Date: 20210202

File: 566-02-13910

Citation: 2021 FPSLREB 11

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PEDRO SOUSA-DIAS

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Sousa-Dias v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Abudi Awaysheh, Grievance and Adjudication Officer

For the Employer: Marc Séguin, counsel

Decided on the basis of written submissions filed August 18, September 8 and 15, 2020 and a videoconference hearing held on December 14 and 21, 2020.

REASONS FOR DECISION

I. Grievance before the Board

[1] Pedro Sousa-Dias ("the grievor") is a border services officer ("BSO") employed by the Canada Border Services Agency ("the employer"). He works at the Lansdowne Port of Entry ("POE") at the Thousand Islands Bridge, an international crossing located between Kingston and Brockville, Ontario.

[2] Driving to work on February 26, 2014, the grievor had a flat tire caused by a nail. He missed one shift. The employer denied him "leave with pay for other reasons" also known as "6990 leave" pursuant to clause 52.01(a) of his collective agreement. That clause provides for discretionary leave with pay when circumstances not directly attributable to the employee prevents him or her from reporting for duty.

[3] The Public Service Alliance of Canada (the "union") argued that the grievor had made reasonable efforts to have the tire repaired but was unable to do so until the next morning. Driving to work on a punctured tire or a spare, as suggested by the employer, would have been dangerous. The employer's other proposed options for getting to work were not mentioned to him at the time and none had been reasonably available.

[4] The employer alleged that the grievor's claim that he could not get his tire fixed that day was false, that by being re-inflated it was repaired enough to get him to work, that it did not need to be replaced immediately, that he had failed to explore other options and had simply chosen not to attend work.

[5] This matter was to be heard by way of written submissions. However, the submissions filed revealed more factual disputes between the parties than had been expected. Accordingly, two days of hearings were subsequently scheduled. The grievor testified, as did the two co-chiefs of the POE at the time, Chief Mark Pegunas and Acting Chief Tammy Kendrew. A/Chief Kendrew had made the decision to deny the leave. She had discussed it with Chief Pegunas who completely supported it. They explained that as co-chiefs they have equal authority and that their working style was to discuss everything.

[6] Having considered the written submissions and the testimony provided at the hearing, and for the reasons that follow, I find that the grievor was prevented from

reporting to work by circumstances not directly attributable to him and that the employer unreasonably denied him leave with pay, contrary to clause 52.01(a) of the collective agreement.

II. Issues

[7] The issues raised by this matter are as follows:

1) Were there circumstances not directly attributable to the grievor that prevented him from reporting to work that day?

2) Did the employer unreasonably deny him leave with pay?

III. Collective agreement language

[8] Clause 52.01(a) of the Border Services collective agreement between the union and the Treasury Board, which expired on June 20, 2014 ("the collective agreement") reads as follows:

> *ARTICLE 52*
>
> *LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS*
>
> *52.01 At its discretion, the Employer may grant:*
>
> *(a) leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld; …*

IV. Summary of the evidence

[9] The address of the Lansdowne POE is 860 Highway 137, Ontario. At the time the grievor lived near Harrowsmith, a rural Ontario community 74 kms from the POE. It typically took him 56 minutes to drive to work. There is no public transit available to the worksite from his home or from Kingston, the closest city to the port of entry.

[10] On February 26, 2014, the grievor's shift was from 2:00 p.m. to 10:00 p.m. He left home at 1:00 p.m. and soon realized that he had a flat tire. Lacking cell phone service in the area, he returned home and called his supervisor, Sean Geraghty, to tell him that he would be late for work and that he was trying to get an appointment with a garage. Superintendent Geraghty told him to call back when he knew more.

[11] He called several service garages, including the Hyundai dealership where he had bought the car ("Hyundai"), to find one that could fix his tire. Midas Automotive in

Kingston (“Midas”) was the only garage that would look at his car that day. Like the others, Midas had no same day appointment, but he pressed the issue and they told him to come in for 4:30 p.m., after the last appointment of the day. He waited at home. Other than checking the tire to try to find the cause of the problem, he did nothing further until he left to go to Midas.

[12] He inflated the tire with a portable pump before leaving home. He avoided the 401 which he would normally take to work and drove the 25 kms, first on a country road and then on Hwy 38, a two-lane highway. He had to stop two or three times to pump up the tire; the last time was when he had just reached Kingston.

[13] Having not heard back from the grievor, Superintendent Geraghty called him at 3:30 p.m. for an update. Both employer witnesses stressed that the superintendent should not have had to call for an update; the grievor should have kept him informed. The grievor advised that he had a 4:30 p.m. appointment at Midas to get his tire fixed and then he would be in to work.

[14] However, Midas determined that the tire could not be repaired and would have to be replaced. They did not have the right size tire for his car and advised that his best bet would be the Hyundai dealership. Midas was closing for the day, the invoice was printed at 5:04 p.m.. The technician pumped air into the tire so that the grievor could drive the short distance to Hyundai and advised him that it would not be safe to drive home on the highway.

[15] The grievor drove to Hyundai, which was now also closed, and left his car there so that the tire could be replaced the next morning. He called Superintendent Geraghty at 6:00 p.m. and advised that Midas could not fix his tire, that he had no other way to get to work, and that he would be taking 6990 leave.

[16] Both employer witnesses expressed concern about the way the grievor mentioned 6990 leave to the superintendent. They alleged that he failed to properly request what they consider to be a special, rarely granted, discretionary leave. Rather, he simply told the superintendent that he would be taking this leave, assuming his entitlement to it. I did not hear from Superintendent Geraghty but the grievor did not dispute the employer’s characterization of the conversation.

[17] He testified that when employees call in to say they could not come to work, the superintendents usually ask what kind of leave they would be taking. He knew other employees who had been granted 6990 leave when car issues prevented them from getting to work, so he did assume he would be entitled to it in the circumstances. Mr. Geraghty advised that that would be up to the chief but that he would mark it down as 6990 leave, subject to the chief's authorization. The grievor testified that that was common and not unexpected; he knew that the chiefs, not the superintendents, authorized 6990 leave.

[18] Rather than incur the cost of a taxi home, he waited in a Tim Horton's coffee shop until 8:00 or 8:30 p.m. for a friend to give him a lift home. The grievor's wife is a high school teacher and wrestling coach. She could not pick him up as she was away at a tournament at the time. The grievor testified that he would have used her car to get to work had she been in town.

A. Midas and Hyundai documentation

[19] The union introduced the grievor's Midas invoice for $38.41 and the Courtesy Check report attached to it. The technician's notes on the Courtesy Check state: "Needs L/R Tire Replaced. Has a Nail to [sic] close to sidewall to repair." Also introduced was the Hyundai Service Report which states: "Repair left rear tire – nail in tire" and shows the purchase and installation of a new tire for a total of $170.45. The employer challenged the contents of this documentation in a number of ways.

[20] Firstly, it noted that the Midas invoice seemed to indicate that the appointment was for an oil change and not to replace a flat tire. The employer witnesses, however, did not suggest that the grievor did not have a flat tire, but simply indicated that, in their view, taking the time to get an oil change while seeing to the flat tire did not demonstrate that the grievor was applying his best efforts to get to work.

[21] The grievor explained that the service Midas provided by lifting the car to check the tire was done as a courtesy. However, the technician told him that he was behind in his scheduled maintenance and suggested that they could do an oil change at the same time, as the car would be up on the hoist anyway. It had been tough to get a same day appointment anywhere and he had had to press the issue to get Midas to look at his tire. He had squeezed himself in at the end of their day. When they suggested that an

oil change could be done at the same time, he felt obligated to agree so as to pay something for their time.

[22] The employer also noted that the Midas technician had marked the status of each Courtesy Check item in one of three columns: "No Work Required," "May Require Future Attention," or "Immediate Attention." Although the technician had noted that the grievor's left-rear tire had a nail in it and had to be replaced, under the "Wear Pattern/Damage" section he had checked "May Require Future Attention" for the left rear tire. The employer argued that if the tire required immediate replacement the technician would have checked the "Immediate Attention" column.

[23] The union replied that the employer was reading the Courtesy Check report incorrectly. The tire-check column records tire pressure and tread depth, not whether or not a tire has a nail in it. The black-and-white copies do not show that the three boxes are coloured green, yellow, or red. The only tire with a mark in the yellow box is the left-rear one. It showed signs of wear, whereas the other three tires were marked as being in good or "green" condition. It was not surprising that the only tire showing wear on an eight-month-old car was the same one that had to be repeatedly pumped with air on the way to Midas.

[24] The employer stated that four hours had elapsed from when the grievor first left his home at 1:00 p.m. to his arrival at Midas at 5:04 p.m. yet at that time the left-rear tire pressure was at 27 psi, compared to 29 and 30 psi for the other three. The loss of 3 psi during that elapsed time was not alarmingly low, and in any event, if the tire really needed immediate replacement, there would have been no need to increase its pressure from 27 to 30 psi.

[25] The evidence was that the grievor arrived at Midas at 4:30 p.m., the invoice was printed at 5:04 p.m.. The evidence also indicated that he had manually pumped up the tire before leaving home and several times along the way; the last time being just as he entered Kingston. The tire did not lose only 3 psi over four hours as suggested by the employer. And, the evidence was that Midas increased the pressure to 30 psi to assist the grievor to drive to Hyundai, as it could not replace the tire.

[26] The Hyundai Service Report indicates: "Repair left rear tire – nail in tire." Attached to it is the Sym-Tech Automotive Protection, Tire-Gard Road Hazard Warranty Claim Form. The Warranty Claim Form states: "This Form must be completed by the

Vehicle Selling Dealer In Its entirety and approved by the Service Manager." The form was duly completed. For "TYPE OF CLAIM", two boxes may be checked, one for repair, the other for replacement. The form indicates that the box for replacement is to be checked "only if tire is irreparable". The box for replacement was checked on the form.

[27] The union submitted that the following paragraph of the employer's submission was not based on evidence and was offensive:

> *The evidence suggests that the left rear tire needed to be re-inflated.* ***It is false that the grievor was told that his tire could not be repaired.*** *It was repaired and was given added tire pressure. There is no indication by the Midas technician that the left rear tire needed to be immediately replaced.* ***The grievor simply chose to take advantage of the situation and not report to work.***
>
> [Emphasis added]

[28] The grievor took exception to the employer's allegation that it was false that he had been told his tire could not be repaired. He testified that he is keenly aware of his obligations as a peace officer and, apart from that, he was highly offended by these statements on a personal level. For his employer to suggest that he would lie about a tire was ridiculous.

[29] Equally offensive was the suggestion that he was taking advantage of the situation to get a day off, when, in fact, he had been running around Kingston trying to get his car fixed. As the union put it:

> *BSO Sousa-Dias was stuck in Kingston doing nothing waiting inside a Tim Hortons during this freezing weather, it was impossible for him to go home, but the employer submits without any evidence that he was "taking advantage" of the situation, but has not explained what he was actually doing while he was "taking advantage" of the situation. Its not an advantage for a working person, to be stuck in a Tim Hortons waiting to be picked by a friend so that they can return home because their car had a tire that needed to be replaced.*
>
> [*Sic* throughout]

[30] Both chiefs sought to distance themselves somewhat from the employer's position that it was false that the grievor had been told that his tire had to be replaced. A/Chief Kendrew had never seen the technician's notes or any of the Midas courtesy

check report. Chief Pegunas had seen the document, although it was not clear when he had seen it. He was not aware that it said that the tire had to be replaced. When specifically directed to the technician's notes, he agreed that they contradicted the employer's allegation that the grievor had not been told that his tire had to be replaced. Ultimately, when faced with this evidence both witnesses accepted that the tire had to be replaced. However, they still questioned whether it had to be replaced immediately and still felt that best efforts had not been made to get to work.

[31] A/Chief Kendrew testified that having now seen the Midas documentation, it indicated to her that the tire had to be replaced, but that did not necessarily mean immediately. He should have come to work and dealt with replacing the tire later. She did not know if the grievor had a spare. She knew that some car models had ceased to include them and sold them in separate kits instead. She said that, personally, if she lived remotely like the grievor she would have had such a kit, just in case, to ensure that she could always get to work.

[32] She agreed that safety was paramount. However, she disagreed with the grievor's testimony that the trip to the port and home again after his shift would not have been safe on a spare. He testified that spare tires were called "donuts" for a reason - they were not meant for driving any distance on the highway but were just to get you to the nearest garage. She countered that she had driven 100 kms on a spare to get to work. It was not ideal, you had to take it easy and drive very slowly but with caution and slower speed it could be done. However, she acknowledged that she had done this in the early evening in May, just getting into dusk, and agreed that the temperature would be colder and the road conditions likely worse on a February night.

[33] A/Chief Kendrew also acknowledged that this kind of effort may not be expected of the average convenience store employee, for example. However, she felt very strongly that there are different expectations of peace officers. They carry guns, it is very important that they show up at work when expected, for the safety and good stewardship of the port, that is, the avoidance of the need to bring someone in on overtime. She did not dispute that the port was slow in winter and that it could not be assumed that overtime would necessarily have been incurred to cover the grievor's shift. She said that it might have been required, but she did not know.

[34] The employer also noted that the Hyundai Service Report showed an odometer reading of 25 741 km, which was 23 km more than what was recorded at Midas. Therefore, the car had been driveable for at least 23 km after the grievor left Midas which further suggested to the employer that the tire had been repaired simply by being re-inflated. The grievor could have driven to work to complete his shift but simply chose not to.

[35] The grievor testified that he did not know why there was a discrepancy in the two odometer readings. These events occurred six years ago and he did not remember anything that would explain it. He speculated that he might have driven around Kingston to see if other garages were still open, before leaving the car at Hyundai which he knew would be closed. There are others in the area near Midas that he had used in the past. However, he could not remember for sure.

[36] Alternatively, Hyundai or Midas could have simply recorded the odometer reading incorrectly. Hyundai, for instance, recorded only the odometer 'in' not 'out' perhaps indicating that the reading had not been done carefully. The grievor stated that he could only speculate, he simply did not know. He did note that had he gone home and returned, if that was the employer's implication, that would have added 50-60 kms to the odometer reading, not 23 kms.

B. Failure to explore other options

[37] The employer took the position that the grievor should have made it in to work on his punctured but re-inflated tire, or by using a spare, if he had one. However, it also argued that he had failed to explore other options to report to work, for example, using his wife's vehicle, a carpool, a taxi, a rental vehicle, getting his friend to drive him to work instead of home or having a port vehicle sent to pick him up. Chief Pegunas also suggested a hybrid solution. He could have taken a cab to Gananoque, halfway between Kingston and the port, and a port vehicle could have picked him up from there, thus reducing the expense of the taxi option.

[38] According to the employer, the grievor had failed to have a conversation with the superintendent about whether there might have been other means for him to get to work. Had he done so, some of these options might have been available. Even if they weren't, the point was that he did not explore them.

[39] The grievor testified that he would have used his wife's vehicle had it been available, but it was not. His wife was away at a tournament.

[40] He testified that he had never carpooled and it did not occur to him to try and do so. Such arrangements are made in advance and the participants wait at a specific place and time to be picked up. He did not believe it would be possible to suddenly find a carpool to join, especially in the middle of a shift. A/Chief Kendrew testified that it was not impossible as there were different shift start times. However, there was no evidence that there actually was a car pool that might have been leaving Kingston at 6:00 p.m. or that, if there was, that this information had been given to the grievor.

[41] The grievor acknowledged that a taxi was possible but that it would have been prohibitively expensive. Even for a one way 50 km trip from Kingston he would likely have been charged for the return trip as well, as it would have been outside the cab company's catchment area. As well, the return home after his shift would have been another costly 74 kms by cab. The Commuting Assistance Directive recognizes that the cost of a taxi is prohibitive. It lists only "taxi pools" as being eligible for commuting assistance, not individual taxi use.

[42] The grievor testified that the option of a rental car did not occur to him as he was not in the habit of renting cars. A/Chief Kendrew offered the candid opinion, based on her knowledge of the area, that there was no likelihood of finding a rental agency open at that time. Chief Pegunas did not suggest otherwise but still felt that it had been an option that the grievor should have explored. The union submitted an internet search from September 15, 2020 that showed 20 car rental businesses in the Kingston and surrounding areas. Only two were open after 5:00 p.m., one in Brockville, 85 kms away and 40 kms past the port, and one in Alexandria Bay, 64 kms away in New York state. The union pointed out that those were summer season hours and that February hours would be, at best the same, or possibly shorter.

[43] A/Chief Kendrew stressed that the grievor's friend who picked him up at Tim Horton's could just as well have driven him to work, as home. The grievor testified that he did not think it would have been reasonable to ask his friend to drive him 50 kms to the port and pick him up after his shift.

[44] Use of a port vehicle would have to have been authorized by the employer. The grievor testified that the employer did not offer to send a port vehicle to pick him up,

or even mention it as a possibility. He had never heard of a port vehicle being used in this way. Neither chief mentioned any instance of a port vehicle being sent for an employee who was having difficulty getting to work due to vehicle issues.

C. The aftermath

[45] The grievor stated that he went to have a conversation with A/Chief Kendrew about this matter because he knew the chiefs had to authorize 6990 leave. She stated that it should be no problem and that most likely they would pay him under 6990 leave, but she told him she needed a summary of his information. When they first spoke, Chief Kendrew seemed to agree that his situation fell under clause 52.01 but a few days later his request was denied. This conversation was not specifically put to A/Chief Kendrew. However, she testified generally that she did not recall speaking to the grievor and speculated that he would likely have been in contact only with his direct supervisor.

[46] The grievor provided his summary on March 5, 2014 and the acting chief emailed him in response: "After consulting with L.R. [Labour Relations] when you originally spoke to me on the request, I was advised that 6990 would not apply in this case so therefore, I denied the request...." This email corroborates the grievor's testimony that they spoke about this matter, but not specifically what was said.

[47] The email exchange continued the next day when the grievor asked for the rationale for the decision and the acting chief responded: "The rationale is that it is the employee's responsibility to get into work." In the grievor's view this was simply a statement of position. It did not provide a rationale for the decision or answer the question he had posed.

[48] He filed the grievance on March 9, 2014. The employer denied it at the final level on February 21, 2017 as follows: "… after careful consideration of all the facts available to [the employer], I find that you did not demonstrate that you made every effort possible to report to work." The grievance was referred to adjudication on March 29, 2017.

D. Inconsistent treatment of employees

[49] The grievor testified that he could think of three comparable situations in which other employees, whom he named, had been granted 6990 leave. One was a co-worker

who could not attend work due to a snowstorm. He was authorized to stay home and was granted 6990 leave. The second was a co-worker who had a mechanical issue with his car on the way to work and had been granted 6990 leave. He had not provided any documentation from garages; the employer simply took his word. The third was a co-worker who lost shingles off his roof in a windstorm. He asked Chief Pegunas for four hours of 6990 leave to fix his roof and was granted it. The grievor was sure that this incident occurred prior to his flat tire incident. He was not sure if the other two events had occurred before or after.

[50] Chief Pegunas testified that 6990 leave was a special leave, rarely requested or granted. He had only granted it three or four times in a 30-year career. As it was not meant for a specific circumstance, like vacation or sick leave, it could be abused. Management had to be very careful about consistency and, therefore, always consulted with labour relations. He said that there were a number of tests applied to the granting of it, but did not say what they were.

[51] The chief did not address the grievor's allegation that three named employees had been granted 6990 leave. When asked about it in cross-examination he could neither confirm nor deny it. He did not recall the employee who had car troubles or the one in the snowstorm but did not deny these allegations. He vaguely confirmed the allegation about the employee who had roof shingle issues by saying that that one was "possible." He said that while he had only granted 6990 leave a few times, others may have granted it more often.

[52] He did recall an administrative clerk who had tried to get into work in a snowstorm, had slipped off the road and been towed home. She tried again when the plows came through, but by then the snow was drifting, she felt very uncomfortable, called in and said she could not do it. He testified that the employer felt that she had really tried and granted 6990 leave. This employee was not one of the three mentioned by the grievor.

[53] Similarly, A/Chief Kendrew said that she had only been asked for 6990 leave half a dozen times in her career, although it had recently become a more frequent request due to the pandemic. She did not recall anything about the other employee with car issues whom the grievor alleged had received 6990 leave. Or the one whom the grievor alleged had been granted it when he could not attend work due to a

snowstorm. As for the employee who Chief Pegunas agreed had "possibly" been granted four hours of 6990 leave to deal with his roof shingles - she indicated that she did not know about it.

V. Submission of the union

[54] The union noted that it was not directly attributable to the grievor that he had a nail in his tire, nor that Hyundai could not give him an appointment on February 26, nor that Midas was unable to install a new tire for him, such that he had to leave it with Hyundai to replace the next day. It would have been unsafe for the grievor to drive to work and home again on a punctured tire that had simply been re-inflated, or on a spare tire.

[55] Taking a cab more than 50 km one way and then another for the 74 km trip home was not economically feasible and was not required of other employees. There is no public transit to the POE and other employees who have had car problems or snow issues received 6990 leave.

[56] Neither A/Chief Kendrew who made the decision, nor Chief Pegunas with whom she discussed it, had all the information. They had only the grievor's email summarizing the situation. They did not have the invoices. They did not have a statement from Superintendent Geraghty. They did not speak to the grievor to understand the details of his situation. They did not ask if he had a spare tire or if his wife's car had been available. They did not put any of their suggested options to him to find out if he had tried any of them and, if not, why not.

[57] Suggesting that the grievor lied about what he was told about the state of his tire was inappropriate and offensive. It is the kind of statement that those in power say to those who are not in power, to an employee who just tries his best to show up for work.

[58] The employer's evidence about the administrative clerk who was granted 6990 leave is telling. She tried to drive to work from a rural area in a snowstorm, slid off the road, got towed home, tried again later when the plows went through but encountered drifting snow. The employer decided that she had really tried and granted her 6990 leave. This indicates the kind of heroic efforts required to be granted leave.

[59] The case law requires that the grievor must have made reasonable efforts to get to work. The employer's position requires that every effort possible be made. That is not in harmony with the jurisprudence.

VI. Submission of the employer

[60] The employer argued that the tire had been sufficiently repaired, that it did not have to be replaced immediately, or if it did, the grievor should have used a spare, if he had one.

[61] He had decided unilaterally that he would not come to work. He stated that he would take 6990 leave, rather than requesting that he be granted it. He made this decision without discussing other means of getting to work with the superintendent.

[62] The employer would have liked to have seen a more robust engagement from the beginning, at least a second call to the superintendent before the superintendent had to call him. Had the grievor had a conversation earlier with his supervisor about different ways of getting to work, other solutions such as sending a port vehicle, would have come up.

[63] The grievor had not bothered to explore any other options, such as using his wife's vehicle, a carpool, a taxi, a rental car, having a port vehicle pick him up, or having his friend drive him to work. Whether these options were available or not, the point was that the grievor made no effort to explore the possibilities.

[64] The employer noted that the granting of leave under clause 52.01(a) is discretionary, that cases of this type are fact driven and each must be examined on their own merits. The burden of proof is on the grievor.

VII. Reasons for decision

A. Port of Entry only accessible by personal vehicle

[65] The employer submitted that where the grievor chose to live in relation to his work site is his personal choice, but it remains his responsibility to report to work on time. The employer cited *Steele v. The Treasury Board (Post Office Department)*, PSSRB File No. 166-02-633 (19720920) in which an adjudicator concluded that a grievor's inability to report for work was partly due to where he lived, far from his workplace, in an area not served by public transit. The former Board in that case held

that the grievor could live wherever he wished but that he, not the employer, had to bear the inaccessibility risk.

[66] It is difficult to understand why the employer would make this submission and cite *Steele* to support it. This case has nothing to do with where the grievor lives; it has to do with the POE's location off a highway, nowhere near a residential area, and not served by public transit. *Steele* does not apply. It was undisputed that all employees of the POE qualify for transportation assistance to use their personal vehicles to get to this remote worksite. The *National Joint Council's Commuting Assistance Directive*, dated June 1, 2010 states as follows:

> …
>
> *This directive applies to all employees at a worksite where commuting assistance has been authorized, and does not apply:*
>
> …
>
> *(d) where adequate public transportation operates between a worksite and a suitable residential community, irrespective of the distance criteria;*
>
> …
>
> *1.1 The deputy head will authorize commuting assistance only when:*
>
> *(a)* ***adequate public transportation is not available*** *between a suitable residential community and the worksite; and*
>
> *(b)* ***no suitable residential community is located within a road distance of 16 kilometres*** *from the worksite using the most direct, safe and practical route.*
>
> …
>
> *4 Types of Assistance*
>
> *Commuting assistance will be provided by the use of Crown-owned vehicles, charter services,* ***taxi pools****, subsidized regular commercial transportation fares, or the use of privately-owned vehicles.*
>
> [Emphasis added]
>
> …

B. Midas and Hyundai documentation

[67] A/Chief Kendrew did not have the service garage documentation when she made her decision to deny the grievor 6990 leave. That decision was conveyed to the grievor on March 5, 2014 and the invoices were provided later, on March 16, 2014. The acting chief did not reconsider her decision when this additional information

was provided. In fact, she never saw these documents until they were put to her on cross-examination. It seems that this information was considered by the employer during the grievance procedure. However, the acting chief testified that she had had nothing to do with the grievance procedure. Chief Pegunas had seen these documents before, however, he was unaware that they indicated that the tire had to be replaced until specifically referred to the Midas technician's note on cross-examination.

[68] The Midas technician's note is clear: "Needs L/R Tire Replaced. Has a Nail to [sic] close to sidewall to repair." The Hyundai warranty claim form is equally clear. Hyundai checked the appropriate box for the tire replacement to be covered by warranty. The form indicates that replacement is covered by warranty only if the tire is irreparable. By checking the box, Hyundai verified that it was. The grievor provided evidence from two different automotive service garages stating that the tire was irreparable and had to be replaced.

[69] Only when presented with this evidence, apparently for the first time, did the chiefs accept that the tire had to be replaced. However, even then they did not accept that it necessarily had to be replaced immediately.

[70] It is true, as the employer pointed out, that neither document stated in writing that the tire had to be replaced immediately. Nor do we know if the Midas technician used the word "immediately" when telling the grievor that his tire had to be replaced. However, the grievor testified that Midas specifically advised him that it would be unsafe to drive on the highway. Consistent with that advice, he did not drive either to his home or his workplace, both of which entailed considerable distances of highway driving.

[71] The grievor's actions fully corroborate that he received this advice. It would have been a great deal more convenient to drive 25 kms home and back to Hyundai the next day, if he thought it would be safe to do so. Instead, he left his car at Hyundai and waited until 8:00 or 8:30 p.m. at a Tim Horton's coffee shop for his friend to give him a lift home. He did not get home until 9:00 or 9:30 p.m.. He also had to ask his friend to drive him back to Hyundai in the morning, as his wife was away. The employer effectively suggested that rather than drive a safe and operable vehicle, the grievor chose to inconvenience himself and his friend to that extent, simply so that he could

"… take advantage of the situation and not report to work." This is not a credible position.

[72] The employer effectively suggested that the grievor should have ignored Midas' advice, as well as his own judgment, and set out on the highway, after 5:00 p.m. when the garages were closed, to drive approximately 50 kms to a remote location off the highway, with a punctured tire. He should have done so because, in the employer's view, Midas had temporarily "repaired" the punctured tire by adding 3 psi to it. And, he should have done so knowing that, even if he made it, he would still be facing a 74 km drive home after his shift ended at 10:00 p.m.

[73] Given that the grievor had to pump up the tire several times to drive 25 kms from his home near Harrowsmith to Kingston earlier in the day, it is clear that this was not a slow leak. Best case scenario, he would very likely have been forced to pull over multiple times to pump up his tire, there and back. This is far from reasonable. To suggest that this should have been attempted at night, in February, on the 401, is not only unreasonable, it is a dangerous proposition that shows little regard for the grievor's health and safety.

C. Employer options: unavailable, unreasonable, not offered or dangerous

[74] The employer took the position that the grievor's car was drivable and that he should have come to work either relying on the extra 3 psi Midas had pumped into his punctured tire or on a spare tire if he had one. However, it also faulted him for failing to explore other options for getting to work.

[75] As the union aptly put it, the employer provided a "laundry list" of possible solutions for the grievor (using his wife's car, finding a carpool, taking a taxi, renting a car, having his friend drive him to work, or asking the superintendent to send a port vehicle to pick him up).

[76] The grievor was never given any indication that he was expected to explore these options at the time. Not in any of the three conversations with the superintendent, not in the emails or conversation with A/Chief Kendrew after the fact. The first time these options were proposed was in the employer's written submission filed in this matter.

[77] As indicated earlier, the only reasonable suggestion, in the grievor's view, was that of using his wife's vehicle, which he would have done had she not been away.

[78] The grievor testified that he did not think it would have been reasonable to ask his friend to drive him to work. There was no evidence as to where the grievor's friend lived or what other commitments he might have had that evening. Based only on the grievor asking him for a lift from Kingston to his home 25 kms away, one cannot assume that it would have been reasonable to request a drive to work 50 kms in the other direction. A/Chief Kendrew said that if he had gotten himself into work the employer would have seen him home. However, the grievor had no way of knowing that and would have assumed his friend would have to pick him up after his shift as well. This is not a reasonable suggestion.

[79] As the grievor testified, the *Commuting Assistance Directive* clearly considers the cost of taxis to be prohibitive and, therefore, provides funding assistance only for the use of taxi pools. No one testified that using taxis was a common event at the port. In the grievor's view, the superintendent likely did not suggest it because he knew it would be too costly. Apparently recognizing this as well, Chief Pegunas suggested the hybrid solution of taking a taxi halfway, to Gananoque, and being picked up from there in order to reduce the taxi fare. And again, having had no indication that he could be taken home if he got himself into work, the grievor would certainly have assumed that a costly return trip by taxi would also be required.

[80] As for the car pool idea, the grievor had never car pooled before. How could he suddenly find and insert himself into a car pool, even if there were different shift start times as the acting chief testified? How would he find a car pool that just happened to be leaving Kingston at 6:00 p.m.? Should he have just started calling co-workers at random? If there was a later evening shift (and that was not clear) it was the employer who would know which employees would be coming in for it. It did not offer any such information to the grievor.

[81] Should the grievor really have tried to rent a car? It would have been a costly option to arrive at work for the last few hours of his shift. However, the grievor candidly testified that it did not even cross his mind as he was not in the habit of renting cars.

[82] It is clear that it would not have been possible, in any event. There were no car rental agencies open in Kingston after 5:00 p.m.. It is hard to imagine that that information would come as any surprise to the employer, given a presumed familiarity with the region in which it operates and where most of its employees reside. A/Chief Kendrew offered the candid opinion, based on her knowledge of the area, that there was no likelihood of finding a rental agency open at that time. Yet, the grievor was faulted for not searching for one. Chief Pegunas testified that he should have at least tried to find an open rental agency.

[83] Apparently, the point was to try; to show the effort, regardless of the odds of success. The employer's focus was not on what was reasonably feasible, but rather on the degree of effort expended by the grievor, even on a pointless endeavour. The employer never said that there was an open agency or even that there might have been. Rather, it focussed on the fact that the grievor, in its words: "did not bother to inquire."

[84] Both the car rental and the car pool suggestions call to mind the Board's decision in *Coppin v. Canada Revenue Agency*, 2009 PSLRB 81 in which the employer was similarly focussed on whether the grievor in that case had tried to find a service which she had never used and did not believe existed. The adjudicator commented as follows:

> *40 Ms. Gill-Conlon never used public transportation to commute from Barrie to Mississauga. She believes that the service does not exist. No evidence was presented at the hearing that would make me conclude that she is mistaken. Obviously, if she believed that there was no public transportation**, it was normal that she did not try to use it** on December 23, 2004.*
>
> [Emphasis added]

[85] Of all the options the employer proposed, the most puzzling was the port vehicle suggestion. The need for a driver would have taken another employee out of the port during the evening shift. Given A/Chief Kendrew's comment that they would have seen him home as well, it would have taken another employee out of the port for two hours of the night shift in order to drive the grievor home and get back to port. Rather than a practical solution, it would seem to compound the problem of the grievor's absence from the workplace.

[86] But more important to this matter, is the fact that the employer never suggested it. The grievor spoke to his supervisor three times: when he called to advise that he had a flat, when the supervisor called for an update, and when he called to advise that the tire could not be fixed and he had no other way to get to work. At none of these junctures was there any suggestion that a port vehicle could be sent, not even a hint at the mere possibility of it.

[87] The testimony given about this option was not persuasive. Both chiefs insisted that a port vehicle could likely have been sent, if the grievor had only raised it with the superintendent.

[88] Chief Pegunas thought that the grievor should have suggested that he would take a cab to Gananoque and be picked up there. However, while this may have happened in the past, the chief could not recall any instance of a port vehicle picking up an employee from Gananoque within the last ten years. He could not recall a port vehicle ever picking up an employee from home. He did say that a couple of times officers had gotten sick, could not drive and were dropped off at home. And once, after employees had to stay for an all-night seizure, the employer had deemed it unsafe for them to drive and had taken them home in a port vehicle.

[89] A\Chief Kendrew mentioned the same instance of the all-night seizure. She also said that there were a few employees who had temporarily lost their drivers' licences and had been helped to get to work with a port vehicle. And, there was one employee with a medical restriction on driving who had been accommodated in this way.

[90] Both chiefs acknowledged that these were very rare occurrences. They provided no evidence that the grievor knew about them or could have been expected to know about them. The grievor testified that the only instance he knew of, after 14 years in the workplace, was the occasion of the all-night seizure mentioned by both chiefs. This instance was clearly highly unusual and a very different circumstance.

[91] I asked why the onus was entirely on the grievor, and not the superintendent, to suggest such a rare option that was entirely within the employer's awareness and control. A/Chief Kendrew said that these were not the employer's options to present; that it was the employee's responsibility to get to work and, therefore, to come up with options. However, she indicated that it would have "come up" in a respectful,

collaborative conversation with the supervisor, had the grievor initiated such a conversation, rather than simply stating that he would take 6990 leave.

[92] Chief Pegunas said that if the grievor had only spoken to the supervisor earlier in the day, something could have been worked out. However, I note that the grievor had spoken to the supervisor at 1:00 p.m. and 3:30 p.m.; before he stated at 6:00 p.m. that he would take 6990 leave. Superintendent Geraghty did not mention any possibility of a port vehicle (or any other option) in the earlier calls either.

[93] I do not accept the employer's insistence that it was exclusively up to the grievor to initiate a conversation about options with the supervisor. However, I note that he did tell the supervisor that his tire could not be fixed, that he had no other way to get to work and that, therefore, he would be taking 6990 leave. Surely indicating that he had no other way to get to work should have been sufficient to put the ball in the supervisor's court to suggest sending a port vehicle, if such an option really existed. Instead he just said he would put it down for 6990 leave subject to the chief's authorization.

[94] I find that the port vehicle option was not available to the grievor at the time and that neither he, nor apparently the superintendent, had been given any reason to think that it might be. A\Chief Kendrew testified that Superintendent Geraghty would have called her at some point about the grievor not being able to get into work. She did not instruct him to offer this option to the grievor, or even to determine whether a vehicle might be available.

[95] The employer's port vehicle option is reminiscent of the employer's suggestions in *Smith v. Canada Revenue Agency*, 2018 FPSLREB 68, a case in which a grievor had been unable to attend work due to road conditions. The Board in that case commented as follows:

> ***35*** *Aside from strictly applying its storm policy, it is unclear on what basis the employer believes that the grievor did not make a sufficient effort to get to work. The employer pointed out that the grievor did not call the Summerside Tax Centre to see if he could work there that day. Nor did he telework.* ***On the other hand, the employer's representative did not know if those options were considered or even possible at the relevant time.***
>
> [Emphasis added]

[96] It also calls to mind the employer's position in *Martin v. Treasury Board (Department of Veterans Affairs)*, 2014 PSLRB 37 and the Board's comments as follows:

> ***70**…**she [the grievor] did not open a** discussion on alternate ways of utilizing her time during the extended delay period, suggesting that the grievor could have done online research or attended a VAC office in the UK and worked from there. This suggestion is also without any factual basis. … **How was the grievor supposed to know if there was any work she could have done from London via the Internet or whether she could access a VAC office? If this was a realistic option, it was something the manager could have looked into and, if it were viable, suggested it.** There was no such discussion.*
>
> [Emphasis added]

[97] In both of these cases the employer argued that the grievors should have initiated discussions about options that were within the employer's control and about which the grievors knew nothing. The Board, in both cases, properly put the onus on the employer to investigate and offer any such options. The same applies here.

[98] The grievor in *Martin* had been stranded after vacationing in England due to the eruption of the Eyjafjallajökull volcano in Iceland in April 2010. The eruption had blanketed the sky over northern Europe with volcanic ash and her scheduled return flight was grounded. The first available flight left five days later. The adjudicator stated as follows:

> ***72** … Clause 52.01(a) of the collective agreement is clearly meant to deal with situations when an employee is kept from getting to work by obstacles beyond his or her control. As I stated earlier, these are fact-driven cases, and of the cases submitted, seven dealt with snowstorms. **The reasonableness or unreasonableness of the decision to grant leave is generally driven by whether at some juncture the circumstance that kept the employee from getting to work changed**. In the snowstorm cases, this question usually turns on when the roads became passable or when the bus routes were restored and whether the circumstances remained such that the employee could not get to work. In this case, the grievor attended the first day of work after she got on the first available flight back to Halifax.*
>
> [Emphasis added]

[99] In this case, the circumstance that kept the grievor from getting to work, his flat tire, only changed once he was able to get it replaced, allowing him to safely drive to the port.

[100] In *Close v. Treasury Board (Department of Citizenship and Immigration)*, 2016 PSLREB 18 the Board granted the grievor three hours of leave with pay when her husband, who normally cleared snow from their driveway, was unable to do so due to an injury. He showed her how to use the snowblower, but she also had physical restrictions, and it took her three hours to clear the driveway. The Board stated that employees do not have to make heroic efforts to get to work and commented as follows:

> ***86*** *Ms. Close did not fail to plan for snow removal. She did not simply sit back and make no effort. Her usual and reasonable arrangements for snow removal failed, and considering all her options****, she decided that the best course of action was to clear the snow herself, even though she had a bad hip and it took her longer than it would have taken her husband. I cannot find that her actions were unreasonable, even if, hypothetically, other actions might have been more effective.***
>
> [Emphasis added]

[101] In this case, the grievor decided that the best course of action was to get his tire repaired at Midas and failing that, and following Midas' advice, to get it replaced at Hyundai the next morning. This was a reasonable approach and would be considered so even if there had been other options that might have been more effective.

[102] In this case, however, there were no other actions that might have been more effective. The options suggested by the employer after the fact were either unavailable (his wife's car), unreasonable due to cost or common courtesy (taxi or asking his friend to drive him 50 kms to work and picking him up at 10:00 p.m.), unrealistic (car pool, rental car) not offered by the employer (port vehicle) or dangerous (driving 50 kms on the highway and 74 kms back on a punctured tire, at night, in February, in Eastern Ontario).

D. Were other employees granted leave in similar circumstances?

[103] Both chiefs stressed that they were careful to respond to 6990 leave requests consistently, not only at the port level but across the region. That is why they always consulted Labour Relations on such requests, to ensure consistency. However, neither of them could respond to the allegation that three other employees had received 6990 leave in comparable circumstances.

[104] It would have been a simple matter for the employer to produce evidence to address this allegation which was first made in the union's written submission filed on August 18, 2020. It was ignored and not addressed in the employer's response. The allegation was made again in the grievor's testimony on December 14, 2020, the first day of hearing. It was ignored and not addressed in Chief Pegunas' examination in chief.

[105] When asked about it in cross-examination he could only say that the roof shingles instance was "possible" and that he could not recall the other two instances. Even after another week between the first and second days of hearing, the employer was no better placed to respond. A/Chief Kendrew could only say that she did not recall the car or the snowstorm issues and that she did not know about the roof shingles.

[106] Ultimately, the employer's evidence was that one instance was possible and neither chief could confirm or deny the other two.

[107] This was not a vague allegation. The grievor had provided three specific names and described three specific circumstances. The employer had three months from when the union's submission was filed to check their leave records and another week before the second day of hearing to do so. It could easily have confirmed whether these employees had received 6990 leave and, if so, whether their circumstances were comparable to the grievor's situation, as he alleged. Despite the alleged importance of consistency in granting 6990 leave, it did not do so.

E. Cursory consideration of the leave request

[108] It was clear on the evidence that the employer had very little information about the grievor's circumstances, but was content to deny the leave on that basis without further inquiry.

[109] A/Chief Kendrew testified that she just had the grievor's emails. He had provided a brief summary of events at her request. Without inquiring further she discussed the matter with Chief Pegunas, with a labour relations consultant, and possibly with the District Director (she was not sure about the latter). The one person she did not discuss it with was the grievor.

[110] Neither chief had the Midas and Hyundai documentation. Neither chief asked Superintendent Geraghty for a report of his three conversations with the grievor. They did not know all of what might, or might not, have been discussed. They did not know if the grievor's absence had necessitated calling someone in on overtime or had otherwise impacted operations. Chief Pegunas said that, had it been July 4, for example, they would have liked to have had the option of getting him in earlier in the day (presumably via a port vehicle). However, both chiefs acknowledged that February is a slow time at the port, and neither inquired into the actual impact of his absence, at the time or since.

[111] The chiefs had no information about the hypothetical options they proposed for the grievor and did not seek any. They did not know if there had been a port vehicle available and someone to drive it. They did not know if he had a spare tire. They did not know that his wife was out of town and that her vehicle was unavailable. They knew nothing of the circumstances of his friend, whom it was suggested could have simply driven him 50 kms in the opposite direction, rather than to his home.

[112] A/Chief Kendrew's March 5, 2014 email to the grievor simply states that labour relations "advised that 6990 would not apply in this case so therefore, I denied the request." Taking the acting chief at her word as expressed in this email and given the paucity of any other information upon which the decision could have been made, I find that it was primarily based simply on that advice received from labour relations.

[113] I also find that, to the extent that either chief considered the actual merits of the request, apart from the labour relations advice, the decision seems to have been largely based on two factors that were repeatedly raised as concerns by both of them: 1) that the grievor did not get back to his supervisor in a timely way and had to be called back for an update; and 2) that the grievor had asserted that he would take 6990 leave, rather than requesting it.

[114] I agree with the employer that the grievor should have informed his superintendent as soon as he got the appointment at Midas. I further agree that 6990 leave is discretionary and that the grievor could have been more careful in his choice of words to indicate that he would be requesting it.

[115] However, the employer is obligated to fairly consider all the circumstances and the merits of such a request. Clause 52.01(a) of the collective agreement provides that

"…such leave shall not be unreasonably withheld". In my view, the employer's consideration of the merits of the grievor's request was cursory and may have been unduly influenced by the umbrage taken by both chiefs at his perceived lack of deference.

VIII. Conclusion

[116] I find that circumstances not directly attributable to the grievor prevented him from reporting for duty, namely that his flat tire had to be replaced and that he had no other reasonable means of getting to work. The employer unreasonably withheld leave with pay contrary to clause 52.01(a) of the collective agreement.

[117] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IX. Order

[118] The grievance is allowed.

[119] The employer is ordered to grant the grievor leave pursuant to clause 52.01(a) of the collective agreement for his shift on February 26, 2014.

February 2, 2021.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board