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Date: 20030924

Files: 166-34-31433  
and 31434  
166-34-31435  
166-34-31436

Citation: 2003 PSSRB 81



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

BETWEEN

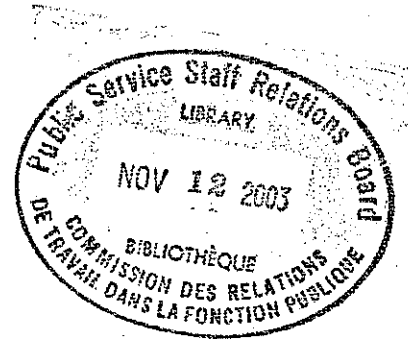
R. LÉTOURNEAU, C. LÉTOURNEAU, J. BENOÎT

Grievors

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

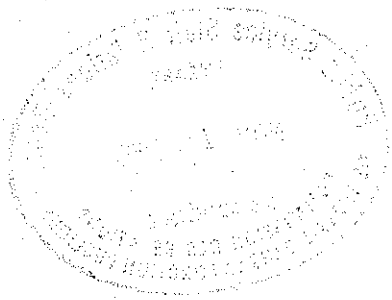


*Before:* Léo-Paul Guindon, Board Member

*For the Grievors:* Francine Cabana, Public Service Alliance of Canada

*For the Employer:* Stéphane Hould, Counsel

Heard at Quebec City, Quebec,  
June 25, 2003.



## DECISION

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[1] The grievors presented grievances to their employer on June 21, 2000, in the case of Jacques Benoît, August 29, 2000, in the case of Richard Létourneau (two grievances) and October 11, 2000, in the case of Carl Létourneau.

[2] The parties' agreed statement of facts is worded as follows:

[Translation]

1. *The employees were covered by the collective agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada that expired on October 31, 2000;*
2. *In 2000, the three individuals were customs officers (PM-02) working variable hours based on predetermined shifts at Quebec Airport and Service maritime de Montréal, respectively;*
3. *The three employees are challenging the employer's refusal to pay the shift premium (article 27.01 of the collective agreement) or the weekend premium (article 27.02 of the collective agreement) for hours worked at night;*
4. *At the time of the grievances, there was no night shift at the workplaces at Quebec Airport and Service maritime de Montréal;*
5. *At the time of the grievances, Quebec Airport did not have a night shift on the weekend;*
6. *At the time of the grievances, the employees worked overtime beyond their shift. The parties are agreed on the employees' hours of work for each grievance, namely:*

00-3921-17461:

(Board file 166-34-31433)

*Work period of August 25, 2000. Request that article 27.01 of the collective agreement (shift premium) apply. The employee worked the 4:00 p.m. to midnight shift on August 18 and continued working between 12:01 and 1:00 a.m. on the 19th, which was attached to his shift on August 18.*

00-3921-17462:

(Board file 166-34-31434)

*Same event as grievance 17461. Work period of August 25, 2000. Request that article 27.02 of the collective agreement (weekend premium) apply. The employee worked the 4:00 p.m. to midnight shift on*

August 18 (Friday) and continued working between 12:01 and 1:00 a.m. on the 19th, which was attached to his shift on August 18.

00-3921-18671:

(Board file 166-34-31435)

Work period of September 29, 2000. Request that article 27.01 of the collective agreement (shift premium) apply. The employee's shift during that period was from 4:00 p.m. to midnight. During the nights of September 25 and 27, the employee continued working from 12:01 to 12:30 a.m.

00-3921-16208:

(Board file 166-34-31436)

Period of October 22, 1999 and period of May 25, 2000. Request that article 17.01 of the collective agreement (shift premium) apply. On October 22, the shift was from 3:00 to 11:00 p.m. The employee continued working from 11:00 p.m. to 3:00 a.m. On May 25, 2000, the shift was from 3:00 to 11:00 p.m. The employee continued working from 11:00 p.m. to 8:00 a.m.

7. The employees were paid for their overtime;
8. The employees did not receive their shift premium or weekend premium for the work they performed when no shift was scheduled, namely:

00-3921-17461:

(Board file 166-34-31433)

Between 12:01 and 1:00 a.m. on the 19th, which was attached to his shift on August 18. This grievance also seeks payment of the shift premium for the future.

00-3921-17462:

(Board file 166-34-31434)

Between 12:01 and 1:00 a.m. on August 19 (Saturday). This grievance also seeks payment of the weekend premium for the future.

00-3921-18671:

(Board file 166-34-31435)

Between 12:01 and 12:30 a.m. on September 25 and 27. This grievance also seeks payment of the shift premium for the future.

00-3921-16208:

(Board file 166-34-31436)

From 11:00 p.m. to 8:00 a.m. on October 22, 1999 and May 25, 2000.

[3] The articles of the collective agreement relating to shift and weekend premiums read as follows:

**ARTICLE 27**

**SHIFT PREMIUMS**

...

**27.01 Shift Premium**

*An employee working on shifts, half or more of the hours of which are regularly scheduled between 4:00 p.m. and 8:00 a.m., will receive a shift premium of one dollar and sixty cents (\$1.60) per hour for all hours worked, including overtime hours, between 4:00 p.m. and 8:00 a.m. The shift premium will not be paid for hours worked between 8:00 a.m. and 4:00 p.m.*

...

**27.02 Weekend Premium**

(a) *An employee working on shifts during a weekend will receive an additional premium of one dollar and sixty cents (\$1.60) per hour for all hours worked, including overtime hours, on Saturday and/or Sunday.*

...

[4] The parties admit that the grievors work on shifts within the meaning of the collective agreement.

[5] The grievors received the shift premium for the hours of work scheduled for their shifts (from 4:00 p.m. to midnight or from 3:00 to 11:00 p.m., as the case may be) and were paid the overtime rate (without any shift or weekend premium) for the time they worked beyond their shifts.

[6] The grievors are requesting that the employer pay them the shift or weekend premium for the time specified in their respective grievances. They are also claiming those premiums for the work they have done at night or on the weekend since November 1, 1999, and for the work they will do in the future.

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Argument for the bargaining agent

[7] Counsel for the bargaining agent submits that clause 27.01 of the collective agreement provides that a shift premium will be paid to employees working on shifts half or more of the hours of which are regularly scheduled between 4:00 p.m. and 8:00 a.m. A premium of one dollar and sixty cents (\$1.60) per hour will be paid for all hours worked, including overtime hours, between 4:00 p.m. and 8:00 a.m. The shift premium will not be paid for hours worked between 8:00 a.m. and 4:00 p.m.

[8] The three grievors worked the evening shift from 4:00 p.m. to midnight, Richard Létourneau on August 18, 2000, Carl Létourneau on September 25 and 27, 2000 (3:00 to 11:00 p.m.), and Jacques Benoît on October 22, 1999, and May 25, 2000.

[9] The employer failed to comply with the provisions of clause 27.01 of the collective agreement by refusing to pay the shift premium for the overtime hours worked by the grievors following their shifts, half of the hours of which were scheduled between 4:00 p.m. and 8:00 a.m. The adjudicator must allow the grievances, declare that the employer did not comply with clause 27.01 of the collective agreement and order the employer to pay the grievors the shift premiums for the periods covered by the grievances, for all such periods since November 1, 1999, and for the future.

[10] Clause 27.02 provides for a weekend premium for employees working on shifts during a weekend. Such employees receive one dollar and sixty cents (\$1.60) per hour for all hours worked, including overtime hours, on Saturday and/or Sunday. Nothing in this article states that the shift must be regularly scheduled on the weekend for the premium to be granted. Richard Létourneau worked overtime on Saturday following his shift from 4:00 p.m. to midnight on Friday and is therefore entitled to receive the weekend premium for the overtime he worked between 12:01 and 1:00 a.m. on Saturday, August 19, 2000.

[11] The adjudicator must allow the grievance, declare that the employer did not comply with clause 27.02 of the collective agreement and order the employer to pay the grievor the shift premium for the period covered by the grievance, for all such periods since November 1, 1999, and for the future.

Argument for the employer

[12] Counsel for the employer submits that, according to the principle established by *Coallier*, [1983] F.C.J. No. 813, the grievors cannot request that the decision be retroactive by more than 25 days, and the adjudicator should not agree to make the decision retroactive to November 1, 1999.

[13] Article 27 of the collective agreement must be interpreted in the overall context by considering the fact that shift and weekend premiums are specifically intended to encourage employees to accept shifts outside daytime working hours.

[14] Compensation for overtime hours is provided under specific overtime clauses and differs from shift and weekend premiums. The objective of the premiums is not to compensate for overtime, which is covered by article 28 of the collective agreement. This distinction between the overtime premium and the shift premium is explained in the decision of Adjudicator David M. Beatty in *Barnes and Solowich and Treasury Board* (Board files 166-2-1828 and 166-2-1829). That interpretation was taken up again in *Duval and Treasury Board* (Board file 166-2-12382).

[15] In *Samborksy and Treasury Board* (Board files 166-2-19803 to 166-2-19805), Board Member T.O. Lowden specified that the term "shift", which was not defined in the collective agreement, corresponded to the scheduled hours for an employee as determined by the employer in accordance with a schedule set out in the collective agreement. Clause M-31.01 in that case was exactly the same as the clause in this case (except for the amount of the premium). Since overtime is not part of an employee's schedule, it does not entitle an employee to the premium for hours worked in overtime.

[16] Here, the grievors worked overtime, which entitles them to be paid at the premium overtime rate but which does not constitute a shift creating a right to the premium provided for in clause 27.01 and/or 27.02. As well, there can be no pyramiding of shift premiums and overtime pay, and the grievances should therefore be dismissed.

[17] In reply, the bargaining agent's representative submits that it was recognized in *Cox and Treasury Board*, [1988] C.P.S.S.R.B. No. 11, that when employees work in excess of their regularly scheduled shift they are entitled to a shift premium if the

regularly scheduled shift to which the overtime is attached creates a right to a shift premium.

[18] Moreover, while the shift premium is payable only for regularly scheduled hours between 4:00 p.m. and 8:00 a.m., the same is not true for the weekend premium, which is payable for all hours worked on Saturday or Sunday according to the wording of clause 27.02.

#### Reasons for decision

[19] In files 166-34-31433 (Richard Létourneau), 166-34-31435 (Carl Létourneau) and 166-34-31436 (Jacques Benoît), the grievors are claiming a shift premium for the overtime hours they worked following their shifts. The regular shift for each of them during the periods at issue was the evening shift (from 4:00 p.m. to midnight in the first two cases and from 3:00 to 11:00 p.m. in the third).

[20] The evidence shows that the grievors received the shift premium for the hours they worked during their regular evening shift and that the employer paid them at the premium overtime rate for the hours they worked in overtime.

[21] In their grievances, the grievors allege that they are entitled to receive the shift premium for the hours they worked in overtime in addition to the compensation they received on the basis of the overtime rate.

[22] The employer refuses to pay the shift premium for the overtime hours the grievors worked beyond the regularly scheduled hours of their shifts, that is, from 4:00 p.m. to midnight or from 3:00 to 11:00 p.m. These regular shifts are considered evening shifts creating a right to the shift premium provided for in clause 27.01 of the collective agreement, and the employer did in fact pay the grievors the premium for the scheduled hours of the shifts.

[23] The employer justifies its refusal to pay the shift premium for the overtime hours worked on the basis that those hours are not "regularly scheduled" within the meaning of clause 27.01, which provides for the payment of a shift premium. The employer also submits that the case law prevents the pyramiding of shift premiums and compensation paid at the specific rate for overtime.



[24] A review of clause 27.01 of the collective agreement and the decisions rendered with respect to similar clauses leads me to conclude that the grievors are entitled to the shift premium for the overtime hours they worked following their evening shifts. The overtime was worked immediately following the regular shift in each of the above-mentioned three files, and the shifts created a right to a shift premium under clause 27.01 of the collective agreement.

[25] In the decision rendered in *R. Barnes and G. Solowich, supra*, Adjudicator David M. Beatty reached the following conclusion:

*At the very least then, in the private sector, it must be acknowledged, as Mr. Newman contended, that there is some doubt, absent some express language in the collective agreement, whether an employee is entitled to receive both an overtime and a shift premium for the same hours worked. In short, the arbitral jurisprudence in the area would tend to support Mr. Newman's contention that the parties intended to include the phrase "including overtime hours worked" as a matter of clarification in order to ensure that in the hypothetical case referred to by Mr. Newman, such an employee would be entitled to the shift premium in addition to the overtime rate for the hours he worked on the evening shift. In sum, the language used by the parties in providing for a shift premium is consistent with and perhaps explicable by the historical treatment given by arbitrators, at least in the private sector, to such clauses.*

[Emphasis added]

[26] Clause 31.01 of the collective agreement considered by Adjudicator Beatty is similar to clause 27.01 applicable here, and the words "including overtime hours" used in those clauses are clearly placed between two commas. Thus, based on the principle developed in *R. Barnes and G. Solowich, supra*, the parties intended to include the phrase between commas as a matter of clarification in order to ensure that the employees would be entitled to the shift premium in addition to the overtime rate for shifts creating a right to the shift premium.

[27] The example that Mr. Newman submitted to Adjudicator Beatty was set out as follows in *R. Barnes and G. Solowich, supra*:

*By way of illustration Mr. Newman offered the example of an employee whose regularly scheduled shift on a particular day was from 0730 until 1600 and who was subsequently asked to work the evening shift. Clearly such an employee*

would be entitled to overtime pay for that evening shift and would likely claim for the shift premium for those hours as well. Mr. Newman asserted that absent the reference to overtime hours in article 31.01 it might well be in such a case that an employer would deny the employee's claim for the shift premium, arguing that to grant it would be to improperly allow the 'pyramiding' of these benefits. Accordingly, Mr. Newman included [sic] the phrase "including overtime hours worked" was inserted in article 31.01 to ensure that the employee posed in his hypothetical would be entitled to the shift premium as well as the overtime rates for the evening shift and indeed to insure that his position was treated in the same fashion as someone such as Mr. Barnes who also received eight hours' pay at overtime rates as well as eight hours of pay with the shift premium.

[Emphasis added]

[28] Thus, according to this decision, the punctuation used in clause 27.01 of the collective agreement in this case clearly indicates that the shift premium is payable for hours worked in overtime and must in fact be added to the compensation already paid to the grievors at the overtime rate.

[29] Vice-Chairman J.-M. Cantin, acting as an adjudicator in *Duval and Treasury Board, supra*, concluded that the grievor was entitled to the shift premium for the hours he had worked in overtime, for which he had been paid at the overtime rate. He adopted the interpretation suggested by Mr. Newman in the example submitted in *R. Barnes and G. Solowich, supra*.

[30] The interpretation set out in *R. Barnes and G. Solowich, supra*, and *Duval, supra*, can be applied to this case, since the grievors' overtime hours were all worked during shifts more than half of the hours of which were between 4:00 p.m. and 8:00 a.m., thus creating a right to the shift premium under clause 27.01.

[31] This interpretation was taken up again by Adjudicator T.W. Brown in the decision he rendered in *Cox and Treasury Board, supra*, with respect to a collective agreement clause similar to the ones interpreted in the previous two decisions. Adjudicator Brown stated the following:

....

The decisions cited by the parties spell out that the words "including overtime hours worked" merely serve to

*define and thereby clarify the phrase "all hours" in clause 31.01. To attract the shift premium the hours worked by an employee must fall within a shift half or more of the hours of which are scheduled between 4:00 p.m. and 12:00 p.m. This is true also for overtime worked - the overtime must be worked on a shift half or more of the hours of which are scheduled between 4:00 p.m. and 12:00 p.m. The question becomes one of determining whether in the present case the grievor worked the overtime on a shift half or more of the hours of which are scheduled between 4:00 p.m. and 12:00 p.m. Or to put it another way, was the overtime worked attached to the shift which he worked from 8:00 a.m. to 4:00 p.m. and which shift did not attract a shift premium or did it form part of the shift which was scheduled to commence at 4:00 p.m. and terminate at 12:00 p.m. and to which a shift premium was attached?*

*A careful reading of paragraph 31.01(b) and the cases cited by both parties leads me to believe that overtime worked for the purposes of attracting a shift premium does not stand in isolation from a scheduled shift worked, be this a regular shift worked or an overtime shift worked. That is to say, when an employee works in excess of his regularly scheduled shift he is entitled to a shift premium if the regularly scheduled shift to which the overtime is attached creates a right to a shift premium. An employee would be so entitled, for instance, when he works past 12:00 p.m. in a continuing overtime situation.*

*An employee who works on a shift scheduled from 8:00 a.m. to 4:00 p.m. and who continues to work on an overtime basis past 4:00 p.m. is deemed to be working on overtime on a shift which is scheduled between 8:00 a.m. and 4:00 p.m. even though the overtime hours are actually being worked at the same time as employees on another scheduled shift, say from 4:00 p.m. to 12:00 p.m., are working. It cannot be said that the overtime hours he is working are attached to the shift half or more of the hours of which are scheduled between 4:00 p.m. and 12:00 p.m.*

[Emphasis added]

[32] In that decision, Adjudicator Brown clearly stated that an employee is entitled to a shift premium where the shift to which the overtime is attached creates a right to a shift premium. This interpretation can also be applied here.

[33] For these reasons, the grievors are entitled to receive the shift premium of one dollar and sixty cents (\$1.60) per hour in addition to the overtime pay they have already received for the hours they worked.

[34] The employer must pay the grievors the shift premium for the following hours of work:

For Richard Létourneau (166-34-31433), from 12:01 to 1:00 a.m. on August 19, 2000;

For Carl Létourneau (166-34-31435), from 12:01 to 12:30 a.m. the nights of September 25 and 27, 2000;

For Jacques Benoît (166-34-31436), from 11:00 p.m. to 3:00 a.m. the night of October 22 to 23, 1999, and from 11:00 p.m. to 8:00 a.m. the night of May 25 to 26, 2000. (N.B. The evidence showed that the wording of paragraph 6 must take precedence over the wording of paragraph 8 of the agreed statement of facts.)

[35] The grievances in files 166-34-31433, 166-34-31435 and 166-34-31436 are allowed, since the evidence showed that the employer did not comply with the provisions of clause 27.01 of the collective agreement.

[36] With respect to file 166-34-31434 in Richard Létourneau's name, in which a weekend premium is claimed for the overtime worked between 12:01 and 1:00 a.m. on August 19, 2000, the grievance is dismissed.

[37] First of all, the overtime worked on that date is attached to an evening shift that entitled the grievor to the shift premium provided for in clause 27.01 of the collective agreement for the regular shift of 4:00 p.m. to midnight on August 18, 2000. As a result of the conclusion I have reached above, the overtime attached to that shift, which creates a right to a shift premium, also entitles the grievor to the shift premium provided for in clause 27.01 of the collective agreement.

[38] In addition, the wording of paragraph 27.02(a) places the words "including overtime hours" between two commas in the same way as in clause 27.01, examined above. Although the words "regularly scheduled" in clause 27.01 are not repeated in paragraph 27.02(a), this has no impact on the interpretation of clause 27.01 that I have accepted. Thus, both of the interpretations adopted for clause 27.01 could be applied to paragraph 27.02(a) with such modifications as the circumstances require. In this sense, the grievor would be entitled to the weekend premium in addition to overtime pay if the hours he worked in overtime are either attached to a shift that entitles him to the weekend premium or within a weekend shift established by the employer. Since

neither of these situations exists in Board file 166-34-31434, no violation of paragraph 27.02(a) by the employer has been shown and the grievance in this file is dismissed.

[39] The grievors' request that the decision be retroactive to November 1, 1999, is denied. In *Canada (National Film Board) v. Coallier, supra*, Pratte, Marceau and Hugessen J.J.A. of the Federal Court of Appeal stated that a grievance is not admissible for the period prior to the time limit for presenting a grievance set out in the collective agreement. In this case, the time limit for presenting a grievance is 25 days under clause 18.10 of the collective agreement and, according to the principle established by the Federal Court of Appeal, the decision cannot be retroactive beyond those 25 days from the date the grievances were presented.

Léo-Paul Guindon,  
Board Member

OTTAWA, September 24, 2003.

P.S.S.R.B. Translation

