

**Files:** 166-2-27186  
166-2-27378  
166-2-27379



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**GARY L. PAYNTER ET AL**

Grievors

and

**TREASURY BOARD  
(Agriculture and Agri-Food Canada)**

Employer

***Before:*** Jean Charles Cloutier, Board Member

***For the Grievors:*** Mike Tynes, Public Service Alliance of Canada

***For the Employer:*** Judith K. Begley, Counsel

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Heard at Charlottetown, P.E.I.,  
August 13, 1997.

## DECISION

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This decision follows the hearing of three group grievances referred to adjudication. Gary L. Paynter and the other employees who are identified in, and whose signatures are attached to the three grievance forms presented, are members of the Primary Products Inspection Group and are employed by Agriculture Canada in Prince Edward Island. All three grievances allege the employer has violated different provisions of article 21 of the Group Specific Collective Agreement (Code 408/89) between the Treasury Board and the Public Service Alliance of Canada.

### 1st Grievance (166-2-27186)

In the first grievance, the grievors are grieving "... management's decision to amend our daily and weekly hours of work". The grievance dated November 20, 1995 reads as follows:

#### *Details of Grievance*

*The Primary Products Inspectors (see list attached) are grieving management's decision to amend our daily and weekly hours of work. The decision, which was communicated to us in a letter dated October 23, 1995, contravenes Article 21 (hours of Work and Overtime) of the PPI Group Specific Agreement, and any other relevant articles of that agreement, as well as of the PSAC Master collective agreement.*

#### *Corrective Action Requested*

*We request this new schedule cease immediately, and that its implementation be put on hold until the final resolution of this grievance. We request that the collective agreement be respected. Finally, we request that the affected employees be made whole and be compensated overtime and benefits for hours worked outside the hours of work currently worked prior to this change, this, in accordance with the collective agreement.*

### 2nd Grievance (166-2-27378)

In the second grievance, the grievors are grieving "... that the employer is not allocating overtime work on an equitable basis ...". The grievance dated November 20, 1995 reads as follows:

Details of Grievance

*The Primary Products Inspectors (see attached list) grieve that the employer is not allocating overtime work on an equitable basis among readily available, qualified employees. This is in contravention of Article 21 (assignment of overtime work) of the PPI Group Specific Collective Agreement and any other relevant Articles of the PSAC Master Collective Agreement.*

Corrective Action Requested

*We request that the employer allocate overtime work on an equitable basis among readily available qualified employees. We request that the Collective Agreement be respected and that the grievors be made whole; that all benefits and salary loss due to the missed overtime opportunities be compensated.*

3rd Grievance (166-2-27379)

In the third grievance, the grievors are grieving that the employer is not providing adequate advance notice to employees who are required to work overtime. The grievance dated November 20, 1995 reads as follows:

Details of Grievance

*The Primary Products Inspectors (see list attached) grieve that the employer is not giving employees who are required to work overtime adequate advance notice of this requirement. This is in contravention of Article 21. (Assignment of Overtime Work) of the PPI Group Specific Agreement and any other relevant Article of the PSAC Master Collective Agreement.*

Corrective Action Requested

*We request that the employer give the employees who were required to work overtime adequate advance notice of this requirement. We request that the Collective Agreement be respected and that the grievors be made whole.*

In their opening statement, the parties agreed that all three grievances would be heard together due to the fact that their witnesses could speak to all three and that they were interrelated in nature.

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EVIDENCE

Mr. Tynes, "the grievors' representative" introduced twelve exhibits. The first witness called was Mr. Gary Lee Paynter who is an Inspector with the Food Production and Inspection Branch and also Vice President of local 9004 which is the Prince Edward Island Component of the Agriculture Union.

The facts as they relate to the grievors can be put simply. The Department of Agriculture took the position that they must recover overtime charges provided to the industry. The industry ("clients") are the growers and shippers of potatoes in Prince Edward Island. The Department sent a memorandum to the potato industry on September 22, 1995 (Exhibit G-3) entitled "Regional Overtime Policy". Prior to this policy, all inspectors worked from Monday to Friday. The major changes that were highlighted by the witness with respect to the change in the daily and weekly hours of work were the following:

- A) As of September, 1995, half of the staff would work from Monday to Friday and the other half would work from Tuesday to Saturday.
- B) All contiguous overtime was to be paid by the client and had to be requested before 4:00 P.M. on that day.

Mr. Paynter produced two work schedules (Exhibits 4 and 5) that were prepared by supervisors whereby the inspectors are given rotations from the Monday to Friday schedule for four weeks and then to the Tuesday to Saturday schedule for the next four weeks. Certain inspectors did obtain permission for two-week rotations.

Memos were sent to Management by Mr. Paynter in his capacity of Vice President of the local (Exhibits 6 and 7) indicating the negative reaction to this new policy and also trying to minimize the impact as Union representative. No response or offer to discuss was forthcoming from Management. The grievors believe that contiguous overtime should be allocated by supervisors and not by clients.

Insofar as the equitable distribution of overtime is concerned, the witness referred to Exhibit G-12 which relates to a partial study that was made on the matter between April 1995 and February 1996. This study indicates that one inspector (Dingwall) had twice as many hours of overtime as another inspector (Docherty) during

that period. The witness was of the view that there should be a mechanism in place so that anyone who was denied overtime would have the opportunity to catch up at a later date.

In cross-examination, Mr. Paynter acknowledged that this type of scheduling was put in place in 1990 for a period of time and that no grievances were then submitted. The witness agreed with counsel for the employer that their main objective is to give the best service to their clients so that the industry continues to grow in the domestic and international markets. The witness also recognized that the Saturday workload had not changed since the implementation of the new schedule. He confirmed that half of the staff worked on Saturday at a time and a half rate prior to implementing the new policy, whereas half of the staff now work Saturdays at a straight time rate.

Mr. Paynter recognized the fact that contiguous overtime continued but that the major change is the fact that the client pays for it rather than Agriculture Canada.

As to the issue of advance notice to employees who are required to work overtime, the witness stated that the grievors would prefer that the current 4:00 P.M. notice be changed to a noon advance notice, as is the case for meat inspectors. Mr. Paynter admitted that the context is different and that Growers and Shippers often receive orders in the later part of the afternoon which is considered as regular practice in the potato industry.

The second and last witness on behalf of the Grievors was Mr. Romeo Leblanc who is Regional Vice President (PSAC) for Prince Edward Island and New Brunswick. The witness expressed his concern about the lack of consultation between management and the union prior to the implementation of the policy. While he had some conversation with the Director of Operations, during which he emphasized the fact that there were many problems with this policy, he felt that their conversation should not be considered as consultation with the bargaining agent. It was his opinion that Management contravened the Collective Agreement by not consulting with the Union.

The Employer's evidence can be summarized as follows.

Four exhibits were produced (Exhibits E-1, E-2, E-3 and E-4).

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The first witness was Mr. Robert McDonel, a potato farmer who grows table potatoes for domestic and export markets. The witness stated that buyers often call for instant delivery of potatoes. Such calls are usually received near the end of the day for delivery on the next business day. If such requirement is not met, the order may be lost. Saturday is considered a normal shipping day in the industry. Once such an order is received, a call is placed immediately to obtain the services of an inspector. In answering a question from the grievors' representative, the witness said that he is Director and Vice President of the Potato Board and that they were consulted by the employer on the changes and the increase in fees.

The second witness was Mr. Paul M. Farrell, Director of Operations for Prince Edward Island (P.E.I.) Agriculture and Agri Food Canada. The witness described the organization in P.E.I. which consists of seven sub-offices with each one being unique. Each office consists of a supervisor and a certain number of inspectors (the number varies from three to twelve inspectors). There are different types of inspections such as table stock, seed potato and export. Inspectors work 7 1/2 hours a day and work overtime beyond those hours on client request. Saturday is considered a regular shipping day and there are always inspections to be done on that day. Mr. Farrell stated that due to various factors such as resource reductions, increased inspection fees, collecting overtime from clients, expanding the service to six-day operation, reduced overtime budgets, etc., consultation with the industry resulted in certain managerial decisions. Mr. Farrell requested that all supervisors in all offices speak to each employee and explain the changes and he himself spoke to Mr. Romeo Leblanc. Many inspectors expressed concerns about the changes as did Mr. Leblanc. Mr. Farrell did mention to the grievors' representative that the overtime budget has been reduced and that additional P.Y.'S could have been a solution but was not considered. The schedule and the overtime are planned and implemented office by office. Mr. Farrell did admit that he did not consult with a Union representative except that he had talked to Mr. Leblanc. Management has posted overtime hours worked in each office but at the request of many inspectors (Exhibit E-4) this practice was stopped.

The last witness for the employer was Mr. Donald T. Brown, Supervisor/Inspector at the Charlottetown Office. The witness stated that there are three kinds of overtime:

- a) Contiguous
- b) Call back
- c) Designated holidays

and that 80% of the overtime was contiguous and that this was normal because it did not make sense to replace an inspector who is already on site. Cost was a factor, but on request, an inspector could be replaced for personal previous commitments. Clients prefer the same inspector for many reasons such as the knowledge of the class of stock, hot spots, etc. Mr. Brown stated that between 8:00 and 9:00 AM. every morning he calls the dealers and shippers for their agenda for the day so that he may provide them with the service they need. However, any additional requirements from shippers will only be known on the spur of the moment when a further call for service is received. Mr. Brown had discussions with the staff on an individual basis so as to explain to them the new Regional Overtime Policy (Exhibit G-3).

Most employees are accustomed to work overtime on Saturday, therefore, working six-day weeks. Prior to the implementation of the new policy, overtime was paid for Saturday work and many inspectors earned up to \$10,000. yearly in overtime.

Counsel for the grievors asked if Mr. Brown had consulted with a Union official prior to the implementation of the policy. His answer was yes in that he had consulted with all the inspectors, but that he had not in any particular or special way consulted directly with the Union. Mr. Brown also stated that under the former policy inspectors had the option of cash or compensatory leave for their overtime worked but on September 30th of each year, whatever balance was left had to be paid.

#### ARGUMENTS

The arguments by the representative of the grievors may be summarized as follows.

#### 1st Grievance (Amended Hours of Work)

Prior to the change, the grievors came under clause 21.01 of the Primary Products Inspection which reads as follows:

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ARTICLE 21

HOURS OF WORK AND OVERTIME

21.01 Hours of Work

*Except as provided for in clause 21.03, the normal workweek shall be thirty-seven and one-half (37 1/2) hours exclusive of lunch periods, comprising five (5) days of seven and one-half (7 1/2) hours each, Monday to Friday. The workday shall be scheduled to fall within an eight (8) hour period where the lunch period is one-half (1/2) hour or within an eight and one-half (8 1/2) hour period where the lunch period is more than one half (1/2) hour and not more than one (1) hour. Such work periods shall be scheduled between the hours of six (6) a.m. and six (6) p.m. unless otherwise agreed in consultation with the Alliance and the Employer at the appropriate level.*

The grievors were on a normal work week of 37 1/2 hours and clause 21.03 cannot apply because 21.03 applies to employees working day or night shifts. Clause 21.03 reads as follows:

*21.03 For employees who work on a rotating or irregular basis:*

*(a) Normal hours of work shall be scheduled so that employees work:*

*(i) an average of thirty-seven and one-half (37 1/2) hours per week and an average of five (5) days per week,*

*and either*

*(ii) seven and one-half (7 1/2) hours per day,*

*or*

*(iii) an average of seven and one-half (7 1/2) hours per day where so agreed between the Employer and the majority of the employees affected,*

*(iv) subject to the operational requirements of the service, an employee's days of rest shall be consecutive and not less than two (2).*

*(b) Every reasonable effort shall be made by the Employer:*



- (i) *not to schedule the commencement of a shift within twelve (12) hours of the completion of the employee's previous shift;*
- (ii) *to avoid excessive fluctuations in hours of work;*
- (iii) *to consider the wishes of the majority of employees concerned in the arrangement of shifts within a shift schedule;*
- (iv) *to arrange shifts over a period of time not exceeding two (2) months and to post schedules at least seven (7) days in advance of the starting date of the new schedule.*

The grievors' representative also stated that the employer by discussing the change individually with each employee failed to abide to clause 21.06 which reads as follows:

*21.06 The Employer agrees that, before a schedule of working hours is changed, the change will be discussed with the appropriate Steward of the Alliance, if the change will affect a majority of the employees governed by the schedule.*

The employer failed to carry out proper consultations with the bargaining agent before implementing the new schedule.

### 2nd Grievance (Equitable Distribution of Overtime Work)

The Alliance representative referred to exhibit G-12 which shows the variances in overtime worked during a certain period of the new schedule. Emphasis was placed on the fact that clients' need could continue to be met and that the employer should abide by clause 21.14 (a) which reads as follows:

#### *21.14 Assignment of Overtime Work*

*Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*

- (a) *to allocate overtime work on an equitable basis among readily available, qualified employees,*

It is not reasonable to try to catch up at this time but the employer should compensate employees either in cash or in compensatory leave.

### 3rd Grievance (Inadequate Advance Notice)

Reference was made to article 21.14 (b) which reads as follows:

*21.14 Assignment of Overtime Work*

*Subject to the operational requirements of the service,  
the Employer shall make every reasonable effort:*

...

*(b) to give employees who are required to work overtime  
adequate advance notice of this requirement.*

The grievors' representative stated that to be notified before 4:00 P.M. was far from being adequate advance notice and the employer should request clients to give notice before noon or else have other inspectors on stand by or call back situations.

The grievors' representative referred to the decision of the Federal Court of Appeal in Attorney General of Canada vs. R.S. Tucker, [1979] 1 F.C. 543.

The representations by counsel for the employer can be summarized as follows.

Counsel stated that the grievors have the burden of proof because they claim that the employer did not follow the collective agreement.

1st Grievance (Amended Hours of Work)

Management has all rights which are not expressly given up (Residual rights). I was referred to section 7 of the Financial Administration Act and section 7 of the Public Service Staff Relations Act and also to article M-6 of the Public Service Alliance of Canada Master Agreement which reads as follows:

ARTICLE M-6

MANAGERIAL RESPONSIBILITIES

*M-6.01 Except to the extent provided herein, this Agreement  
in no way restricts the authority of those charged with  
managerial responsibilities in the Public Service.*

The change in schedule was motivated by operational requirements and due to the fact that the nature of the business is client driven. The clients are potato shippers giving service from Monday to Saturday. Clauses 21.01 and 21.03 (supra) do authorize

the employer to schedule hours of work on either a regular or a rotational or irregular basis.

The implementation of the shift change was done as fairly as possible and the employees were given the choice of two or four week rotations. As for clause 21.06 (supra), discussion took place between Messrs. Leblanc and Farrell at which time Mr. Leblanc could have raised any concerns he or the bargaining agent had. Discussion also took place with all employees individually including Mr. Paynter who is the Vice President, local 90004.

The objection by the grievors is really about the loss of overtime. However, there is no right to receive overtime and the loss of such does not constitute an infringement of the collective agreement.

#### 2nd Grievance (Equitable Distribution of Overtime Work)

Clause 21.14 (a) (supra) states clearly that the equitable distribution of overtime is subject to operational requirements. It is because of operational requirements that inspectors are asked to remain on site for contiguous overtime which is the most practical and economical way and this is done by sub-office. One must remember that 80% of the overtime is contiguous, therefore it is reasonable to keep the person on site rather than moving an inspector from another site.

#### 3rd Grievance (Inadequate Advance Notice)

I was referred to clause 21.14 (supra) which provides, that subject to operational requirements, the employer is to make every reasonable effort to give employees who are required to work overtime adequate advance notice of this requirement. At times, buyers do not give a lot of notice therefore the growers/shippers must react to the market or else they may lose that sale. The employer struck a balance with the industry for service hours and the cut off is 4:00 P.M. The industry/clients make the calls and this is considered by the employer as an operational requirement. This whole operation is driven by the client and the inspectors are to assure the required service is provided.

The following decisions were also relied upon:

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R.A. Watier and J.R.J. Chartrand and Treasury Board, Board files 166-2-321 and 1662-322; M. Savard and H. Zirpdji and Treasury Board, Board files 166-2-1768 and 166-2-1769; H. Zirpdji and M. Savard and Treasury Board, Board file 168-2-98; D. Freitag, M. Jorgenson, B. Souster, A. Waruk and D. Willis and Treasury Board, Board files 166-2-8086 to 8090.

The grievors' representative's rebuttal can be summarized as follows:

The changes were made due to a cost factor exercise when resources should have been added because clients increased significantly. The collective agreement was violated and should have been respected. Another key factor is the lack of discussion with the bargaining agent where input should have been sought. The changes made in the last two years have not resolved the problems, and if discussion had occurred, many options could have been looked at therefore bringing solutions to these problems.

#### DECISION

It is clear to me that the grievors all came under clause 21.01 (supra) prior to the Regional Overtime Policy (Exhibit G-3) dated September, 1995. After the implementation of the new policy, they became employees who work on a rotating or irregular basis. It is evident that the new policy was a result of the employer reviewing its operational requirements in light of the costs of its operations and the service that the Potato Industry expected it to provide. As unfair as the whole process may have seemed to the grievors, especially since they saw their regular Saturday overtime compensation disappear, I am satisfied that under section 7 of the Financial Administration Act and section 7 of the Public Service Staff Relations Act, together with the various clauses under article 21 of the Group Specific Collective Agreement, the employer had the authority to modify working hours so as to better manage its operations vis-à-vis the clients' requests. There was no suggestion by the grievors that the employer could not alter the shift schedule; rather, their position was that the employer failed to discuss the change as required by article 21.06.

In the instant case, Mr. Farrell requested all supervisors to speak to each employee to explain the changes. He also talked to Mr. Leblanc, the Regional Vice President of the PSAC, although he acknowledged that he did not specifically discuss

the proposed changes with him, or with any other union official, prior to their implementation.

The purpose of the requirement to discuss in article 21.06 is to ensure that the bargaining agent is made aware of any proposed changes in the hours of work and that it has the opportunity to discuss with management any concerns that the employees may have with respect to the proposed changes before those changes are implemented. This is an obligation that the employer owes to the bargaining agent and it is not met by management discussing the proposed changes with individual employees.

I am satisfied that the change in the hours of work arose because of operational requirements. No evidence was adduced that would suggest that the hours of work would be any different than they presently are had proper discussion taken place. In the absence of any specific evidence that would suggest that the position of the grievors has been prejudiced by the lack of discussion, I am not prepared to grant the remedy requested. However, I am prepared to issue a declaration, and accordingly declare, that insofar as the implementation of the new hours of work for the grievors is concerned, the employer did not comply with the intent of its obligation to discuss under article 21.06 of the Group Specific Collective Agreement. In this regard, I would strongly urge the employer to take steps to ensure full compliance in the future.

Insofar as the second grievance is concerned, I am satisfied that the method of overtime distribution is based on operational requirements. I was not persuaded that equitable distribution could be achieved in a better fashion. It is not practical nor cost efficient to replace inspectors on site for contiguous overtime nor is it feasible to request inspectors to work overtime in another location (client) or sub-office. The second grievance is accordingly denied.

The third grievance must also be denied. The potato industry involves a relationship between growers, brokers, clients and inspectors. The growers are in a competitive market and must respond to the requests of their clients. I am satisfied that the 4:00 p.m. cut-off was implemented because of operational requirements and was a reasonable attempt to accommodate the needs of the growers and the concerns of the employees. With respect to the latter it is noted that management does respect the individual commitments of the inspectors.

**Jean Charles Cloutier,  
Board Member**

OTTAWA, September 12, 1997.