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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DENY LECOURS AND LOUIS RODRIGUE

Grievors

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Evelyne Henry, Deputy Chairperson

For the Grievors: Paul Taylor, Public Service Alliance of Canada

For the Employer: Karl G. Chemsi, Counsel

Heard at Quebec City, Quebec,
November 16, 2001
(written submissions completed January 18, 2002).

[1] Marine surveyors Deny Lecours and Louis Rodrigue each lodged a grievance, under article 28 of the March 26, 1999 collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Technical Services Group (Codes: 403, 405 to 408, and 413), claiming overtime of 24 hours per day during the period from November 13 to December 4, 1999 for work performed aboard the M.V. ALCOR.

[2] At the first level of the grievance process, the employer allowed the claims for overtime during the period from November 13 to 15, 1999, but denied the claims covering the period from November 18 to December 4, 1999.

[3] The delay in processing at adjudication was caused by a number of factors: an unsuccessful mediation; the unavailability of the parties; and a rescheduling of the hearing, requested by the employer and agreed to by the Public Service Alliance of Canada.

Evidence for the Grievors

[4] Mr. Louis Rodrigue is a marine surveyor who has been employed by Transport Canada since July 1998, before which time he was self-employed.

[5] In October or November 1999, when the M.V. ALCOR ran aground approximately six miles east of Île d'Orléans off the north shore of the St. Lawrence, the Manager of the Quebec Transport Canada Centre (TCC) mandated Mr. Rodrigue to go aboard in order to investigate the accident, note the risks of pollution, assess the damage, and determine whether it was preferable to move or to immobilize the vessel.

[6] Mr. Rodrigue described in great detail his first days and nights aboard the M.V. ALCOR. Around noon on the second day, Deny Lecours joined him there. The first days aboard the M.V. ALCOR were very busy. During the most dangerous period, both marine surveyors worked aboard the vessel.

[7] Around November 15, 1999, the employer decided to keep only one marine surveyor aboard the M.V. ALCOR at a time, on 12-hour shifts. The grievors discussed the situation between themselves and suggested to the Manager that 24-hour shifts be scheduled because of the costs, risks, and waste of time associated with changing shifts every 12 hours. The employer agreed to 24-hour shifts, of which 18 hours would be hours of work, and six hours would be hours of rest. During the six hours of

rest, the grievors would be on standby. The employer insisted that the grievors rest for six hours.

[8] When the grievors submitted their claims two weeks after the work was completed, the Manager refused to approve the claims: he no longer recalled authorizing 24-hour shifts, of which 18 hours would be hours of work, followed by six hours of rest. The grievors therefore submitted new claims, requesting that they be paid 24 hours per day during all of the periods at issue. At the first level of the grievance process, the employer paid overtime in accordance with the agreement, that is, 24 hours per day until November 15, 1999, and then on the basis of 18 hours worked plus six hours on standby.

[9] On cross-examination, Mr. Rodrigue confirmed that the stressful emergency situation did not last until December 4. It lasted only for the period during which both grievors worked together aboard the vessel. The marine surveyor working aboard the M.V. ALCOR was able to communicate with the Manager using a portable telephone and a facsimile machine. Mr. Rodrigue was rather vague about the duties performed after November 15, 1999.

[10] Other persons were aboard the vessel, doing repair or refloating operations. The conditions aboard the M.V. ALCOR remained precarious and not conducive to rest.

[11] Mr. Rodrigue was in a position of responsibility and authority throughout the time he was aboard the M.V. ALCOR.

[12] Mr. Deny Lecours has been employed as a marine surveyor since October 1997. He explained that the operations aboard the M.V. ALCOR were carried out in three stages: first, when the vessel ran aground and an unknown emergency situation existed; second, when the situation was calmer, someone had to be found to refloat the vessel, and a call for tenders was issued; and third, when the Groupe Desgagnés team "salvaged" the vessel. The overtime at issue occurred during the last stage.

[13] Mr. Lecours stated that the marine surveyors aboard the M.V. ALCOR were Transport Canada's eyes and ears. They monitored the operations and the comings and goings of persons aboard, and reported to the Transport Canada technical services. They kept a journal of all occurrences aboard the vessel. Mr. Lecours was in a position of responsibility and "captive" 24 hours per day. Over time he realized that,

given the stress, he was unable to "switch off" or rest for six hours. He nevertheless continued to work his 24-hour shifts.

[14] Under cross-examination, Mr. Lecours stated that he did not recall when the employer asked him for evidence of the work performed during the hours at issue. In the reports, he recorded all the important aspects of the activities aboard the vessel, but not his personal activities.

Evidence for the Employer

[15] Denis Galarneau has been the Regional Director of Marine Safety since June 1998. He is responsible for marine safety for the entire province of Quebec.

[16] As the responsible director, Mr. Galarneau was promptly informed of the emergency situation aboard the M.V. ALCOR. Since Transport Canada's mandate was to protect lives, goods, and the marine environment, Mr. Galarneau was responsible for providing the Minister's office with information about the M.V. ALCOR and for managing media relations.

[17] Mr. Galarneau made sure that the responsible Manager, André Desrochers, had the employees needed in his geographic area. Mr. Galarneau was informed of the situation and was consulted about certain decisions, the first of which, on Sunday, November 14, 1999, had to do with renting a marine shuttle at a cost of $2,500 per day, in order to ferry the inspectors without being obliged to call on the Coast Guard.

[18] On Monday, November 15, 1999, Mr. Desrochers consulted Mr. Galarneau about the arrangements for the next two weeks. They discussed having one inspector aboard the M.V. ALCOR, on 12-hour shifts, in order to monitor the situation. The grievors wanted 24-hour shifts. Given the six-hour rest periods, it was reasonable to agree to the 24-hour shifts, since other persons including the captain and some crew members were aboard the vessel. The labour standards set out in the *Canada Labour Code*, Part II, require six hours of rest. Mr. Galarneau accepted the suggestion that the 24-hour shifts include six hours of rest.

[19] Mr. Galarneau did not want to interfere in the details of the schedule of the grievors, who are classified at the TI-7 group and level and, as project managers, are highly skilled.

[20] Under cross-examination, Mr. Galarneau stated that the requirement for six hours of rest did not result from budget concerns, but from a desire to ensure that the grievors would benefit from adequate hours of rest. Theoretically, Mr. Galarneau was to report daily at first and then three or four times per week.

[21] The position of marine surveyor involves a great deal of responsibility and requires a high level of skill. When the grievors are on standby they are in a position of responsibility and it must be possible to reach them if an urgent situation suddenly arises; as it must be possible to reach them year-round.

[22] Mr. André Desrochers is the Manager of the Quebec TCC, Vessel Inspection Division. When these events occurred, there were 11 inspectors in this Division.

[23] Mr. Desrochers sent a marine surveyor to inspect the M.V. ALCOR, note the damage, assess the mechanical difficulties and, if it was necessary to refloat the vessel, give notice of the appropriate restrictions. The day after the M.V. ALCOR ran aground, Mr. Desrochers sent a first inspector, Mr. Rodrigue, an engine specialist; the following day he sent a second inspector, Mr. Lecours, a hull specialist.

[24] Initially, there was a great deal of activity day and night. Calculations had to be made in preparation for the arrival of the towing vessels, and the tide conditions had to be determined in co-operation with the owner of the vessel or independently. The inspector could oppose moving the vessel in order to avoid an environmental disaster. The vessel ran aground on Tuesday, November 9, 1999. Some stability was established on Friday, November 12, when the fears of rapid changes and the dangerous period had passed. Some degree of stability was established over a few days, and two inspectors shared the shifts aboard the vessel until the following Tuesday. Starting on November 16, there was only one inspector aboard per shift.

[25] During the weekend of November 12 and 13, 1999, Mr. Desrochers spoke to Mr. Rodrigue and Mr. Lecours. He learned that they were working day and night and not working alternately. He told them that he did not want ongoing work periods that ran counter to safety standards to continue; when two persons were sent out, it was so that they could work alternately. Mr. Desrochers contacted Mr. Galarneau in order to rent a marine shuttle and thus avoid confinement for the inspectors, meet the obligation to provide them with meals, and allow them to change every 12 hours. He informed Mr. Rodrigue of these arrangements.

[26] Mr. Rodrigue, who represented the inspectors, told him that he did not consider 12-hour shifts safe, that steps would have to be taken to install ladders and gangways, and that ladders were dangerous at night. Since there were officers aboard whom he knew well, 24-hour shifts were possible. It would be possible to plan for the six-hour rest periods to be taken while other persons aboard watched for oil leaks or emergency situations.

[27] Mr. Desrochers reported to Mr. Galarneau Mr. Rodrigue's arguments in favour of 24-hour shifts—18 hours of work and six hours of rest—because he could rely on the officers aboard the vessel. Mr. Galarneau agreed. Mr. Rodrigue, who was the union representative, communicated this decision to the other inspectors. The work schedule was drawn up by the employees themselves.

[28] Aboard the M.V. ALCOR, the inspectors had a pager, a portable telephone, and a computer available to them. There was also a facsimile machine that operated using the portable telephone. Mr. Desrochers contacted the inspectors aboard the M.V. ALCOR daily. On weekends, Mr. Desrochers could be reached on his pager.

[29] Mr. Desrochers produced his inspectors' work description (Exhibit P-7); pages 6 and 7 describe their working conditions as follows:

> [Translation]
>
> *Must be able to draw up the schedule of activities while avoiding scheduling conflicts* […] *when an emergency arises, must organize action and at times may have to work long uninterrupted hours, under very great stress, until the emergency has been overcome or controlled.*

[30] The tides are read roughly every six hours (each day, the tide is 50 minutes later than on the previous day). Mr. Desrochers produced the tides table (Exhibit P-8).

[31] Mr. Desrochers stated that he was anxious to speak during the day with the inspector aboard the M.V. ALCOR, in case he had to take photos or perform other duties. He had not scheduled specific times for the rest periods. He did not want a person to work for more than 18 hours; that was the condition of his approval of the 24-hour shifts. The inspectors did not inform him that this system was not working.

[32] As a result of the grievance process, part of the overtime was paid. There is implicit overtime when a person must remain at work; when this overtime is not

previously authorized, the person provides reasons for it as soon as possible afterward. Initially, Mr. Desrochers opposed payment of overtime for the weekend; two inspectors were aboard the M.V. ALCOR, and one of them could rest while the other one worked.

[33] The overtime claimed by the other inspectors complied with the instructions issued on November 15, 1999.

[34] Under cross-examination, Mr. Desrochers reiterated that the employer wanted inspectors to work for 18 hours per day and to rest for six hours per day (18-6). Inspectors' responsibilities were the same, whether they were on standby to order immediate evacuation or to respond to an environmental disaster, and whether they were aboard the M.V. ALCOR or inspecting a vessel. If an inspector was unable to rest for six hours, Mr. Desrochers could have introduced 12-hour shifts, but no one informed him that the 24-hour shifts were not working.

Argument for the Grievors

[Translation]

Point in Issue:

Did the complainants actually work during the periods at issue?

Argument:

1. *At the outset of the hearing, the parties agreed that article 34.05 would apply to the complainants' situation. Article 34.05 reads as follows:*

   This article does not apply to an employee when the employee travels by any type of transport in which he or she is required to perform work, and/or which also serves as his or her living quarters during a tour of duty. In such circumstances, the employee shall receive the greater of:

   (a) on a normal working day, his or her regular pay for the day,

   or

   (b) pay for actual hours worked in accordance with Article 32, Designated Paid Holidays and Article 28, Overtime of this collective agreement.

2. *In order to demonstrate that the complainants had "actual hours worked", we shall distinguish their situation from "captive time", as defined in the case law.*

3. *In Martin (166-2-19004), the complainant was a park warden who claimed overtime because he was "captive" when he had to travel in the back country. The adjudicator dismissed the grievance, stating as follows:*

   "I am of the opinion, therefore, that once his daily chores were done and the grievor was able to relax and to read, walk around, socialize or sleep according to his choosing, he was no longer "at work". He was not "working" simply because the mode of travel associated with his work took him to a remote location where he spent the night. He was not "working" simply because he was not able to go home at the end of the day. He was not "working" simply because he was out of contact with his family. He was not "working" simply because his surroundings were more spartan or less luxurious than a first class hotel. Surely payment for "work" is not dependent upon the standard of comfort which one is able to enjoy when away from home on business. None of what the grievor experienced was unusual or unexpected. It was all part of the normal routine for which he was hired."

4. *In Paton (166-2-17754), the complainant claimed overtime for the entire time he had to remain on a vessel without working. It was clearly impossible for him to leave the vessel during the period at issue, a situation that necessarily limited the activities in which he could engage even while he was not performing the duties assigned to him. The adjudicator allowed the grievance, stating that the article on overtime in the collective agreement applied to the case. The employer appealed the decision to the Federal Court (A-338-89), which ruled that article M-28 (travel time) applied instead:*

   ''Having concluded that clause M-28.05 of the Master Agreement applies, it now remains to decide its meaning. The clause stipulates that an employee is to receive the greater of his or her regular pay for the day and pay for "actual hours worked". The question then arises: What are actual hours worked? Do such hours mean time during which work related duties were actually performed or is the wording broad enough to include, as counsel for the respondent urged, all hours when an

> employee is "captive" on a ship, including sleep and leisure time? (...)
>
> It seems to me that in looking at the language of clause M-28.05 and its context, the use of the adjective "actual" in the clause was intended to convey a meaning that described work in the normal sense of doing or engaging in the specific performance of duties. The clause's reference to living quarters implies that if an employee is within the terms of clause M-28.05 then only the time spent actually working will count for payment and that so-called "captive time" on the ship is not to be treated as actual hours worked. I believe this interpretation to be reasonable and in accord with what I believe was intended by the parties to the collective agreement.
>
> I find it difficult to accept that the Master Agreement intended that an employee should be paid at the double overtime rate while he is allowed a full night's sleep for a number of consecutive nights (...)"

5. *In these cases, the complainants were "captive" simply because it was physically impossible for them to return home. They could not claim that they had rendered any service or been of any use to their employer during that time.*

6. *In the present case, the complainants were not simply "captive" aboard a vessel. They had actual hours worked. Quite unlike the situations in Martin and Paton, in this case an employer-employee relationship existed between the employer and the complainants during the periods at issue.*

7. *The expression "employer-employee relationship" implies an exchange, under the terms of which the employer requests a service and the employee renders that service. In this case, there was such an exchange. In fact, the employer asked the complainants to be present on the Alcor, to assume a position of responsibility as inspectors, and to be prepared to provide an immediate response to the anticipated demands. The employer asked the complainants to render these services, which they did.*

8. *According to the employer's own testimony, we know that the employer wanted to have an inspector aboard the Alcor 24 hours per day. The employer never considered the possibility of not having an inspector aboard the vessel. The employer considered two 12-*

hour shifts, which would also have ensured that an inspector was present 24 hours per day. We may therefore conclude that the employer asked the complainants to be present and to assume a position of responsibility aboard the Alcor for a 24-hour period.

9. *The complainants found that they were required to assume a position of responsibility as inspectors at all times while they were aboard the Alcor. As Mr. Lecours explained in his testimony, they could not "take off their inspectors' hats". This burden existed by virtue of their simply being aboard the Alcor and being recognized as inspectors - government representatives. It must also be carefully noted that there was only one inspector at a time aboard the Alcor, a situation that implies that at no time was it possible to transfer this responsibility to another inspector.*

10. *If we are to understand the extent of this responsibility, we must consider that the complainants were in a precarious and dangerous situation. They had to be prepared to act at any time. For example, they had to be prepared to evacuate the vessel immediately, to take immediate action to protect human life, to provide prompt response to an environmental disaster, or to respond to inquiries by the persons aboard the Alcor. Immediate response to these demands was not optional; it was mandated by the employer and therefore compulsory.*

11. *The employer claims that it ordered the complainants to take six hours of rest. In fact, this rest period never materialized. In fact, it was never a real possibility because there was no replacement inspector aboard. This fact means, not that the complainants did not rest, but that they were working while they were trying to rest. As we have stated, aboard the Alcor the complainants were constantly wearing their inspectors' hats. They were in a position of responsibility and had to be prepared to provide an immediate response to various types of demands.*

12. *It is important to note that the employer explicitly mandated the complainants to respond to these demands by paying them to be on standby. Furthermore, the complainants were in fact regularly disturbed during the times they were trying to rest. According to their testimony, they were wakened every 15 minutes when they were sitting down and every half hour when they were lying down. They had to be on high alert and prepared to act at any time. According to their testimony, they always had at least one eye open, as well as both ears.*

13. *In summary, the employer asked the complainants to be present aboard the Alcor 24 hours per day, to assume a position of responsibility as inspectors, and to be prepared to respond immediately to the anticipated demands. It asked them to render these services, which they did. We must therefore conclude that the complainants did have actual hours worked during the periods at issue.*

14. *Lastly, article 30 provides that an employee on standby who is to be compensated "…shall be available during his or her period of standby at a known telephone number and be available to return for work as quickly as possible if called". As well, article 31 provides that such an employee shall be paid reporting pay. In this case, the complainants were not paid reporting pay but, on the contrary, remained at work, where they had actual hours worked. It must therefore be concluded that the complainants should have been paid, not standby pay, but overtime. Therefore, it is appropriate to deduct the amount of standby pay the complainants were paid from the amount of overtime paid to them.*

[Boldfacing in original omitted]

Arguments for the Employer

[Translation]

(I) Introduction

These arguments were written following the hearing held at Quebec City on Friday, November 16, 2001. The two grievors testified on their own behalf. Denis Galarneau (Regional Director, Marine Safety) and André Desrochers (Manager) testified for the employer.

(II) Points in Issue

Were the employees eligible to be paid overtime for the periods at issue?

Specifically:

- *Were the employees authorized to work that overtime?*

- *Did the employees have actual hours worked during the hours at issue?*

- *Does simply being captive aboard the vessel make the employees eligible to be paid overtime?*

(III) Arguments

The employer argues that, overall, the evidence has established some decisive points. Firstly, the employees were not authorized to work that overtime. Secondly, the employees have not established that they had actual hours worked during those hours. As a result, the argument available to the employees is the "captive time" argument. At issue is whether simply being obliged to remain aboard the vessel makes them eligible to be paid overtime even if they did not have actual hours worked during the hours at issue. According to the employer, the employees' argument fails on even this last point.

Authorization to work overtime hours

1. *According to the applicable article of the collective agreement (Exhibit S1), "overtime" means:*

   > (a) in the case of a full-time employee, authorized work [performed] in excess of the employee's scheduled hours of work,

2. *According to Board's abundant case law, one basic test is that overtime must be authorized by the employer if it is to be paid.*[1] *The right to authorize overtime is an exclusive prerogative of the employer.*

3. *The evidence has shown that the employer clearly told the employees the amount of overtime they were authorized to work in light of the normal duties to be performed. Although they were in constant contact with management, the employees never felt the need to suggest an adjustment to the schedule agreed to, and did not mention any urgent or special situation requiring such an adjustment.*

4. *Specifically, the evidence has established the following facts.*

   When the vessel ran aground on Tuesday, November 9, 1999, the situation was precarious because the vessel was cracked and attempts to tow it had been unsuccessful. At that time, two inspectors were aboard the vessel at a time. Starting on Friday, November 12, 1999, the situation was stabilized and the critical period had passed, as was announced at a media conference.

   Starting on Monday, November 15, 1999, Mr. André Desrochers, the Manager, decided that only one

[1] See, for example, the decisions in: *Côté* (PSSRB No. 166-2-18529); *Boulianne* (PSSRB No. 166-2-15021); *Lancashire* (PSSRB No. 166-2-14848).

inspector would be aboard the vessel and that 12-hour shifts would be rotated among the six inspectors.

Through Mr. Rodrigue, the employees suggested a rotation of 24-hour shifts instead, citing the difficulty of gaining access to the vessel and the fact that a rotation of 12-hour shifts would not be convenient.

A consultation on this suggestion was held between Mr. Desrochers and Mr. Denis Galarneau, the Regional Director. It was decided that the employees' suggestion would be accepted, on condition that the employees organize their work so as to take hours of rest. The employees were authorized to work a maximum of 18 hours per 24-hour period. The six remaining hours were to be used as a rest period. Thus the employees were paid overtime for the work performed in addition to their scheduled hours of work, and also received a standby bonus for the six hours to be used for rest.

During their testimony, Mr. Galarneau and Mr. Desrochers justified their instructions, noting that for safety reasons it was not reasonable to require or to allow employees to work for 24 hours. As well, the nature of the work to be performed meant that taking six hours of rest during the 24-hour period was entirely feasible.

Aboard the vessel, the main duties were to measure the crack every six hours, a schedule that corresponded to the tides. The employees were to make spot inspections and to complete reports on the vessel's condition.

During the periods at issue, that is, from November 18 to December 1, 1999 for Mr. Rodrigue and from November 29 to December 4, 1999 for Mr. Lecours, the employees were able to contact management at any time. However, they mentioned no difficulties with the schedules agreed to and no special unforeseen circumstances.

5. *Therefore, the authorization to work overtime was specific and was accurately and clearly communicated by the employer. It was understood by all the employees assigned to this vessel, including Mr. Rodrigue and Mr. Lecours, and was never challenged concerning the nature of the work. Under it, the employees were authorized to work overtime up to a maximum of 18 hours per 24-hour period. The six remaining hours were to be used for rest.*

Actual hours worked

6. *Still according to the definition of "overtime" contained in article 2 of the collective agreement, work authorized by the employer [and performed by the employee] may be paid as overtime. Thus overtime consists in the actual performance of duties required by the employer.*

7. *As well, article 34.05 provides as follows:*

> **34.05.** This article does not apply to an employee when the employee travels by any type of transport in which he or she is required to perform work, and/or which also serves as his or her living quarters during a tour of duty. In such circumstances, the employee shall receive the greater of:
>
> (a) on a normal working day, his or her regular pay for the day,
>
> or
>
> (b) pay for actual hours worked in accordance with Article 32, Designated Paid Holidays and Article 28, Overtime of this collective agreement.

8. *Assuming the employer's authorization that the hours at issue constituted overtime—which is not the case—, then only the actual hours worked could be paid.*

9. *In Paton,[2] the Federal Court of Appeal defined the extent of the expression "actual": Iacobucci C.J. wrote as follows:*

> "It seems to me that in looking at the language of clause M-28.05 and its context, the use of the adjective "actual" in the clause was intended to convey a meaning that described work in the normal sense of doing or engaging in the specific performance of duties."

10. *The evidence has established that the employer repeatedly requested that the employees provide it with details about the duties they performed during the hours at issue. The employees never responded to these requests.*

11. *At the hearing, when asked by the adjudicator what the work involved in concrete terms during the hours at issue, Mr. Rodrigue was unable to explain what duties he performed. When he was asked again to explain in*

[2] *Attorney General of Canada v. Paton*, [1990] C.F. 351 (A-338-89)

what the work he considered he had performed during those hours consisted, he could only state that he wanted to be paid overtime because he was "captive" aboard the vessel during the hours at issue.

12. *Under cross-examination, Mr. Lecours affirmed that all the activities without exception were recorded in a report. In his opinion, only personal activities were not recorded. When produced as evidence, the activity report (Exhibit P5) showed that in fact no duties were recorded during some periods (see, for example, Exhibit P5, December 4, 1999, from 8:00 p.m. to 4:20 a.m.). Thus there were periods during which Mr. Lecours performed no duties, except for personal activities.*

13. *Mr. Lecours also admitted that a number of entries in the activity report were only a vague description of the general activities aboard the vessel, and that he did not participate in those activities (see, for example, Exhibit P5, December 2, 1999, from 2:00 a.m. to 7:55 a.m.).*

14. *Lastly, the employees have referred to the fact that they were wearing their inspectors' hats 24 hours per day. In their written argument, they have claimed that* "the employer asked the complainants to be present on the ALCOR 24 hours per day, to assume a position of responsibility as inspectors, and to be prepared to provide an immediate response to the anticipated demands. The employer asked the complainants to render these services, which they did. We must therefore conclude that the complainants did have actual hours worked during the periods at issue."

    With respect, this statement is erroneous. The employer's instruction was quite clear that, theoretically, the employees were not to work more than 18 hours per day. This instruction was understood and agreed to by all the employees, including Mr. Rodrigue and Mr. Lecours, a fact that was uncontested. We also note that the decision to remain aboard the vessel for 24 hours was made at the express request of the employees themselves, made through Mr. Rodrigue. The employer agreed to the compromise given the much more stable situation of the vessel, the relatively simple nature of the duties to be performed, and the feasibility of organizing the work so that rest could be taken.

15. *Concerning the evidence, the employer argues that the employees have not discharged the burden of establishing that they had actual hours worked during the hours for which they have claimed overtime pay. The numerous statements that the employer asked*

them to render services, and that they did so, are simply not supported by any of the evidence (see the written arguments submitted by their representative).

16. *There remains the argument that the employees should be paid overtime for the hours at issue simply because they were aboard the vessel, the conditions aboard the vessel were mediocre to say the least and, according to the employees, they were captive.*

Captive time

17. *The issue of captive time has been addressed in Federal Court of Appeal case law. In the Paton matter, the Chief Justice of the Federal Court of Appeal, writing as follows, clearly indicated that being captive aboard the vessel cannot be considered having actual hours worked:*

> "It seems to me that in looking at the language of clause M-28.05 and its context, the use of the adjective "actual" in the clause was intended to convey a meaning that described work in the normal sense of doing or engaging in the specific performance of duties. The clause's reference to living quarters implies that if an employee is within the terms of clause M-28.05 then only the time spent actually working will count for payment and that so-called "captive time" on the ship is not to be treated as actual hours worked. I believe this interpretation to be reasonable and in accord with what I believe was intended by the parties to the collective agreement."

18. *In Martin,[3] Mahoney J. of the Federal Court of Appeal also rejected the principle of captive time, reiterating the findings of Adjudicator Chodos, who had written as follows:*

> "I am of the opinion, therefore, that once his daily chores were done and the grievor was able to relax and to read, walk around, socialize or sleep according to his choosing, he was no longer "at work". He was not "working" simply because the mode of travel associated with his work took him to a remote location where he spent the night. He was not "working" simply because he was not able to go home at the end of the day. He was not "working" simply because he was out of contact with his family. He was not "working" simply because his surroundings were more spartan or

[3] *Martin v. Canada (Treasury Board)*, [1990] F.C.J. No. 939 (QL) (A-568-89)

> less luxurious than a first class hotel. Surely payment for work is not dependent upon a standard of comfort which one is able to enjoy when away from home on business. None of what the grievor experienced was unusual or unexpected. It was all part of the normal routine for which he was hired."

19. *On this point, the situation of Mr. Lecours and Mr. Rodrigue was similar in all respects to their position description (Exhibit P7), which clearly indicates that their normal duties consisted in investigating a broad range of accidents, pollution incidents, and other occurrences. It is also entirely normal that much of the work will be performed in a demanding marine environment where the working conditions, such as weather conditions and tide levels, may be difficult and risky.*

20. *The employer argues that simply remaining aboard the vessel, even with the subjective feeling of being in a position of responsibility, does not suffice to consider that there were actual hours worked. No unusual or unforeseen situation existed that did not correspond to the duties for which the employees were hired; as a result, the so-called "captive time" cannot be paid as overtime.*

(IV) <u>Conclusion</u>

The evidence has established that the two grievors understood and agreed to the instruction not to work more than 18 hours per 24-hour period and to organize their work so as to take hours of rest. It has been established that, given the nature of the work to be performed and the situation of the vessel at the time, it was entirely possible to take hours of rest. As well, the employees have not successfully established that they had actual hours worked during the hours at issue. Nor are they able to state what the actual work was that they claim to have performed. Lastly, the "captive time" argument cannot succeed, since captive time cannot be considered actual hours worked. The type of work the employees had to do was similar in all respects to their work description, and there were no unusual or unforeseen circumstances whatsoever.

For all these reasons, it is respectfully requested by the employer that the grievance be dismissed.

Reply of the Grievors

We reply to the following arguments by the employer:

1. that the overtime was not authorized;

2. that the nature of the work to be performed was such that it was feasible to take six hours of rest during the 24-hour period;

3. that the overtime consisted in the concrete performance of tasks required by the employer.

1. The employer's representative has claimed that the hours at issue should have been authorized. We submit that this argument is completely irrelevant since the hours at issue were mandated by the employer. The case law cited by the employer's representative deals with situations where the employees chose to work overtime (optional overtime). In those cases, clearly the employees had to obtain authorization to work overtime. However, when overtime is mandated (compulsory overtime), this authorization is taken for granted. In this case, overtime was compulsory since the employer mandated the complainants to work overtime (see our arguments in chief).

2. The employer's representative has claimed that the nature of the work to be performed was such that it was feasible to take six hours of rest during the 24-hour period. That argument merely reiterates the view of the employer's representatives, who never set foot on the Alcor. The complainants' testimony has established that the reality was quite otherwise (see our arguments in chief).

3. The employer's representative has claimed that the overtime consisted in the concrete performance of tasks required by the employer. We find the use of the word "concrete" highly disconcerting, since it seems to suggest that the work must be physical or manual, instead of mental. In this case, the work was mainly mental, which does not preclude its constituting work (see our arguments in chief). For example, we note the decision in ***Olynyk v. Treasury Board (166-2-14668)****, in which the complainant, a nurse, was required by the employer to carry a pager and to remain at the workplace during lunch breaks. The adjudicator, writing as follows, ruled that this requirement constituted work:*

> There can be no doubt that in thus holding themselves available to respond to emergency calls, the employees are restricted in the use that they can make of their unpaid meal break. They are thus

> under the control and direction of the employer during those meal breaks (…) Counsel for the employer argued at length that employees on their meal breaks would be recalled to duty only in the event of a life threatening emergency and that such emergencies are a distinct possibility in a correctional institution. No one doubts that there is a distinct risk of a life threatening emergency. The question which should be asked is: Whose risk is it? And, following from that question, the obvious next question: Who must bear the cost of providing against that risk? Clearly, it is the employer's risk and it is the employer who must bear the cost of providing against that risk.
>
> *This decision shows that compulsory presence at the workplace and responsibility for responding to emergency situations, while mental exercises, may nonetheless constitute work. In the present case, there is no need to insist that the complainants performed concrete tasks, since their work was mainly mental. Furthermore, we wish to reiterate that the complainants were not simply "captive" aboard the Alcor. They had actual hours worked (see our arguments in chief).*

Reasons for Decision

[35] The relevant excerpts from the collective agreement in this case are article 34.05 and the definition of "overtime" contained in article 2; these excerpts read as follows:

> *"overtime" (heures supplémentaires) means:*
>
> *(i) in the case of a full-time employee, authorized work [performed] in excess of the employee's scheduled hours of work,*
>
> *...*
>
> *34.05 This article does not apply to an employee when the employee travels by any type of transport in which he or she is required to perform work, and/or which also serves as his or her living quarters during a tour of duty. In such circumstances, the employee shall receive the greater of:*
>
> *(a) on a normal working day, his or her regular pay for the day,*
>
> *or*
>
> *(b) pay for actual hours worked in accordance with Article 32, Designated Paid Holidays and Article 28, Overtime of this collective agreement.*

[36] Mr. Lecours and Mr. Rodrigue have not established that they performed authorized work over and above the 18 hours per day for which they were paid.

[37] As well, the schedule of 18 hours of work followed by six hours of rest was introduced at the grievors' request, the alternative being 12-hour shifts. Thus it was the responsibility of Mr. Lecours and Mr. Rodrigue to notify their manager if they were not managing to rest for six consecutive hours, but they did nothing of the sort. I am not convinced that the duties to be performed prevented the grievors from sleeping; rather, they were prevented from sleeping by the precarious conditions aboard the M.V. ALCOR.

[38] Mr. Rodrigue was well aware of these conditions when he suggested 24-hour shifts and when Mr. Galarneau agreed to shifts of 18 hours of work followed by six hours of rest. Mr. Rodrigue was in daily contact with his manager and could readily have notified him that the schedule was not working if that was in fact the case. The written reports and the lack of detail about the work performed during the six hours of rest lead me to conclude that Mr. Lecours and Mr. Rodrigue did not work over and above the 18 hours per day for which they were paid.

[39] Concerning captive time, the case law is quite clear that captive time cannot constitute actual hours worked. In this case, I am not even convinced that there was captive time, since Mr. Lecours and Mr. Rodrigue remained aboard the M.V. ALCOR, at their own request, during their rest periods (for each of which six-hour periods they received a standby bonus); they could have been relieved every 12 hours. For all these reasons, the grievances are dismissed.

Evelyne Henry
Deputy Chairperson

OTTAWA, March 11, 2002.

PSSRB Translation