Date: 20140819

File: 566-02-3567 and 3568

Citation: 2014 PSLRB 78

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

STEVEN JAMES BYLOW AND STEVEN KYLE BYLOW, JR.

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Bylow v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: Michael F. McNamara, adjudicator

For the Grievors: Sheryl Ferguson, union advisor, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Employer: Lea Bou Karam, counsel

Heard at Toronto, Ontario,
July 16 and 17, 2013.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievances involve similar circumstances that arose as a result of a requirement for CX's to take firearm training as a result of the Correctional Service of Canada's (CSC) decision to change the type of firearm used by its officers. The grievors, Steven James Bylow, Sr. ("Bylow Sr."), and Steven Kyle Bylow, Jr. ("Bylow Jr."), alleged that their hours of work were changed to a non-existent shift and that, as a result, overtime compensation is payable to them.

[2] The first grievance states as follows:

> *I grieve the fact that on or about (17/18 nov 09,). [sic] the employer did change my hours of work from (0700 to 1830) hours to 1100-2300 hours which are not recognized hours of work according to my current roster/schedule.*

[3] The second grievance states as follows:

> *I grieve the fact that on or about (17/18 Nov09,). [sic] the employer did change my hours of work from (1830-0715) hours to 1100-2300 hours which are not recognized hours of work according to my current roster/schedule.*

[4] The corrective action requested for both grievances reads as follows:

> *For the employer to not direct or schedule me to work hours of work that are not recognized or part of my current roster/schedule.*
>
> *For the employer to follow and adhere to the Correctional Officers Collective agreement.*
>
> *And all other rights that I have under the Collective Agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.*

II. Summary of the evidence

[5] The grievors are father and son and are correctional officers, classified CX-1, at Fenbrook Institution in Ontario. Both grievors gave similar evidence. They were informed in a general email to staff of the requirement to attend a training course on a new firearm. Both work a modified 12-hour shift, and both attended the training at the same time (as they requested) over a four-day period, November 16 to 19, 2009.

[6] The training was held at the Ontario Provincial Police (OPP) training facility in Orillia, Ontario, about 45 minutes from Fenbrook Institution. Each session was held in the evening as the Orillia training location was available only during evenings because the OPP reserved it for itself during the day.

[7] There was no emergency at the time, the training did not involve a classification change and no shift exchange was agreed to. While the employer attempted to characterize the training sessions as voluntary, its email of October 29, 2009 addressed to CX's indicated that as a result of the change in firearms, "…the training requirement for the new handgun" (emphasis added) was a three-day course on the use of the new handgun, with the fourth day devoted to the use of another firearm already used by the CSC.

[8] Bylow Sr.'s hours of work that week were initially scheduled as follows:

Tuesday, November 16:	Day off
Wednesday, November 17:	07:00-19:45
Thursday, November 18:	07:00-19:45
Friday, November 19:	Day off

[9] Bylow Jr.'s hours of work that week were initially scheduled as follows:

Tuesday, November 16:	Day off
Wednesday, November 17:	18:30-07:15
Thursday, November 18:	18:30-07:15
Friday, November 19:	Day off

[10] In a response to the grievors' choices for allotted training times, they were informed by email (Exhibit 2) on November 6, 2009, at 08:00, that they would be attending the training from November 16 to 19 and that, if necessary, their "shift has been changed to Evenings to facilitate the training" and that those who worked twelve hours shifts, as the grievors did, "will be 1100-2300 hrs on their regularly scheduled days".

[11] A document entitled "TRAINING SCHEDULE" was attached to the email. It identified both grievors and the training schedule dates and indicated that the training would take place between the hours of 15h00 and 23h00 on each of the days.

[12] At the hearing, the employer testified that the grievors were paid at overtime rates for the noted Tuesday and Friday hours of work as those days had been

scheduled as days off for the grievors. Therefore, only payment for the two middle days of training is in issue in this case.

[13] In accordance with the employer's instructions, the grievors reported for work at 11:00 on November 16 and 17 before proceeding later that day to Orillia for the firearms training session.

[14] Ryan Dewey, President of the bargaining agent local, testified that no mutual agreement was in place at either the local or national level to change the agreed-upon shift schedule. He indicated that while training is an ongoing and necessary component of work for CXs, in the past, it had been accomplished within existing schedules.

[15] Len Page, Correctional Manager, Scheduling and Deployment for the employer, testified. He has responsibility for about 170 CXs on 14 different rosters with various shift patterns. He described the different schedules and explained how they are arrived at locally and how they are approved nationally. To accommodate service requirements, officers are moved between shifts to cover for vacation and other leave, as well as for training. To accomplish it, shifts must be changed, sometimes with little notice. He testified that the collective agreement requires 48 hours' notice for the employer to avoid a penalty for a shift change, but the more notice given, the easier and better it is for employees to plan their lives.

[16] In cross-examination, Mr. Page was asked about the schedule-change process that occurs when management wishes to effect a change to the existing shift schedule (as opposed to individual shifts within an existing schedule). First, the Local Union and Management Committee must reach an agreement. Then it is reviewed by the Joint Region Committee, and then the National Committee approves it. The approval process takes only a couple of days if it meets the necessary criteria.

[17] Mr. Page identified the 12-hour "CX-1 Roster." It includes 12.00-hour, 12.50-hour and 12.75-hour shift patterns, as follows:

12.00-hour shift:Days: 07:00-19:00	Nights: 19:00-07:00
12.50-hour shift:Days: 07:00-19:30	Nights: 18:45-07:15
12.75-hour shift:Days: 07:00-19:45	Nights: 18:30-07:15

[18] No 11:00 - 23:00 shift is included on this roster. No agreement was reached between the CSC and the bargaining agent to change the roster to add this shift.

[19] Two years before the events in issue, an agreement had been reached between the CSC and the bargaining agent to accommodate training, but it was no longer in effect during the events in issue.

III. Summary of the arguments

[20] The bargaining agent believes that the employer violated the collective agreement when, to accommodate training requirements, it instituted a shift that the parties had not agreed to. Articles 21 and 34 as well as Appendix "K" of the collective agreement clearly define how an employee's hours of work are established and approved. That process was not followed in this case.

[21] The bargaining agent believes the contentious issue between the parties is whether the 11:00-23:00 shift is allowed by the collective agreement. It argues that no such shift was in effect at the time in question and that no agreement to create such a shift was entered into by the parties.

[22] Article 21 of the collective agreement defines an employee's hours of work and overtime. Clauses 21.02 and 21.03 outline the shift-work provisions.

[23] Clause 21.03(b) of the collective agreement states as follows: "The Employer agrees that before a schedule of working hours is changed, the change shall be agreed upon in accordance with the attached letter of understanding."

[24] Clause 21.02(b)(ii) of the collective agreement states in part as follows: "Shift means the employees [*sic*] regularly schedule [*sic*] hours of work in accordance with article 21.03(a) not the post to which the employee is assigned."

[25] Article 34 of the collective agreement defines the modified hours of work system and states in part as follows:

> *The Employer and the Union agree that the following conditions shall apply to employees for whom modified hours of work schedules are agreed upon pursuant to the relevant provisions of this collective agreement. The agreement is modified by these provisions to the extent specified herein.*
>
> ***1. General Terms***
>
> *The scheduled hours of work of any day as set forth in a work schedule, may exceed or be less than the regular workday hours specified by this agreement; starting and finishing times of shifts, meal breaks and rest-breaks [sic] shall be established by*

> *agreement between the employer and the Union at the local level, and approved according to the attached letter of understanding. . . .*
>
> *. . .*

[26] Appendix "K" of the collective agreement is the letter of understanding referenced in articles 21 and 34 and states in part as follows:

> *. . .*
>
> ***PROCESS FOR APPROVING SCHEDULE AND SCHEDULE CHANGES***
>
> *Prior to any schedules being approved for implementation at any institution, they shall be reviewed and certified by the national committee identified for the purpose of overseeing the schedules. The national committee will confirm that the above principles have been adhered to and reflected in the schedules. If the schedules do not reflect the principles then the schedule submitted shall not be certified for implementation and referred back to the local for further changes/amendments.*
>
> *Once a schedule has been approved and implemented, it shall only be altered by the mutual consent of the local Union and management and after the subsequent review and certification by the national committee. However, in cases where a change in the security level of the institution or organizational change (e.g. number of approved posts, hours of operations for posts, classification or type of posts for deployment purposes), the schedule shall be re-submitted to the national committee to review the compliance with the above principles. The national committee shall on an annual basis, review schedules in effect in an institution to ensure continued compliance with the above principles.*
>
> *. . .*

[27] In this case, the employer changed the grievors' hours of work and had them report for work for an 11:00-23:00 shift, which is not a recognized shift. The employer created it to reduce overtime.

[28] Clauses 21.02(b)(ii) and 21.03 of the collective agreement states as follows:

> ***21.02**. . .*
>
> *b) every reasonable effort shall be made by the Employer*
>
> *. . .*
>
> *(ii) to ensure an employee assigned to a regular shift cycle shall not be required to change his or her shift more than once during that shift cycle without his or her consent except as otherwise required by a penitentiary emergency. A change*

> *of shift followed by a return to the original shift is considered as one change;*
>
> *Shift means the employees regularly schedule hours of work. . .*
>
> . . .
>
> ***21.03***
>
> *(a) Shift schedules shall be posted at least fourteen (14) calendar days in advance of the starting day of the new schedule in order to provide an employee with reasonable notice as to the shift he or she will be working. The shift as indicated in this schedule shall be the employee's regularly scheduled shift.*
>
> *(b) The employer agrees that, before a schedule of working hours is changed, the change shall be agreed upon in accordance with the attached letter of understanding.*
>
> *(c) Within five (5) working days of request for modification served by either party, the Union shall notify the Employer in writing of the authorized representative to act on behalf of the Union.*

[29] The grievors received notice in an email dated November 6, 2009 (Exhibit 2), about changes to their hours of work effective November 16, 17, 18 and 19. November 16 and 19 meant existing days of rest were to become overtime, while the regularly scheduled shift hours for November 17 and 18 were being changed to 11:00-23:00, an evening shift, which was a new shift not allowed by the letter of understanding in Appendix "K", as stated in clause 21.03(b) of the collective agreement. The email did not provide 14 days' notice to the grievors of a new schedule, as required by clause 21.03(a). In addition, the employer did not give notice to the bargaining agent in writing, as required by clause 21.03(c).

[30] The bargaining agent also argued that before a change to a shift schedule is made, consultation at the local level and review by the regional level must occur, and finally, approval at the national level is required, as outlined in Appendix "K" of the collective agreement, none of which happened.

[31] The bargaining agent asked that the grievors receive overtime and shift differential pay plus any other entitlement to compensation identified on the grievance presentation form.

[32] The grievors referred me to the following decisions: *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 120; *Cooper v. Treasury Board*

(Correctional Service of Canada), 2011 PSLRB 38; and *Spears v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14759 (19850130). The bargaining agent also referred me to paragraphs 4:2100, 4:2110, 4:2120, 4:2151 and 4:2153 of Brown and Beatty.

[33] The employer argued that the question is whether it can change shifts to accommodate training. It believes that the answer is in the affirmative.

[34] The employer relied on *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55, at para 25, as follows, to establish what an adjudicator can do when faced with an interpretation dilemma:

> *[25] . . . My task is to garner what the parties agreed to from the words they used. In doing so, I cannot change or alter the words they used when they entered into the collective agreement. When interpreting the words used in a collective agreement, I must use their ordinary, everyday meaning, unless doing so would lead to an absurd result or unless the agreement defines them in a special or particular way. I must interpret the words used within the overall context of the agreement in which they appear. And finally I am prohibited from amending the collective agreement by virtue of section 229 of the Act.*

[35] The employer agreed with the references to Brown and Beatty, *Canadian Labour Arbitration*, 4th edition cited by the bargaining agent.

[36] It argued that the rights identified in article 21 of the collective agreement are structured differently in this case, and it contrasted a schedule change with a shift change. Article 34 deals with schedule changes, as does Appendix "K". A schedule is a combination of shifts and days of rest. In clause 21.02(b)(ii), a shift is defined as meaning "the employees [*sic*] regularly schedule [*sic*] hours of work in accordance with article 21.03(a) not the post to which the employee is assigned."

[37] A shift can be changed in many ways. According to clause 21.02(b)(i) of the collective agreement, the employer may change an employee's shift without the employee's consent once in a shift cycle. According to clause 21.05, employees may exchange shifts. Both cases represent a shift change and not a schedule change. If a shift is changed without sufficient notice, a penalty is applied.

[38] The employer's case was that a shift change is not a schedule change and that a shift change is permitted by the language in the collective agreement.

[39] The employer referred me to *Wamboldt* and to *Campbell et al. v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 57.

IV. Reasons

[40] The grievors had their hours of work for four days during one week in November 2009 altered in order to accommodate training requirements. Their initial shifts of either 7a.m. to 7:45 p.m. or 6:30 p.m. to 7:15 a.m. were altered so that they were now required to work from 11 a.m. to 11:00 p.m. The grievors contest this change of hours on the basis that the employer has changed their shift to an un-approved shift. In other words, it is not the change itself which the grievors contest but rather the change to the particular hours which the employer required the grievors to work.

[41] There is no dispute between the parties that the hours of 11:00 a.m. to 11:00 p.m. are not hours which are found within the approved shift schedule at Fenbrook Institution. The evidence disclosed that within this institution, the 12-hour shifts which had been approved under Appendix "K" began at either 7 a.m., in the case of the day shifts, or at 6:30, 6:45 or 7:00 p.m. in the case of evening shifts. No 12-hour shift began at 11:00 a.m. There is also no issue between the parties that the process for effecting a schedule change referred to in Appendix "K" had not been followed.

[42] The grievors contend that while the employer has the right, under article 21 of the collective agreement, to have them switch "shifts" during the life of the shift schedule, it can only switch the grievors to hours which correspond to pre-approved shift schedules.

[43] The concept of "approved" shift schedules is derived from Appendix "K" of the collective agreement. Appendix "K" is a letter of understanding between the parties with respect to the effective scheduling of shift work for the CSC. The letter begins by outlining the four principles of effective scheduling agreed to by the parties and then sets out the rules that the parties established in order to "maintain sustainable solutions for all stakeholders and to ensure effective scheduling that will address the business needs of the organization and the quality of life for employees".

[44] The appendix then goes on to state that any shift schedule being approved for implementation at any institution must be reviewed and certified by a national committee established for that very purpose. The next paragraph then states that once a shift schedule has been approved by the committee, it can only be altered by the

mutual consent of the local union and management and after subsequent review and certification by the national committee.

[45] In deciding this case, I must also be mindful of the provisions contained in clause 21.03 which state as follows:

> *a. Shift schedules shall be posted at least fourteen (14) calendar days in advance of the starting date of the new schedule in order to provide an employee with reasonable notice as to the shift he or she will be working. The shift as indicated in this schedule shall be the employee's regularly scheduled shift.*
>
> *b. The Employer agrees that, before an employee's shift schedule is changed, the change shall be agreed upon in accordance with Appendix "K".*

Thus, both clause 21.03 and Appendix “K” refer to the employer’s ability to change an employee’s “shift schedule”, but limit that ability in forcing the employer to seek and obtain the approval of the national committee prior to instituting the new hours.

[46] I find, however, that the change to the shift schedule referred to in clause 21.03 does not apply to the circumstances at issue here but instead applies to a much broader factual situation. I find that paragraph 21.03(b) refers to a situation in which the shift schedule itself is changed and does not refer to the temporary change that is in issue here.

[47] I find that the issue in this case concerns a much more discrete change than the one outlined above, one that is, as the employer argues, specifically covered by the terms of clause 21.02(b).

[48] The issue between the parties is this: can the employer, when it effects changes to the shift schedule, effect such changes so as to schedule an employee for hours which do not correspond to shifts that have been approved under Appendix “K”? I find that it cannot.

[49] Clause 21.02(b)(ii) states that when “a shift” is scheduled for an employee, the employer shall make every reasonable effort to ensure that the employee “shall not be required to change his or her shift more than once during that shift cycle without his or her consent”, except in the case of institutional emergencies, an exception that does not arise here. This clause, as opposed to the other clauses cited earlier, specifically contemplates the type of discrete change to a schedule which occurred here.

[50] After indicating that a change in shift can be effected once in the lifetime of a shift cycle, it then states that a change of shift followed by a return to the original shift shall be considered as one change.

[51] In reviewing all the evidence and the parties' positions on how to interpret the collective agreement language, I was led to the conclusion that, in including such comprehensive articles which provide for such a detailed process around the establishment of and change to shifts, the parties have signalled the importance of the scheduling system and the need for predictability around such issues. The parties to the collective agreement have put into place a system to establish, review and amend shift schedules that is comprehensive and rigorous and that serves both parties' needs.

[52] The system which they have put in place provides for the establishment of approved shifts and for the administration of those particular shifts. The collective agreement provisions always refer to those established shifts and the change referred to in paragraph 21.02(b)(ii) refers to an employee changing his or her "shift".

[53] The employer is correct in its submission that the change in issue is captured by clause 21.02(b)(ii). However, that conclusion does not end this matter for while the employer is, by virtue of that clause, permitted to change an employee's shift once during the life of a schedule, the question here is whether that means that it can change that shift into whatever hours it wishes, or whether it is bound to change that shift to another "shift" that has been approved as per the collective agreement.

[54] I find that given the care and attention paid to the clauses setting out day work as opposed to shift work, the length of shifts, their scheduling and the principles to be followed in so scheduling, it is more reasonable to conclude that this clause should be read as "a change from one shift to another" rather than to read is as saying "a change from one shift to any hours that the employer wishes". Under the terms of the collective agreement, the word "shift" is used as a term of art and I find that a "shift" is only a "shift" if it has been created in accordance with the collective agreement. It would have been a simple matter for the parties to indicate in clause 21.02(b)(iii) that the employer can, once during the lifetime of a shift schedule, change an employee's shift into hours of work that meet the needs of the service, or similar language. The fact that they instead chose to use the word "shift" is indicative of something. I also find that the final sentence in clause 21.02(b)(ii) supports my interpretation as it refers

to a "change of shift" which I find cannot be interpreted to be synonymous with "change in hours".

[55] I find that given the manner in which the collective agreement is written, the employer has the ability to change an employee's shift to another, but that it must effect that change within the established shifts available to it. The provisions of the collective agreement clearly refer to changing an employee's "shift" and I find that it is implicit within the provision that the change is from one shift to another. For example, paragraph 21.02(b)(ii) provides that, for an employee on shift work such as the grievors, the employer will make every reasonable effort to ensure that an employee assigned to a "regular shift cycle" shall not be required to "change his or her shift more than once during that shift cycle without their consent", unless the change is required by a penitentiary emergency and that a "change of shift followed by a return to the original shift is considered as one change".

[56] I find that the clear wording of the collective agreement contemplates that there be a change to an established shift and that the collective agreement clearly provides that such shifts can only be established through the process described in article 21 and in Appendix "K".

[57] Mr. Page provided evidence that in the past, the parties had reached an agreement to enable training to take place. However, he also stated that whatever agreement had been reached in the past was no longer in effect. I therefore find that his evidence with respect to this case does not assist me in coming to a conclusion.

[58] In *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, at para 18, the adjudicator states as follows:

> *[18] When the parties agreed to include Appendix "K" in the collective agreement, they agreed to jointly decide on the schedules. If one of them, in this case, the employer, does not agree with the other, it cannot unilaterally impose its will on the other. If the employer believed that the schedule did not respect the principles of effective scheduling outlined in Appendix "K" of the collective agreement, it could have filed a policy grievance against the union. However, it did not have the right to "take the law into its own hands".*

[59] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[60] The grievances are allowed.

[61] The employer violated Appendix “K” of the collective agreement

[62] I order the payment of overtime for the hours the grievors worked on November 17 and 18, 2009, which were outside their scheduled hours of work. For Bylow Sr., these hours would be between 19:45 and 23:00, and for Bylow Jr., the hours would be between 11:00 and 18:30.

August 19, 2014.

Michael F. McNamara,
adjudicator