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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**SCOTT HODGE AND TYEE CUNNINGHAM**

Grievors

and

**TREASURY BOARD  
(Fisheries and Oceans Canada)**

Employer

*Before:* Léo-Paul Guindon, Board Member

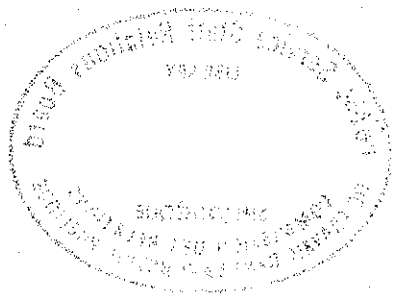
*For the Grievors:* Abe Rosner, CAW, Local 2182

*For the Employer:* Neil McGraw, Counsel



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Heard at Comox, B.C.,  
July 8 and 9, 2003.



## DECISION

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[1] The present references to adjudication concern grievances by Scott Hodge and Tyee Cunningham, Marine Communications and Traffic Services (MCTS) Officers employed by Fisheries and Oceans Canada, at the Comox Operations Centre.

[2] They grieve that they have been denied the meal and relief breaks that they were entitled to under the collective agreement for December 10, 2000 for Mr. Cunningham, and December 30, 2000 for Mr. Hodge.

[3] Clause 21.14 of the collective agreement between the Treasury Board and the Canadian Association of Professional Radio Operators (Code: 409/2000; Expiry date: April 30, 2001) reads as follows:

### *Rest Periods - Operating Employees*

*21.14 Where operational requirement permit, the Employer will provide operating employees with meal and relief breaks.*

[4] The Comox MCTS Centre has three operational positions - one providing traffic regulating and two providing radio communications (safety 1 and safety 2 positions). Comox is the designated DGPS monitoring site for the British Columbia coast. The vessel traffic is primarily ferries, tugs and tows, fishing boats, cruise ships proceeding along the inside coastal passage and a high volume of recreational traffic during the summer months. The Comox Centre operates 24 hours a day and seven days a week all year round and the operating employees (MCTS officers) work 12-hour shifts, on rotation in each of the three positions every four hours.

[5] The "Report of the Standing Committee on Fisheries and Oceans" (Exhibit E-8) describes the role of the MCTS as follows:

### *The Role of MCTS*

*In fulfilling its mandate, MCTS performs the following functions:*

- It monitors international distress and calling frequencies to detect vessels in distress and advises authorities such as Search and Rescue and Environmental Response. It broadcasts marine safety information such as weather bulletins, ice information and notices to shipping concerning dangers to navigation.*
- MCTS screens vessels to ensure that vessels entering Canadian waters meet Canadian safety standards and*

*implements measures to compensate for any identified deficiencies to minimize the risk of marine pollution and threats to marine safety.*

- *MCTS regulates vessel traffic movements in order to reduce marine risks. It issues recommendations and directions and, under certain conditions, restricts traffic movements. It provides specialized surveillance for conservation and environmental protection to support other departments and agencies such as Environment Canada, the RCMP, Agriculture and Agri-Food Canada, Transport Canada and the Department of National Defence.*
- *MCTS manages an Integrated Marine Information System to support economic benefits and national interests. Marine traffic information is supplied to industry and to other government departments, including National Defence.*
- *MCTS provides Public Correspondence Services to facilitate ship to shore communications to assist shippers and agent by relaying ships' business messages as well as private messages.*

*MCTS clients include: commercial vessels, ferries and government vessels; fishing vessels; pleasure craft; the Canadian public; other government departments and agencies; agencies in other countries; ports, ship owners and pilots and other marine stakeholders.*

[6] The witnesses emphasized the security component of their duties and the constant alertness and readiness required to cope with a wide variety of potentially dangerous situations that may arise suddenly and without notice.

[7] They complain that they cannot take real meal or relief breaks and that they have to work complete shifts when only three employees are on duty on a shift. That situation occurred on the day they filed their grievances, for both day and night shifts on December 10, 2000, and for the night shift on December 30, 2000. Exhibit E-3 shows that in December 2000, a fourth employee was assigned to work for only six shifts and was able to replace the three officers in rotation for meal and relief breaks. On all other shifts, the MCTS officers at the workstations had to take their meal or relief breaks at their workstations.

[8] On those occasions when there are only three employees on rotation, they can be away from their workstations for only very short periods of time, being continuously responsible to perform the duties related to their work. The National Standard Manual states the responsibilities of the MCTS officers in section 17.4, as follows:

#### **17.4 Completing the Watch**

- a) An MCTS Officer shall not leave an assigned workstation unless relieved by another qualified employee. The on-duty MCTS Officer shall:
- i) *provide a complete briefing to the relieving MCTS Officer;*
  - ii) *complete any duties requiring special attention which cannot be completed by the MCTS Officer accepting the watch; and*
  - iii) *"sign off" from the workstation on the applicable recording medium.*

[Underlining added by the undersigned.]

[9] To be qualified, employees train for 18 months and they cannot stop performing their duties for more than 90 days if they wish to retain their qualification.

[10] To be able to assume those duties, the MCTS officers have to take a "baby monitor" with them when they have to walk away from their workstation for short periods of time to take fresh air on the deck or to warm up their meals in the microwave. With the baby monitor, they are still able to listen to incoming calls and to the conversations of the other officers in the Operations Centre. If a call comes in from a vessel or an emergency occurs, the officer has to return immediately to his workstation to be able to respond properly to the situation. The grievors consider that, with a baby monitor on them so that they can follow what is happening at the workstation, it is not a real rest period.

[11] In some circumstances, it has happened that an officer in the Operations Centre takes on another officer's duties and advises the officer who is absent from his workstation that he will take care of the situation. For the grievors, this situation occurred in exceptional circumstances and in their view did not comply with the rule stated in section 17.4 of the National Standard Manual. For the employer, this practice is evidence of the teamwork that should exist between the MCTS officers working in the Operations Centre.

[12] The grievors request meal and relief breaks on the dates of the grievances and the employer denies it on the basis that the employees cannot leave their assigned workstation because no other qualified employee is available to relieve them. Those reasons relate back to the requirements of section 17.4 of the National Standard Manual (Exhibit E-4), although that section was not referred to by the employer in its reply.

[13] At the MCTS Centre of Comox, the officers in the Operations Centre are authorized to eat and drink at their workstations, and take their meal and relief breaks while they carry on their duties. According to the grievors, that situation increases the level of stress related to their duties and lowers the physical and mental alertness needed in the performance of their tasks.

[14] Andrew Nelson, Acting Senior Program Specialist, testified that the staffing requirements are normally applied with the "Position Staffing Standard" (P.S.S.) of 5.5 employees for each working position. Consequently, to fill the three operating positions in the Comox MCTS Centre, 17 employees are needed by the P.S.S.

[15] In December 2000, 17 employees worked in operations at the Comox MCTS Centre. Eleven of them were classified as radio operators (grid 1, level RO-3) and among them one (E. Lange) was on sick leave for the entire month of December. Six employees were appointed as supervisors and worked in the three positions in the operations area. One of the supervisors (B. Silzer) was acting officer in charge and did not work in operations positions. Consequently, in December 2000, 15 employees were available to hold a post in operations at the Comox MCTS Centre.

[16] In spite of the fact that more leave provisions are included in the new collective agreement, the P.S.S. has not changed to accommodate the application of the new provisions. Consequently, the overtime carried out by the employees is increasing (from 5,376 hours in 2000 (Exhibit E-5) to 5,952 hours in 2001 (Exhibit E-6)). The average overtime carried out by one Comox employee in 2001 was 350 hours (5,952 hours divided by 17 employees). This average is more than the average overtime at the national level, which is 268.82 hours (Exhibit E-7). In cross-examination, Mr. Nelson agreed with the analysis found in paragraphs 2.1 and 2.2 of the "Best Practices Project Report" (Exhibit E-9), which reads as follows:

## 2. MCTS STAFFING STANDARD

### 2.1 Background

[...]

*The current staffing standard for MCTS is 5.5 persons per workstation. This standard was established at the time of MCTS integration in the early 1990's, and was a compromise between the then existing Vessel Traffic Services and Radio Operations standards. The number of MCTSOs required at a MCTS center is a product of the number of workstations and the staffing standard. If the product is a fractional number, e.g. 3 workstations  $\times$  5.5 = 16.5, the standard stipulates rounding up to the next whole number, i.e. 17 MCTSOs would be hired. An MCTS center is considered to be fully staffed when the number of MCTSO available for work is the same as the number required.*

*MCTS officials have expressed concern that this 5.5. standard is no longer valid. It is believed that the actual absences exceed the expected ones, thereby causing shortages in the number of MCTSOs available to staff workstations. This shortage results in overtime requirements*

### 2.2 Analysis

*Consulting and Audit Canada was contracted to review the MCTS Staffing Standard, and within the context of this review, to closely study MCTS overtime expenditures. When the CCG Management Board approved the Best Practices Project Charter, clear direction was provided that any recommendation for a change to the staffing standard would only be considered if the associated impact on overtime was assessed.*

[...]

[17] According to Mr. Nelson, it is clear that adding more people to the staff will reduce overtime and could permit employees to take meal and relief breaks.

### Arguments

#### For the Grievors

[18] Clause 21.14 states that the employer will provide operating employees with meal and relief breaks where operational requirements permit. The purpose of this clause is found in Article 1 of the collective agreement (clauses 1.01 and 1.02), which

emphasizes that the working conditions are provided for the safety and occupational health of the employees in the framework of serving the people of Canada efficiently.

[19] The bargaining agent had to show that the employer did not provide meal and relief breaks to the operating employees and that the operational requirements did not prevent it from doing so. The bargaining agent met its burden in both cases.

[20] The evidence demonstrates that guarding continuously does not correspond to the common sense understanding of a break, which means not working. A rest period is not one where you sit in your work area and are still responsible for all the duties of your position. You never stop working when you have to walk away from your workstation with a "baby monitor" with you to be able to listen to what is happening and to allow you to give an immediate response to a situation. The employees do not have a choice but to have their meal at their workstation, because they are still responsible all the time when nobody is available to replace them. With only three employees by shift in the operations area, it is not possible to replace employees for meal and relief breaks.

[21] In the first level grievance decision filed under Exhibit E-10, the employer admitted that it did not provide breaks during the shift because operational requirements did not permit such breaks at that time. On the days of the grievances, December 10 and 30, 2000, the employer did not advance proof that an extraordinary situation had occurred that prevented it from providing meal and relief breaks to the employees.

[22] The MCTS Comox Centre is grossly understaffed, as shown by the number of employees available for assignment in the shift schedule for December 2000. With 15 employees available, the Comox Centre is understaffed by two on the basis of the staffing standard of 5.5 employees per workstation. The 350 hours of overtime done on average per employee at Comox is a lot more than the national average of 269 hours, giving a clear indication that the Comox Centre is understaffed.

[23] The interpretations given by adjudicators on similar clauses of collective agreements state that the employer must provide meal and relief breaks to employees if operational requirements permit. Whether operational requirements permit breaks is a question of fact to be determined in each case.



[24] The employer cannot rely upon staffing inadequacies as operational requirements to avoid the obligation to provide breaks to employees. The employer should have sufficient personnel to fulfill the obligations it contracted under the collective agreement.

[25] The grievors' representative submitted the following authorities to support his position: *Randall and Others* (Board files 166-2-4828 to 4831), *Lawes et al. and Others* (Board files 166-2-6437 to 6440, 6666, 6473 and 6474 and 7026 to 7029), *Noakes* (Board file 166-2-9688), *Randall and Yates* (Board files 166-2-13810 and 13811), *Baker* (Board file 166-2-16090), *Dooling* (Board file 166-2-16387), *Shield* (Board file 166-2-16410), *Newell and Haliburton* (Board files 166-2-16637 and 17187), *Drolet and Tremblay* (Board files 166-2-17046 and 17047), *MacDonald and Kelly* (Board files 166-2-20526 and 20527), *Rooney* (Board file 166-2-21306), *Graham* (Board file 166-2-21414), *MacGregor* (Board file 166-2-22489), *Degaris* (Board files 166-2-22490 and 22491), *Cloutier and Others* (Board files 166-2-23628, 23795 and 23797 to 23799), *NavCanada and Canadian Air Traffic Control Association*, [1998] C.L.A.D. Bi, 246, *NavCanada and Canadian Air Traffic Control Association*, [1998] C.L.A.D. No. 531, and *Brown*, 2002 PSSRB 59 (166-2-30651).

#### For the Employer

[26] Counsel for the employer submits that the bargaining agent did not show that the operational requirements permit meal and relief breaks. The bargaining agent did not fulfill its burden of proof.

[27] Since 1996, the same pattern applies to the break periods at the Comox MCTS Centre. The collective agreement has been renewed twice since then and no modifications were made to clause 21.14.

[28] Common sense leads one to define breaks as relief and time to eat. In practice, employees are requested to come back to their workstation to respond to incoming calls but the other employees who are still at their workstations can take care of calls with a teamwork understanding.

[29] They do not remain in the workstation 12 hours in a row but they are still responsible and paid for the meal and relief breaks. They eat at their workstations by choice and they are able to take their lunchtime in the kitchen and come back to their position if a call comes in and the other employees cannot take care of it.

[30] If the employer increases the staffing standard and hires more employees, it will not increase the possibility of giving meal and relief break times to employees away from their workstations. Improving the staffing standard will not mean that four employees will be available to cover the three operational positions in all shifts.

[31] The employer's obligation to provide meal and relief breaks is limited to operational requirements and continuous monitoring is mandatory.

[32] The present case cannot set a standard of practice and the staffing and scheduling options available to correct the situation should be addressed in the process of negotiations. Staffing and scheduling are the sole responsibility of the employer.

[33] The evidence did not show that the employees were not able to eat or take relief periods. All those situations were covered by the employer, who has no obligations to give break times to the employees outside their workstations.

[34] The decision rendered in *Green and Others* (Board files 166-2-16474, 16516, 16676 and 16700 to 16702) deals with a clause similar to the one in the present file. The adjudicator concluded as follows.

*Article 13.01(b) does not mean that the employer is obliged to provide meal and relief breaks. Still less does it mean that the employer is obliged to arrange matters in such a way as to enable employees to have such breaks. It most certainly does not oblige the employer to grant any definite number of breaks of any particular duration at particular times during a shift. Finally, there is no obligation on the employer to increase manning levels beyond what is required to do the assigned work solely in order that employees may have the opportunity to enjoy meal or relief breaks.*

[35] In *Viau and Others* (Board files 166-2-16635, 16638 and 16703), the adjudicator concluded that the decision as to whether operational requirements permit granting of these breaks during the period of operations with a single controller is therefore also a management prerogative.

[36] The principle stated in *Kerr and Others* (Board files 166-2-14395 and 14396, 14475, 14516 and 14517) can be applied in the present file. This principle reads as follows:

*In this dispute the facts disclose that the decision of the employer fell comfortably within the boundaries of its discretion. The requirement that nurses remain available to meet unanticipated demands for their professional services was reasonable and prudent. Calling in a relief nurse for one-half hour in the circumstances would constitute "superfluous staffing". Requiring the employer to pay wages as a condition precedent to the exercise of its discretion in article 14.12 is antithetical to the structure of the provision. That structure is clearly designed to permit the employer to confine employees to their "place of duty" during meal breaks without consequence.*

[37] The meal and relief breaks were provided by the employer in a way that follows the interpretation of the collective agreement and the grievances should be denied.

[38] In reply, the grievors' representative submitted that the employer admitted in the grievance decision that the employee was unable to obtain a relief break during the shift due to the requirement that all positions be continually monitored and neither of the other employees was able to replace him.

[39] The decision rendered in *Green and Others (supra)*, goes against the position taken in all other cases of the same nature, which state that it is an obligation to provide breaks to the employees. In *Kerr and Others (supra)*, the clause is very specific and the grievance is related to overtime.

#### Reasons for Decision

[40] The wording of clause 21.14 must be interpreted within the context of the collective agreement as a whole. Meal and relief breaks are not defined in the collective agreement and common sense should apply.

[41] The functions and responsibilities of the MCTS officers working as operating employees in the Comox Centre were described precisely by the witnesses and are similar to those of air traffic controllers considered in *Lawes and Others (supra)*. The adjudicator pointed out the importance of breaks for those operating employees as follows:

*...The nature of the function and responsibility of an operating employee while on duty is, in my view, an important element to consider. The parties involved here were not negotiating an agreement in some vacuum or dealing with theoretical obligations and entitlements. They were well aware of the tremendous stress and tension that may arise at any time in the course of performing these duties. The need for a clear mind, good eyesight, ability to concentrate and the ability to respond responsibly and effectively was and is known to the parties. That the work of a controller is demanding and requires constant alertness is not denied. In these circumstances it is reasonable to expect that the parties intended that the operating employees shall receive meal and/or relief breaks unless very unusual unpredictable operating conditions make such breaks impractical. Apart from the specific evidence which was reported by the witnesses it is common knowledge based on common experience that breaks during a working day are not only desirable but essential to efficient performance. It is for that reason that most people are granted coffee breaks and meal breaks as a normal work day occurrence.*

*...Common sense suggests that the parties were and are well aware of that norm. Surely then persons employed in exacting occupations requiring mental alertness and concentration which involve grave responsibilities could not have been considered to have waived an entitlement to relief breaks during an 8 ¼ hour work period. Indeed one would think that it is in the public interest to ensure that controllers do in fact receive "meal and relief breaks" unless unusual circumstances make that impractical.*

[42] I agree with the "norm" defined by Adjudicator Mitchell and that "norm" becomes more important for the MCTS Comox Centre, where work periods are for 12 hours. I find that for effective performance of their duties, the MCTS officers require meal and relief break periods.

[43] The evidence shows that, on December 10 and 30, 2000, the two grievors were unable to obtain a relief break during their shifts. They complained that they could not take relief breaks on those occasions when only three employees are on duty, because nobody can replace them at their workstations. They can leave their

workstations for very short periods of time to go pick up something to drink, put a plate in the microwave or go to the washroom. For those short periods, they carry a "baby monitor", which allows them to hear what is happening at their workstations and gives them the opportunity to come back immediately to the workstation if a call comes in, in order to give an adequate response. During these short periods, the grievors continue to be personally responsible for all obligations related to their duties. The "teamwork" approach encouraged by the employer does not reflect the responsibilities of the MCTS officers specified in section 14.7 of the National Standard Manual.

[44] The common sense definition of a "break" is when an employee takes a period of time to rest or change his routing, especially if he is working in a stressful environment. I do not consider the very short periods of time taken by the grievors outside their workstations as meal and relief breaks within the meaning to be given to those terms in clause 21.14, while they are still on watch with a baby monitor or when they eat their lunch at their workstations. In the present grievances, the employer did not provide meal and relief breaks according to the common sense understanding of those words.

[45] In *Kerr and Others (supra)*, the nurses were requested by the employer to take their meal break at "their place of duty", in the Health Care Unit lunchroom. During their meal breaks, nurses are not required to perform their normal duties. This decision does not apply in the present file, where the grievors are required to perform their normal duties (constant monitoring) during their meal and relief breaks.

[46] The circumstances described in these cases raise three issues. Firstly, does clause 21.14 impose on the employer the obligation to provide meal and relief breaks to operating employees? Secondly, if so, what circumstances can be considered as operational requirements and would ensure that the employer complies with that obligation? Thirdly, do the circumstances leading to the grievances constitute a breach of clause 21.14?

[47] The interpretation of a similarly worded provision advanced in *Lawes and Others (supra)*, *Randall and Others (supra)* and *Noakes (supra)* is that a positive obligation is imposed upon the employer to provide operating employees with meal and relief breaks, operational requirements permitting. I subscribe to that interpretation and I conclude that such interpretation should apply to the present case.

[48] Counsel for the employer submitted that operational requirements did not permit breaks on the dates of the grievances by reason of the requirement that the operating positions should be continually monitored and no other employee was available to provide relief. This argument cannot be accepted because the constant monitoring is a normal requirement of the operating positions. No unusual or exceptional circumstances occurred on the dates of the grievances, which can explain that no other employee was available to replace the operating employee in the workstation for meal and relief breaks. I do not consider as exceptional circumstances the facts of Mr. Lange's long-term disability and the acting appointment of Mr. Silzer. Those circumstances could have been accommodated by the employer, who knew of them in advance.

[49] The grievors submitted that the MCTS Comox Centre was understaffed by two in December 2000. That situation appears on the December 2000 schedule (Exhibit E-3), showing that only three employees were available to cover the three workstations in the operations area for almost the entire working shift.

[50] The employer admitted, in its grievance decision (Exhibit E-10), that neither of the two other employees on shift on December 10 and 30 was able to relieve the grievors for breaks. The December 2000 schedule shows that such a situation prevailed for the very large majority of the working shifts for that month. The grievors' representative demonstrated that the employer did not provide meal and relief breaks to the employees on December 10 and 30, 2000. He also established that no exceptional circumstances that can be considered as operational requirements occurred on those dates.

[51] The normal staffing standard of 5.5 employees per working position was not fulfilled for the month of December 2000, where 15 employees were available to cover the three operational positions instead of 17, according to the standard. The shift schedule for December 2000 shows that of the 17 employees, one was on long-term sick leave (E. Lange) and another (B. Silzer) was acting supervisor in charge. No one replaced them in working positions, leaving only 15 employees to cover the three operational positions.

[52] I agree with Chairperson Tarte in *Cloutier and Others (supra)*, when he stated the following:

*The standard has no legal effect and is not part of the collective agreement. However, and at the very least, it is a clear and precise indication of what management considers to be a sound administrative practice in staffing matters. Although an employer is not required to follow its own administrative procedure to the letter, it cannot be given carte blanche and allowed to dispense with the application of its own policies any time it sees fit to do so. In a case like the present one, the staffing standard is an extremely relevant tool in deciding the central question at issue here; namely, whether the employer ensured that sufficient staff was available to meet its contractual obligations.*

[53] Using the standard as a guide, as done in *Cloutier and Others (supra)*, I conclude that the employer was responsible for its inability to provide meal and relief breaks to the grievors on the dates specified in the grievances.

[54] The weight of the Board's case law on clauses similar to clause 21.14 supports the conclusion that the wording of the clause creates an obligation on the part of the employer to supply adequate staff to permit operating employees to take meal and relief breaks. I agree with the conclusion stated by the adjudicator in *Randall and Others (supra)*:

*The employer does have an obligation pursuant to Article 13.02(d) to supply adequate staff to permit operating employees to take meal and relief breaks of reasonable duration except when unusual operational conditions make the taking of such breaks impractical.*

[55] Article 13.02(d) in *Randall and Others* had the same wording as clause 21.14 of the present case, and I come to the conclusion in the circumstances of this case that no unusual operational conditions have been established that would have resulted in the taking of breaks being impractical.

[56] For all of the above reasons, I declare that the employer violated clause 21.14 of the collective agreement by failing to provide meal and relief breaks on the December 10 and 30, 2000 shifts as specified in both grievances.

[57] Consequently, the grievances are allowed.

**Léo-Paul Guindon,  
Board Member**

OTTAWA, November 3, 2003.

