File: 166-2-28332
166-2-28333

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN KING

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs and Excise)

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Vickie Lou McCaffrey, Counsel, and Debra Prupas, Counsel

Heard at Toronto, Ontario,
October 26 to 28, 1998.
(Written submissions filed November 13 and December 14, 1998.
On February 12, 1999, confirmation received that no further written representations would be submitted.)

This decision relates to two grievances filed by John King, a PM-02 Customs Inspector at Pearson International Airport in Toronto. His first grievance (Board file 166-2-28332) reads as follows:

> *I grieve that management has violated my rights according to article 18.19 of the PM Group Specific and/or any other article relating to pay for work performed.*
>
> *(July stat)*

As corrective action, he requests:

> *That the department reimburse me for all monies still outstanding forthwith.*

The second grievance (Board file 166-2-28333) reads as follows:

> *I grieve that management has violated my rights according to article M-20 of the P.S.A.C. Master Agreement. They have failed to compensate me at the applicable rates.*
>
> *(July stat)*

As corrective action, he requests:

> *That the department reimburse me for all monies still outstanding forthwith.*

The relevant articles of the collective agreements are as follows.

Subclauses M-20.05(a) and (b) of the Master Agreement between the Public Service Alliance of Canada and the Treasury Board read as follows:

> *ARTICLE M-20*
>
> *DESIGNATED PAID HOLIDAYS*
>
> …
>
> *M-20.05 When an employee works on a holiday, he or she shall be paid:*
>
> *(a) time and one-half (1 1/2) for all hours worked up to the regular daily scheduled hours of work as specified by the relevant Group Specific Agreement, and double (2) time thereafter, in addition to the pay that the employee would have been granted had he or she not worked on the holiday,*

or

(b) upon request, and with the approval of the Employer, the employee may be granted:

(i) a day of leave with pay (straight-time rate of pay) at a later date in lieu of the holiday,

and

(ii) pay at one and one-half (1 1/2) times the straight-time rate of pay for all hours worked up to the regular daily scheduled hours of work as specified by the relevant Group Specific Agreement,

and

(iii) pay at two (2) times the straight-time rate of pay for all hours worked by him or her on the holiday in excess of the regular daily scheduled hours of work as specified by the relevant Group Specific Agreement.

…

Article M-40 of the Master Agreement reads as follows:

ARTICLE M-40

VARIABLE HOURS OF WORK

…

The Employer and the Public Service Alliance of Canada agree that the following conditions shall apply to employees for whom variable hours of work schedules are approved pursuant to the relevant provisions of the applicable Group Specific Agreement. The Master Agreement and Group Specific Agreements are modified by these provisions to the extent specified herein.

It is agreed that the implementation of any such variation in hours shall not result in any additional expenditure or cost by reason only of such variation.

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 the relevant Group Specific Agreement; starting and finishing times, meal breaks and rest periods shall be

determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.

For shift workers such schedules shall provide that an employee's normal workweek shall average the weekly hours per week specified in the relevant Group Specific Agreement over the life of the schedule. The maximum life of a schedule shall be six (6) months.

For day workers, such schedules shall provide that an employee's normal workweek shall average the weekly hours per week specified in the relevant Group Specific Agreement over the life of the schedule. The maximum life of a schedule shall be twenty-eight (28) days.

Whenever an employee changes his or her variable hours or no longer works variable hours, all appropriate adjustments will be made.

…

5. …

Designated Paid Holidays

(a) A designated paid holiday shall account for the normal daily hours specified by the relevant Group Specific Agreement.

(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours' pay specified by the relevant Group Specific Agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.

…

Subclause 18.08(b) and clause 18.19 of the Programme Administration (PM) Group Specific Agreement (Code: 308/89) read as follows:

18.08 Shift Work

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

> *(a)* …
>
> *(b)* *work seven and one-half (7 1/2) hours per day, exclusive of a one-half (1/2) hour meal period;*
>
> …
>
> *18.19 Notwithstanding the provisions of Clauses 18.08 to 18.18 and 18.22, consultation may be held at the local level with a view to establishing shift schedules which may be different from those established in Clauses 18.08 and 18.09. Such consultation will include all aspects of arrangements of shift schedules.*
>
> *** Once a mutually acceptable agreement is reached at the local level, the proposed shift schedule will be submitted at the appropriate Employer and Alliance levels of approval before implementation.*
>
> *Both parties will endeavour to meet the preferences of the employees in regard to such arrangements.*
>
> *It is understood that the flexible application of such arrangements must not be incompatible with the intent and spirit of provisions otherwise governing such arrangements. Such flexible application of this clause must respect the average hours of work over the duration of the master schedule, and must be consistent with the operational requirements as determined by the Employer.*

The employer and the bargaining agent entered into a "Variable Shift Scheduling Arrangement" (V.S.S.A.) (Exhibit E-1) pursuant to clause 18.19 of the PM Group Specific Agreement. It is set out in full as follows:

VARIABLE SHIFT SCHEDULING
ARRANGEMENT
CUSTOMS INSPECTORS (PM 1)
AT
LESTER B. PEARSON INTERNATIONAL
AIRPORT
PASSENGER OPERATIONS SECTION

> *Article 101 APPLICATION*
>
> *This variable shift scheduling arrangement applies to the employees classified as Customs Inspectors, PM-1, on shift work, covered by the Master Agreement and Group Specific Agreement, employed at the Lester B. Pearson International Airport, Passenger Operations Section.*

The Master Agreement and the PM Group Specific Agreement are modified by this local arrangement only to the extent specified herein.

It will be the responsibility of management to ensure that all employees and future employees, covered by this agreement, receive copies of this agreement.

Article 102 Definitions

(a) SHIFT WORK:	*Hours of work which are scheduled on a rotating or irregular basis.*
(b) ZERO TIME BALANCE:	*Means that an employee has worked the required number of hours for a specified period of time, i.e. 300 hours over a 56 day period.*
(c) MINUS TIME BALANCE:	*Means that an employee has not worked the required number of hours for a specified period of time, i.e. less than 300 hours over a 56 day period.*
(d) PLUS TIME BALANCE:	*Means that an employee has worked more than the required number of hours for a specified period of time, i.e. more than 300 hours over a 56 day period.*
(e) WORK DAY:	*Means a period of 8 hours and 34 minutes worked consecutively, exclusive of a meal period.*
(f) WEEK:	*Means seven (7) consecutive days beginning at 00:01 hours Monday morning and ending at 23:59 hours on Sunday.*
(g) SUMMER:	*Means that part of the year during which daylight saving time is in effect.*
(h) WINTER:	*Means that part of the year during which standard time is in effect.*

Article 103 Hours of Work

103.01 Employees in the work area covered by this local agreement shall be scheduled so that they, over a 56 day period:

(a) Work 300 hours.

(b) Work eight hours and thirty-four minutes per day, exclusive of a half (½) hour meal period.

(c) Work five (5) consecutive days and receive three (3) consecutive days of rest within an eight (8) day period, unless changed to meet a zero time balance.

(d) The remaining time will be scheduled:

i) at the time the work schedule is posted,

ii) and will normally be worked on the employees' final scheduled work day of the Master Schedule.

103.02 Whenever an employee leaves on a permanent basis the work area covered by this Agreement, a zero time balance shall be achieved.

The employee will arrange with Management a plan which is mutually agreeable for eliminating a minus time balance. Options available to employees include the use of vacation leave, compensatory time, lieu days, or a pay deduction. Also, an employee may choose to work off the minus time balance at the straight time rate of pay.

Should no agreement be reached, Management by giving notice in writing within seven (7) days shall designate the manner in which the zero time balance is to be achieved by the employee.

A plus time balance shall be compensated in accordance with Clause 19.03 of the PM Group Specific Agreement.

103.03 Whenever an employee leaves the work area covered by this Agreement because he/she is assigned on a temporary basis to another workplace which has different hours of work he/she shall be credited with working the days

and hours of work in effect at the place to which he/she is assigned

103.04 *Management shall set up a shift schedule for a period of not less than fifty-six (56) days and post it at least fifteen (15) days in advance to cover the normal requirements of the work area covered by this local Agreement.*

103.05 *The shift schedule will consist of the following*

Summer (D.S.T.)	*23:00 - 08:04*
	06:00 - 15:04
	08:00 - 17:04
	12:00 - 21:04
	15:00 - 00:04
	17:00 - 02:04
Winter (S.T.)	*23:00 - 08:04*
	06:00 - 15:04
	07:00 - 16:04
	12:00 - 21:04
	15:00 - 00:04
	1700 - 02:04
Ram/Skyport	*07:00 - 16:04*
	16:00 - 01:04

103.06 *The employees covered by this Agreement are entitled to a 30 minute meal period.*

When, because of operational requirements, an employee is required to be on duty for the full period covered by his/her scheduled shift, including the meal period (a total of 9 hours and 4 minutes), he/she shall be paid for the one-half (½) hour meal period at the applicable overtime rate.

103.07 *In accordance with the Master Agreement Article M-40, the provision in the relevant Group Specific Agreement relating to the minimum period between the termination and commencement of the employee's net shift shall not apply to an employee subject to variable hours of work.*

Article 104 *Benefits*

For the purpose of determination of benefits, reference should be made to the Master Agreement and PM Group Specific Agreement.

Article 105 Duration

This variable shift scheduling arrangement may be terminated by either party by giving thirty (30) days notice following consultation on the reason for termination. Upon termination of this arrangement, the relevant provision of the Master Agreement and Group Specific Agreement will apply.

LOCAL AGREEMENT OF THE COLLECTIVE AGREEMENT
APPLICATION COMMITTEE
RESPECTING VARIABLE HOURS OF WORK AT
LESTER B. PEARSON INERNATIONAL AIRPORT
PASSENGER OPERATIONS DIVISION

The fact situation underpinning the grievance is as follows. The grievor worked 8.57 hours on a designated paid holiday: Canada Day, July 1, 1997. He was paid in accordance with the employer's formula, which is set out in Exhibit E-3.

This formula is based on the employer's interpretation of the decision of the adjudicator in *Endall et al* (Board files 166-2-15656 to 15679) arrived at some years after the issuance of that decision on March 4, 1987. This situation is set out as follows at page 10 of the employer's written argument:

	Incorrect Prior Method	***Endall Method***
Normal Hours Pay	***8.57***	***7.5***
Extra Duty Pay (8.57 x 1.5)	*12.855*	*12.855*
Total	*21.425*	*20.355*
Minus included pay	*8.57*	*8.57*
Extra Duty Payment (in a premium cheque)	*12.855*	*11.785*
Differential		*12.855*
		- 11.785
		1.07

Since 1989, a "Variable Shift Scheduling Arrangement" (V.S.S.A.) was in effect for customs inspectors (PM-01) shift workers at Lester B. Pearson International Airport, Passenger Operations Section (Exhibit E-1). This local agreement of a joint union-management committee was signed on August 8, 1989 by the employer, and on

September 18, 1989 by the bargaining agent. This V.S.S.A. document provides that the Master Agreement and the PM Group Specific Agreement governing the PM-01 customs inspectors at this location are to be modified for these employees only to the extent specified in the agreement.

Article 105 of the V.S.S.A. provides that this agreement may be terminated by either party giving 30 days notice following consultation on the reasons for termination. No such notice of termination was given by either party and so the V.S.S.A. was in effect at the time Mr. King worked the designated paid holiday, and was still in effect at the time of the hearing.

Through evidence at the hearing, it was established that the V.S.S.A. was beneficial to both the employer and the employees. By working a slightly longer day, that is 8.57 hours, the employees benefited by having more continuous days off. The employer benefited and saved money by having more continuous hours worked by the shift workers without having to bring in overtime workers at premium rates.

For the next six years after the V.S.S.A. was adopted, the employees continued to be paid in accordance with the prior method used by the employer in its example. The adoption of the V.S.S.A. did not change this. The policy for the payment of work on a designated paid holiday was changed unilaterally by the Department based on its interpretation of the *Endall et al* case (supra).

Arguments

Written arguments were filed by the parties and are reproduced below.

For the Grievor

RE: ***KING, John -#28332/33***
Entitlement to pay for work on a Designated Paid Holiday (D.P.H.)

Further to our hearing in Toronto on this matter October 26-28, 1998 and your direction to submit written argument, the Alliance offers the following points in argument:

1. ***Article M-20****, p.22 of the Master Agreement:*

-applies
-is specific to D.P.H.
-is the only article in the agreement that deals exclusively with D.P.H.

-speaks of "employees" (see definition at Article M-2.01(f) at p.4)

-Note: M-20.05, at p.26 also uses the term "employee"

-The parties have not qualified this language in any way.

-The employer, I expect, will ask you to read into the language (which, in our submission is clear and absent of any ambiguity) the modifier "day shift or regular non-rotative non-shift employee". The language cannot be so interpreted and, respectfully, nor does this Board have the jurisdiction to import these words into the contract.

-Notably, the parties have not excluded shift workers from the application of M-20. This they would have had to have done in very clear terms for the employer to now argue that the provisions under the title "Designated Paid Holidays" (see article M-20 and Table of Contents) do not apply to shift or variable hours workers.

-The issue, which is the pay entitlement for a shift worker who works on a Designated Paid Holiday is provided for in Article M-20.05 p.26…."when an employee works on a holiday, he shall be paid…"

-"shall" is mandatory and as there is no dispute that John is an employee, nor that he worked on a holiday (Canada Day 1997, M-20.01(e) p.24) he shall be paid: (for his 8.57 hours worked

1.5 x 7.5 (as specified by the relevant (PM) Group Specific Agreement)
= 11.25
2.0 x 1.07 = 2.14
13.39 Hours pay

in addition to his holiday pay had he not worked.

2. ***Article M-27***

-which deals with pay administration is silent on the issue of pay for work on a holiday. Again, the parties have not in any way modified an employee's entitlement to pay for work on a holiday by virtue of this working shifts in the pay article.

3. ***Article M-39*** *Part Time Employees*

-While this article has no direct bearing on the issue (as John is not a Part Timer) nonetheless, article M-39.07 provides the same pay formula as does M-20.05 (1.5x for the first 7.5 and 2x thereafter). Nor does this article attempt to make any distinction between types of employee by using a shift versus non-shift.

4. ***Article M-40*** *"Variable Hours of Work"*

-B-35 note reference to article 20

Note that protected clauses apply to employees on variable hours in John's (PM) Bargaining Unit.

-Note, no distinction made here, either between employees based on whether they work a rotating or regular, non-rotating shift.

-M-40(5)(b) D.P.H. p. 96 – One must only ask:

- was John an "employee"?

- did he work on a holiday?

*- if the answers to both of these are Yes, then he **shall** be compensated according to a agreed upon formula.*

-To use the formula, we must know what are his regular scheduled hours…."

-Note the distinction between (a) "normal daily hours specified by the group specific agreement which provides for holiday pay even when one does not work, and (b) "regular scheduled hours worked".

-It is our submission that the former, by reference to the PM Group Specific Agreement Article 18.08(b) is 7.5 while the latter is clearly 8.57, the hours that are scheduled and actually worked (V.S.S.A., article 102(e)).

-This grievance concerns John's pay entitlement for hours actually worked on a holiday i.e. 8.57

-His entitlement in (a) is not in dispute, that is to say we accept that John is to be paid 7.5 hours at straight time as holiday pay whether he works or not.

-The employer's formula is not only unnecessarily complex, it is inaccurate. Applying M-40(5)(a) p.96, the formula is 8.57 (V.S.S.A. article 102(e) x 1.5 = 12.855, or 12.85, as they have been paid for years prior to the change.

-Now, using M-20 we arrive at 13.39 hours pay for working 8.57 hours on D.P.H. Using M-40 we arrive at 12.85. Neither supports the 11.78 using the employers formula. Again, applying the words "shall be compensated". It is obvious that, applying the employer's formula he is not! Instead, he is compensated 11.78 hours (see E-3) or 1.075 hours less than his entitlement under the article. A clear violation!

The employees, in the event we ignore M-20.05 in favour of M-40, lose their double time for hours worked beyond 7.5, the employer now seeks to further diminish its liability by creating a formula that virtually obliges the employee to work for no pay for more than one hour on each of eleven D.P.H.'s or to donate their time, gratis. This cannot have been the intent of the parties in negotiating this agreement! Otherwise, why would they, as they have done in article M-27.02 recognize that an employee is entitled to be paid for services rendered then withhold over one hours pay each holiday for services that have been rendered?

5. ***Estoppel:*** *as is provided for in both the Master and Group Specific Agreements, management at the Airport and the local negotiated their own set of rules to be governed by regarding hours of work. Obviously, these new rules (V.S.S.A.) held some benefits for both sides and you will recall the evidence on the matter of what each party stood to gain by entering into a local agreement.*

Receiving premium pay for each of 8.57 hours (or 8 hours and 34 minutes) was a major consideration of the grievor. That this formula for compensation was clearly understood and agreed to by the parties is abundantly clear from the 6 year history of payment according to that formula by the department without argument from the local.

Past practice has been clearly established.

So has each party's acceptance of exactly what was intended by the V.S.S.A.

Mutually *– The employer continued to act on this clear understanding until they read Endall #15656/79. Does Endall change the jointly understood application of V.S.S.A.*

NO !!!

The proper recourse for the department, if they wish to change the rules, is to consult, as is provided for in PM Article 18.19, p.10, and failing resolution, to serve notice (30 days) of their intent to terminate V.S.S.A. and revert to the relevant clauses in the agreements.

There has been no consultation. Nor has there been any notice of termination. In good faith, the local has relied, to its detriment, on a promise made concerning payment and has (and continues) to live up to their undertaking under V.S.S.A. Despite this, the employer claims there is no detriment. Even with the loss of pay!

6. ***Formula:***

*There appears to be no dispute that Mr. King is entitled to be paid at 1.5 x for all hours worked on a D.P.H. This is clear from counsel's remarks and the exhibits. The problem is with the formula. The employer need not add then subtract hours as they have done in the formula. However, if they choose to then they must subtract the same number of hours that has been added. In other words, if they add 7.5 hours holiday pay, they must only subtract that same amount of hours automatically included, which is also **7.5** not 8.57.*

The evidence was that every two weeks Mr. King is paid 75 hours, or double 37.5. Thus, he is being paid for 7.5 only per day not the 8.57 worked. The 8.57 is credited to arrive at the proper average, but not paid. It is this flaw that is the basis for the dispute.

What we are saying is quite straight forward. John is entitled to 7.5 hours pay on a D.P.H. if he does not work.

Pay him that.

Now, if the employer schedules him to work on a D.P.H. (as they did on Canada Day, 1997) pay him at the rate of 1.5x for all hours worked up to his scheduled hours. John worked 8.57 hours. His pay entitlement for that is 12.855 hours.

It is not difficult.

Further, when we look at the obvious flaw in applying the formula the employer seeks to use, the result is so illogical it argues against its application (see attached A).

8. ***Case Law:***

A. Hiltz #17398/403

This case does not apply as we do not dispute the Holiday Pay portion of the pay entitlement. That is to say it is only King's entitlement to premium pay for hours worked that is in issue. At page 9, paragraph 2 beginning "stated differently…. the decision supports our position. In the Hiltz case, the employer was paying too much Holiday Pay (12 versus 8 hours) which is not the case here. All John is paid for bi-weekly is 75 hours, or 7.5 hours each day, not 8.57.

B. Endall #15656/679

Concluding sentence, at page 10, beginning with the proviso…. "so long as employees….to sustain a grievance." As said earlier, this is not happening. Neither M-20 nor M-40 result in 11.78 hours.

A

The big problem that arises with using the government formula is that when an employee only works for a short period for a day, not only does the department underpay the employee, but fails to recognize that under a certain amount of time, the employee is actually charged to work for the department. Based on the government formula a Case #2 situation looks as follows:

In the specific case of Customs Inspectors at Pearson International Airport, who are scheduled to work 8.57 hours (8 hours and 34 minutes) on Christmas, if the employee needs to take off time to be home with his/her family we will substitute in the Staff Relations form:

Employee scheduled to work 8.57 on a Stat. holiday. Works .5 hours and uses 7.57 hours of paid annual leave.

Extra Duty Pay	*.5 x 1.5 =*	*0.75*
Add Stat. holiday		*7.50*
Total		*8.25*
Less his scheduled hours of work	*-*	*8.57*
Extra Duty hours to be paid	*-*	*0.32 **

** In this case the employee would then have to pay the government 1/3 hour for having come in to work at all.*

Reporting on the RC Forms
The regular activities would be shown as 0.5 hours. Vacation leave with (sic)

It is obvious that the department that is dealing with all of Canada's Revenue is not able to manage the funds properly – is it any wonder that Canada is having such financial problems.

Argument for the Employer

1. REPLY TO UNION'S WRITTEN SUBMISSIONS

A. Reply to paragraphs 1 through 3 at pp.1-2 of the Union's Submissions

1. The Employer disputes the Union's argument that M-20 of the PSAC Master Agreement applies. Rather, the Employer submits that the Grievor, and other Customs Inspectors involved in this test case, are governed by Article M-40 in the PSAC Master Agreement given the operation of a local agreement concerning variable hours of work schedule approved under section 18.19 of the PM Group Specific Agreement.

VSSA Agreement

2. A local agreement of variable hours of work schedule approved under section 18.19 of the PM Group Specific Agreement exists at Pearson International Airport (hereinafter "PIA"). It was signed on September 18, 1989 and is titled: "A Variable Shift Scheduling Arrangement Agreement for Customs Inspectors (PM1) at Lester B. Pearson International Airport" (hereinafter "VSSA Agreement").

Exhibit E-1 VSSA Agreement.

3. The Grievor testified that since he began his employment at PIA in 1990, he has never known Management to give notice under Article 105 VSSA Agreement for the purpose of terminating the VSSA Agreement.

Testimony of J. King

4. In light of this, the Employer submits that the evidence supports the view that this VSSA Agreement was not terminated and remains in effect.

5. Moreover, article 101 of the VSSA Agreement unequivocally states that it applies to Customs Inspectors at Pearson Airport. Quoting from the VSSA Agreement:

> *"This variable shift scheduling arrangement applies to the employees classified as Customs Inspectors PM-1,* on shift work, covered by the Master Agreement and Group Specific Agreement, employed at the Lester B. Pearson International Airport, Passenger Operations Section."*
>
> *Exhibit E-1, VSSA Agreement*
>
> ** Note: Written prior to the massive reclassification of all Custom Inspectors from PM-1 to PM-2s.*

6. The Employer submits that Article 101 of the VSSA Agreement is clear and unambiguous and cannot be interpreted so as to exclude its application to all grievors in the instant matter.

7. The VSSA Agreement at PIA was approved pursuant to Article 18.19 of the PM Group Specific Agreement.

Article 18.19 of the PM Group Specific Agreement – An Enabling Provision

8. Article 18.19 of the PM Group Specific Agreement is an enabling clause. It provides the local Employer and Union with an opportunity to establish a shift schedule which differs from the "normal daily hours of work" specified in Article 18.08 to 18.18 and 18.22. Essentially, it allows the two parties to vary some or all of the shift schedules in articles 18.08 and 18.09 of the PM Group Specific Agreement. Article 18.19 states:

> *" Notwithstanding the provisions of Clauses 18.08 to 18.18 and 18.22,* ***consultation may be held at the local level with a view to establishing shift schedules which may be different from those established in Clauses 18.08 and 18.09."***
>
> *(emphasis added)*

M-40 of the PSAC Master Agreement Triggered by VSSA Agreement

9. Once consultation has occurred at the local level under article 18.18 PM Group Specific Agreement, and a shift scheduling arrangement has been reached, the Employer submits that Article M-40 of the PSAC Master Agreement is triggered and governs the method of pay for Employees working variable hours schedules for work performed on designated paid holidays.

10. To be more specific, the intention that M-40.05(b) of the PSAC Master Agreement is triggered by the existence of a variable shift scheduling arrangement is reflected within Article M-40 itself at page 92 of the PSAC Master Agreement:

> *" **The Employer and the Public Service Alliance of Canada agree that the following conditions shall apply to employees for whom variable hours of work schedules are approved pursuant to the relevant provisions of the applicable Group Specific Agreement.** The Master Agreement and Group Specific Agreements are modified by these provisions to the extent specified herein."*
>
> *(emphasis added)*

11. Further to the above, the Employer submits that a plain reading of this text supports the position that M-40 of the PSAC Master Agreement modifies *M-20 to the extent that M-40 relates to the rate of pay for Employees working variable hours schedules for work performed on designated paid holidays, where a VSSA Agreement is in place.*

12. Given this view of M-40 of the PSAC Master Agreement, the Employer further submits Articles M-27 and M-39 of the PSAC Master Agreement have no relevancy to the issues associated with remuneration for pay on designated holidays.

B. Reply to paragraph 4 at pp.2-3 and paragraph 6 at p. 4

13. Respecting paragraph 4 of the Union's submissions, the Employer takes issue with the Union's position on how compensation is determined under M-40 of the PSAC Master Agreement. The Employer disputes the Union's analysis and submits that the Union is simply reinserting its position that M-20 applies.

14. Respecting paragraphs 4 and 6 of the Union's submissions, the Employer submits that the following interpretation of M-40 of the PSAC Master Agreement is how pay is calculated for Employees working variable hours schedules when they work on a designated paid holiday.

"Rate of Pay for Designated Holiday" – Article M-40.05(a) PSAC Master Agreement

15. Employees working variable hours schedules are compensated a set amount for a designated paid holiday –whether they work the holiday or not. The rate of pay for "normal daily hours" on a designated paid holiday for Employees working variable hours schedules for work performed on designated paid holidays with a VSSA Agreement in place is set out in Article M-40.05(a) of the PSAC Master Agreement.

16. In determining the amount of pay for "normal daily hours" on a designated paid holiday, Article M-40.05(a) of the PSAC Master Agreement refers back to the "normal daily hours" specified in the PM Group Specific Agreement. Article 40.05(a) states:

> *"Designated Holidays*
> *(a) A designated paid holiday shall account for the* ***normal daily hours specified by the relevant Group Specific Agreement."***
>
> *(emphasis added)*

"Normal Daily Hours" – Article 18.08(b) of the PM Group Specific Agreement

17. Article 18.08(b) of the PM Group Specific Agreement states that the "normal daily hours" of work is 7.5 hours per day. Article 18.08(b) provides:

> *"18.08 Shift Work*
> *When, because of the operational requirements of the Service, hours of work are scheduled for employees on a rotating or irregular basis, they shall be scheduled so that employees, over a period of not more than fifty-six (56) calendar days; …*
>
> *(b)* ***work seven and one-half (7 1/2) hours per day, exclusive of one-half (1/2) hour meal period."***
>
> *(emphasis added)*

18. It is the Employer's submission that in this instance, all Employees working variable hours schedules who work a designated paid holiday receive 7.5 hours straight-time pay for "normal daily hours" in the event they do not work their regularly scheduled shift. In this respect, the Employer and Grievor agree on the interpretation of M-40.05(a) of the PSAC Master Agreement.

"Pay for Work on the Holiday by Employees working variable hours schedules" - Article M-40.05(b) PSAC Master Agreement

19. However, the Employer and Grievor disagree on how the second part of the formula for payment is calculated for Employees working variable hours schedules who work on designated paid holidays.

20. Article M-40.05(b) PSAC Master Agreement outlines how Employees working variable hours schedules who work on designated paid holidays are to be paid. It requires the Employer to pay these Employees the following compensation:

> *"Designated Holidays*
>
> *(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated,* ***in addition to the normal daily hours' pay specified by the relevant Group Specific Agreement, time and one-half (1 1/2) up to his or her regular scheduled***

> ***hours worked*** *and double time for all hours worked in excess of his or her regular scheduled hours."*
>
> *(emphasis added)*

21. The Employer submits that the formula under M-40.05(b) of the PSAC Master Agreement is very specific in recognizing the distinction between "normal daily hours" of pay as specified under M-40.05(a) of the PSAC Master Agreement (which refers back to 18.08(b) of the PM Group Specific Agreement) and "regular scheduled hours worked" which in this instance is covered under Article 102(e) the VSSA Agreement.

22. Article 102(e) the VSSA Agreement states that Employees working variable hours schedules at PIA are regularly scheduled to work 8 hours and 34 minutes per day. They work 5 consecutive days and receive 3 consecutive days off.

> *Exhibit E-1 – Article 102(e) and Article 103.01 (a), (b) and (c)*

23. Thus under the M-40.05(b) pay formula, the Employees working variable hours who work a designated paid holiday, receive in addition to the 7.5 hours as specified in Article M-40.05(a) of PSAC Master Agreement (as per 18.08(b) of the PM Group Specific Agreement), compensation at time and one half for their "regularly scheduled hours worked", such being 8.57 hours per day (as provided in Article 102(e) of the VSSA Agreement), and "double time for any hours performed beyond their regular scheduled hours".

24. Employees working variable hours schedules, who work the designated paid holiday, receive their holiday pay in the form of a premium cheque separate from the regular bi-weekly pay cheque. As a consequence, the pay included in the regular bi-weekly cheque must be credited against the pay to be received in the premium cheque.

> *Exhibit E-2: Memorandum dated May 12, 1996 from B. Herd, Staff Relations to Director and Managers, Customs Border Services, Inland Southern Ontario Region (hereinafter "Herd's Memorandum")*

25. Mr. Herd's memorandum explains that because 8.57 hours pay is already included in the bi-weekly pay cheque, that amount must be deducted from the total pay entitlement *for work on the designated paid holiday. The credit of 8.57 hours is made for the purpose of balancing the hours Employees working variable hours schedules must work in order to achieve an average of 37.5 hours per week over the course of their 300 hour 56 day cycle.*

> *Exhibit E-2; Herd's Memorandum*

26. The crediting of included pay, which is referred to in Mr. Herd's memorandum, is made against the amount payable on the premium cheque. This credit is a critical *part of the analysis which the Grievor has never satisfactorily addressed in his submissions. However the Employer derives the 11.785 hours extra duty payment by accounting for this credit.*

	Incorrect Prior Method	***Endall Method***
Normal Hours Pay	***8.57***	***7.5***
Extra Duty Pay (8.57 x 1.5)	*12.855*	*12.855*
Total	*21.425*	*20.355*
Minus included pay	*8.57*	*8.57*
Extra Duty Payment (in a premium cheque)	*12.855*	*11.785*
Differential		*12.855*
		-11.785
		1.07

27. Prior to correcting the method of pay for Employees who work variable hours schedules and who work a designated paid holiday, the Employer submits it was incorrectly over compensating these Employees by 1.07 hours for each designated holiday worked.

VSSA Agreement and Subsequent Application of Article M-40 is Analogous to Compressed Work Week Arrangement

28. The Employer further submits that the manner in which both the VSSA Agreement and subsequent application of Article M-40 formula work is analogous to the pay formula for an employee who has negotiated a compressed work week arrangement with his/her Employer.

29. A person working on a compressed work week arrangement receives the base designated holiday rate of pay that all other members of their group receive whether they work the holiday or not (i.e. based on "normal" work week arrangement such being 7.5 hours per day based on a 37.5 hour week, with a bi-weekly pay period for the entire group).

30. Additionally, when this person works the holiday, their pay formula accounts for and compensates them for working their "regularly scheduled hours", as defined under their individual compressed work arrangement, which are longer than the normal 7.5 hour day, 5 day week.

31. Their benefits, such as vacation leave and sick leave hours are also set up in a way so as to reflect the compressed work week arrangement. In this manner it is very much like the situation that exists for the Grievors in the present case who are working variable hours under the VSSA Agreement, which essentially is a type of compressed work arrangement.

> *Exhibit 1 – VSSA Agreement, Article 104;*
>
> *PSAC Master Agreement, M-40.05(b), section dealing with "Vacation Leave" at page 96.*

32. In reply to the Union's argument, the Employer submits that Article M-20 specifies compensation on designated paid holidays for Employees whose daily hours of work are enunciated under Articles 18.08 and 18.09 of the PM Group Specific Agreement. Article M-20 deals with Employees who are scheduled to work shifts in accordance with

articles 18.09 through to 18.18 and 18.22 inclusive where a VSSA Agreement is not *present.*

C. Employer's Reply to Appendix "A"

*33. In Appendix "A" the Grievor is arguing that it is logical for his "*premium rates of pay*" to be applied against the* actual "hours" he is scheduled to work. *The Employer disagrees that these two values are comparable for the purposes of arguing an inequitable "set off" exists that favours the Employer.*

34. The Employer's general answer to the Union's submission is that if the Employee is scheduled to work 8.57 hours on the designated paid holiday, yet only works .5 hours, the Employee stills owes the Employer 8.07 hours of regularly scheduled work and must account for them in a manner which comports with the terms of both the VSSA and PSAC Master Agreements.

35. In more specific terms, the Employer disputes the claims in Appendix "A" because the Grievor is suggesting that it is fair to match *his entitlement for "premium pay" for designated paid holidays under M-40.05(a) of the PSAC Master Agreement as an equitable set off against what he owes in terms of 8.57 regularly scheduled "hours" work. The Employer disputes this "matching" of the two different values (i.e. pay and hours).*

36. Simply put, the Employer takes umbridge with the Union mixing both "hours" and "pay" entitlements in coming up with a figure of what is owed. In Appendix "A", the Union is mixing units of value (i.e. a "premium pay" with "hours") for purposes of determining what is owed. In comparison, the Employer only considers one type value (i.e. "hours") in computing what is owed.

37. The effect of mixing these two different "values" is apparent when analyses are compared:

Union's Submission Under Appendix "A"

Extra Duty Pay (.5 x 1.5)	*0.75*
Add Stat Holiday hours (M-40.05(a))	*7.5*
Total hours	*8.25*
Less Scheduled hours	*-8.57*
Extra Duty Hours to be paid	***-0.32***

vs.

Employer's Submission

Scheduled hours	*8.57*
Less hours actually *worked*	*0.50*
Remainder of hours	*8.07*
Less Stat Holiday hours (M-40.05(a))	*7.5*
Regularly Scheduled Hours Owing	***0.57***

38. The Employer believes that the Employee who works variable hours in the Union's example only *satisfies his/her shift scheduling arrangement with the Employer by taking .57 hours (i.e. 37 minutes) of* leave. *The Employer does not accept the Union's submission that the Employee* can pay *the Employer for 0.32 of an hour (i.e. 20 minutes) and call it even.*

39. Finally, the Employer's view in relation to this issue is entirely consistent with the other aspects of the PSAC Master Agreement. It submits that its view is supported by the wording in M-40.05 of the PSAC Master Agreement. At page 96 it states:

> *"Vacation Leave*
>
> *Employees shall earn vacation at the rates prescribed for their years of service as set forth in the specific article of the relevant Group Specific Agreement.* ***Leave will be granted on an hourly basis and the hours debited for each day of vacation leave shall be the same as the employee would normally have been scheduled to work on that day."***
>
> *(emphasis added)*

40. For purposes of illustration, assume the following scenario: an Employee who works variable hours has been scheduled to work the holiday, but decides, after the schedule has been set, to take the holiday off as a vacation leave.

41. The Employee receives a designated paid holiday credit *for 7.5 hours of what is owed the Employer under both the VSSA Agreement and the PSAC Master Agreement. To ensure that the bargain under the VSSA Agreement is kept, this Employee submits a leave form or arranges to make up 1.07 hours of time by extending a day at work.*

D. Reply to paragraph 5 and Claim of Estoppel at pp. 3 and 4

42. The Employer initially submits that the claim of estoppel is without merit given that there has been "no detriment resulting therefrom".

> *Brown and Beatty Canadian Labour Arbitration 3rd Ed.*
> *(Toronto: Canada Law Book, 1998) at pp.2-61.*

43. The Grievor alleges that he has lost 1.07 hours in pay to his detriment. In response to this, the Employer argues that he is now receiving what he is entitled to receive; he has lost nothing. Given this view, there is no detriment and one of the essential elements to establish the estoppel has not been satisfied.

44. In the alternative, should the Adjudicator find that the elements for Estoppel do exist, the Employer argues that the equitable doctrine ends when Employer gives notice *that it is reverting to the correct terms of the contract.*

> *Brown and Beatty Canadian Labour Arbitration 3rd Ed.*
> *(Toronto: Canada Law Book, 1998) at pp.2-61.*

45. In the spring of 1996, Management at Pearson International Airport (hereinafter "PIA") determined that calculations with respect to the pay administration of designated holidays were incorrect. Following of the decision in Ronald E. Endall et al, v. Treasury Board (National Defence) (File Nos. 166-2-15656 to 166-2-15679) (hereinafter "Endall"), Management was of the opinion that Employees working variable hours schedules, who worked the designated paid holiday, were being overcompensated by 1.07 hours per designated paid holiday worked.

46. On May 13, 1996, Management at PIA, implemented the change in the pay system relating to Employees working variable hours schedules, who worked the designated paid holiday. As part of the implementation process, it issued a memorandum advising the Employees and Managers of the error in the pay formula and indicating that pay for Employees working variable hours schedules, who worked the designated paid holiday, would hence forth be calculated according to the decision in Endall.

Exhibit E-1; Herd's Memorandum

47. Additionally, the Grievor submitted into evidence, a memorandum that L. Kobel, an Operations Coordinator, sent to all Employees on May 22, 1996. Her memorandum set out the pay method that was to be used in calculating pay for Employees working variable hours schedules, who worked the designated paid holiday.

Exhibit E-3; Kobel's Memorandum

48. The Employer submits that any estoppel that existed ended when it gave notice to the Employees of reversion to the strict terms of the VSSA and PSAC Master Agreements by way of its conduct and a letter – both occurring on May 13, 1996. On this day, Management at PIA implemented the change in the pay system relating to Employees who work variable hours schedules and who work on a designated holiday. On this date, Mr. Herd also sent out a memorandum describing how the pay formula worked.

Exhibit E-1; Herd's Memorandum

49. In the alternative, and in the event that the Adjudicator does not accept May 13, 1996 as the date of notice given by the Employer of its reversion, the Employer submits that any estoppel that existed ended when the Grievors received Ms. Kopel's memorandum on May 22, 1996.

Exhibit G-1; Kopel's Memorandum

50. In the further alternative, should the Adjudicator find that the elements for Estoppel do exist, the Employer argues that the equitable doctrine only operates retrospectively. Put another way, it is not permissible for a grievor to use the doctrine prospectively.

51. The Employer submits that the Grievor may still not rely on the doctrine to protect interests which he alleges accrued after *reversion to the original terms of the contract has occurred. This would be using the doctrine of estoppel prospectively, which is impermissible.*

Brown and Beatty Canadian Labour Arbitration 3rd Ed.
(Toronto: Canada Law Book, 1998) at pp.2-61.

52. The doctrine could only operate in this instance to protect the Grievors if the Employer was stating that it wanted to "claw back" all incorrectly distributed payments made prior *to the date of reversion. In this instance it would be permissible for the Grievor to use it as a* shield *against the Employer's intended "claw back".*

53. However, in the matter at hand, such is not the case, and the Employer states for the record that it has no intention of seeking any "claw back" payments.

54. In the further alternative, and in the event the elements of estoppel are determined to be present, the Employer submits that the Grievor may still not rely on the doctrine given that he intends to use it to ground his grievance rather than to prevent an allegation of contractual breach.

> *Brown and Beatty Canadian Labour Arbitration 3rd Ed.*
> *(Toronto: Canada Law Book, 1998) at pp. 2-62.*

55. The Employer submits that the Grievor wants to use the doctrine of estoppel in this instance as a sword for the purpose of advancing or founding his grievance on the basis of past practices absent any allegation associated with contractual breach.

> *Brown and Beatty Canadian Labour Arbitration 3rd Ed.*
> *(Toronto: Canada Law Book, 1998) at pp. 2-62.*

*56. In this instance, he is improperly using the doctrine to advance what he describes in his written submissions as "*past practice*" or the "*six year history of payment*" in the event the Adjudicator's interpretation of the VSSA Agreement, the PM Group Specific Agreement and PSAC Master Agreement goes against him.*

II. ISSUE

57. What is the correct method in calculating the payment due to Employees working variable hours for work on designated paid holidays?

III. ARGUMENT

58. It is submitted that Employees working variable hours at PIA on designated holidays are properly compensated in accordance with Article M-40 titled "Designated Paid Holidays" on page 96 of the PSAC Master Agreement.

Variable Shifts Established Under a VSSA Agreement

59. In this matter a VSSA Agreement, or a variable hours of work schedule, was agreed upon and approved at PIA by Management and the Union (CEUDA), pursuant to Article 18.19 of the PM Group Specific Agreement, and has been in place since September 1989.

60. The Employer submits that as a result of the VSSA schedule at PIA, Article M-40.05(b) of the PSAC Master Agreement is triggered and governs the method of pay for Employees working variable hours schedules for work performed on designated holidays.

Compensation Under Article M-40

61. Based on its interpretation of Endall, Articles M-40.05(a) and (b) of the PSAC Master Agreement and 18.08(b) of the PM Group Specific Agreement, Management corrected the rate of pay for Employees working variable hours schedules who work on designated holidays. In its May 13, 1996 memorandum, the Employer indicated that these Employees would be paid in the following manner:

> *"… the employee will receive pay for 11.785 hours* ***(8.57 hours at time and one half plus 7.5 hours holiday pay at straight time*** *= 20.355 hours* ***minus the 8.57 hours which are automatically included in the regular bi weekly pay).***" *(emphasis added)*
>
> *Exhibit E-2; Herd's Memorandum*

62. The Employer submits that the pay method described in the May 13, 1996 memorandum is the correct method. The Employer's position is that an Employee working variable hours schedules who works on designated holidays at PIA is entitled to: 7.5 hours pay which, per articles M 40.05(a) of the Master Agreement and 18.08(b) of the PM Group Specific Agreement, constitutes the normal hours pay for the PM Group plus 8.57 hours at time and one-half which are the scheduled hours of work (12.855 hours converted) for a total pay entitlement of 20.355 hours.

63. Given that 8.57 hours pay is already included in the bi-weekly pay cheque, that amount must be deducted from the total pay entitlement. The credit of 8.57 hours is made for the purpose of balancing the hours an Employee working variable hours must work in order to achieve an average of 37.5 hours per week over the course of the 300 hour 56 day cycle.

64. The Employer submits that this view of compensation for variable shift employees who work on designated holidays is supported by the case law. Specifically, this view is in accordance with the decisions in Endall and Hiltz.

Discussion of Endall

65. The Employer's change to its pay formula, as explained in its May 13, 1996 memo, follows the PSSRB's decision in Endall.

66. The issue in Endall concerned the number of additional hours of compensation that was due to the grievors for work performed on designated holidays.

67. The facts in Endall were that the grievors varied and lengthened their normal work hours by arrangement *with the Employer. In comparison to their normal 8 hour shift counterparts, the grievors chose to work 12 hour shifts.*

68. The Adjudicator found that the Employer had been overcompensating the long (variable) shifted Employees by 4 hours. Quoting Adjudicator Kwavnick at page 9:

> *"…* ***when an employee works a 12 hour holiday shift, he is entitled to 18 hours of straight time pay (12 hours at time and one-half) for work done on a holiday and, in addition, he is entitled to eight hours of holiday pay.*** *This makes a*

> *total of 26 hours of straight time pay. Since he already receives 12 hours pay as part of his regular salary, he is entitled to 14 additional hours at straight time rates (emphasis added)."*

69. The decision in Endall was not challenged by way of a judicial review. Additionally it was followed in Hiltz et al v. Treasury Board (Environment Canada) (File Nos. 166-2-17398 to 17403) (hereinafter "Hiltz")

Discussion of Hiltz

70. As indicated in oral argument, the Employer submits that Hiltz is an important authority because its facts are nearly on all fours with the instant matter.

71. Factually, the Grievor was an employee for whom a variable hours of work schedule was approved pursuant to the relevant provisions of the Group Specific Agreement. Additionally, he was scheduled to work a regular shift of 8.25 hours *on a designated paid holiday.*

See Hiltz, pp. 1-2

72. The Grievor's claim in Hiltz mirrors the claims in the matter at hand. In Hiltz, the Adjudicator summarized the Grievor's claim as follows:

> *" At issue, I consider, is the interpretation to be given to the provisions dealing with pay on designated paid holidays in Article M-40 of the Master Agreement, above recited. The grievor worked a 8.25 hours on a designated paid holiday and was paid the equivalent of 7.5 hours at straight-time rates of pay, plus 8.25 hours at time and one-half. The grievor claims that because he worked in excess of his normal daily hours which were 7.5 hours, he should somehow be compensated for the excess period of .75 hours at the rate of double time. He alleges that this is overtime work and should be compensated accordingly."*
>
> *Hiltz, at p. 4*

73. In determining the rate of pay under Article M-40, the Adjudicator concluded the following:

> *" **I cannot accept the grievor's claim that he is entitled to compensation at double time for any of the time he worked on the designated paid holiday, as he did not work '... in excess of his regularly scheduled hours', which were 8.25,** as admitted to on his behalf. His claim is just unfounded and his grievance is , accordingly, dismissed."*
>
> *(emphasis added)*
> *Hiltz, p. 4*

74. Similar to the grievor in Hiltz, the Grievor in the instant matter was required, and did work his regularly scheduled 8.57 hours *on the July 1, 1997 designated paid holiday as per the terms of the VSSA Agreement. He states he should receive compensation for 1.07 hours (8.57 minus 7.5) at double-time under Article M-20 of the PSAC Master Agreement.*

75. Similar to Hiltz, the Employer in the instant matter disputes the Grievor's claim and submits that the grievor should be paid under the terms of Article M-40 of the PSAC Master Agreement. Under Article M-40, the Grievor in the instant matter is only eligible for double-time rates on a designated paid holiday, if he works longer than his regularly scheduled 8.57 hours of work *which were agreed to under the VSSA Agreement at PIA.*

Additional Considerations

76. Additionally, it is submitted that the correction of the pay method for Employees working variable hours schedules on designated paid holidays comports with the intention of the parties expressed in Article M 40 of the Master Agreement. At page 92 it says:

> *…* ***It is agreed that the implementation of any such variation in hours shall not result in any additional expenditure or cost by reason only of such variation.***
>
> *(emphasis added)*

77. In conclusion, the Employer submits that the present calculation being used at PIA, and everywhere else with the Public Service and Revenue Canada, to compensate PM Group Employees working variable hours on a designated holiday accords with the decisions in Endall and Hiltz and with the terms of Article M-40 of the PSAC Master Agreement and the PM Programme Administration Group Specific Agreement.

Reasons for Decision

According to subclause M-40.5(a), "Designated Paid Holidays", of the PSAC Master Agreement: "A designated paid holiday shall account for the normal daily hours specified by the relevant Group Specific Agreement".

Subclause 18.08(b) of the PM Group Specific Agreement provides as follows:

> *18.08 Shift Work*
>
> *When, because of the operational requirements of the Service, hours of work are scheduled for employees on a rotating or irregular basis, they shall be scheduled so that employees, over a period of not more than fifty-six (56) calendar days:*
>
> *…*

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

Mr. King's regular pay for the day is his hourly rate multiplied by 7.5 hours as provided for in his collective agreement for his classification and range. This is not essentially changed by the V.S.S.A. All the V.S.S.A. does is vary the 7.5 daily hours by spreading the hours over fewer days so that each employee works a regularly scheduled shift of 8.57 hours. This allocation of hours is for convenience sake, as expressed in the V.S.S.A. The employee is still paid every two weeks at his hourly rate for 7.5 hours a day as if he had worked these hours in that manner. The fact that he actually works a shift (8.57 hours) which is 1.07 hours longer than a normal 7.5-hour day makes no difference to his actual compensation. He is paid for 75 hours work every two weeks.

Whether or not he works on a designated paid holiday, he is paid the same base amount for a two-week period in which a designated paid holiday occurs as in a two-week period in which no holiday occurs, i.e. 75 hours, continuing the fiction recognized in the V.S.S.A. of the employee working 7.5 hours daily over a 10-day period, even though he actually works 8.57 hours over a shorter period of time.

This is quite clear. Even though an employee works more than a 7.5-hour shift on a regular working day (or on a designated paid holiday), the pay he receives for 75 hours work is as if he worked 7.5 hours in 10 working days over the two-week period. Similarly, if a designated paid holiday occurs in a two-week period and he takes the holiday (does not work), he gets the same pay. Breaking it down, the regular pay for the day: 7.5 hours x his hourly rate, or 1/10 of 75 hours because this is the basic "fiction" of the V.S.S.A.

There is no problem at this stage. He simply gets his regular pay for the day or, in other words, he gets the same pay at the end of a two-week period whether he is entitled to a holiday (designated paid holiday), which occurs in the period, or is working a two-week period in which there is no holiday. He gets this even though he does not work on the holiday. The only issue is the premium pay he is entitled to if he works 8.57 hours on a designated paid holiday.

Subclause M-40.5(b), "Designated Paid Holidays", of the PSAC Master Agreement deals with pay for work on the holiday by employees working variable hours schedules. It reads:

> *Designated Paid Holidays*
>
> *(a)* …
>
> *(b)* *When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours' pay specified by the relevant Group Specific Agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.*

"Regular scheduled hours worked" is not the same as "normal hours of work" or the two would not be so distinguished. On a plain and simple reading, it must be the hours that employees working variable hours schedules are regularly scheduled to work. In Mr. King's case, this is 8.57 hours. On a strict reading of the collective agreement, Mr. King would only be entitled to double time for time worked after 8.57 hours. He did not work beyond 8.57 hours.

Paragraph 102(e) of the V.S.S.A. Agreement establishes that employees working variable hours schedules at Pearson International Airport are regularly scheduled to work eight hours and 34 minutes per day (8.57 hours). They work five consecutive days and receive three consecutive days off: 103.01(c) of the V.S.S.A.

Mr. King is certainly entitled to premium pay at time and one-half for all hours worked on the designated paid holiday. Therefore, he is entitled to be paid for 12.855 hours of work. It is not necessary to go through a convoluted process of adding and subtracting. I agree with former Board Member D. Kwavnick's dicta in *Endall et al* (supra), in which he characterizes the employer's methods of adding some hours and subtracting others as an "unnecessarily complex maneuver". If the employer wishes, for its own reasons, to use a method of calculating holiday pay which involves adding and subtracting hours, it may do so providing the results are in conformity with the collective agreement.

In the instant case, the results of the employer's exercise in adding and subtracting are not in conformity with the collective agreement. The grievor was paid 1.07 hours less than he was entitled to under the relevant provisions of the collective agreement.

Mr. King is entitled to be paid his regular pay for the two-week period in which the Canada Day holiday occurred (7.5 hours on the designated paid holiday as explained above). This he would get whether he worked or not. However, he did work 8.57 hours. Therefore, he is entitled to premium pay at time and one-half for a total of 12.855 hours (8.57 x 1.5 = 12.855 hours) for his work on the holiday in addition to his regular pay for the two-week period.

One of the main points of disagreement between the employer and the bargaining agent is the compensation entitlement under subclause M-40.5(b), "Designated Paid Holidays".

The employer's interpretation, although it considers subclauses M-40.5(a) and (b) of the PSAC Master Agreement and clause 18.08 of the PM Group Specific Agreement, is based heavily on its interpretation of the *Endall et al* case (supra). In its May 13, 1996 memorandum (Exhibit E-4, tab 10), the employer indicated that these employees would be paid in the following manner:

> *Re: Designated Paid Holidays*
>
> *…*
>
> *…the employee will receive pay for 11.785 hours (8.57 hours at time and one half plus 7.5 hours holiday pay at straight time =20.355 hours minus the 8.57 hours which are automatically included in the regularly bi weekly pay).*
>
> *…*

In my opinion, the rationale in the *Endall et al* case is distinguishable from Mr. King's fact situation. The relevant provisions of the respective collective agreements are not identical. Also the relevant provisions of the V.S.S.A. must be taken into account in Mr. King's grievances. Having said this, I wish to add that I would not have reached the same conclusion as did the adjudicator in the *Endall et al* case.

I cannot accept the bargaining agent's argument that, by operation of clause M-20.05 of the Master Agreement, Mr. King as an "employee" could be entitled to be paid 13.39 hours' pay for his 8.57 hours worked (7.5 x 1.5 (as specified by the relevant (PM) Group Specific Agreement) = 11.25, and 1.07 x 2.0 = 2.14, for a total of 13.39 hours' pay) in addition to his holiday pay of 7.5 hours. Mr. King claims double time for 1.07 hours. Based on former Board Member T.W. Brown's reasoning in his decision in *Hiltz et al* (Board files 166-2-17398 to 17403), which I accept, Mr. King is entitled to compensation at the rate of time and one-half for these hours, not double time.

Mr. King's entitlement for working 8.57 hours on Canada Day, July 1, 1997, is to premium pay at time and one-half for all hours worked up to the end of the hours he is regularly scheduled to work (8.57 hours). The only effect of the V.S.S.A. is that it makes it quite clear that these are the hours that he is regularly scheduled to work. He does not get double time for work beyond 7.5 hours in that day. Former Board Member T.W. Brown came to a similar conclusion in *Hiltz et al* (supra) where he decided as follows:

> *I cannot accept the grievor's claim that he is entitled to compensation at double time for any of the time he worked on the designated paid holiday, as he did not work "… in excess of his regular scheduled hours", which were 8.25 hours, as admitted to on his behalf. His claim is just unfounded and his grievance is, accordingly, dismissed.*

Therefore, the premium pay Mr. King is to receive is 8.57 hours x 1.5. He is entitled to this amount <u>in addition</u> to the regular pay that he received in his bi-weekly pay cheque.

Accordingly, the grievances are allowed to the extent set out above.

Rosemary Vondette Simpson,
Board Member

OTTAWA, August 19, 1999.