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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

IAN HODGSON AND JOHN KNIGHTON
AND
PUBLIC SERVICE ALLIANCE OF CANADA

Grievors/Bargaining Agent

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Ian R. Mackenzie, Board Member

For the Grievors and Bargaining Agent: David Landry, Public Service Alliance of Canada, and Paul Champ, Counsel

For the Employer: Rosalie Armstrong, Counsel

Heard at Vancouver, B.C., and Ottawa, Ontario,
May 26 and 27 and October 18 to 22, 2004.

[1] These grievances and reference under section 99 of the *Public Service Staff Relations Act* (*PSSRA*) arise out of the aftermath of the tragic events of September 11, 2001. Prior to September 11, 2001 ("9/11"), Regional Security Inspectors employed at international airports (Class 1 airports) across Canada were considered "day workers" and worked regular hours, from Monday to Friday. Shortly after 9/11, Transport Canada implemented shift work for these Inspectors. The Union of Canadian Transport Employees (UCTE) is a component of the Public Service Alliance of Canada (PSAC) and represents the grievors. The relevant collective agreement is the Technical Services Group agreement (expiry date: June 21, 2000) (Exhibit A-1/G-1). The PSAC alleges that the employer breached the collective agreement because it failed to come to an agreement with the bargaining agent on the change in hours of work (contrary to clause 25.04). The grievors allege that shift work was unilaterally imposed contrary to the collective agreement and that the employer is consequently in breach of the working articles of the collective agreement.

[2] The PSAC filed a reference under section 99 of the *PSSRA* on June 10, 2003. The following corrective action was requested:

> 1. *A declaration that the collective agreement has been violated.*
>
> 2. *An order requiring the employer to comply with its obligations under the collective agreement.*
>
> 3. *Any other order which the Board may see fit to impose.*

[3] The two grievances referred to adjudication were considered by the parties to be "test grievances" (approximately 14 grievances were filed by affected employees). The details and corrective action requested are similar in both grievances. The following is from the grievance of Ian Hodgson:

> *B. DETAILS OF GRIEVANCE*
>
> *I grieve management's decision to unilaterally (without consultation and agreement) change my normal work week and work days in violation of article 25.04 of the Collective Agreement.*
>
> *I grieve management's failure to compensate me at the appropriate overtime rate in accordance with articles 25 and 28 of the Collective Agreement (and all other relevant sections).*

I grieve management's decision to unilaterally continue to impose shift work.

C. CORRECTIVE ACTION REQUESTED

That management immediately cease the unilateral scheduling and imposition of shift work.

That I be compensated at the appropriate overtime rate in accordance with the Collective Agreement.

That management respect and apply the normal work week and work days provided in article 25.04 of the Collective Agreement.

That management consult and agree with the Alliance in the event Management wishes to alter the work week, work days and hours provided under article 25.04.

That I be compensated for all losses, which I incurred as a result of Management's decision to unilaterally schedule and impose shift work.

That I be made whole.

[4] Mr. Knighton filed his grievance on March 27, 2002, and Mr. Hodgson filed his grievance on April 9, 2002. Both grievances were referred to adjudication on June 11, 2003.

[5] In its final level response to the grievances, Transport Canada submitted that clause 25.04 did not apply to the transition from day work to shift work, and that clause 25.02, requiring discussion with the bargaining agent at the appropriate level, was the applicable clause.

[6] The hearing of these matters was originally scheduled for November 2003, but scheduling difficulties led to it being scheduled only in May 2004. Similarly, efforts to schedule a continuation resulted in dates in October 2004.

[7] At the commencement of the hearing, the grievors and the bargaining agent were represented by David Landry, of the PSAC. When the hearing continued in October, Mr. Landry had retired and was replaced by Paul Champ, counsel.

[8] Five witnesses testified on behalf of the grievors and the bargaining agent and five witnesses testified on behalf of the employer. An order excluding witnesses was requested and granted.

BACKGROUND

[9] The interpretation of Article 25 of the Technical Services Group collective agreement is at the heart of this matter. For ease of reference, reproduced below are those portions relied on by the parties in their consultations. (I am using the term "consultations" in its generic sense.)

> ***25.01*** *An employee's scheduled hours of work shall not be construed as guaranteeing the employee minimum or maximum hours of work.*
>
> ***25.02*** *The Employer agrees that, before a schedule of working hours is changed, the changes will be discussed with the appropriate steward of the Alliance if the change will affect a majority of the employees governed by the schedule.*
>
> ***25.03*** *Provided sufficient advance notice is given and with the approval of the Employer, employees may exchange shifts if there is no increase in cost to the Employer.*
>
> ***25.04*** *(a) Except as provided for in clause 25.09, the normal work week shall be thirty-seven and one-half (37 1/2) hours exclusive of lunch periods, comprising five (5) days of seven and one-half (7 1/2) hours each, Monday to Friday. The work day shall be scheduled to fall within a nine (9)-hour period between the hours of 6:00 a.m. and 6:00 p.m., unless otherwise agreed in consultation between the Alliance and the Employer at the appropriate level.*
>
> *(b) The scheduled weekly and daily hours of work stipulated in 25.04(a) may be varied by the Employer, following consultation with the Alliance, to allow for summer and winter hours, provided the annual total is not changed.*
>
> [...]
>
> ***25.09*** *For employees who work on a rotating or irregular basis:*
>
> *(a) Normal hours of work shall be scheduled so that employees work:*
>
> > *(i) an average of thirty-seven and one-half (37 1/2) hours per week and an average of five (5) days per week,*
> >
> > *and*
> >
> > *(ii) seven and one-half (7 1/2) hours per day.*
>
> [...]

> *(d) Every reasonable effort shall be made by the Employer:*
>
> [...]
>
> *(iii) to consider the wishes of the majority of employees concerned in the arrangement of shifts within a shift schedule;*
>
> *(iv) to arrange shifts over a period of time not exceeding fifty-six (56) days and to post schedules at least fourteen (14) days in advance of the starting date of the new schedule;*
>
> *(v) to grant an employee a minimum of two (2) consecutive days of rest.*
>
> [...]
>
> *(g) Notwithstanding the provisions of this article, it may be operationally advantageous to implement work schedules for employees that differ from those specified in this clause. Any special arrangement may be at the request of either party and must be mutually agreed between the Employer and the majority of employees affected.*

EVIDENCE

[10] Regional Safety Inspectors (RSIs) are responsible for safety and security at airports, as well as railways and harbours. Airports are classified as Class 1, 2, or "other" airports. All international airports are Class 1 airports (Calgary, Edmonton, Halifax, Montreal (Dorval), Montreal (Mirabel), Ottawa, Toronto (Pearson), Vancouver and Winnipeg). The duties of RSIs include inspecting pre-board screening, checked baggage, cargo, aircraft security, catering and access control.

[11] Prior to September 11, 2001, RSIs were scheduled as "day workers", working 7.5 hours per day between the core hours of 6:00 a.m. and 6:00 p.m., from Monday to Friday. There would be occasional inspections scheduled on weekends, and inspectors were paid overtime for this work.

[12] The Senior Management Committee at Transport Canada had been looking at the work schedules of RSIs since September 2000, at least. The Minutes of Transport Canada's Senior Management Committee, Security and Emergency Preparedness Branch, dated September 26-28, 2000 (Exhibit G-8), refer to "Review and Approval of Policy on Shift Schedules for RSIs". The Minutes state that officials from Corporate Staff Relations stressed the necessity of consultation with the UCTE and including the

RSI community in the process before "finalization" of an RSI inspection schedule. Under "Next Steps", Jean Barrette, the Director of Security Operations, was tasked with having further discussions with Regional Directors. The work schedules were to be costed and the parameters of coverage at Class 1 and Class 2 airports were to be looked at. D. Johns, of Staff Relations, was to prepare a paper on "managerial flexibility based on the TI contract".

[13] At the January 16-18, 2001, Senior Management Committee meeting, Mr. Barrette reported that staff relations advisors were recommending the following steps (Exhibit G-9):

> [...]
>
> - *Identify articles in the TI contract which provide management options of irregular work week*
> - *Send same list to regions for comments*
> - *Arrange early dialogue with UCTE of management's intentions*
> - *Formulate a draft policy paper*
> - *Develop a communications strategic plan with staffs* (sic)
>
> [...]

[14] At the April 10-12, 2001, Senior Management Committee meeting, Mr. Barrette advised that there would be no further action on shift schedules until later in the fall because of the possibility of a strike (Exhibit G-10).

[15] The Technical Services Group was on strike on September 11, 2001. When the full extent of the events of 9/11 became clear, the employees returned to work. The demands on Transport Canada's services on September 11, 2001, and the days immediately following were extensive. Retired employees as well as employees from other parts of the Department were called in to duty. Shifts were scheduled on a 24-hour, seven-day per week basis.

[16] Paulette Hébert-Théberge, Regional Director of the Prairie and Northern Region, testified that up until September 17, 2001, employees in her region were receiving regular pay and overtime for the extended hours. After September 17, 2001, shift

work was formalized and employees received shift premiums. She also testified that by September 14 or 15, shift work was already being seen by management as a "long-term thing". In cross-examination, she testified that shift work was "well decided upon" by September 20, 2001, but the implementation took some time.

[17] Ms. Hébert-Théberge testified that the first efforts to discuss hours of work with the local union were early in October 2001. She asked her staff relations advisor to contact the local UCTE representative, Kerry Williams, on October 9, 2001.

[18] Security Operations issued a Policy Letter on "Enforcement Policy and Philosophy" ("Policy Letter 16") on October 25, 2001 (Exhibit G-16). The Policy Letter set out the following hours of work coverage:

> *HOURS OF WORK*
>
> *Regional Directors are to ensure that there is **security coverage seven days per week during the hours of operation of the aerodrome** at all Class I airports. In addition during the quiet hours, there is to be one inspector present in each International Terminal 50% of the time on a random basis.*
>
> *Due to ongoing staffing initiatives some regions may have difficulty meeting the hours of coverage. If this is the case, they should inform ABC* [Director of Security Operations] *outlining how they intend to meet the requirements.*

[19] The Policy Letter also set out increased frequency in inspections of pre-board screening, checked baggage, cargo, aircraft security, catering, and access control.

[20] The Department first contacted the bargaining agent at the national level on October 3, 2001. Lynn Landriault, Chief of Staff Relations, testified that she discussed shift work with Wayne Elliott, the Vice-President of the UCTE, on October 3, 2001. She testified that there was still a lot of confusion around hours of work and advised him that discussions in more detail were required. The first consultation meeting occurred on October 26, 2001 (Exhibit A-2). At that meeting, Mr. Barrette provided an update on the impact of the events of 9/11 on security operations at Class 1 airports, as well as hiring forecasts. Mike Wing, President of the UCTE, stated that he had serious concerns about the capacity to implement shift work with the employees on hand. He also stated that the forecast of 27 new hires was not sufficient to implement shift work. Eric Daoust, a Transport Canada Staff Relations Advisor, presented a document

outlining the options available to management in meeting operational requirements ("Shift Work Schedule – Security (TI Group)", Exhibit A-3).

[21] Option 1 was overtime at either the beginning or the end of the day, either on call-back or contiguous to the normal hours of work. The document stated that no consultation was required for this option. Option 2 was the establishment of shift work of an average 37.5 hours per week, five days per week, and 7.5 hours per day. Consultation was identified as required with respect to changing the hours of work (clause 25.02). Option 3 was the establishment of a different shift schedule from Option 2 and was described as "work schedules that are operationally advantageous". This option was also described as a variable hours of work schedule. Consultation was identified as required, and also the mutual agreement between the employer and the majority of affected employees was identified as required in order to implement a schedule that differed from that specified in clause 25.09. Management requested that the bargaining agent provide feedback on the identified options.

[22] At the October 26, 2001, meeting, Mr. Wing also indicated that the UCTE had heard from its members that there were inconsistencies in compensation for the hours worked across the regions. He requested further information from the Department. This information was provided in written form on May 2, 2002 (Exhibit R-5).

[23] The UCTE also raised the issue of pending grievances at the October 26, 2001, consultation meeting. Ms. Landriault sent a letter to Mr. Wing, dated November 12, 2001 (Exhibit A-7), agreeing to suspend the time limits for filing a grievance and deeming timely any grievances filed within 25 days following completion of the consultation process. A draft of a joint memorandum announcing the agreement to suspend the time limits was prepared by staff relations for signature by Messrs. Barrette and Wing (Exhibit A-6) but was never finalized. Subsequently, the UCTE advised its members of the agreement to suspend time limits on its Web site (Exhibit R-4). Mr. Knighton's grievance was filed on March 27, 2002, and Mr. Hodgson's grievance was filed on April 9, 2002.

[24] Brian Bramah, the Regional Director for the Pacific Region, sent an e-mail to all staff at the Vancouver International Airport on October 30, 2001, stating that he had asked John Getty to solicit preferences for a continued shift pattern at Vancouver International Airport (Exhibit E-1). He was seeking a majority consensus on whether a 9.375-hour shift or a 7.5-hour shift was preferred. He stated in the e-mail: "It looks

like we may be in this for a while." He also indicated that he had met with the Local Vice-President of the UCTE, David Lee, and that he had participated in the October 26, 2001, union-management consultation meeting in Ottawa. Mr. Getty replied by e-mail the following day (Exhibit E-1) with the preferences of the seven inspectors, which he described as "a dog's breakfast". He also noted that "any voluntary compliance is gone".

[25] On November 13, 2001, a second consultation meeting was scheduled (Exhibit R-1). Mr. Wing was not available to attend the meeting. Angela Tancorre and Mr. Ferrand attended on behalf of the UCTE. At the meeting, Mr. Ferrand noted that it was a challenge for the UCTE to contact its members to obtain information on hours of work and he requested the employer's assistance to facilitate his consultation process. Ms. Landriault requested detailed information as to when, where and with whom these consultations were to take place. Mr. Ferrand also advised that the UCTE was waiting for feedback from the PSAC's Grievance and Adjudication Section prior to providing a position on the options presented at the October 26, 2001, consultation meeting.

[26] Sometime after receiving this advice from the Grievance and Adjudication Section, the UCTE provided its position on the options paper prepared by the Department (Exhibit A-3). Mr. Wing testified that he told the Department representatives that it was the union's position that new employees could be hired as shift workers, and current employees could choose to be shift workers, but that those current employees who did not want to do shift work could not be required to do so without the agreement of the union.

[27] Mr. Daoust consulted with the Treasury Board on December 10, 2001 (Exhibit G-21), on the bargaining agent's position, which he described as follows:

> [...]
>
> 1. *They indicate that we can't change the core group, as they call them from day workers to shift workers. They are basing their argument on the Article 25.04 that the 46 TI's (core group) are day workers and that the work day shall be scheduled to fall within a 9 hour period between the hours of 6:00am and 6:00pm, unless otherwise agreed in consultation with the alliance* [sic] *and the employer at the appropriate level. As they won't agree, they are of the view that we can't change their hours of work thus we can't apply the 25.09 article for those employees.*

> 2. *They are of the view that all excess hours worked outside the 9-hour period 6 to 6 be compensated at the applicable overtime rate.*
>
> 3. *However, they are in agreement that the new employees can become shift workers and in fact could work the other hours that revolve around the hours scheduled day worker TIs (core group).* [sic]
>
> [...]

[28] Mr. Daoust received the following reply from Kathryn Wilder Patterson, a negotiator with the Treasury Board, on December 12, 2001, (Exhibit G-21):

> *... The requirement is to consult with the union, and while it is preferable that there be an agreement, it is not a requirement. Article 25.09 can be applied to existing employees, and is not restricted to new employees. Other arrangements may be implemented as per 25.09(g) with the agreement of the majority.*
>
> [...]

[29] At a union-management consultation meeting on December 13, 2001, Mr. Wing reiterated the bargaining agent's position that current employees could not be changed to shift workers without consent and that new employees could be hired as shift workers (Exhibit A-4/R-3). Mr. Wing testified that the bargaining agent conceded that it could not object to having new inspectors hired as shift workers. He said that some of the current inspectors were prepared to move to shift work and the bargaining agent was not going to object if that was their wish. The other current employees were prepared to fill in on shift work until new hires were in place, at which point they would return to day work.

[30] A document on hours of work and inspection frequency was also presented at the December 13, 2001, meeting (attachment to Exhibit R-3) that set out excerpts from Policy Letter 16 (Exhibit G-16).

[31] During this period, new inspectors were being hired. The competition/ deployment posters set out the following condition of employment: "...Ability and willingness to work intermittent/irregular hours including shift work as required..." (Exhibit E-22).

[32] Policy Letter 16 was revised on May 9, 2002 (Exhibit R-8). Security coverage was reduced to 16 hours per day, seven days per week. During the quiet hours, the Policy Letter required one inspector in each International Terminal one day per week on a random basis.

[33] Ian Hodgson is an RSI based in Edmonton. He was offered an indeterminate position as a Regional Security Officer on September 30, 1997 (Exhibit G-5). He testified that he was hired with the understanding that he would be working during the core hours of 6:00 a.m. to 6:00 p.m., from Monday to Friday. The letter of offer does not refer to hours of work. There was no mention of the possibility of shift work on the competition poster, the letter of offer, or during his interview. He accepted the position on this basis, as he had worked shift work as a police officer and did not want to continue with shift work.

[34] Prior to September 11, 2001, Mr. Hodgson was working from 7:30 a.m. to 4:30 p.m., Monday to Friday. For a period of time, he was on a compressed work week. Ms. Hébert-Théberge testified that his compressed work week was cancelled on or about September 16, 2001. On occasion, he was required to travel on weekends and he received overtime in accordance with the collective agreement for these hours. After September 11, 2001, there were discussions in the Edmonton office about the requirement of additional shifts at the airport for a period of time. This did not have an impact on Mr. Hodgson in the first part of September, as he was continuing to work at the downtown office. On September 19, 2001, he was required to report to the Calgary International Airport. To the best of his recollection, he was paid overtime for his work during the month of September. In the first week of October, he worked outside his core hours of work, but was not paid overtime for these hours. From October 9 to the end of the month, his hours of work were within his core hours; therefore, he was not entitled to any overtime payment. Ms. Hébert-Théberge testified that Mr. Hodgson refused to accept shift work "as a way of life and continually tried to make his point" (by claiming overtime). However, she testified that he did accept the actual assignment of work as requested.

[35] By April 2002, Mr. Hodgson's rotating shifts started. He testified that the rotation in hours of work has been changing fairly constantly since that time. There have been between four and six different schedules since shift work was implemented. Mr. Hodgson reviewed the history of his hours of work under the shift schedules. At

the time of this hearing, his hours of work were evening shifts, three days on and two days off. He testified that being a day worker had allowed him to spend time with his young family and shift work, including weekend work, interfered with his family life. Shift work also interfered with his volunteer activities at his church. He also testified that shift work was detrimental to his health.

[36] John Knighton is an inspector at the Vancouver International Airport and he has worked at that location since November 2000. He testified that after September 11, 2001, his duties remained essentially the same but the amount of work increased twofold. When he was hired as an inspector in July 2000, he was advised that his hours of work were to be 7.5 hours per day, between the core hours of 6:00 a.m. and 6:00 p.m., from Monday to Friday. When he started at the Vancouver International Airport, his hours of work were from 7:00 a.m. to 3:00 p.m., Monday to Friday. He had worked shift work in the past and testified that he would have applied for a different position if the job had been a shift-work position. Prior to September 11, 2001, when he was required to do evening work, he was paid overtime.

[37] After September 11, 2001, Mr. Knighton was put on rotating hours of work, outside the core hours of 6:00 a.m. to 6:00 p.m. He was scheduled for 12-hour shifts. Initially, he worked from 7:30 p.m. to 7:30 a.m. At the end of October 2001, he received compensation in the form of overtime for all hours worked outside his core hours of 6:00 a.m. to 6:00 p.m. After October 30, 2001, he stopped receiving overtime and started receiving a shift premium for evening and night shifts, as well as a weekend premium for hours worked on Saturday and Sunday. The only time he received overtime compensation was when he worked on a scheduled day off. At the time of the hearing, he was on a shift schedule of four days on, three days off. His work hours vary. The coverage at the Vancouver International Airport is from 5:00 a.m. to 10:00 p.m. Shifts start at 5:00 a.m., 6:00 a.m., and 7:00 a.m. and at noon. The shifts are 10-hour shifts, for which he is paid 9.5 hours. Mr. Knighton testified that he and the other inspectors all pitched in during the period immediately following the events of 9/11. At a meeting in October 2001, with Brian Bramah and people from Human Resources, he and others indicated that they wanted to go back to straight days - that is, back to the normal operations. The inspectors were asked if they would continue to work until the end of October, pending an agreement between the employer and the bargaining agent. Mr. Knighton testified that the inspectors agreed.

[38] On February 12, 2002, Mr. Knighton sent an e-mail to Mr. Bramah indicating that he had agreed to continue working a rotating schedule until the end of October 2001, but that he now wished to return to the provisions of subclause 25.04(a) and work inside the core hours of 6:00 a.m. to 6:00 p.m., from Monday to Friday (Exhibit E-10/G-3). Mr. Bramah replied as follows:

> *As you know the operational requirements of your position changed as a result of the tragedy in the U.S. You will remain on the current shift rotation until further notice. We have been in consultation with your union at the HQ level. These discussions continue with respect to the various interpretations to your collective agreement. I am currently looking into narrowing the window of coverage to allow for more inspectors on duty during the peak periods. An example would be 16hr coverage vs. the current 20hrs. Beth is currently working with all those effected* (sic) *to provide the required coverage.*

[39] Mr. Knighton also testified that on February 20, 2001, the request was made at a meeting with Mr. Bramah for a return to day work. At that meeting, Mr. Knighton testified that Mr. Bramah suggested that discipline would be imposed if inspectors refused to work shift work. Mr. Bramah testified that he could not recall making such a statement. In an e-mail to David Lee, the local UCTE representative, he indicated that he considered the issue of shift work "closed", given the staff meeting of February 20, 2001 (Exhibit E-10). Mr. Bramah testified that, in his view, shift work was not voluntary and that he was trying to impose it on a voluntary basis by seeking the preferences of the employees for shift length and particular shifts (Exhibit E-1).

[40] Mr. Knighton testified that he wanted to remain as a day worker. He stated that he was hired as a day worker and those were the terms and conditions when he signed his employment agreement. Sunday is his day of rest. He has been an active member of the Reserves since 1994 and is the Company Sergeant Major. His obligations to the Reserves include weekends and Thursday evenings. When he is required to work on Sundays, he cannot attend training, and he has had to miss meetings on Thursday evenings. If he wants to attend these activities when he is scheduled to work, he has to take annual leave. Mr. Knighton also testified that he runs a business on the side, raising and training thoroughbred horses. Before his change in hours, he was able to assist in the training and now he has to pay someone to do the work.

[41] Mr. Knighton was asked in cross-examination if it had crossed his mind to consider another line of work. Mr. Landry objected to the question on the basis of relevance. I allowed the question and reserved on the weight to be given to the testimony. Mr. Knighton stated that he "absolutely loved" his job and that he was well paid for doing a job that he loved. Although there were times when he had considered another position at Transport Canada, he stated that he would not change jobs. He believes that his job could be done within the requirements of the collective agreement.

[42] A joint union-management memorandum to Security Inspectors, signed by Messrs. Barrette and Elliott, was issued on April 11, 2003 (Exhibit A-8). The memorandum set out the consultation process to date and advised that a contract had been awarded to Orbis Partners Inc. to "conduct a review of operational requirements, the development of shift schedule options, if applicable, and the adaptation of implementation tools/training." The memorandum also addressed inconsistencies in hours of work across the country:

> [...]
>
> ... [inconsistencies] *are in place, at the moment, to address regional operational considerations. Following consultations with the Union and the Regions and a review of the data collected, senior management has decided that such arrangements will continue until a final decision is reached, upon completion of the consultation process and this after careful consideration of any alternative solutions....*
>
> [...]

[43] The joint memorandum also stated that new inspectors had been hired and in-depth training was ongoing: "...As qualified inspectors are brought into the workplace, this will provide an opportunity for us to review the hours of work."

[44] Counsel for the bargaining agent objected to the introduction of the Orbis Report and to the testimony of one of its authors, William (Bart) Millson. Counsel objected on the basis that the contents of the Report were irrelevant to the main issue before me. Mr. Champ submitted that the Report has no bearing on the proper interpretation of the collective agreement. If it was allowed, the bargaining agent had concerns about the veracity of the Report and would have to spend considerable time cross-examining Mr. Millson on the methodology. This would unduly delay or extend

the hearing. The fact that the consulting firm was hired and that a study was conducted is already in evidence. Counsel for the employer submitted that the Orbis study was part of the consultation process. The Department wanted to assess whether the employees were satisfied with the shift schedule, how it affected them and how it could be improved. The bargaining agent accepted and even "embraced" the idea and signed off on the correspondence relating to the study. The Report was relevant for establishing whether there were discussions or consultations on the change in schedules from day work to shift work.

[45] I allowed the introduction of the Report and the testimony of Mr. Millson. I noted that this did not preclude objections to parts or aspects of the Report once it was introduced. I noted the objections to the relevance of the Report and stated that argument on the relevance of the evidence could be left to final argument. I indicated that I would assess the relevance and weight to be given to the evidence in my final decision.

[46] A "Request for Proposal" (Exhibit G-22) set out the following parameters for the study:

> [...]
>
> *2. **The Requirement***
>
> *Transport Canada is seeking expert advice and short-term implementation support in order to review the impact of the expanded hours of operations on the security inspection operations in Class 1 airports. This review includes:*
>
> - *The development a national survey to be completed by inspectors at Class 1 airports.*
> - *The conduct of regional visits to conduct employee's focus group and analysis of existing shift schedule arrangements.*
> - *The development of hours of work scenarios for presentation to management representatives.*
> - *Researching and presenting off the shelf software solutions that could be used to maintain schedules of different work hours.*
> - *Providing training to Regional Directors in the elaboration of shift work schedules.*

- *Developing and providing workshops on "Shift Work Lifestyle and Life Balance" to inspectors to help them adapt to the new regime. The workshops will be in either English or French. The estimated length of each workshop is ½ day - to be determined by the TC Project Authority in consultation with the Contractor.*

[...]

[47] Focus groups were set up at all nine Class 1 airports and site visits at six of those airports (Exhibit E-14). All inspectors also received a questionnaire on hours of work. The response rate to the survey was 81.3% (at the Ottawa International Airport, all inspectors chose not to respond). From this survey, the Report found that 56.5% of the respondents had less than one year of service as an RSI, 17.4% had between one and three years of service, and 26.1% had more than three years of service. Most respondents found day shifts "most desirable" (86.1%). The term "day shift" was not defined in the survey. Mr. Millson testified that a day shift was where most of the hours of work were within the 9:00 a.m. to 5:00 p.m. period.

[48] Mr. Knighton testified that the consultants asked him and other inspectors about how shift work was affecting their lives. He testified that at no point did they present a return to the pre-September 11, 2001, schedule as a possible option. The survey also found that 91.5% of inspectors preferred a schedule that included 10-hour shift lengths and a work pattern of three or four consecutive shifts in a row before days off.

[49] The consultants also reviewed schedules at six Class 1 airports: Halifax, Dorval, Ottawa, Toronto, Calgary and Vancouver. Weekday, weekend and quiet-hour coverage, as set out in Policy Letter 16, were examined. The required weekday coverage was met or exceeded at five of the six airports; inspectors at Ottawa International Airport averaged only 12 hours per weekday (four hours short of the required 16 hours of coverage). Only Calgary International Airport met the weekend coverage requirement of 16 hours per day. Ottawa International Airport was short six to eight hours per day on the weekend, and the others were four hours short per day. In terms of quiet-hour coverage, Montreal-Dorval International Airport was the only airport to meet the required coverage. The consultants stated, in the Executive Summary, that some sites indicated that the lower-than-required coverage was "not viewed as detrimental to the security operations" of their site; "the schedules were designed to best address the specific coverage requirements of the airport while at the same time attempting to

meet the coverage as required by Transport Canada". In other sites, inspectors acknowledged the "shortcomings" in the coverage and were hopeful that the hiring of new airport inspectors would address these shortcomings.

[50] In the executive summary to the final report (Exhibit E-14), the consultants concluded:

> *... the current project demonstrated that inspectors at Class 1 airports across Canada were generally satisfied with the work schedules in place designed to meet the expanded hours of coverage required by Transport Canada. Few indicated a desire to change the current schedules and most felt the schedules provided the flexibility necessary to conduct their work requirements. .... Accordingly, it appears the current schedules in place for airport inspectors at Class 1 airports across Canada should, for the most part, remain intact unless operational requirements change.*

[51] Orbis Partners Inc. met with Mr. Elliott three or four times. Mr. Millson's associate, Alex Stringer, met with Mr. Elliott to review the survey.

[52] Orbis Partners Inc. also presented a series of workshops on health and lifestyle and shift work, designed for employees and family members. The workshops were completed by March 2004.

[53] The Orbis Report was submitted to the Department in September 2003. Mr. Daoust forwarded a copy to Mr. Elliott on November 14, 2003, for discussion. A joint memorandum (attaching the Orbis Report) to all RSIs, signed by Messrs. Barrette and Elliott, was issued on May 20, 2004 (Exhibit R-12). The joint memorandum stated that the report "could be used as a reference tool for you as well as your managers". The joint memorandum concluded: "We would like to thank you in advance for your continued cooperation."

[54] In cross-examination, Mr. Millson was asked to identify a Statistics Canada study on shift work and health (Exhibit G-27). He testified that he was aware of the study and its findings.

[55] Mr. Elliott testified that consultations between the UCTE and Transport Canada were not completed. The last discussion the parties had was a request from Mr. Barrette that the bargaining agent identify who was the appropriate person to deal with on consultations on hours of work, as specified in clause 25.02 of the collective

agreement. As of the date of the hearing, the parties had not had further discussions or consultations on hours of work.

[56] Mr. Barrette testified that there would be a "destructive impact" if there was to be a return to day work. Transport Canada would not be able to keep up with the required level of coverage and it would result in Transport Canada's not meeting its safety and security obligations. Mr. Barrette also testified that it was the employer's opinion that it could not have inspectors who were hired prior to September 11, 2001, as day workers and those inspectors hired after September 11, 2001, as shift workers, because there was no authority in the collective agreement for grandfathering or seniority.

SUBMISSIONS

For the Grievors/Bargaining Agent

[57] Mr. Champ submitted that the grievances claim that the grievors were directed to work hours in excess of their normal hours of work, contrary to subclause 25.04(a), without being properly compensated through the payment of overtime. The section 99 reference by the bargaining agent is alleging a breach of subclause 25.04(a), which imposes a duty on the employer to consult and reach agreement with the bargaining agent before changes can be made to "normal" working hours. This case hinges on the interpretation of "normal". The grievances and reference are interwoven, although the employer has different obligations to the bargaining agent and to employees. The differences are particularly noticeable in the area of remedies.

[58] Mr. Champ noted that the 9/11 tragedy brought out the best in managers and employees; everyone stepped up to get the job done. The evidence showed that the employer had considered expanding hours of operation and implementing shift work prior to the events of 9/11, but it did not do so and had 9/11 not occurred, the employer may well have engaged in consultation. Mr. Champ argued that, to some degree, the employer did take advantage of the situation.

[59] Mr. Champ argued that hours of work is a fundamental term of employment. After the rate of pay, it is probably the most fundamental term; it is how people organize their lives. The earliest union battles were about hours of work. When interpreting the collective agreement, one must recognize how important hours of work are. In *Merilees v. Sears Canada Inc.* (1988), 49 D.L.R. (4th) 453, the British

Columbia Court of Appeal recognized that hours of work are regarded as a fundamental term. When the employer tried to shift the plaintiffs' work week to Sundays, the Court held that this amounted to constructive dismissal.

[60] Mr. Champ submitted that what the case is about begins and ends with the collective agreement. Ultimately, it rests with an interpretation of a collective agreement provision. It was the bargaining agent's submission that most of the evidence is irrelevant, or at best marginally relevant. The employer led so much evidence in an attempt to cloud the real issue and to confuse the case. The real issue is the proper interpretation of subclause 25.04(a). The bargaining agent has two facts to prove: (1) that the employees worked hours in excess of the normal work week; and (2) that no agreement was reached with the bargaining agent. This is not a "consultation" case, but a "consult and agree" case. The decision in *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board,* PSSRB File No. 169-2-11 (1971), is an example of a consultation case where there is no requirement that the parties agree. The requirement for consultation is similar to the requirement that decision-makers provide reasons. Even if this were a straight consultation case, the employer did not meet its obligations under the consultation clause. The requirement is to consult before the decision is made. The bargaining agent was not advised until October 26, 2001, whereas the decision to go to shift work was made within weeks of September 11, 2001.

[61] Mr. Champ argued that the words and provisions in the collective agreement are put there for a reason and must be given a meaning. The collective agreement must be read as a whole; provisions cannot be read in isolation. The collective agreement sets out two categories of employees: day workers and shift workers. Provisions in the collective agreement govern whether or how the employer can transfer employees from one category to the other. Subclause 25.04(a) is the default provision in the collective agreement; it states that the normal work week "shall be" 37.5 hours per week, 7.5 hours per day, from Monday to Friday. The scheduling of these work hours is also mandatory ("shall be scheduled"), unless otherwise agreed in consultation at the appropriate level. The default or normal position is therefore Monday to Friday, 7.5 hours a day. A benefit or right is conferred on employees by this article. The employer has restricted flexibility to schedule hours between 6:00 a.m. and 6:00 p.m. If the employer wants to change that default position, agreement with the bargaining agent is required at the appropriate level. The appropriate level might be the local or

the regional level if the hours of work were to be changed at a particular location, but here, where there is a national change, the appropriate level is the national level. The employer clearly recognized this and felt it had to consult at the national level.

[62] Mr. Champ submitted that subclause 25.09 refers to employees who work on a rotating or irregular basis. The subclause is just about those employees. Irregular is not "normal"; the employer has to get employees to agree to irregular or rotational hours in order to rely on this provision. This is supported by Part III of the collective agreement as a whole; subclause 25.12(b) refers to "shift workers" and "day workers". There are different rights and benefits in each of these categories. For example, Article 27 ("Shift Premiums") and Article 26 ("Shift Principle") do not apply to day workers.

[63] Mr. Champ noted that clause 25.12 refers to a maximum life of a schedule, which raises the question, what does "schedule" mean? A schedule is a written document setting out a schedule of hours that employees will work. There is a schedule for day workers and a schedule for shift workers. Clause 25.02 refers to "schedule of working hours". The employer states that "schedule" means day work or shift work. It is the bargaining agent's position that if that was what was intended, those words would have been used. Subclause 25.04(a) is a significant benefit and once that benefit has been conferred, explicit language is required to take it away. Clause 25.02 is ambiguous. A schedule as set out in subclause 25.12(b) can apply to either day work or shift work. Subclauses 25.12(a)(i) and (ii) refer to a maximum life of a schedule, which clearly refers to a written schedule of actual hours of work.

[64] Mr. Champ submitted that while clause 25.02 refers to discussions with the appropriate steward, the employer's position is that to make changes on a national level all that is required is to talk to the appropriate steward. The bargaining agent's position is that this is nothing more than a provision for workers to work out what the schedule is going to be, and that the majority of employees are to work it out.

[65] Mr. Champ noted that overtime entitlements are set out in Article 28. The definition of overtime is contained in subclause 2.01(a) - in excess of or outside "normal hours" of work. According to subclause 25.04, day workers can only be scheduled for hours in the period between 6:00 a.m. and 6:00 p.m. Any hours outside of those core hours are necessarily outside the scheduled hours. The employer was entitled to change the hours of work outside the core hours but had to provide overtime for anything outside of the core hours. Shift premiums do not apply to day

workers. Mr. Champ referred me to *Re Northern Electric Office Employee Association v. Northern Electric Co. Ltd.* (1968), 19 L.A.C. 125, and *Re U.E.W., Local 512 v. Anchor Cap and Closure Corp. of Canada* (1965), 16 L.A.C. 157, both of which held that an employer can schedule an employee outside of the core hours but must pay overtime. Mr. Champ also referred me to *Re United Glass and Ceramic Workers, Local 248 v. Canadian Pittsburgh Industries Ltd.* (1972), 24 L.A.C. 402. These cases all concluded that the hours of work provided for in the collective agreement were to be considered a benefit.

[66] Mr. Champ also referred me to the *National Film Board v. Le Syndicat général du cinéma et de la télévision, section Office national du film,* PSSRB File No. 169-8-389 (1984), where the arbitrator held that changing what constitutes the "normal work week" for an employee alters the terms of the agreement.

[67] Mr. Champ also referred me to *Tornblom v. Treasury Board (Department of Agriculture),* PSSRB File No. 166-2-2016 (1976). In this case, the employees' work schedule was changed without seven days' notice. The adjudicator held that these employees were not entitled to shift premiums because they were day workers. *Tornblom* (*supra*) defines what a schedule is; it is necessarily a written document and does not mean employees working days versus those working shifts. The parties have used "day" and "shift" throughout the agreement. If they had meant to make such a significant decision on the transfer from day to shift work, they would have spelled it out.

[68] Mr. Champ submitted that the bargaining agent need only prove that the grievors were day workers and that they worked in excess of the core hours of 6:00 a.m. to 6:00 p.m. The bargaining agent only has to make this *prima facie* case. Then the burden shifts to the employer to prove that it legitimately transferred these employees to shift work.

[69] Mr. Champ stated that the bargaining agent did not dispute the operational requirements of increasing hours of coverage. The employer took a risk when it negotiated the agreement that it would be able to handle an immediate need on a permanent basis without the use of overtime. The employer could have consulted meaningfully and perhaps worked out an arrangement on a temporary basis, thereby meeting its obligations under subclause 25.04(a) and saving money. The bargaining agent did not simply put forward the status quo as an option. Mr. Wing set out an

option at the December 13, 2001, meeting (all new employees would be shift workers, and pre-9/11 workers could decide whether to be shift workers). This was an opening position and no one knows where the negotiations might have led; the employer was not interested in discussing this option further.

[70] Mr. Champ submitted that the decision to move to shift work was made by the employer before discussions had begun. If this were consultation as required under clause 25.02, the employer would not have met its obligation. The evidence clearly demonstrates that the employer had made up its mind before its first meeting with the bargaining agent on October 26, 2001. The evidence also showed that Mr. Knighton was basically told at the February 20, 2002 meeting that he would be disciplined if he refused to do shifts (Exhibit G-3).

[71] Mr. Champ argued that there was no agreement with the bargaining agent on the change to shift work and that consultation with the bargaining agent is ongoing today.

[72] The Orbis Report was not an accurate document and does not support any conclusions on the support of the employees for shift work. The demographics showed that only 26% of the employees had more than three years of service, which means that the majority were new hires after September 11, 2001.

[73] Mr. Champ submitted that both grievors never agreed to be shift workers. Both testified about the significant impact of shift work on their lives.

[74] Mr. Champ submitted that the remedy for the reference under section 99 of the *PSSRA* was a declaration. For the grievors, the remedy should include the expenses the grievors incurred as a result of working shifts (*Re Northern Electric Office Employee Association* (*supra*)). Further, they should receive overtime payment for all hours worked outside their normal hours (*Anchor Cap* (*supra*)). Mr. Champ also requested a declaration that the employer failed to pay overtime at the rate prescribed in subclause 28.01(a) for the hours worked in excess of the normal working hours set out in subclause 25.04(a). The compensation ordered should be equal to the difference between the overtime and the shift premium paid to the grievors. The period of compensation should commence 25 days prior to Ms. Landriault's letter (Exhibit A-7), in other words, from October 18, 2001, to the date of this decision. The order should also include a declaration that the employer shall pay overtime in the future for hours

worked outside the normal hours of work. The grievors should also be compensated for any consequent losses and I should retain jurisdiction on this issue if the parties are unable to agree.

[75] For the section 99 reference, there should be a declaration that the employer is in violation of subclause 25.04(a) for failing to consult and reach an agreement with the bargaining agent at the national level before making a change to the normal working hours. Also, there should be a declaration that the employer must comply with the collective agreement and consult and reach an agreement with the bargaining agent if it wants to change day workers to shift workers.

For the Employer

[76] Ms. Armstrong submitted that Airport Inspectors were day workers prior to September 11, 2001, and for very dramatic reasons the employer was required to change their hours of work. The nub of the case is that the collective agreement empowers the employer to change the hours of work. This is also supported by section 7 of both the *PSSRA* and the *Financial Administration Act* (*FAA*) – the right of the employer to assign duties. The employer met and, in fact, exceeded all of its obligations to both grievors and to the bargaining agent.

[77] Ms. Armstrong argued that the employer's obligation is limited to clause 25.02. To respond to new threats, the employer had to create shifts and increase coverage to ensure sufficient inspections. The employer sought to respect clause 25.02 and invited the bargaining agent to engage in discussion. The Department arranged for a meeting as soon as it could. The employer also hired new inspectors and assigned team leaders (later managers), as well as hiring a consultant. The bargaining agent did not agree to the creation of shift work, but it was never required that the bargaining agent agree. What is relevant is clause 25.02. In *Public Service Alliance of Canada v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 169-2-568 (1997) (QL), it was held that consultation does not presuppose agreement; it just means discussion.

[78] Ms. Armstrong submitted that the employer saw the bargaining agent as part of an organic whole and does not see it as factionalized. The Department discussed this matter with local stewards and with higher union officials. Ms. Armstrong stated that the bargaining agent suggests that this is not a consultation case. If it is not, the employer does not understand what it is about.

[79] Ms. Armstrong stated that the employer does not agree that there is a "shifting burden", as suggested by counsel for the bargaining agent. It is important also to distinguish the section 99 reference from the grievances. The proper remedy for a section 99 violation is a declaration that the employer did not respect its obligation to the bargaining agent. The grievances relate to employees.

[80] Ms. Armstrong noted an overlap between the grievances and the section 99 reference. The bargaining agent alleges a breach of clause 25.04 in the section 99 reference. In the grievances, although they relate to overtime allegedly owed, the grievors refer to clause 25.04. It is not clear what they are grieving – overtime or a breach of clause 25.04. If they are alleging a breach of clause 25.04, under normal situations one is not entitled to have a policy grievance if the matter can be dealt with by way of an individual grievance. The employer agreed that grievances could be heard along with the section 99 reference, but this does affect the potential remedy in the case. The only possible remedy if the grievors' grievances relate to clause 25.04 would be a declaration. There is no monetary remedy that could make them whole under clause 25.04.

[81] Ms. Armstrong stated that the employer was surprised to hear the bargaining agent talk about damages or compensation for losses. Not once have the grievors led any evidence about their losses. The employer does not feel that there should be any monetary damages for a breach of clause 25.04. A remedy might include entitlement to overtime but cannot extend to damages.

[82] Ms. Armstrong submitted that the question of whether clause 25.04 applies at all in this case is a threshold issue. One must read the whole agreement and each term has a meaning. "Normal work week" for day workers is set out in subclause 25.04(a). It sets conditions on how the normal work week can be changed. It does not create a vested right in being a day worker. It does not say that day work is sacrosanct. The employer has the right to change employees from day workers to shift workers. The limitations cited by counsel for the bargaining agent are not limitations in the federal government sector.

[83] Ms. Armstrong argued that the bargaining agent is suggesting a seniority-based approach that would allow some employees to be day workers and some shift workers. There is no seniority in the collective agreement; this is not a chocolate or cookie factory where people with seniority get preferential shifts.

[84] Ms. Armstrong argued that being a day worker is not part of the classification of inspectors. The collective agreement determines the hours of work. Clause 25.04 only provides that an agreement is necessary when a change is proposed in the length of the day. Clause 25.04 does not apply because it states "except as provided for in 25.09". This is the door out of having only day workers.

[85] Ms. Armstrong submitted that other options in the collective agreement provide for other types of workers. Clause 25.09 refers to "rotating" and subclause 25.09(g) refers to "special arrangements". There is no magic in being hired as a day worker. Section 7 of the *PSSRA* and section 7 of the *FAA* allow for movement from one to the other as long as the rules are followed. The bargaining agent suggested that the employer was at "fault" for negotiating these provisions; the bargaining agent is an equal partner in negotiations.

[86] Ms. Armstrong submitted that clause 25.02 is a broader provision that provides for discussion with the steward at the appropriate level. This requires an assessment of whether the appropriate level is the local or national level. Clause 25.09 only talks about the length of the working day, whereas clause 25.02 talks about what to do when changing the schedule of working hours. This is beyond changing the hours of the workday. Clause 25.02 is overarching and applies unless otherwise specified. Subclause 25.09(g) shows actually how to mutually agree and is an exception carved out of clause 25.02. Clause 25.02 is the default and applies to workers under subclause 25.09(a). There are three levels of interface: clause 25.04 requires agreement and the employer must rely on the bargaining agent to engage in these discussions. When the employer establishes shifts of 9.375 hours, the majority of employees have to agree and no bargaining agent is involved. Clause 25.02 only requires discussion with the appropriate union steward. This involves discussion with someone with a union position, someone involved in union activities. The discussion is to be held before the change. There is no end date on the discussion provided, and discussions can go on forever. However, sometimes there is a need for closure.

[87] Ms. Armstrong argued that even though clause 25.02 requires discussion before the change, it is not always possible to have a discussion prior to change. The events of 9/11 took everyone by surprise. The fact that management discussed shift work in 2000 in management meetings was just reasonable management practice. There was no security threat at the time and discussions were at a high level. Also, at that time

the collective agreement was being negotiated and even if there had been the desire to implement shifts, it was not possible for the employer to do so.

[88] Ms. Armstrong submitted that Article 4 ("State Security)", while not eliminating employer obligations, does soften slightly the stringent aspects of the clause; it requires the employer to do the best it can but not necessarily before the change is implemented. Given the issues that management had to deal with in responding to the threats in the days and weeks following 9/11, it was amazing that management did manage to talk to the bargaining agent as early as it did. The employer went out of its way to minimize the impact through the hiring of new employees, the hiring of a consultant and contacting the Employee Assistance Program (EAP). Given the effect of clause 4.01 and what was going on in the time following 9/11, it is not appropriate to focus on the strict interpretation of clause 25.02 in terms of discussions "before" a change is implemented.

[89] Ms. Armstrong submitted that the Policy 16 Letter on hours of coverage at Class 1 airports was known by employees in the early days of the conference calls. The Policy 16 letter is not subject to consultations or discussions; it sets out operational requirements. Operational requirements are the responsibility of the employer. Under the collective agreement, all the employer had to do was discuss the change to working schedules – and the employer went far beyond this requirement. In British Columbia, David Lee was the appropriate steward and the matter was discussed with him. In the Prairie Region, the appropriate steward was Kerry Williams, and there were discussions with him. The majority of employees were also consulted. What more could the employer have done?

[90] Ms. Armstrong argued that in a workplace without seniority, it is problematic for the employer to agree to have a group of employees not doing shift work while others work shifts. The lack of experience of new inspectors meant that they could not operate on their own. The employer did not impose the shift schedule unilaterally. The employer let employees work out the schedule that best fit their obligations. The status quo of continuing with overtime does not seem fair. Could the employer have such a callous view as to let its employees experience burnout?

[91] Ms. Armstrong submitted that the test should be whether the employer made the best efforts to engage the bargaining agent in discussions. Ms. Armstrong's view was that "discussion" was exceeded here. The employer's actions were a proactive

model of how to behave in the face of a crisis. The employer published a booklet to highlight the efforts made by employees in the aftermath of the events of 9/11 (Exhibit R-9). This "thank you" to employees came from the highest level of management and indicates that the employer went far beyond discussion.

[92] Ms. Armstrong referred me to *Public Service Alliance of Canada v. Treasury Board (supra).* The employer did its share of work in consulting with the bargaining agent. There was no intent to exclude the bargaining agent. The employer did most of the work in consulting. In that case, the adjudicator found that there was no point in continuing with consultation. In this case, the bargaining agent did not propose any option. The Orbis Report clearly demonstrated that employees were coping with the schedules and that a majority liked the schedules. The bargaining agent did not write to its members attacking the study and at this hearing provided no witnesses to attack the statistical validity of the study. The employer met its obligation. Even if I were to find that consultation rather than discussion was required, this does not presume agreement or a union veto. In such a case, the language in the collective agreement would be different.

[93] Ms. Armstrong noted that the bargaining agent's suggestion that seniority be used to address the 16-hour coverage is based on letters of offer and not on the collective agreement. Mr. Wing agreed that the collective agreement carried the day and not collateral documents outside of the collective agreement. The *Merilees v. Sears Canada Inc.* (*supra*) case cited by the bargaining agent is a private contract case and easily distinguishable.

[94] Ms. Armstrong argued that *Piotrowski v. Canadian Food Inspection Agency*, 2001 PSSRB 94, holds that once an employer converts day workers to shift workers, there is no entitlement to overtime. Instead, they are entitled to a shift premium. The grievors did not demonstrate in this case that they are still day workers. In that case, where is their loss? The fact that the conditions were not met under Article 25 in terms of consultation does not change the fact that the grievors are now shift workers. Discussions occurred as early as October 3, 2001. Consequently, the grievors, at most, would be entitled to a declaration and three or four days of overtime, offset by days off and the shift premium. The bargaining agent led very little evidence of what that overtime would be.

[95] Ms. Armstrong disputed the bargaining agent's position that the grievances should go back 25 days prior to the letter from Ms. Landriault (Exhibit A-7). Ms. Armstrong argued that Mr. Knighton grieved in March 2002 and Mr. Hodgson in April 2002. There was no evidence that they did not file their grievances earlier as a result of that letter. They could have grieved earlier and it does not seem fair to allow their grievances to go back as far as the bargaining agent suggests. It was her submission that the grievances should only cover the period commencing 25 days prior to the filing to the grievances.

[96] Ms. Armstrong argued that Mr. Millson, of Orbis Partners Inc., was credible; however, he was not an expert on the health aspects of shift work. The bargaining agent could have provided its own witness on health-related issues. She argued that I should give the Statistics Canada study (Exhibit G-27) absolutely no weight. Mr. Millson had no detailed knowledge of the study. Whether it is true or not that shift work is unhealthy is irrelevant. Ms. Armstrong argued that it was not possible to draw conclusions about desirability of shift work on the basis of new versus pre-September 11, 2001, workers. No correlations were drawn by the consultant. In any event, all workers are important in the employer's view and the employer does not distinguish between new and older employees. Mr. Millson also noted that the definition of "days" in the survey could be interpreted to mean day shifts.

[97] Ms. Armstrong argued that the bargaining agent's position that clause 25.04 is the default position is not tenable. If it is the default, then there would never be any other kind of workers, when the agreement is clear that different categories can be created. The bargaining agent also argued that day work was a "benefit"; it was the employer's position that this was not a vested right.

[98] Ms. Armstrong also submitted that the grievors' request for damages was vague.

[99] Ms. Armstrong argued that, in conclusion, the bargaining agent did not prove its case that the employer violated its obligation to its employees, nor that the employer violated any obligation to the bargaining agent. The employer did its best to accommodate employees and meet its operational objectives of protecting the flying public.

Reply

[100] Mr. Champ submitted that the employer's argument that it treats the bargaining agent as an "organic whole" is not supported by the language of the collective agreement. Although the bargaining agent does act collectively, it has different levels and a component structure. The collective agreement specifies that discussion must be held with the appropriate level and that has a meaning.

[101] Mr. Champ argued that the employer's submission that the claim for damages or consequential losses was a surprise is not true. In the two grievances, the grievors seek as corrective action that they be "compensated for all losses". The grievors asked that they "be made whole". This covers any kind of losses that flow from the breach of the collective agreement. Both grievors had losses. The bargaining agent's submission was that I should retain jurisdiction if the parties cannot agree to the damages owing.

[102] The employer's argument that clause 25.02 is broader than subclause 25.04(a) cannot be supported. Under this interpretation, the employer would not be required to talk to the national president if broader changes are proposed.

[103] Mr. Champ noted that the employer suggested that it was not possible to discuss the proposed change before the decision was made. The language in the agreement has to have some meaning so that if it is impossible to discuss beforehand the employer must pay overtime until it has discussed the matter with the bargaining, agent.

[104] Mr. Champ agreed that the employer is free to make operational decisions based on operational requirements. However, how it compensates employees still has to be in compliance with the collective agreement.

[105] Mr. Champ noted that the *P.S.A.C.* (*supra*) case cited by the employer had a collective agreement provision with an exception for operational requirements. This is not the case here. Similarly, *Piotrowski v. Canadian Food Inspection Agency* (*supra*) was a provision with strict operational requirements.

[106] Mr. Champ submitted, with reference to the employer's position on the retroactivity of the grievances, that the letter from Ms. Landriault (Exhibit A-7) was clear and there was no qualification; it refers to "any related grievances". The employer should be held to that commitment.

REASONS FOR DECISION

[107] Counsel for the employer raised in final arguments the retroactive aspects of the grievances. The agreement to suspend time limits for the filing of grievances (Exhibit A-7) is what it is; there is no room for debate on the effect of that agreement. If there had been no agreement, one can assume that the grievances would have been filed earlier. Consequently, the grievances have full retroactive effect to September 11, 2001.

[108] The Orbis Report (Exhibit E-14) is not of much relevance to these proceedings. If the grievances and section 99 reference related to whether a majority of employees supported the variable hours of work schedules, it might have had some secondary relevance. However, this issue was not before me. Consequently, I have not given any weight to the evidence on the contents of the Report. Similarly, I have given no weight to the study of the health effects of shift work introduced into evidence by the bargaining agent (Exhibit G-27). I had also reserved on the weight to be given to Mr. Knighton's response to a question from Ms. Armstrong on whether he had considered changing jobs. I can give no weight to this evidence, as it is not relevant to the matters in dispute. I note, however, that his answer demonstrated an exemplary commitment to his duties and responsibilities as an inspector.

[109] At the end of the day, not much is in dispute as far as the facts are concerned. The dispute is on the proper interpretation of the collective agreement. In the end, the bargaining agent did not question the operational requirements in the post-9/11 world. There seemed to be general agreement that consultation or discussions had taken place with the bargaining agent and that no agreement had been reached on the changes in hours of work. It was the employer's submission that neither consultation nor agreement was required. There was some debate as to whether management had intended to implement shift work even before September 11, 2001. Nothing hinges on this factor. The issue remains whether the employer has the authority to do so.

[110] The bargaining agent argued that clause 25.04(a) applied, and the employer argued that clause 25.02 applied. I have concluded that neither clause is applicable to this situation. Clause 25.04(a) provides as follows:

> ***25.04*** *(a) Except as provided for in clause 25.09, the normal work week shall be thirty-seven and one-half (37 1/2) hours exclusive of lunch periods, comprising five (5) days of seven and one-half (7 1/2) hours each, Monday to Friday. The work day shall be scheduled to fall within a nine (9)-hour period between the hours of 6:00 a.m. and 6:00 p.m., unless otherwise agreed in consultation between the Alliance and the Employer at the appropriate level.*

[111] Clause 25.04(a) is subject to the broad exception of clause 25.09, the clause that establishes the hours of work for employees who work on an "irregular or rotating" basis. The clause goes on to establish a "normal" work week of Monday to Friday, 7.5 hours per day. The next sentence refers to core hours of work within a nine-hour period between the hours of 6:00 a.m. and 6:00 p.m., with the important proviso that these core hours can be changed on the agreement of the bargaining agent and the employer, at the appropriate level. This requirement to agree refers solely to the core hours of work, and not the average hours of work or the days of work. This would allow for an earlier start time or a later finishing time, if the bargaining agent agreed. However, it does not govern a change of hours of work that has the effect of changing a day worker into a shift worker.

[112] Clause 25.02 provides as follows:

> ***25.02*** *The Employer agrees that, before a schedule of working hours is changed, the changes will be discussed with the appropriate steward of the Alliance if the change will affect a majority of the employees governed by the schedule.*

[113] This clause does not refer to hours of work, but "a schedule of working hours." A schedule is the way that hours and days of work are organized. As stated in *Tornblom* (*supra*), a schedule is a written document. *The Concise Oxford Dictionary* (10th ed.) defines "schedule" as "a timetable". *Webster's Third New International Dictionary* defines "schedule" as "a usually written plan ... for future procedure typically indicating the objectives proposed, the time and sequence of each operation..." In French, the collective agreement refers to "l'horaire des heures de travail". The *Dictionnaire Canadien des relations du travail* defines "horaire de travail" as "répartition des heures de travail à l'intérieur d'une période donnée : journée, semaine ou mois." A schedule can therefore be regarded as a distribution of hours of work within a fixed period. The collective agreement elsewhere reinforces this interpretation of a schedule as a fixed period by referring to the "life of a schedule"

(clause 25.12(b)). I conclude, therefore, that this clause applies solely to proposed changes in the allocation of hours and days of work over a fixed period. In other words, discussion is required when the employer proposes to change a schedule of shifts or days of rest. It does not cover the situation where employees are transformed from "day workers" to "rotating or irregular" workers.

[114] The hours of work article (Article 25) in this agreement sets out two generic regimes for employees: day workers (clause 25.04) and shift workers (clause 25.09). Overlaid on these two regimes is the possibility of variable hours of work for both day workers and shift workers (clause 25.06 and subclause 25.09(g)). (Also, there is provision for part-time workers, which is not at issue here.) For the moment, I will focus on the relationship between clause 25.04 and clause 25.09.

[115] In most cases, what article an employee falls under is not in dispute; jobs are either day jobs or shift jobs and when employees are appointed, they know what their hours of work are. The bargaining agent agreed that the employer had a right to hire new employees as shift workers and it is clear that shift work was a condition of employment for those inspectors hired after September 11, 2001. The issue here is whether an employee hired on the understanding that he/she will be working as a day worker can have his/her hours of work changed so that the employee becomes a shift worker. The bargaining agent argued that being a day worker was part of the terms and conditions of employment. In the letter of offer that Mr. Hodgson received (Exhibit G-5), there was no mention of his hours of work. I accept his testimony that he accepted the job on the understanding that it was a day position. However, the primary source for terms and conditions of employment remains the collective agreement.

[116] The issue of the transition from day work to shift work has not arisen often in the *PSSRA* regime. However, there have been a few decisions that bear some analysis. Two decisions involve primary products inspectors and collective agreement provisions that are identical to the provisions in this case: *Freitag, Jorgenson, Souster, Waruk and Willis v. Treasury Board (Department of Agriculture),* PSSRB File Nos. 166-2-8086 to 8090 (1980), and *Paynter v. Treasury Board (Agriculture and Agri-Food Canada),* PSSRB File Nos. 166-2-27186, 166-2-27378 and 166-2-27379 (1997) (QL). Before examining those cases, it is necessary to look at an earlier decision of the Board: *Zirpdji v. Canada (Treasury Board),* PSSRB File No. 168-2-98 (1976) (QL). An analysis of

these decisions leads to the conclusion that the employer can transform day workers into shift workers without the agreement of the bargaining agent.

[117] *Zirpdji* (*supra*) was a complaint under section 23 of the *PSSRA* on a question of law and jurisdiction arising from an adjudicator's decision (PSSRB File Nos. 166-2-1768 and 79). In that case, the employer had changed the hours of work of immigration inquiry officers and court stenographers from Monday to Friday to include weekend work. The grievances claimed overtime for the weekend days on the basis that the change from day work to shift work was in violation of the collective agreement. The collective agreement included the following provision:

> *Where scheduled hours are to be changed so that they are different from those specified in clause 25.02* [normal hours of work], *the Employer, except in cases of emergency, will consult in advance with the Alliance on such hours of work and, in such consultation, will establish that such hours are required to meet the needs of the public and/or the efficient operation of the Service.*

[118] The Board concluded:

> [...]
>
> *...Any work day starting before 7:00 a.m. and/or terminating after 6:00 p.m. is not day work according to clause 25.02. As the only alternative to day work is shift work, the adjudicator did not err in law when he arrived at the following conclusion:*
>
> > *Any work which does not come under the definition of day work under clause 25.02 is in my view shift work under clause 25.06 and would come within the meaning of the words "on a rotating or irregular basis" in accordance with what I deem to be the intention of the parties at the time they signed the agreement, having regard to all the provisions thereof.*
>
> [...]
>
> *As mentioned by the adjudicator, clause 25.06 is the most important provision involved in this grievance. The opening sentence of clause 25.06 reads as follows: "When, because of the operational requirements of the service, hours of work are scheduled for employees on a rotating basis ..." At page 17 of his decision, the adjudicator finds, as a finding of fact, that the operational requirements of the service necessitated the change made by the employer. The remainder of the*

> *phrase establishes that under certain conditions, that is, the operational requirements of the service, hours of work may be scheduled on a rotating or irregular basis. In the light of the other provisions of article 25, the new schedule of work applicable to the aggrieved employees can be considered as being within the purview of clause 25.06. After it establishes this principle, the clause determines the mechanism the schedule should follow. Consequently, the finding of the adjudicator that, taking into account the managements' prerogative, there is an inference that the employer was entitled to make the change, is, in our view, an interpretation which is consistent with the provisions of the collective agreement.*
>
> [...]

[119] *Piotrowski* (*supra*) is similar to *Zirpdji* (*supra*) in that the article provides for a change in hours of work on the basis of operational requirements. In *Piotrowski*, the adjudicator concluded that the clause recognizes that management has the right to modify hours of work and to change them from a non-shift work to a shift work basis because of operational requirements. The Federal Court upheld the decision: [2003] F.C.J. No. 990.

[120] In *Freitag* (*supra*), primary products inspectors had a similar change in their hours of work, with the addition of weekend work to what had been a Monday to Friday schedule. The adjudicator concluded that there were no material differences in the hours of work provisions in the two collective agreements and that the "sweeping proposition" contained in *Zirpdji* (*supra*) "admits of no exceptions":

> [...]
>
> *... I find the ...* [Zirpdji decision] *to be controlling. "The only alternative to day work is shift work". Thus, it would seem that, however infrequent the rotation, for the Employer to schedule a worker, on a regular basis, to work on what would otherwise be a day of rest, is to transform that individual worker from a day worker to a shift worker, in the Public Service...*

[121] In *Paynter* (*supra*), primary products inspectors in Prince Edward Island had their days of work changed from a Monday-to-Friday schedule to a schedule that included a mixture of Monday to Friday and Tuesday to Saturday (half of the staff worked Monday to Friday, and the other half worked Tuesday to Saturday). Prior to the change in schedule, the inspectors were considered "day workers" and fell under the equivalent clause to clause 25.04. The adjudicator concluded that the employer

had breached its duty to discuss the change with the bargaining agent (as provided for in a clause identical to clause 25.02 in this case). He also concluded that the employer had the authority to modify working hours pursuant to section 7 of the *PSSRA*, section 7 of the *FAA* and the various clauses under the hours of work article of the collective agreement.

[122] The employer referred me to *P.S.A.C. v. Treasury Board* (*supra*). This case involved immigration investigators and the introduction of shift work. There was a clause in the collective agreement, similar to those in *Zirpdji* (*supra*) and *Piotrowski* (*supra*) that required the employer to consult in advance with the bargaining agent and to "establish that such hours are required to meet the needs of the public and/or the efficient operation of the Service". The bargaining agent argued that the employer had not established the operational requirement for shift work and did not dispute that the employer had the authority to introduce shifts if operational requirements were established. In the case before me, the bargaining agent has not disputed the operational requirements for the hours of operation specified in Policy Letter 16 (Exhibit G-16).

[123] Counsel for the bargaining agent referred me to the *National Film Board* decision (*supra*). That case involved the imposition of a work week different from the one specified in the collective agreement. I agree that it is not open to the employer to change the hours of work to something not contemplated by the collective agreement. However, in the case before me, the hours of work are contemplated by the collective agreement. Similarly, in *Re Northern Electric Office Employee Association* (*supra*), the hours of work imposed were not set out in the collective agreement. In *Anchor Cap* (*supra*), employees were classified as seven-day workers and five-day workers and the Board held that the employer could not change five-day employees to seven-day employees without paying overtime. In the case before me, employees are not classified by hours of work and the principle articulated in *Anchor Cap* is not applicable. Similarly, in *Re United Glass and Ceramic Workers, Local 248* (*supra*), the grievor was classified as a day worker.

[124] The *Zirpdji* (*supra*) decision and subsequent decisions under the *PSSRA* have not clearly articulated the source of management's authority to change hours of work from day work to shift work. The scope of management rights under the *PSSRA* regime has been outlined by the Federal Court as follows: the Treasury Board may do that which

is not specifically or by inference prohibited by the statute or the collective agreement (*Brescia v. Canada (Treasury Board)*, 2004 FC 277).

[125] The employer relied on section 7 of the *PSSRA*:

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

[126] The employer also relied on section 7 of the *FAA*:

> *7(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to*
>
> [...]
>
> *(e) personnel management in the public service of Canada, including the determination of the terms and conditions of employment of persons employed therein;*

[127] I find subsection 11(2) of the *FAA* to be more specific in its application to this case:

> *(2) ...notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> *(a) determine the requirements of the public service with respect to human resources and provide for the allocation and effective utilization of human resources within the public service;*
>
> [...].
>
> *(d) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any matters related thereto;*
>
> [...]

[128] It is clear that the general management rights conferred on the Treasury Board may be substantially circumscribed by negotiated terms and conditions of employment contained in a collective agreement (e.g., see *Public Service Alliance of Canada v. Canadian Grain Commission* (*supra*). In this case, I have determined that the collective agreement does not restrict the right of the employer to determine the hours of work such that an employee who was formerly a day worker becomes a shift worker. There is still an obligation on management's part to consult with the bargaining agent on such fundamental changes in conditions of employment (see the joint consultation article – Article 21).

[129] There was some dispute about the consistent treatment of employees in the weeks following 9/11, in terms of overtime. The evidence at the hearing did not resolve this dispute. However, there was no grievance or application before me on the consistent treatment of employees with regard to overtime. I therefore do not need to come to a conclusion on this aspect of the evidence. I encourage the parties to discuss consistency in the payment of overtime and other benefits for employees who were in the same situation.

[130] Mr. Champ alleged, in the alternative, that the employer did not even meet its obligation to consult, pursuant to clause 25.02. I have already concluded that the obligation contained in clause 25.02 (to discuss changes to a schedule of working hours) is not applicable. I have also concluded that the Joint Consultation provision in the collective agreement (Article 21) could apply to these changes in working conditions. However, there was no allegation of a breach of this article in the grievances or the section 99 reference and I cannot address it.

[131] Counsel for the employer raised the lack of seniority in the federal public service, as well as the absence of "grandfathering", as a justification for the decision to change the hours of work for all inspectors. She argued that the employer was required to treat all employees the same and could not have day workers and shift workers in the same positions. I see no restriction in the collective agreement to such a hybrid arrangement. The employer successfully imposed such a hybrid arrangement in *Paynter* (*supra*). I am not questioning the employer's operational reasons for imposing shift work on all employees in this case; I am only noting that the constraint on the employer is not a legal one.

[132] The employer introduced evidence and argument on the majority support for variable hours of work, under subclause 25.09(g) of the collective agreement. This was not an issue that was properly before me. The scope of the grievances and the application was limited to the question of the authority of the employer to impose shift work. I therefore come to no conclusion on whether there was majority support for variable hours of work.

[133] There was evidence throughout the hearing of the good will of employees, the bargaining agent and the Department in ensuring the highest level of safety and security for the Canadian public. The RSIs have made a significant sacrifice in their lifestyle to meet these enhanced safety and security levels and should be commended for their commitment to their duties and responsibilities. I encourage the parties to continue their dialogue on the best ways to balance this commitment to enhanced safety and security with the best interests of the employees performing these critical functions.

[134] In conclusion, the grievances are denied. In addition, the reference under section 99 of the *PSSRA* is dismissed.

Ian Mackenzie,
Board Member

OTTAWA, March 31, 2005.