case. In that case, there was only a generic work description that covered employees who performed both packaging and labelling and shipping and receiving duties. Those employees were rotated daily or even at a moment's notice through the two positions. On such facts, it could be said that they were assigned and that they actually performed the work. She distinguished *Hupée et al.* on the grounds that the wording of the collective agreement in that case was different and that, in particular, the case lacked the third condition. That being the case, it was enough that the employees' work description in that case assigned them the task of packaging and labelling dangerous goods.

[34] Accordingly, she submitted that the grievance should be dismissed, subject to the fact that the employer understood and agreed that, when the grievor substituted for the storeperson/packer, he would receive the daily allowance.

C. Grievor's reply

[35] The representative for the grievor submitted that *Anderson et al.* was indeed applicable to the facts of this case. He submitted that the storeperson/packer and the FFSR could be envisaged as being two points on an assembly line. The storeperson/packer packaged the goods and then sent them on to the FFSR. The FFSR then shipped the package. However, the FFSR had to be ready at a moment's notice to relabel or redirect a package of dangerous goods if, in his or her opinion, it had not been packaged or labelled properly. That responsibility, duty and authority existed daily, and the fact that it might not be exercised on any given day did not mean that the FFSR was not discharging his or her duty to ensure that the goods were packaged properly.

IV. Reasons

[36] I will commence by stating that I agree that clause 61.01 of the collective agreement, correctly interpreted, requires that an employee claiming the allowance at issue satisfy the following three conditions:

- a. he or she must be certified pursuant to the *TDGA* and its regulations;

- b. he or she is assigned the responsibility for packaging and labelling dangerous goods for shipping in accordance with the *TDGA* and its regulations; and
- c. he or she is required to package and label dangerous goods for shipping on the day or days for which the allowance is claimed.

[37] I have to deal only with the second and third conditions, since the parties agreed that the first has been satisfied.

[38] Dealing with the second condition, in my opinion, the responsibility for a task can be assigned by an employer in one of two ways. The employer can expressly order or instruct an employee to perform a particular task, or the employer can make the responsibility part of the core duties and responsibilities of the employee's position.

[39] There was no evidence of any express order or instruction from the grievor's supervisor that, when acting as an FFSR, he was to package and label dangerous goods. That being the case, one must ask whether it was part of the core duties and responsibilities set out in his work description because, as noted in the *McKay* decision at paragraph 98, duties that an incumbent is expected to do by reason of his or her work description can amount to work that is assigned.

[40] The answer to that question in my mind has to be, "No."

[41] A comparison of the two work descriptions makes it clear that, almost by definition, the storeperson/packer is assigned the duty of packaging dangerous goods as a core part of his or her work duties. Under "Client-Services Results," the very first topic of each work description, the storeperson/packer's results include "package for shipment." By way of contrast, the results of an FFSR speak only of "warehousing, receiving, receipting and shipping." There is no reference to packing.

[42] The same difference can be found between the key activities of the two positions. The very first key activity of a storeperson/packer is that of performing "... all packaging, weighting [*sic*] and documentation of material, including dangerous goods to be shipped are required. . . ." By way of contrast, the key activities of an FFSR do not include any reference to anything related to packaging or labelling goods, let alone dangerous goods. Indeed, neither the words "pack" nor "label" appear under the position's key activities.

[43] It is clear then in my view that the employer expects the storeperson/packer to package goods, including dangerous goods, and that it expects the FFSR to ship them. The two tasks and responsibilities are kept separate and distinct. The storeperson/packer is to pack; the FFSR is to ship.

[44] I was not persuaded that the fact that both the storeperson/packer and the FFSR have the responsibility of ensuring "... that the dangerous goods the clients are shipping are properly packaged and prepared for shipment" means that the FFSR is assigned the task of packaging and labelling dangerous goods for two reasons.

[45] First, on the grievor's evidence, some packages come to him that are not packed by the storeperson/packer. For example, ammunition is packed by ammunition technicians, not by the storeperson/packer. But, since those packages flow through the assembly line, it would make sense that both the storeperson/packer and the FFSR would be expected to identify packages that might not have been packaged properly and, for that reason, need to be sent back. It does not mean that either the storeperson/packer or the FFSR were assigned the responsibility to package those types of prepackaged dangerous goods.

[46] Second, and assuming that dangerous goods are packaged and labelled by the storeperson/packer, the fact that the FFSR has the responsibility of ensuring that the packaging of dangerous goods is performed correctly does not mean that he or she has been assigned the task of packaging them. It means only that, if he or she sees something wrong, he or she must do something to remove the packaged goods from the shipping process. Removing such goods from shipment, or sending them back to be repackaged correctly, is not the same thing as actually performing the tasks of packaging and labelling.

[47] Such facts distinguish this case from *McKay*, in which there were generic work descriptions and in which the employees routinely rotated on a daily if not on a moment's notice between the tasks associated with packaging and labelling materials and those associated with shipping such packaged goods. In that case, the employer made no attempt to distinguish either the work responsibilities or the daily performance of those responsibilities. On the other hand, in this case, the employer had separate and distinct expectations and responsibilities for its storeperson/packer and its FFSR. And, in normal course, the performance of the tasks assigned to them did not overlap.

[48] Turning to the third and last condition, I was similarly not persuaded that there was any evidence that the grievor actually packaged or labelled any dangerous goods outside the times he substituted for the storeperson/packer. The most that could be said was that he might have printed out a new label and placed it right-side up or in the correct position on the package. I have some doubt that reprinting a label containing information that presumably was created by the person who actually packed the goods would amount to “labelling” within the meaning of clause 61.01 of the collective agreement. Even if it did, any such action would require no more than the minimal performance of the task of labelling dangerous goods. In my opinion, it would not amount to performing the task to a degree significant or material enough to trigger an entitlement under clause 61.01.

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

(The Order appears on the next page)

V. Order

[50] The grievance is dismissed.

April 2, 2013.

**Augustus Richardson,
adjudicator**