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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**BRION BAILEY, BRIAN L. ELLIS, JERRY KOPPENOL,  
BASHIR MADHANI, JOHNSON WU**

Grievors

and

**CANADA CUSTOMS AND REVENUE AGENCY**

Employer

***Before:*** Evelyne Henry, Deputy Chairperson

***For the Grievors:*** Alan H. Phillips, The Professional Institute of the Public Service of  
Canada

***For the Employer:*** Richard Fader, Counsel

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Heard at Vancouver, British Columbia,  
May 24 and 25, 2001.

## DECISION

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[1] The five grievors: Brion Bailey, Jerry Koppenol, Johnson Wu, Brian Ellis and Bashir Madhani are International Tax Auditors at the Burnaby-Fraser Tax Services Office of the Canada Customs and Revenue Agency (CCRA). At all relevant times they were members of the Auditing Group (AU) for which the Professional Institute of the Public Service of Canada (PIPSC) was the certified bargaining agent. They grieved the employer's denial of their pay on March 23<sup>rd</sup>, 1999 after 9:00 a.m. and the characterisation of their absence from work as "Illegal Strike Activities, Leave Without Pay".

[2] On May 7, 2001, the employer raised an objection to my jurisdiction to hear the grievances claiming that the grievors had not been disciplined, nor had they argued a violation of any provision of their collective agreement, during the grievance process. The employer submits the issue here is one of no work no pay.

[3] At the beginning of the hearing the employer reiterated its objection. The grievors replied that they have argued all along that the action of the employer constituted a financial penalty.

[4] The burden of proving that the employer's action constituted a financial penalty lie with the grievors. They were asked to submit their evidence in this regard. The employer submitted that it would submit evidence on its position on the events of March 23<sup>rd</sup>, 1999 and on its decision not to discipline the grievors pursuant to those events.

[5] On March 23<sup>rd</sup>, 1999 there was a picket line greeting employees reporting to work at the Burnaby-Fraser Tax Services Office (BFTSO) and the Surrey Taxation Centre which are housed in adjacent and communicating buildings (sometime referred to as "The Campus"). The picketers were from the Public Service Alliance of Canada (PSAC) Table Two who had been on rotating strikes since December 1998. There were two members of the striking group employed at the Surrey Tax Centre. This was the fourth or fifth time that employees were met by a picket line upon reporting to work. Employees had been given general instructions to follow if confronted by a picket line.

[6] In February and early March, when confronted by picket lines, the employees had been asked by the employer to go away from the work site and told to report back at nine o'clock. After being told repeatedly to go away and report back an hour later,

the employees were then sent home by the employer. On these occasions the employees were paid for the full day.

[7] After the incident of March 1<sup>st</sup>, 1999, where employees were again sent home, the employer made an application in the Supreme Court of British Columbia for an interlocutory injunction to restrain the number of picketers at premises occupied by the Department of National Revenue including the Surrey Taxation Centre and the Burnaby-Fraser Tax Services Office (BFTSO). The application was adjourned when the Public Service Alliance of Canada undertook to the Court not to physically block or impede access to the premises of the Department of National Revenue. This consent order was dated March 5<sup>th</sup>, 1999.

[8] On March 23<sup>rd</sup>, 1999 employees were instructed by the employer to cross the picket line and report to work or they would not be paid and might face disciplinary sanctions.

[9] The grievors' evidence was that they were prevented from entering the employees' parking lot at the back of the Surrey Taxation Centre and were instructed to report to their team leaders at the entrance of the BFTSO at nine o'clock. They went to neighbouring restaurants and returned at nine o'clock. Upon returning, as they still could not enter the parking lot they parked on the street at parking metres of the duration period of two hours.

[10] At the entrance to their building they were met by picketers, at least twenty in number and possibly thirty or forty. The grievors gathered with other employees around their team leaders and their managers for instructions. At or around nine o'clock, the grievors were informed by the Assistant Director, Verification and Enforcement, Lucie Binet, that they were required to cross the picket line and report to work or they would not be paid. Employees wishing to cross the picket line would be escorted through by the managers. The grievors testified that they were told by Lucie Binet that, if they did not cross the picket line when their name was called, they would not get another opportunity to do so. Bashir Madhani did not hear his name being called but witnessed Lucie Binet being shouted down by picketers when she started calling names. He had a discussion with Manager, Lorna Gray, suggesting that the police be called and the picketers moved to allow employees safe passage through the picket line. This was not done. The managers: Lucie Binet, Lorna Gray,

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Douglas Mills and Carolyn Darts were escorting groups of four or five employees through the picket line.

[11] According to the grievors their managers looked visibly stressed and could not offer a safe escort through the picket line, the members of which kept moving, touching or jostling the employees as they wound their way through. When the escorts started, the picket line became more vociferous and rowdy. The grievors believed it was just a matter of time before something physical would happen. The grievors left at 9:30 a.m. to go home although they were not directed or authorized by the employer to go home.

[12] Johnson Wu submitted his leave records for the weeks ending February 12 and 19, 1999 as well as those covering March 1<sup>st</sup> and 23<sup>rd</sup>, 1999. On February 15, 16 and March 1<sup>st</sup>, 1999, Mr. Wu was paid under code 117 "Authorized Leave With Pay - Strike Activities" for the entire day. On April 9, 1999 he received a letter from Lucie Binet, Assistant Director, Verification and Enforcement advising him that his timesheet for March 23<sup>rd</sup>, 1999, had been adjusted. Mr. Wu's time was paid under code 117 "Authorized Leave With Pay - Strike Activities" for one hour and charged to code 118 "Unauthorized Absences - Illegal Strike" for six and one half hours. Mr. Wu testified that he had caught a cold waiting to be sent home on March 1<sup>st</sup>, 1999.

[13] On April 7, 1999 Brion Ellis received an e-mail from Doug Mills addressed to "All Users" which read:

*The following are the guidelines which will be followed in accounting for employees' time as a result of PSAC strike action on Tuesday March 23:*

*\* Employees who entered the workplace, either on their own, escorted, or after the picket lines went down and remained on duty for the balance of the day will be paid for the full day. The time spent waiting to get into the office may be charged to code 117, Leave for Strike Activities With Pay.*

*\* Employees who were in the field for the entire day or who came to the office and left to work at home or in the field for the balance of the day will be paid for the whole day. Any time spent waiting at the office may be charged to code 117.*

*\* Employees who entered the building and then chose to leave for the day or chose not to cross and left for the day will have their pay deducted from 9:00 when escorts through the picket line began. Their time from 9:00 to the end of the*

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*work day will be charged to code 116, Leave for Strike Activities Without Pay.*

*\* Employees will not be allowed to request vacation, compensatory time, change of compressed or make-up time if they chose to leave or to not enter the workplace. Sick leave or requests for any other paid leave will be looked at on an individual basis. All paid leave for March 23 which was not pre-approved must be approved by a management exclusion.*

*The timesheets which you have submitted for the week of March 26 will be reviewed by your Section Manager and adjusted where necessary to comply with the above based on the description of your activities on March 23 which you supplied to your team leader. Any employee who has any time adjusted to code 116, Leave for Strike Activities Without Pay, will receive written notification from the ADVE.*

[14] Brion Bailey and Jerry Koppenol did not testify but the parties agreed their evidence would be the same as that of the other grievors.

[15] The grievors called Harjinder Johal who was the most senior PIPSC official at the Burnaby-Fraser Tax Services Office on March 23<sup>rd</sup>, 1999. Mr. Johal testified to the events on previous occasions when the employees were sent home and compared them to that of March 23<sup>rd</sup>, 1999. Mr. Johal had received a message from the PIPSC President, Steve Hindle, that there was an understanding between PIPSC and the PSAC that safety was not in issue for employees who chose to go across the picket line escorted by managers. Mr. Johal explained that he and his AU members were not in a legal strike position and, when ordered by the employer to cross the picket line, he had no choice except to obey. When he went across the line, the picketers became more agitated and he was jostled and confronted by an angry picketer whose face was very close to his. Mr. Johal described: "His face was very close to mine, shouting, flecks of spittle came from his mouth to my face." Lucie Binet was escorting him through the picket line. Mr. Johal indicated that he believed the picketers at the BFTSO were grain handlers or inspectors, they were PSAC members; he did not know them. At the Surrey Taxation Centre in the back, the picketing PSAC members were either employees of the CCRA or GS's (General Services) members whom he knew. Mr. Johal stated that the picket line at the BFTSO was very loud, more boisterous and obnoxious than on previous occasions. Mr. Johal recalls that a role call of sorts took place and employees were asked to cross the picket line. Mr. Johal testified that a great deal of confusion existed at the picket line on March 23<sup>rd</sup>, 1999.

[16] Mr. Johal met with management after the events to discuss the fate of the employees who had not made it to work on March 23<sup>rd</sup>, 1999. An employee, Judy Chan, who was pregnant at the time, was not docked pay for the day. Employees who reported to work after the picket lines went down around one o'clock were paid for the day. A large number of AU employees who worked off the premises, either at home or auditing in the field, were also paid for the day. The grievors all worked in international audits and could not work from home or off the premises; they were not paid for the day, nor were they allowed to use leave credits for that day.

[17] James Thatcher testified that he arrived at 7:30 a.m. and was informed to report to the main entrance at 9:00 a.m. When he did the situation was chaotic; he saw two groups of employees: a group of AU's around the Audit Management team headed by Lucie Binet and another made up of collections officers and collections staff some distance away.

[18] When his name was called shortly after nine o'clock, Mr. Thatcher got in a group willing to cross the picket line. The group was headed by Lucie Binet; the employees moved in single file weaving through the picket line which continued to walk in a circle. The picketers became increasingly belligerent and angry, yelling in the faces of these employees and rubbing shoulders as they were going around. Mr. Thatcher did not make it into the building. He was the last one of the group. A picketer stood in front of him who was extremely angry and was shouting in his face. Mr. Thatcher did not feel safe going around him. He became separated from the group. The escorting manager did not stop or come for him at that time. Mr. Thatcher told the picketer to calm down and he backed away; he felt unsafe crossing the picket line. Mr. Thatcher did not try again to cross the line. Around eleven o'clock the management team stopped escorting the staff through the picket line. Mr. Thatcher stayed outside the building until about 11:30 a.m.; he then went home, a 15 minutes drive from work. He had lunch and came back to the office around two o'clock. The picketers had left so he went in to work and reported to his team leader what had occurred. Mr. Thatcher suffered no loss of pay. His timesheet for March 23<sup>rd</sup>, 1999 indicated Leave With Pay, code 117 until 2:00 p.m. This was the same code used when he had been confronted with a picket line on previous occasions. His normal hours of work are until 5:00 p.m.

[19] In cross-examination Mr. Thatcher indicated that he did not go home because on previous occasions the picketers had disbanded in late morning. He decided to stay around in order to go in as soon as he felt it was safe to do so.

[20] The employer called four witnesses. Wolf Stockhecke is the Assistant Director for the Revenue Collections Division. He reported directly to John Purda, the Director of the Burnaby-Fraser Tax Services Office. William Douglas Mills was a Section Manager reporting to the Assistant Director, Verification and Enforcement Division, also reporting to John Purda. Finally, Shirley Ann McPhee is a Human Resources Manager for both the BFTSO and Surrey Taxation Centre.

[21] On March 23<sup>rd</sup>, 1999, there were approximately six hundred employees at the BFTSO; approximately three hundred worked in the Verification and Enforcement Division, and some two hundred worked in Mr. Stockhecke's Revenue Collections Division. The rest worked in the three smaller divisions: Client Services Division, the Investigation Division and the Appeals Division.

[22] On December 14, 1998, John Purda issued to "All Employees" a memorandum on "Notice to Employees Regarding Picket Lines". It provided guidelines to employees when faced with picket lines from Table Two employees; they were advised to contact a management representative in such cases and follow instructions.

[23] Prior to March 23<sup>rd</sup>, 1999, Mr. Stockhecke and other managers instructed employees to go for coffee breaks and report back to the site at a set time for further instructions. Management would then attempt to determine the picketers' intention. After extending coffee breaks and having employees report back a couple of times, the employer would send the employees home. Shortly after the employees were sent home, the picket lines would come down. This left only the managers and excluded staff to provide the public with limited services.

[24] The decision to send employees home would be taken by the Director, John Purda, in consultation with the management team as well as with the Director of the Surrey Taxation Centre. The decision was communicated orally by the excluded managers to groups of employees gathered outside.

[25] Following the March 1<sup>st</sup>, 1999 incident, a pattern emerged: the picketers impeded access to offices until employees were sent home; then the picket lines came

down. The employer sought an injunction to limit the number of pickets to six; and obtained a consent order from the B.C. Supreme Court.

[26] On March 23<sup>rd</sup>, 1999, Mr. Purda arrived at work at 5:30 a.m.; the picketers came around 6:30 a.m. until 7:30 a.m. Mr. Stockhecke arrived at 7:00 a.m.; he noticed some picketers as well as employees already in the building. They had arrived either before the picketers or were able to go through the picket lines.

[27] When the picketers numbered around thirty and did not appear to be taking down their lines, a decision was made to send employees away with directions that they should report back at 9:00 a.m. for further instructions. At 9:00 a.m. all excluded managers went outside and announced to employees they would have to go to work or at least attempt to get in to work. Managers offered to escort employees in to the building. Employees were told that, if they chose not to report to work, this would be unauthorized time off and they would not be paid.

[28] There were two teams of escorts: one for the Verification and Enforcement Division and one for the Revenue Collections Division. Mr. Stockhecke never said, nor did he hear managers say, that employees would be given only one opportunity to cross the picket line. He continually offered an escort to those who wanted to come in. Mr. Stockhecke acted as an escort some fifteen to twenty times between 9:00 a.m. and 11:30 a.m. Mr. Mills acted as an escort on fewer occasions. He denied having taken a roll call, nor did he advise employees they would have a single opportunity to cross the picket line.

[29] The Director called a halt to the escorts of employees when Mr. Stockhecke was grabbed from behind by a picketer and brought to the ground. The situation was judged unsafe, although Mr. Stockhecke was not injured. There were still employees waiting to be escorted through the picket line. The picket lines came down around one o'clock and employees were able to go in to work. The police were not called either to open the picket line or to report the assault on Mr. Stockhecke. This decision was premised on assumptions based on the traditions and culture of British Columbia labour relations and the usual reaction of the police.

[30] Shirley Ann McPhee testified regarding the situation on the picket line at the Surrey Taxation Centre. Employees were told to report to work or they would not be paid and would be disciplined. Ms. McPhee saw the normal "boo and hiss" as well as



the call for solidarity from picketers but she saw no physical blockage to prevent employees from going in to work. Ms. McPhee saw no PIPSC employees on the Surrey side; the employees she saw were members of PSAC. The picket line on the Surrey side came down between 1:00 p.m. and 1:30 p.m.

[31] Ms. McPhee was the staff relations advisor to the directors of both the Surrey Taxation Centre and the BFTSO. She prepared procedures to be followed to deal with the March 23<sup>rd</sup> activities. She recommended that a letter be sent to employees informing them that no disciplinary action would be taken against employees who did not report to work on March 23<sup>rd</sup>, 1999. She provided a draft text to the Director but does not know if it was sent.

[32] Ms. McPhee testified that the decision not to discipline employees was taken at the regional management level. She explained that employees who did not report to work were not paid because no work was performed and no leave was authorized.

[33] Managers instructed team leaders to inquire into and report on what their staff did on March 23<sup>rd</sup>, 1999. Employees who reported to work were paid regardless of the time they came in. Those who went home and failed to report to work were paid until 9:00 a.m. and had the rest of their time charged to code 118 "Unauthorized Absences - Illegal Strike, Without Pay".

#### Arguments for the Grievors

[34] On the jurisdictional issue the grievors argued that the action of the employer in withholding their pay was in fact imposing a financial penalty. The grievors relied on the *Beaudet* decision (Board file 166-2-16491 to 16514). The following paragraph, on page 2, describes the facts:

*Since you were absent without authorization from your work stations on May 22, 1986 from 1:00 p.m. until approximately 2:15 p.m., I wish to inform you that you will not be paid for the period of your absence.*

[35] On page 4 the employer argued the no work, no pay principle:

*[...] Manager Lachapelle did not want to punish the employees for their illegal meeting. He simply docked them pay.*

[36] The adjudicator took jurisdiction and stated in the reasons for decision:

[...] *On May 26, in response to this action, their employer declared them to be “absent without authorization from [their] work stations”. If the employer decides to dock the grievors part of their pay for May 22, it has the right to do so. The fact remains, however, that in so doing, it was subjecting them to disciplinary action resulting in a financial penalty. The present cases are not just another example of the application of the administrative measure “No work, no pay”.*

[37] The grievors then referred me to the *Kerouac* decision (Board file 166-2-2673) where a letter carrier did not deliver all his mail because of inclement weather. The employer had argued the absence of jurisdiction invoking a no work, no pay situation. Adjudicator Garant took jurisdiction but found that the punishment was justified.

[38] In the *Berthiaume et al* decision (Board files 166-2-2335 to 2340) the employer had argued its having no intent to discipline but simply to apply the no work, no pay principle. The adjudicator took jurisdiction on the basis that the measure was one of financial penalty and partially allowed the grievance.

[39] On the merits the grievors argued unfair treatment. The incident of March 23<sup>rd</sup>, 1999 was the fifth incident in six weeks where they reported to work and were faced with a picket line. In all previous instances the employees were sent home; on that day the employer decided to force employees to cross the picket line. Only those AU's who had to report to work at the BFTSO were required to cross the picket line. A vast number of AU's were able to rearrange or reschedule their work outside the office and thus avoided having to cross the picket line.

[40] The evidence revealed that the picket line was different from previous ones. The grievors, who have good powers of observation, found that the picket line's hostility was escalating and in their opinion there was reason to be concerned about potential violence. The attitude of the picketers indicates that they were targeting the AU members. The line did not separate during the escorts. The picketers' attention moved to excluded people and they confronted them with verbal abuse. The concerns of the grievors were valid. The culmination in an assault on Wolf Stockhecke is the proof.

[41] There is also the effect of confusion. Mr. Ellis testified that Ms. Binet, the most senior manager from Verification and Enforcement on the site, told him this was his last chance to cross the picket line. This evidence was not contradicted. Mr. Ellis went

to the other members of his team and relayed this information. That is why the grievors went home.

[42] The evidence revealed that after the assault on Mr. Stockhecke, the employer allowed employees to just wait and not attempt to cross the picket line until it went down. These employees were paid for the whole day.

[43] The employer placed the employees at risk unnecessarily. Managers did not witness the physical nudging, touching and pushing; yet Mr. Johal testified that Ms. Binet agreed that pregnant Ms. Chan would not be required to go through the line for fear of being touched, jostled or pushed. Ms. Chan did not lose any pay. Mr. Thatcher described his escort totally differently from what was described by Mr. Mills and Mr. Stockhecke. Ms. Binet led a group of four or five employees; Mr. Thatcher was the last one with no other manager beside or behind him when he was blocked off. Mr. Thatcher went home, came back and got paid for the whole day. He reported this to his team leader. Why was he paid for the two to two and one-half hours he was at home? There is no equity in a situation where one employee can claim potential safety risks and others cannot. The evidence reveals the grievors had concerns for their safety. Their concerns were borne out by the assault on Mr. Stockhecke.

[44] The grievors referred me to the *Fallman et al* decision (Board files 166-2-20776 to 20780). That case dealt with a situation where employees were given a written reprimand and not paid for failing to report to work because of concerns for their safety if they attempted to cross a picket line. The grievances were allowed because employees had complied with the employer's directive.

#### Arguments for the Employer

[45] The employer submitted that the situation of March 23, 1999 went back to the pre-agency era and was governed by paragraphs 11(2)(a) and (d) of the *Financial Administration Act* (FAA) which read:

*(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and*

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*employee relations in the public service, and without limiting the generality of sections 7 to 10,*

*(a) determine the requirements of the public service with respect to human resources and provide for the allocation and effective utilization of human resources within the public service;*

...

*(d) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any matters related thereto ...*

[46] Mr. Purda as Director of the BFTSO was exercising this authority under the FAA. The decision was made to keep the operations going and thus was in keeping with Article 6 of the AU collective agreement. The employer referred me to the *Coopey* decision (Board file 166-2-15355) which deals with the exercise of such authority.

[47] In a season of rotating strike shutdown, management has a preoccupation with keeping operations going. Section 7 of the *Public Service Staff Relations Act* (PSSRA) provides:

*7. Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

[48] This provision implies that an adjudicator is not to second-guess management on purely administrative decisions.

[49] The grievors never quoted any leave clauses during the grievance process, nor at this hearing. The employer relies on the *Burchill* decision [1981] 1 F.C. 109 to argue that they are now prevented from doing so. The employer thinks that the issue is whether this is discipline or a purely administrative decision. The burden is on the grievors to establish there was discipline.

[50] The employer referred me to the *Flynn* decision (Board file 166-2-29015) which deals with a principle, that is also reflected in picket line cases, that there has to be an actual intent to discipline in a decision other than a purely administrative one. There is no dispute that the grievors left at 9:30 a.m. The situation was somewhat chaotic; the employer decided to have a roll call in the afternoon. This is a purely

administrative decision and, in the context of section 92 of the *PSSRA*, it is not one where one can get into the theme of discrimination. The employer is not here to justify when it did its head count. Because there is no jurisdiction to look into the administrative decision, equity does not come into question. There is no obligation to pay employees for periods they did not work but it was open to the employer to choose to proceed in this fashion.

[51] The change in the time code does not “illuminate a disciplinary intent”. The rationale for the time code change was strictly a bookkeeping exercise for budgetary reasons, not discipline. No written reprimands were issued and no records were placed on the grievors’ files with the traditional warning that, should there be a repeat, more severe discipline will follow.

[52] The employer also referred to the *Berthiaume* decision (supra). He referred to the arguments made on page 6 and at the top of page 7 and at the last paragraph on page 18 and the first on page 19 which read:

*If the employer, who is not at any time obliged to take disciplinary action, simply decides not to pay an employee who has not worked or who refuses to work, we feel that this amounts to an accounting measure rather than a disciplinary one. In order for the measure to be regarded as disciplinary, there must be active intervention on the part of the employer: this intervention may take the form of a suspension whereby the employer prohibits the employee from working, thus depriving him of his right to work and consequently, his right to be paid; it may also be in the form of a written reprimand which, placed in the employee’s file, causes him real or possible prejudice, or a financial penalty within the meaning of section 91 of the Public Service Staff Relations Act.*

[...]

*We agree with our colleagues’ arguments but wish to make a clearer distinction between disciplinary offence and disciplinary action or penalty; the fact that a sanction is not imposed does not necessarily mean that no disciplinary offence or misconduct has taken place. Although a sanction cannot be imposed when there is no offence, it is entirely possible for an offence to go unpunished, since the employer always has the choice, subject perhaps to the principle of non-discrimination, of punishing or not punishing the employee.*

[...]

*In light of the evidence presented and for the above reasons, we find that the action taken against the grievors must be characterized not as disciplinary but rather as an administrative measure resulting from the application of clause 54.01 of the collective agreement.*

*We find that the employer's decision not to pay the grievors for services not rendered is well-founded.*

[53] The employer referred to the *Morneau et al* decision (Board files 166-2-10080, 10103, 10104, 10122 & 10127) where the adjudicator found that, when employees report to work and while in a holding pattern, they are in fact performing a service but when they leave they are not.

[54] The employer then referred to the *Laflamme et al.* decision (Board files 166-2-914 to 925) at pages 9 and 10 and the *Lasnier* decision (Board file 166-2-18328 to 18333) where it is found that not paying an employee when no work is performed does not constitute a financial penalty.

[55] The employer submitted that it is not in the best interest of good labour relations to grant the grievances. The employer is under the obligation and responsibility to effectively and efficiently manage resources in the Public Service. To order the employer to pay employees in circumstances where they went home on their own accord would send a chilling message. This could force the drawing of hard and fast battle lines in the course of rotating strikes because the employer would be penalized for responding with flexibility. The employer must have the authority to keep operations running and ask employees to be escorted in where it is safe to do so.

[56] The employer asked that the grievances be denied because the grievors failed to meet the burden of proving that discipline was imposed. In the alternative, should this adjudicator find that discipline was imposed, she should find that the facts support that it was justified given the nature of the picket line and the unilateral decision of the grievors to remove their services.

#### Reasons for Decision

[57] Whether the issue is one of pay or one of discipline resulting in a financial penalty I do have jurisdiction to hear these grievances.

[58] Clause 27.02 of the AU agreement provides that: “An employee is entitled to be paid for services rendered ...”

[59] The employer argued that the employees withdrew their services when they refused to cross the picket line on March 23<sup>rd</sup>, 1999 and went home. The employer also argued that the decision not to pay the grievors was administrative and in keeping with the notice provided to the employees that leave would not be authorized should they fail to report to work or fail to make serious attempts to do so.

[60] Can the grievors be faulted for failing to cross the picket line? While a number of employees successfully did so it was not without risks. The evidence revealed that the picket lines reacted differently towards the grievors than towards employees at the Survey Taxation Centre who were represented by their own bargaining agent. The picketers were unknown to the grievors and management of the BFTSO, thus rendering the situation more volatile. An assault did in fact take place around 11:30 a.m.

[61] Until 9:30 a.m. the grievors were where the employer expected them to be. When they went home without authorization it raised the question whether they had decided to support the strikers by withdrawing their services. The grievors presented evidence that the Assistant Director of Verification and Enforcement Division, Lucie Binet, had informed them that they were going to be given only one opportunity to cross the picket line when their names were called. This would provide a motive for the grievors' decision, other than participation in an illegal work stoppage, although that decision was somewhat precipitous. Mr. Wu still had used only half an hour on his two hour parking metre when he decided to go home. I find his fears of catching a cold a somewhat lame excuse for not remaining a bit longer to assess the situation or for failing to come back later to verify that the picket line was still there.

[62] The employer gave every indication to the employees, including the grievors, that it intended to discipline them if they did not report to work on March 23<sup>rd</sup>, 1999. The employer's decision not to discipline them came later.

[63] If I find that no disciplinary action was taken on the part of the employer, I have to find that the denial of pay between 9:00 a.m. and 9:30 a.m. was unjustified.

[64] If I find that the denial of pay was in fact a financial penalty, I have to ask myself if it was justified in the circumstances. The grievors made no efforts to report

to work on March 23<sup>rd</sup>, 1999. The grievors followed their managers' directives until 9:30 a.m. then they decided to go home without authorization. A six and a half-hour penalty is not an excessive response to an unauthorized absence.

[65] Both parties have relied on the *Berthiaume et al* decision (supra) to support their position. In *Berthiaume* (supra) the adjudicator found that the action taken against grievors in similar circumstances was not disciplinary but rather an administrative measure. In *Morneau et al* (supra) the adjudicator relied on *Berthiaume et al* (supra) to reach a similar conclusion. Both adjudicators allowed the grievances in part by ordering that grievors be paid for the time that they were following their employer's directives.

[66] I find that the employer did not take disciplinary action towards the grievors but an administrative one. There was no intent to discipline, no record on the grievors' file and no warning of the consequences on their future.

[67] In the present case the grievors were following the instructions given by the employer until they went home. The crossing of the picket line under escort had just begun and carried on until 11:30 a.m. From 9:00 a.m. to 9:30 a.m., the grievors were no different than the other employees waiting for an opportunity to get escorted into work. The moment they went home, they were no longer rendering a service and therefore are not entitled to pay.

[68] In conclusion, the grievances are allowed to the extent that the grievors should be paid between the hour of 9:00 a.m. to 9:30 a.m.

**Evelyne Henry,  
Deputy Chairperson.**

OTTAWA, Ontario, July 9, 2001.