File: 166-2-28585

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN KING

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs and Excise)

Employer

Before: Rosemary Vondette Simpson, Board Member

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

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

Heard at Toronto, Ontario,
October 26, to 28, 1998.
(Written submissions filed November 5 and December 4, 1998.)

John King, a PM-02 Customs Inspector employed by Revenue Canada at Pearson International Airport in Toronto, grieved an alleged violation of Article 19 of the Programme Administration (PM) Group Specific Agreement: Code 308/89. His grievance reads as follows:

> *I grieve that my rights have been violated under article 19 of the PM Group Specific. Since the cancellation of the local overtime agreement by Revenue Canada and the forced implementation of the National Overtime Policy in the Toronto Region, as of April 1997, I have not been offered equitable overtime. Nine months have now passed and I have fallen two to three hundred hours behind in overtime offered in comparison to my coworkers for the same period. It is now the end of the fiscal year by which our personal income tax is based and there is no possible way to recover the monetary loss. The first related grievance was filed on July 07, 1997.*
>
> *Requested Action:*
>
> *To be compensated in cash for the loss of potential earnings over the aforementioned period, which was a result of unequal distribution of overtime.*
>
> *To be offered available overtime on an equal basis.*

Article 19 of the PM Group Specific Agreement reads as follows:

ARTICLE 19

OVERTIME

19.02 Assignment of Overtime Work

(a) Subject to the operational requirements of the Service, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.

(b) Except in cases of emergency, call-back or mutual agreement with the employee, the Employer shall, wherever possible, give at least four (4) hours' notice of any requirement for overtime work.

19.03 Overtime Compensation

Subject to clause 19.05 an employee at levels PM-1, 1A, 2, 3, 4, 5, 6 or 7 who is required to work overtime on a scheduled work day is entitled to compensation at time and one-half (1 1/2) for all overtime hours worked.

19.04 Subject to clause 19.05:

(a) an employee who is required to work on a first day of rest is entitled to compensation at time and one-half (1 1/2) for the first seven and one-half (7 1/2) hours and double (2) time thereafter;

(b) an employee who is required to work on a second or subsequent day of rest is entitled to compensation at double (2) time. Second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest.

(c) When an employee is required to report for work and reports on a day of rest, the employee shall be paid the greater of:

(i) compensation at the applicable overtime rate;

or

** *(ii) compensation equivalent to three (3) hours' pay at the applicable overtime rate, except that the minimum of three (3) hours' pay shall apply only the first time that an employee reports for work during a period of eight (8) hours, starting with the employee's first reporting.*

**

(d) The minimum payment referred to in clause 19.04(c)(ii) above, does not apply to part-time employees. Part-time employees will receive a minimum payment in accordance with M-39.12 of the Master Agreement.

**

19.05 An employee is entitled to overtime compensation under clauses 19.03 and 19.04 for each completed period of fifteen (15) minutes of overtime worked:

(a) when the overtime work is authorized in advance by the Employer or is in accordance with standard operating instructions;

and

(b) when the employee does not control the duration of the overtime worked.

19.06 Employees shall record starting and finishing times of overtime work in a form determined by the Employer.

19.07 Overtime shall be compensated in cash except that, upon request of an employee, the compensation shall be in equivalent leave with pay unless the Employer, by reason of operational requirements is unable to grant such leave.

The Employer shall grant compensatory leave at times convenient to both the employee and the Employer.

Compensatory leave with pay not used by the end of a twelve (12) month period, to be determined by the Employer will be paid for in cash.

The Employer shall endeavour to pay cash overtime compensation by the eight (8th) week after which it is earned.

19.08

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(a) An employee who works three (3) or more hours of overtime immediately before or immediately following the employee's scheduled hours of work shall be reimbursed expenses for one meal in the amount of six dollars ($6.00) except where free meals are provided.

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(b) When an employee works overtime continuously extending four (4) hours or more beyond the period provided in (a) above, the employee shall be reimbursed for one additional meal in the amount of six dollars ($6.00), except where free meals are provided.

(c) Reasonable time with pay, to be determined by management, shall be allowed the employee in order that the employee may take a meal break either at or adjacent to the employee's place of work.

19.09 For the purpose of avoiding the pyramiding of overtime, there shall be no duplication of overtime payments for the same hours worked.

19.10 Compensation under this Article shall not be paid for overtime worked by an employee at courses, training sessions, conferences and seminars unless the employee is required to attend by the Employer.

19.11

(a) If an employee is given instructions during the employee's work day, to work overtime on that day and reports for work at a time which is not contiguous to the employee's work period, the employee shall be paid for the time actually worked, or a minimum of two (2) hours' pay at straight-time, whichever is the greater.

****

(b) Employees of the Department of National Revenue, Customs and Excise and employees of Employment and Immigration Canada who are required to clear commercial transport on a scheduled work day at a time which is not contiguous to the work period, shall be paid the time actually worked or a minimum of two (2) hours' pay at straight time, whichever is greater.

19.12 When an employee is required to report for work and reports under the conditions described in clauses 19.04 and 19.11, and is required to use transportation services other than normal public transportation services, the employee shall be reimbursed for reasonable expenses incurred as follows:

(a) mileage allowance at the rate normally paid to an employee when authorized by the Employer to use his or her automobile when the employee travels by means of his or her own automobile,

or

(b) out-of-pocket expenses for other means of commercial transportation.

Other than when required by the Employer to use a vehicle of the Employer for transportation to a work location other than the employee's normal place of work, time spent by the employee reporting to work or returning to the employee's residence shall not constitute time worked.

Summary of Evidence

For the Grievor

John King and Richard Gabourie testified. The grievor submitted Exhibits G-1 to G-10. Mr. King's position was that these were employer-generated documents provided to him by his supervisor.

Mr. King felt that the new computerized system for overtime offerings, which was put in effect by the employer around June 14, 1997 for a test period, was not resulting in an equitable distribution of overtime.

Although he had a uniformed line position as a customs officer, his position as the president of the large Toronto local union made it necessary for him to take leave to perform his union duties. When he was on leave for union-related business, he did not work in uniform on the line; he worked in street clothes out of a union office. He informed his supervisor that he kept his uniform on the premises and was available for overtime offerings even when he was not working on the line.

Mr. King approached his supervisor who had access to the computerized system to obtain from him the record of some overtime offerings for specific periods. He submitted the information which he received as exhibits despite the fact that Mr. King noted that they overlapped and he doubted their accuracy and reliability.

Mr. King acknowledged that he had received an e-mail from Bruce Herd of Staff Relations inviting him to work with him in developing a special plan to address Mr. King's unique situation. Mr. King did not reply and the matter was not pursued further.

Bruce Herd, of Staff Relations, testified that he had sent an e-mail to Mr. King in an attempt to answer Mr. King's concerns about not receiving an equitable distribution of overtime. He also testified that since the trial period for the new computerized overtime offerings system (COSS) started on June 16, 1997, but the old sytem was discontinued in April 1997, there were no records of overtime from April 1 to June 16.

Exhibits G-1, G-2, G-4 and G-5 purport to be the History of Overtime Hours offered to Customs Inspector John King and they indicate the following:

From October 9, 1997 to December 29, 1997, Mr. King received an offering of 33.43 hours of overtime (Exhibit G-1);

From October 9, 1997 to October 31, 1997, Mr. King received an offering of 5.4 hours of overtime (Exhibit G-2);

From October 9, 1997 to September 1, 1998, Mr. King received an offering of 221.5 hours of overtime (Exhibit G-4);

From January 26, 1998 to March 22, 1998, Mr. King received an offering of 221.5 hours of overtime (Exhibit G-5).

Mr. King, who is president of the union local, does not accept that the employer's figures are necessarily accurate. It is his position that he received fewer offerings of overtime than the computerized system reflects. He believes the correct figure is 150 hours. Exhibit G-6, which is a record of Overtime Callout for April 23, 1998, indicates that, in this period, Mr. King received offerings of 108 overtime hours. This is less than one-third of the 341 hours offered to another employee (Reg Dougald).

Exhibit G-7, which is a History of Overtime Hours Charged for the period June 26, 1997 to January 23, 1998 to Customs Inspector Reg Dougald, and Exhibit G-8, which is a History of Overtime Hours Charged for the period October 6, 1997 to January 23, 1998 to Customs Inspector Susan Kruse, indicate a large discrepancy in offerings between these two employees. From June 26, 1997 to January 23, 1998, Mr. Dougald was offered 186.5 hours (over a seven-month period). In approximately half the time, Ms. Kruse received 195 hours in offerings.

Exhibit G-9, which is a History of Overtime Hours Charged for the period June 16, 1997 to June 17, 1998 to Customs Inspector Kimberly Ing, shows employee Ing receiving 320 hours in offerings in a one-year period, whereas Exhibit G-10, which is a History of Overtime Hours Charged for the period from June 21, 1997 to January 24, 1998 to Customs Inspector Leroy Griffith, shows him as receiving an offering of 203 hours over a seven-month period.

Exhibit G-11, which is a Year End Overtime Report, indicates that 176 of the 314 employees (56%) are below the average number of offerings. Mr. King received 309.57 hours in overtime offerings and Mr. Gabourie received 54 hours in overtime offerings. The average of the top 60 employees (20%) on the list of offerings is 439.72 or 120 hours above the group average.

Mr. Gabourie testified that he works only 3.75 hours per week less than a full-time employee; therefore, he should have been offered only slightly less than the average (314) number of hours. Instead, his offering was only 54 hours.

Mr. Gabourie, a union officer who had served on a joint departmental overtime committee, testified that extensive meetings were held to study problems in the new computerized overtime offerings system (union and management). An audit was done and discrepancies identified. After the committee reached certain conclusions and attempted to report these observations to management, the team members who were drawn from management broke ranks with the rest of the committee. The committee's recommendations were not put into effect.

For the Employer

Mr. Hoffberg testified that the majority of full-time customs inspectors received overtime offerings which fell in the 300- to 400-hour range over the test period of approximately one year. The grievor himself had overtime offerings of 309.75 hours, which grouped around the full-time inspector average of 319.76 hours. A little more than one percent out of a total population of 314 inspectors received overtime offerings in the 500- to 600-hour range.

The employer had recognized the uniqueness of Mr. King's situation as union president when Mr. Herd, of Staff Relations, sent him an e-mail (Exhibit E-6) inviting him to assist in developing a procedure to ensure that he was being offered an equitable amount of overtime given his unique circumstances as union president. Mr. Herd testified that the grievor did not respond to this e-mail.

Mr. Hoffberg testified as to the great volume of work at the Toronto International Airport and the fact that the COSS program, the new computer based overtime offering system which replaced the one-week manual list based overtime offering system, dealt with over 72,500 hours of overtime offerings in its first year of operation (October 6, 1997 to October 5, 1998). Over 300 customs inspectors were involved in these offerings. The introduction of the COSS program was necessary to address the inadequacies of the former system in meeting its obligations under the collective agreement.

Arguments

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

For the Grievor

RE: KING, John Reference to Adjudication #166-2-28585
- Failure to offer overtime on an equitable basis

Further to the hearing on the above in Toronto and your direction to make submissions in writing, the grievor and the Alliance offer the following points in argument:

1. The language grieved, Article 19.02(a) at page 11 of the PM group specific agreement.

- This is not new language! The employer is and has long been obliged contractually to ensure that when it offers overtime it shall be done according to the terms of our agreement.

- The employer, and not the union, determines when, where, and how much overtime is required. When these considerations are decided, it is the employer that decides who will be offered overtime hours, how, when and in what order. The employer decides the system to be used and whose responsibility it is to monitor it to ensure it is working properly, and the employer chooses who has access to the system through a password.

*The point is that this is purely a management function. No joint responsibility is placed on either the union or the employees. Note the language … "the **employer**…" shall make every reasonable effort. To suggest their failure is in any way attributable to the grievor or the union as the employer seemed to be doing in evidence (E-6) or may attempt to do in argument, cannot be seriously received.*

2. What is it that the language obliges the employer to do?

- 19.02(a)

A. "subject to operational requirements" does not enter into this grievance. No evidence was entered that would allow you to conclude their failure was attributable to operational requirements.

B. "shall make" is mandatory;

C. "every reasonable effort…"?
a heavy onus indeed. Look at the words. "every"
"reasonable"
now look at the employer's own evidence.
E-4, tab 2, P.3 #10. This employer seems to interpret every reasonable effort as making "..an…" effort. Just "an" effort. Is calling once and getting no answer "every reasonable effort?" Not all employees have and can afford an answering machine. What about the person in the washroom, shower or working in the yard who is unable to reach the phone before it stops ringing. Notably the employer has chosen to lead no evidence as to how many times the phone is allowed to ring before hanging up nor how long someone with an answering machine is given to call back.

That's because the caller (superintendent?) then immediately calls and offers that overtime to the next employee.

The Customs Inspectors are not being paid to be on standby, waiting by the phone. I draw your attention to join King's unchallenged evidence that he went and asked days in advance for overtime hours he knew would be offered and expected to get as low man on the offerings list. This request was refused, when John could plan on it, then offered three days later to him, on the same day as the overtime was required when, having not heard from the employer, he had made plans for that weekend.

Is this this department's idea of making "every reasonable effort"? Regrettably, I think it is.

*Look at Mr. Hofsberg's testimony. He openly admits under oath that "the department was not meeting collective agreement obligations nor the National overtime policy prior to implementing the policy in June of '97 as a trial. See E-4, Tab 1, paras 1 & 2. This department, with Treasury Board, developed the policy in 1992, a full five years earlier. One need not look long and hard to discover this department's haphazard approach to overtime offering and equity and for that matter, complying with the agreement. Not only that but "it has been in use in **all** other regions for quite some time and has been found to be effective". Why did it take P.I.A. management so long to implement?*

This is the employer's witness! Quite an admission!

Now look at counsel's remark….."there were a lot of bugs in the system, no-one has said otherwise".

Next, look at Bruce Herd's testimony. Mr. Herd is a specialist in staff relations and advises management on the meaning of the agreement. When he himself identifies the problem, see B-6, that union activists are not getting equitable overtime offerings, what does he do? Suggests a resolution? Follow it up? Ensure special considerations are made? Twig to the obvious fact that this system indirectly discriminates against union activists and remedy the situation?

No! None of the above! Is this making "every reasonable effort"? In truth, it is making no effort at all. If the superintendent's who rely on his expertise understand he is unconcerned, what message does that deliver? Can we or should we expect better of superintendents who are not experts?

If these examples are not enough, what about Gabourie's evidence? It was not disputed in cross and did severe damage to the employer's case, as well as their credibility. Gabourie was on a departmental joint overtime committee. After putting in many hours, doing an audit, identifying "huge discrepancies" and specific groups who were being most poorly treated by the system, and bringing these observations to management's attention, he opted out of the committee in frustration as management's team members broke ranks and attempted to put some distance between the committee's recommendations and themselves.

Result? Nothing was done!

Has management made "an" effort? Yes! Have they made "every reasonable effort"? Not even remotely close. The system has been in service since June of 1997, seventeen months, and huge anomalies still exist, as the union forewarned management they would. Perhaps if management took their obligations seriously and consulted with the union before the policy, arrived at jointly between the department and Treasury Board, was sent to CEUDA "for comment" once it was already a fait accompli, we would not be in this position.

How long was the policy in the making? How many drafts, meetings, revisions? How many opportunities to "make every reasonable effort"? Legion. That's how many. Am I saying had they consulted there would be no problems? Who is to know. The point is, they did not, and once again failed in their obligation to make every reasonable effort.

One final comment before I leave the theme of "every reasonable effort", is that we are here, in November 1998, arguing this matter. The employer accepts as fact that John King put them on notice in July 1997 that, in his opinion, as Local President and as an affected employee, the department was failing him. He put them on notice again when he grieved on December 31, 1997, the subject matter of this dispute. Moreover, Richard Gabourie did the same as an overtime committee member. These notices should have gotten the employer's attention, and triggered some remedy. Instead, even in the face of their own document, G-11, there is no acknowledgment of a problem or some will to create a remedy. No evidence was introduced to show that, in the face of these damning statistics the employer intends to do anything.

Amazing!

D. "equitable basis" (see E-4, tab 2, p.2, #4) note the timeframe.…"a period of 6 to 12 months. This is repeated at 2(b) p.1 and #12 at page 3. This detracts from the employer being able to argue that their "window" or timeframe is one year. Moreover, the employer unilaterally undertakes (p.3, para 12) to monitor whether overtime is being offered on an equitable basis.…"on a regular basis"; again, there is no evidence this is being done but ample evidence to suggest it is not. Now I realize that the burden is mine BUT that burden shifts to the employer for an explanation once our burden has been met. It is our submission that our burden has been met (more to follow) and no explanation has been given in evidence.

*Finally, on this point, let's look at another National Policy requirement "every reasonable effort to offer the **same** amount of overtime…" Here this department undertakes to go beyond what the case law requires and offer the "same" amount of overtime. Have they? No, literally by hundreds of hours. (see later comparison of exhibits G-1 – G12) Are they concerned? Apparently not!*

E. "readily available" (see E-4, tab 2, p.2 definition)
This, again, is the employer's policy, the employer's definition, more, Treasury Board's definition.

Note especially…..…."can be contacted"
"can report for work"
"is available at the worksite" (for immediate requirements)

John King testified under oath that he:

a. *was physically present at the workplace;*
b. *had his uniform there;*
c. *wanted overtime;*
d. *let the employer know he wanted overtime*
e. *was in his union office within sight of one office superintendent and only 25 feet from the manager in a hub of activity near the change room, the lunch room, etc.*
f. *had given the department his pager number (and had been contacted by management on it) his office phone number and, when he was not at the office, he left word where he was, what he was doing and how he could be reached.*

It cannot be reasonably argued as I expect the employer may attempt to through E-10 that they could not reach him. Remember, for a certain period John's name was, somehow, left off the C.O.S.S. and somehow his phone number for contact was entered incorrectly.

F. "qualified" (see E-4, tab 2, p.2 #6) John meets this definition, is deemed qualified, and I do not believe this is in dispute in any case.

G. "employees"

This department appears to interpret this term as "except employees who accept a union position and work on behalf of the union". This is preposterous. The agreement applies even to union activists like John King and Richard Gabourie and management owes them equal consideration. To broaden or weaken the precise meaning of the language so as to negate management's obligations to union activists is patently unreasonable and not in keeping either with the spirit (M-1) or the letter (M-16) of the binding agreement.

Before I leave E-4 and go on to examine the exhibits, statistics, I would like to comment on:

Tab 2, #21, p.5

Note the reference to a "pro rated basis" of overtime offering and to a formula requiring approximate equality: ½ the hours, ½ the average.

*The case law does not concern itself with comparison to artificial averages, nor should this department. In Gabourie's case, as a part-timer, he works only 3.75 hours per week less than a full time employee. If the employer lived up to its own policy, he would have been offered only slightly less than the average (314) but, turning to G-11 he sits at 54! **54!!** 260 hours less than average or roughly 1/6 of the average. Even worse, when we compare him to line 160, that lucky unnamed favoured employee who was offered 602 hours overtime, roughly 12x the overtime offered to Gabourie (line #238, G-11) or 548 hours less. (incidentally, what does this disparity say about the employer's other obligation under 19.02(a) to avoid excessive overtime.)*

This is this a significant gap.
Is it in keeping with the Policy?
Is it "approximately equal"?
Does it reflect a "pro rated basis"?

Hardly!

Tab 2, #22, p.5

Note, the employer who generated this policy, chose only to include 5 specific types of leave, none of them "for union business". Interesting?

Note, also, the qualification beginning "However" re: overtime offering for either Days of Rest or contiguous overtime.

Tab 2, #23, p.5

Note "absent"!

Was John King "absent". Of course not.

He testified he was physically present. You cannot be both present and absent. Para 23 obviously does not apply to John King.

Note "normal duties".

As Mr. Hofsberg testified, this can mean, for example, on secondment, taking training, teaching a course, acting in a higher level position.

What were John's "normal duties"? As elected Local Branch President, was it not "normal" to do both Customs Inspectors duties and, when called away from "the line", union activities. He wore two hats. The employer accepts this.

To defend an untenable position this department may go so far as to argue that John, by doing any (as there is no reference to a …"complete shift…" as there is in #21 preceding) union work, even 30 minutes, on his last working day, will be disqualified from consideration for the following 3 days of rest. This proposition cannot stand as it is illogical, a flagrant violation of the agreement and not too subtle discrimination against union activists.

I am sure the employer will draw your attention to the words "for at least a complete shift" in the opening sentence of #23 but that applies to the word ABSENT alone. Next we have the word "or" which is disjunctive, offers an alternative and is not caught by the earlier reference to "a complete shift". So it means any union work.

EXHIBITS

G-1	*10/97*	*- 12/31/97*	*King*	*33.43 hrs*
G-2	*10/9/97*	*- 10/31/97*	*King*	*5.4 hrs*
G-4	*10/15/97*	*- 9/1/98*	*King*	*221.5 hrs*
G-5	*10/6/97*	*- 10/6/98*	*King*	*221.5 hrs*

N.B.: John disputes even these low hours. Note that the department appears to have carried overtime hours from Terminal 3 twice for 64.93 + 71.57 = 136.50 total hours.

G-6	*10.97*	*4/23/98*	*King*	*108.0 hrs*

N.B. Compare John's hours, lowest on the page, with Reg Dougald's, highest on the page.

108 v.341 - less than 1/3 the offering! G-1 through G-10 are employer generated documents, printed by a superintendent with a password/access to the system that John does not have and as he stood watching. As such, the employer would need some very compelling reason why they should be disregarded.

G-7	*6/26/97*	*- 1/23/98*	*Dougald*	*186.5 hrs*

over 7 months

G-8 *10/6/97 - 1/23/98 Kruse 195.0 hrs*
over 3.5 months or 2x Dougald's (1/2 the time)

I draw your attention to John's testimony that when he was low man on the offerings list, overtime was offered to her (his spouse) and she and he objected.

G-9 *6/16/97 - 6/17/98 Ing 320 hrs*
G-10 *6/21/97 - 1/25/98 "L.G." 203 hrs*
over 7 months

G-11 *Most Telling. Although we dispute the #309 for John King, even if we use it for argument sake.*

a. line #160 v. line 238 (Gabourie)
b. 176 of the 314 employees are below the "average", or 56%
c. the average of the top 60 on the list (20%) is 439.72 or 120 hours above the group average

Clearly 20% are getting the lion's share of offerings, representing an excessive, inequitably high offering.

d. these employer-generated stats confirm Gabourie's and King's forewarning and constant reminders that the system is not working.

602 to 309???

The grievor is entitled to be fairly considered. The employer must comply with the agreements and the National Policy. Clearly, they have not! We request that you direct the employer to give John the value of his lost overtime opportunities as did the Board in another Customs Inspector case at P.I.A. (see Boujikian, #166-2-27738 enclosed) and direct this employer to remove the discriminatory aspects of their policy as well as to either repair this flawed system or come up with a new one that meets the requirements of the agreement.

All of which is respectfully submitted.

For the Employer

Employer's Written Argument in Reply Respecting Equitable Offering of Overtime

1. EMPLOYER'S REPLY TO UNION'S WRITTEN SUBMISSION

Reply to Arguments "A" "B" and "C" on pp. 2 and 3 and part of "G" on pp. 6 and 7 of the Grievor's Written Submissions

1. The Employer submits that Mr. Herd's email to Mr. King is clear evidence that the Employer was making every reasonable *effort under Article 19.02 of the Programme Administration Group Specific Agreement to ensure that Mr. King was being offered his equitable share of overtime.*

Exhibit E-6 – Herd's Email to King.

2. In the email, the Employer stated it wanted to work with the Grievor to address his unique circumstances as CEUDA President, whose obligations and responsibilities regularly took him away from his duties on the line which may have affected his ability to secure contiguous overtime opportunities. The email shows that the Employer did not ignore the alleged concerns the Grievor had with respect to the system's alleged impact on him. Rather, the evidence shows that it acted on the Grievor's concerns.

3. The Employer's email invited the Grievor to assist in developing a procedure to ensure that he was being offered an equitable amount of overtime given his unique circumstances as Union President.

Exhibit E-6 – Herd's Email to King.

4. Mr. Herd testified that the Grievor never responded to this email.

Direct Examination of Bruce Herd.

5. When questioned directly on the matter, the Grievor was evasive. Nothing in his testimony indicated that he had, in fact, responded to the 'invitation'.

Cross Examination of John King.

6. In view of the Grievor's steadfast refusal or failure to act, it is unclear what the Employer reasonably *could have done in the circumstances,* short of compelling cooperation*, to ameliorate the Grievor's alleged concerns.*

7. The Employer further submits that combined with other activities *it undertook over the course of the last 18 months, it complied with Article 19.02 of the Programme Administration Group Specific Agreement and made every reasonable effort to offer overtime equitably.*

8. Examples of other activities *the Employer undertook to meet its obligations under Article 19.02 of the Programme Administration Group Specific Agreement were: the development and implementation of the COSS program as a computer based overtime offering system to replace the one week manual list based overtime offering system; the adoption of National Overtime Offerings Principles and Guidelines (hereinafter "National Guidelines"); and the organization of numerous meetings between various levels of Management and representatives from the Union.*

Exhibit E-4,Tabs 1,2,3,4;

Direct Examination of Larry Hoffberg respecting adoption of National Overtime Offering Principles and Guidelines at Pearson International Airport;

Direct Examination of Larry Hoffberg respecting development of Programs within the COSS system and the implementation of the COSS Overtime System at Pearson;

Direct and Cross Examinations of John King respecting the Meetings the Union had with Management (i.e. Departmental Joint Overtime Committee Meetings on Overtime; Meeting with Sprague in August, 1997);

Direct Examination of Richard Gabourie respecting Joint Committee Meetings.

9. The Employer submits that the National Guidelines and the COSS system's viability as methods of tracking of overtime offerings are not properly the subject matter of this grievance.

10. Neither the National Guidelines or the COSS system are part of the PSAC Collective Agreement and it is submitted that they do not fall within an Adjudicator's jurisdiction. With respect, the Adjudicator cannot interpret or apply the guidelines or the COSS system.

Farcey v. Treasury Board (National Defence) (1992) (PSSRB File No. 166-2-21050);

Armand v. Treasury Board (Solicitor General of Canada - Correctional Service) (1990) (PSSRB File No. 166-2-19560).

11. However, the evidence showing how the National Guidelines and the COSS system run and the environment in which they operate has a limited but important purpose in that it provides a context *which assists the Adjudicator assess the* reasonableness *of the Employer's efforts to offer overtime equitably.*

12. Contextually, *evidence submitted by the Employer which relates to* reasonableness, *was that the National Guidelines and the COSS system were used as* tools *for offering overtime to Customs Inspectors equitably. The evidence showed that the new system monitored over 72,500 hours of overtime offerings in its first year of operation, such being October 6, 1997 to October 5, 1998. The evidence also showed that new system documented thousands of overtime offerings which were made to over 300 Customs Inspectors. Evidence was heard that all of this occurred in what can be described as the largest, busiest, international institution of its kind nationally which runs 24 hours a day, 365 days a year.*

Exhibit E-4, tabs 3 and 4;

Direct Examination of Larry Hoffberg respecting operations and Customs staff members and Pearson International Airport;

Direct Examination of Larry Hoffberg respecting the COSS system and how it operates generally;

Direct Examination of Larry Hoffberg respecting the standard practice used by Customs Superintendents to offer overtime to inspectors by using the COSS system.

13. Apart from providing context to assess reasonableness, *the Employer submits that the Grievor's evidence denouncing the National Guidelines and the COSS system as* tools *for offering overtime* stands apart *from Management's obligations under Article 19.02 of the Programme Administration Group Specific Agreement*. As such, it is submitted that these criticisms are irrelevant to the issues before the Adjudicator.

14. Further, the Employer submits that basing a decision on these criticisms would constitute improper considerations *in terms of deciding the issues before the Adjudicator, such being whether or not the Grievor has met the burden of proof and established that he has not received an equitable offering of overtime over the one year period.*

15. In his written submission, under section "G" at pages 6 and 7, the Grievor suggests that 'anomalies' in both the National Guidelines and in the equitable distribution of overtime offers exist. He cites references from Exhibits G-1 to G-11 in support of this argument.

> *Direct and Cross Examinations of John King;*
> *Direct Examination of Richard Gabourie.*
> *Union's Written Submissions, pp. 6-7 beginning at "Exhibits"*

16. In reply to this allegation, the Employer submits that the statistical range of distribution for overtime offerings for Customs Inspectors at Pearson International Airport is normal.

17. In support of this, the Employer refers to Mr. Hoffberg's extensive testimony about the range of distribution of employees in relation to the amount of overtime offerings. Mr. Hoffberg's unchallenged *testimony was that he was involved in the hiring of a large contingent of new employees at Customs at Pearson International Airport over the last year. With various start dates, ranging from April to September 1998, Mr. Hoffberg testified extensively about the characteristics of this new group of employees. He provided evidence that explained where they were distributed in the range.*

> *Direct Examination of Larry Hoffberg;*
> *Exhibit E-4 tab 4 at page 2;*
> *See Exhibit G-12, Bar Chart titled "Overtime Distribution" at page 1, in particular the first two columns titled "under 100" and "100 range";*
> *See Exhibit G-12, Bar Chart at page 3 titled "Under 100 Breakdown" – in particular the column titled "New";*
> *See Exhibit G-12, Bar Chart at page 5 titled "100 Range Overtime" -- in particular the columns titled "New" , "Assignment", "Part time", and "Deployments".*

18. In terms of the high end of the range, Mr. Hoffberg also testified that only 4 Customs Inspectors, or a little more than 1% out of a total population of 314 inspectors, were distributed in the 500 to 600 hour ranges.

> *Direct Examination of Larry Hoffberg;*
> *Exhibit G-11 – Year-End Overtime Report;*
> *See Exhibit G-12 at page 1 Bar Chart titled "Overtime Distribution".*

19. Most importantly, Mr. Hoffberg testified that the majority of full-time Customs Inspectors received overtime offerings which fell in the 300 to 400 hours ranges. Mr. Hoffberg testified, and provided documentary evidence which showed, that the majority of Customs Inspectors at Pearson International Airport, and notably the Grievor himself, *had overtime offerings which grouped around the full-time inspector average of 319.76 hours.*

Direct Examination of Larry Hoffberg;
Exhibit G-12 at page 1, Bar Chart titled "Overtime Distribution";
Exhibit E-4 tab 4.

20. Counsel for the Grievor did not challenge this evidence through cross-examination and therefore Mr. Hoffberg's testimony remains uncontroverted.

21. Given the totality *of the Employer's evidence, as it concerns the size, range, distribution and average hours of overtime offerings for Customs Inspectors at Pearson International Airport, the Employer submits that these statistical characteristics are normal.*

22. Apart from condemning the National Guidelines and COSS system for their alleged 'anomalies', and arguing for a return to the old list-based one week system, the Grievor and Mr. Gabourie did not offer evidence which suggested an alternative overtime offerings system which could or would work better.

Direct Examination of John King;
Direct Examination of Richard Gabourie.

Reply to Argument "D" on Page 4 of the Grievor's Written Submissions

23. Article 19.02 of the Programme Administration Group Specific Agreement requires an Employer to assign overtime equitably over a reasonable period of time. "Equitably" under the PSAC Master Agreement, is not synonymous with "equal" or the "same" – but has been interpreted to mean "approximately equal".

Sumanik v. Treasury Board (PSSRB File No. 166-2-395)

24. The Employer submits that the one-year period used to monitor overtime offerings is reasonable in law.

Berube and Treasury Board (Transport Canada) (1993) (PSSRB File No. 166-2-22187);

Boone v. Treasury Board (Revenue Canada – Customs and Excise) (1989) (PSSRB File No. 166-2-18894).

25. The Grievor asks the Adjudicator to review the hours of overtime by comparing Exhibits G-1 to G-12. Exhibits G-11 and G-12 were developed by the Employer and submitted on consent. Further, Mr. Hoffberg testified to them. As such, the Employer takes no issue with Exhibits G-11 and G-12. However the Employer challenges Exhibits G-1 to G-10 and submits they should be given no weight by the Adjudicator.

26. Respecting Exhibits G-1 to G-10, the Employer argues that they only represent a part of the picture or a "snap shot" of the hours of overtime offered up to the point in time they were printed. They do not account for all hours offered to the Grievor at each COSS system in each of the airport's three terminals for the entire year. Exhibits G-1 to G-10 are incomplete as each only represents a portion of the hours offered, in one of the

three COSS systems, at one of the three terminals, up to the point the exhibit was printed.

> *Evans v. Treasury Board (Solicitor General of Canada – Correctional Services) (1988) (PSSRB File No. 166-2-17195)*

27. The Employer submits that the raw data presented in Exhibits G-1 to G-10 fails to fairly compare all workers because it fails to take into account differences which exist between workers. *For example,* there is no weighting system in the raw data of *Exhibits* G-1 to G-10 which comparatively measures, in a fair way, the equitability of the offerings of a full-time person who worked the entire year to those offered to a part-time member who only worked one month for the same period.

28. As characterized, the Employer submits that Exhibits G-1 to G-10 are seriously flawed as a reliable comparison.

> *Huerto v. Saskatchewan (Minister of Health) [1998] S.J. No. 426 (unreported).*

29. Thus the Employer submits that Exhibits G-1 to G-10 are inappropriate considerations which may lead to the wrong conclusion.

Reply to Argument "E" on Page 4 of the Grievor's Written Submissions

30. The Employer does not dispute the Grievor's submissions, as indicated below, concerning how he could be contacted. It takes no issue with submissions "b", "c" and "d".

> *Union's Written Submissions, page 4, under Section "E" subsections "b", "c" and "d".*

31. However it does take exception to the Grievor's claim in "a" that he "was physically present in the workplace".

> *Union's Written Submissions, page 4, under Section "E" subsection "a".*

32. In relation to "a" and "e" the Employer submits that the Grievor was physically present at the Airport in the Union Office at Terminal Three only some of the time *and certainly not all of the time.*

33. Evidence from the Grievor himself was that he was the President of the Local for the Southern Ontario Region. He stated his position required him to address issues for union members situated at a large number of sites in a vast Region in places as far away as Peterborough. He also stated he dealt with all levels of management including the Associate Deputy Minister and various Directors.

> *Final Direct Examination of J. King in response to a question asked by the Adjudicator, such being whether he was considered full or part time, and whether he had a management counterpart*

34. Additionally, he testified that he served on various steering committees and forums which addressed various issues.

Direct Examinations of J. King

35. Given his active, self-stated involvement as Local 24's President, it is likely that his presence was required off-site some of the time. *Moreover, the Employer submits that it is difficult to perceive how the Grievor could have* effectively *met all his Union responsibilities and duties if he* restricted *himself to carrying out his duties by* only *working out of the Union Office at Terminal Three.*

36. In addition to the Grievor's assertion in "f" that he had given his pager number to management, it is important to note that the Employer's evidence showed that he did not submit his pager number to the Administrative Superintendent for inclusion in his tombstone information at Terminal Two.

Exhibit E-10.
Union's Written Submissions, page 4, under Section "E" Subsection "f".

37. Despite the fact that wrong number was listed in Terminal One's tombstone information for a short period of time, the Employer submits that the evidence shows it offered the Grievor overtime on many occasions.

Exhibit E-4 Tab 5A

38. The listing of overtime offerings for the Grievor shows that the Employer was able to contact him more than one hundred times during the one year period for the purpose of offering *him overtime for Terminals One and Three.*

Exhibit E-4 Tab 5A

39. In the alternative, should the Adjudicator determine that the Grievor has proven inequitability in overtime offerings, a finding which the Employer respectfully submits is not available on the evidence, the Employer submits that the essence of the Grievor's dispute would then shift to the issue of whether the Grievor is "readily available".

40. Mr. Hoffberg's uncontested testimony and his analysis of the Grievor's leave summary forms indicate that the Grievor has taken a considerable amount of time away from the line. Mr. Hoffberg testified that the Grievor's low production hours, or his time on the line, affected the Employer's ability to offer him contiguous overtime.

Direct Examination of Larry Hoffberg;
Direct Examination of Bruce Herd;
Exhibit E-6 Herd's email to King;
Exhibit E-4 tab 7A – Individual Summaries by Activity from September 27, 1997 through until September 25, 1998.

41. Mr. Hoffberg's and Mr. Herd's evidence showed that the greatest amount of overtime offerings for the period were in the form of contiguous overtime.

Direct Examination of Larry Hoffberg;
Direct Examination of Bruce Herd;

Exhibit E-6 Herd's email to King.

42. The Grievor testified that he only worked at Terminals One and Three for the period in question. Given his dispute with a Terminal Manager, and his subsequent harassment complaint against her, the Grievor testified that he did not work at Terminal Two during the period in question.

Cross Examination of J. King.

43. The Employer submits that he was not 'readily available' to work at Terminal Two while the Manager was on site.

44. The Grievor's evidence was that for the period in question, he spent most of his time away from the line at the Union Office located in Terminal Three. *Yet for the eight-month rotation from January through to October 1998,* he was scheduled to work at Terminal One.

Cross Examination of J. King.

45. Given this, the Employer submits that while situated in the Union Office at Terminal Three, the Grievor was not "readily available" for many of the contiguous overtime opportunities available at Terminal One.

46. Additionally, as argued earlier in paragraphs 31 to 34 inclusive, the Grievor could not have effectively carried out his role as the local President if he had restricted himself to working only out of the Union Office at Terminal Three. His duties required him to sometimes visit all terminals, and leave the Airport to visit different work sites within and outside of the Region to attend meetings with members and management.

47. Given this, the Employer submits that while carrying out his duties as the Local's President, the Grievor was not "readily available" for many of the contiguous overtime opportunities available.

48. The Employer also submits that the Grievor's testimony and his written submissions suggest that he wants the Employer to contact him when contiguous overtime is being offered – even when he is away from the line or at another terminal or off site – *ostensibly for the purpose of replacing the worker who is present, on the line, and immediately available.*

Direct Examination of John King;
Grievor's Written Submissions page 4 under section "E".

49. The Employer submits that this suggested course of action would place the Employer in an untenable position.

50 The Employer argues that it would be inequitable, to the Employees who are present, on the line and immediately available, to call and offer contiguous overtime to someone who is away from the line. This would disrupt operational requirements associated with the method of overtime distribution. Counsel further argue that this practice would be impractical and that it would not be cost effective to replace *inspectors on site for contiguous overtime.*

Reply to Arguments in section "G" on Pages 5 and 6 of the Grievor's Written Submissions

51. To reiterate, the Grievor testified that he was the President of the Local for the Southern Ontario Region – a responsibility which left him overseeing a large number of sites with Union employees in Regions as far away as Peterborough. He testified that he applied *to be away from work a great deal of time for the purpose of carrying out his obligations as Union President. Larry Hoffberg's uncontested evidence confirmed these leave patterns.*

> *Direct and Final Cross Examinations of J. King*
> *Direct Examination of Larry Hoffberg;*
> *Exhibit E-4 tab 7A – Individual Summary by Activity for J. King;*

52. It was also the Grievor's view that sections 22 and 23 of the National Guidelines penalized or discriminated against him (and Mr. Gabourie) for Union activity.

> *Direct and Final Cross-Examinations of J. King.*

53. Further, the Grievor stated that his (and Mr. Gabourie's) Union activities are discriminated against because they are not expressly *enumerated under section 22 of the National Guidelines.*

> *Direct Examination of John King*
> *Exhibit E-4 tab 2 at page 5.*

54. In response to the Grievor's allegations of discrimination, the Employer submits that it has had no notice of the claim of discrimination as it was not contained, either expressly or by implication, in the instant grievance.

55. In response to the evidence at the hearing, the Grievor is attempting to change his grievance from one which determines whether he alone *has received an equitable offering of overtime to one which alleges that* both he and Gabourie *have been discriminated against based on their Union activities.*

56. It is submitted that the amendment to the grievance is not permissible and that their claim of discrimination *is not properly before the Adjudicator and is beyond her jurisdiction to decide on.*

> *Burchill v. Treasury Board [1981] 1 F.C. 109 (F.C.A.)*

57. In the alternative, the Employer disputes the Grievor's claim that his overtime offerings have been adversely impacted due to discrimination based on Union activities. In response, it submits that the Grievor received his equitable share of overtime despite his high levels of leave. There is no adverse impact or inequitability and no basis for the claim of discrimination.

> *Please refer to the arguments tendered in this Submission at paragraphs nos. 76-90 at pp. 25 – 29 for full argument on the lack of inequitability given a comparison of Mr. King's hours to both averages.*

58. In the further alternative, the Employer argues that the Grievor's "availability" to accept overtime is a function of choices he made, or that are within his power and not the Employer's.

> *Litkowich v. Treasury Board (Revenue Canada) (1983) (PSSRB File No. 166-2-12952);*
> *Seymour v. Treasury Board (Canada Employment and Immigration Commission) (1984) (PSSRB File No. 166-2-15101)*

59. The Employer's submission that the Grievor voluntarily chose *to request Union leave under Articles 8.04 (a) and (b) of the PSAC Master Agreement is, in many ways, no different than someone who* chooses *to accept a secondment, go on education leave, teach a course, or accept and acting assignment. This was confirmed in Mr. Hoffberg's evidence.*

> *Testimony of Larry Hoffberg at the end of his Direct Examination, in response to questions posed by the Adjudicator.*

60. Although not specifically enumerated under the National Guidelines, it is logically implicit that these forms of leave may affect overtime offerings by way of the operation of section 23 the National Guidelines.

61. The Employer submits that it is difficult to appreciate why the Grievor's specific form of leave (i.e. for Union business) as it relates to overtime offerings, should be treated differently from his colleagues who voluntarily are away on educational leave or on assignment. The Employer submits that the Grievor is once again asking for special treatment which would distinguish him, in an inequitable way, from others.

62. Apart from the above, the Employer submits that the facts in this particular situation places it in a very difficult and novel position.

63. As President of the Union local, the Grievor has an appreciation of the various provisions of the Collective Agreements. He shows an in-depth understanding of the National Guidelines and the new overtime offerings system.

64. Given his understanding of the Collective Agreements, National Guidelines and overtime offerings system, the Grievor nevertheless continued to request significant amounts of Union leave knowing that it could potentially effect the equitability of his offerings. Given his involvement, he was able to perceive a risk of inequitability and bring it to Management's attention.

> *Exhibit E-6 – see Emails sent by King which preceded Herd's*

65. The Employer submits that the evidence suggests that although the Grievor claimed discrimination he chose not to work with the Employer towards developing an accommodations system to alleviate the alleged adverse impact. *Evidence of this is his failure to respond to Mr. Herd's email.*

> *Exhibit E-6 – Herd's email to King*
> *Direct Examination of Herd*
> *Cross Examination of King*

66. It is important to appreciate that this specific situation placed the Employer in a difficult quandary once it was aware of the Grievor's concerns. It has to offer overtime equitably to all employees, including those heavily involved in Union activities, under section 19.02 of the Programme Administration Group Agreement. Yet if the Employer denied the Grievor's extensive Union leave requests, in order to ameliorate the potential impact these might have had on his overtime offerings, it could face a grievance under Articles 8.04 (a) and (b), M-16 of the PSAC Master Agreement and/or a complaint under section 23 of the Public Service Staff Relations Act.

67. As such, it is the Employer's submission that, apart from 'inviting' the Grievor to develop an accommodations procedure for dealing with his unique circumstances, its hands were tied.

68. The Employer submits that although the Grievor has done his best to manufacture *a claim, he has only been able to cobble together an* empty *complaint. In this instance, the Grievor limited his ability to be "readily available" as a result of his own choices. As such, the Employer submits that the ability to control acceptance of overtime offerings was really more within Grievor's power than it was the Employer's.*

> *Litkowich v. Treasury Board (Revenue Canada) (1983) (PSSRB File No. 166-2-12952);*
>
> *Seymour v. Treasury Board (Canada Employment and Immigration Commission) (1984) (PSSRB File No. 166-2-15101)*

III. ISSUES BEFORE THE BOARD

69. The Employer submits that there are three issues before the Adjudicator.

70. Has the Grievor discharged the burden of proof and showed that he has not been offered overtime equitably under article 19.02 of the PSAC Master Agreement?

71. Does the evidence show that the Grievor is "readily available" under Article 19.02 of the Programme Administration Group Specific Agreement?

72. What remedy is the Grievor entitled to, assuming (which is not admitted but specifically denied) that he can show he has not been offered overtime equitably under Article 19.02 of the Programme Administration Group Specific Agreement?

IV. LAW AND ARGUMENT

73. Has the Grievor discharged the burden of proof and showed that he has not been offered overtime equitably under article 19.02 of the Programme Administration Group Specific Agreement?

74. In answer to this first issue, the Employer submits that the Grievor has not met his burden and has failed to prove, on a balance of probabilities, that he has not received his equitable share of overtime offerings.

75. The Employer submits that an analysis of the Grievor's hours to the two averages that were submitted in evidence suggests that he has received his equitable share of overtime offerings.

Report Average – Exhibit E-4 tab 4 page 2

76. The Overtime Offering Report at Pearson International Airport, Passenger Operations for the period of October 6, to October 5, 1998 (hereinafter "Report") states that the average number of hours of overtime offered is 319.76 hours as among 314 employees weighted into a class of 227 full-time *inspectors (184 full time inspectors plus 43 full-time equivalents (the full-time equivalents were comprised by weighting the group of 130 part-time inspectors)).*

> *Exhibit E-4 tab 4 page 2;*
> *Exhibit G-11 page 7.*

77. The list of Mr. King's overtime offerings over the one-year period (hereinafter "Grievor's Overtime Offerings List") shows that he was offered 309.75 overtime hours by the Employer – or only 10.19 hours less than the Report's average over the course of the one-year period.

> *Exhibit E-4 tab 5A*

78. Mr. Hoffberg testified that in preparing the Report, he developed a weighting process to account for recently hired employees, employees with different start dates, deployed or reassigned employees, employees on leave, employees who resign, or the fact that part-time employees work fewer hours than their full-time counterparts. This process was used to diminish the effect the large numbers of new employees had on the average hours for the year.

79. Mr. Hoffberg testified that he was involved in hiring a large contingent of new employees at Customs at Pearson International Airport during this initial year. With various start dates, ranging from April to September 1998, Mr. Hoffberg testified the effect this group of new employees would have on the average if not properly weighted. Briefly put, he said the average for the period would drop to approximately 231 hours.

80. Mr. Hoffberg attempted to ameliorate the effect this group would have on the average by weighting them to full-time equivalencies in his Report. In this way Mr. King, as a full-time Customs Inspector, would have his offerings compared to other full-time inspectors as part-time inspectors combined together to make full-time equivalencies.

> *Exhibit E-4 tab 4 at page 2;*
> *See Exhibit G-12, Bar Chart titled "Overtime Distribution" at page 1, in particular the first two columns titled "under 100" and "100 range"*
> *See Exhibit G-12, Bar Chart at page 3 titled "Under 100 Breakdown" – in particular the column titled "New"*
> *See Exhibit G-12, Bar Chart at page 5 titled "100 Range Overtime" – in particular the columns titled "New" , "Assignment", "Part time", and "Deployments".*

National Guidelines Average – Exhibit E-4 tab 2 page 6 paragraph no. 26

81. In comparison to the figures contained in his Report, Mr. Hoffberg also showed how the Grievor's overtime offering hours compared when the work area average suggested by the National Guidelines was used.

Exhibit E-4 tab 2 at page 6 paragraph no. 24.

82. Under the National Guidelines, Mr. Hoffberg testified that the work area average is reduced to 231 hours *which is arrived at by taking the total number of hours credited to all employees (72,585) and dividing by all employees on the overtime offering list (314) for the period in time.*

Exhibit E-4 tab 2 at page 6 para no. 24.
Exhibit G-11page 3.

83. Under the National Guidelines formula, Mr. Hoffberg testified that the 43 full-time equivalency positions are not used in place of the 127 part-time inspectors. No weighting takes place to account for recently hired employees, employees with different start dates, deployed or reassigned employees, employees on leave, employees who resign, or the fact that part-time employees work fewer hours than their full-time counterparts.

84. Recalling that the Grievor was offered 309.57 hours of overtime for the year, it can be said that under the National Guidelines formula, he received 78.57 hours more than the work area average of 231 hours for the one-year period.

Exhibit E-4 tab 5A.

85. Viewed another way, over the course of the one-year period, the Grievor was offered approximately 393 minutes a month more or approximately 90 minutes a week in excess of the work area average under the National Guidelines formula.

86. Mr. Hoffberg's evidence and testimony respecting the Report, the Grievor's Overtime Offerings List and the application of the National Guidelines at Pearson International Airport were uncontested. As such, the Employer submits that Mr. Hoffberg's evidence and testimony are deemed to be evidence of the facts contained therein.

No Inequitability Exists Under Either Average

87. Regardless of which of the two average hours figures the Adjudicator bases her decision on, the Employer submits that the Grievor received overtime offerings which were "approximately equal" to or more than the average hours for the one year period. As such, there is no evidence the Grievor has suffered inequitability in the period of redress.

Sumanik v. Treasury Board (PSSRB File No. 166-2-395).

88. The Employer requests that the grievance be dismissed as the Grievor has failed to show, on a balance of probabilities, that he has been treated inequitably under Article 19.02 of the Programme Administration Group Specific Agreement.

89. Does the evidence show that the Grievor is "readily available" under Article 19.02 of the Programme Administration Group Specific Agreement?

90. The Employer relies on the arguments put forward earlier as being applicable in terms of assessing the issues of "readily available" and "operational requirements" in the instant case.

> *Please refer to earlier arguments in this submission tendered in paragraphs 39 to 50 at pp. 14-17.*

91. The Employer further submits that, in the circumstances it has balanced its obligations under Articles 19.02 Programme Administration Group Specific Agreement and 8.02(a) and (b) of the PSAC Master Agreement and that the Grievor's choices, or own actions, did not allow him to be "readily available". The ability to accept overtime was something that was within the Grievor's power and not the Employer's.

> *Please refer to earlier arguments in this submission tendered in paragraphs 58 to 68 at pp. 19-22.*
> *Litkowich v. Treasury Board (Revenue Canada) (1983) (PSSRB File No. 166-2-12952);*
> *Seymour v. Treasury Board (Canada Employment and Immigration Commission) (1984) (PSSRB File No. 166-2-15101)*

92. What remedy is the Grievor entitled to, assuming that he can show he has not been offered overtime equitably under Article 19.02 of the Programme Administration Group Specific Agreement?

93. The Employer submits that the decision in Narbonne applies.

> *Narbonne v. Treasury Board (Post Office) (1982) (PSSRB File Nos. 166-2-12473 and 166-2-13059.*

94. If inequitability is found, Narbonne supports the proposition that the Grievor should be offered other opportunities to work overtime rather than monetary damages equivalent to the amount of overtime payment lost.

95. An offering of overtime would avoid overcompensation of the Grievor.

96. The Employer submits Narbonne is the appropriate authority given the extremely low percentage of overtime hours the Grievor actually worked. Although offered 309.57 hours, the evidence shows that Grievor only worked 5 hours of overtime in the redress period.

> *Exhibit E-4, tab 5A*

97. It is further submitted that redress in kind must be applied unless this is impossible or creates particular problems.

> *Cote v Treasury Board (Post Office Department) (1983) (PSSRB File No. 166-2-13060).*

98. Nothing in the evidence, as it concerned the COSS system, shows that this would be impossible or pose particular problems. A corrective entry to the COSS system, as it relates to the Grievor's overtime offerings, could be easily made by the Administrative Superintendent to facilitate this award.

99. In the alternative, and assuming that the Adjudicator concludes that a monetary award is warranted to redress the inequitability, then the Employer submits that Del Monte rather than Boujikan applies.

> *Del Monte v. Treasury Board (Employment and Immigration) (1985) (PSSRB File No. 166-2-15071.*

100. Del Monte held that compensation was to be a monetary award based on the Grievor's record of overtime acceptance. *The Employer submits that this reasoning also protects against overcompensation.*

101. As seen earlier, the evidence shows that Grievor only worked 5 hours of overtime in the redress period from a total offering of 309.57: approximately less than 2 hours for every 100 hours he was offered. Specifically, the Grievor only worked 1.62 percent of the overtime he was offered during the period for which he is seeking redress.

> *Exhibit E-4, tab 5A.*

102. Applying the mathematical formula in Del Monte would result in the following payment to the Grievor: subtract the Grievor's hours of 309.57 from the average hours figure of 319.76; this leaves an inequitable difference of 10.19 hours; the Grievor's record of acceptance of 1.62 percent is multiplied against the figure of 10.19 hours (or 619 minutes); this results in an award for payment of 1 minute.

103. In conclusion, the Employer asks the Adjudicator to note the minimal quantum of the remedy and find that this, in and of itself, strongly suggests that no inequitability is present in these circumstances.

104. As a consequence, the Employer once again submits that the grievance be dismissed.

Reasons for Decision

The grievor was unable to discharge the onus of proof; he failed to establish that the offerings of overtime which he received were inequitable thereby constituting a breach of Article 19 of the collective agreement.

According to the employer's figures, it would appear that he was offered overtime basically on a par with the average offering which stands at 319.76 hours. I have no other cogent evidence. Accordingly, his grievance is denied.

Having said this, there are a number of anomalies in the evidence that concern me. There is no doubt that the employer has a right to computerize its overtime

offering system. It did so with the COSS system. The employer was candid in admitting that there were many "bugs" in the system. When there is an average offering of 319.76 in a year but there are some employees who received offerings up to and including 600 hours in the same period of time, then it would certainly appear that there is not always an equitable offering of overtime. I am only dealing with Mr. King's grievance and in any case, I was not given enough evidence to make an absolute finding in this matter. The employer must, however, make a continuing effort to make its system as effective as the old manual system or grievances will continue to be filed.

Although a year may be a reasonable time to determine whether or not there are inequities, I would caution that the employer would be wise to make periodic checks to enable it to address possible problem areas.

I am concerned about the fact that the large amount of leave that Mr. King took for union business was characterized by the employer in negative terms in its submissions, such as "he had a choice" or he has "a low productivity" because "he chose" to take so much time off the line. There was definitely a suggestion of some kind of blameworthiness in Mr. King's taking large amounts of leave for union business. The fact is that a union officer's right to leave is contained in the collective agreement. In that regard, see Article M-14 of the Master Agreement which deals with Leave With or Without Pay for Alliance Business. At the same time, he does not cease to be an employee in the bargaining unit and is entitled to the benefits provided for in the collective agreement, including the right to overtime offerings.

I do not agree with the employer's argument that someone must be working on the line at the time that overtime is needed if he is to be considered to be readily available. Whether or not an employee is readily available is a question of fact to be determined in each case.

Although the union has not discharged its onus of proving an inequitable distribution of overtime vis-a-vis Mr. King, the employer has admitted there are "bugs" in the system. It would go far in improving union-management relations if the employer, in recognition of its responsibility of ensuring equitable distribution of overtime, made a further attempt beyond the e-mail of Mr. Herd to meet with the

union to ensure that reasonable efforts are being made to achieve equitableness for all employees including Mr. King.

The e-mail was, however, a positive step in the right direction and I would urge Mr. King to work with the employer in producing a system which would address his unique needs as union president.

Although Mr. King's grievance is denied, I would urge the parties to consider carefully the above suggestions.

Rosemary Vondette Simpson,
Board Member

OTTAWA, August 19, 1999.