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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

NORMAN ALLEN, ZAMIRA CICKO, JOHN HARLAND, DONAL IRONS, MARC VAN GAGELDONK, AND JOHN WACHNIK

Grievors

and

CANADIAN FOOD INSEPCTION AGENCY

Employer

Indexed as
Allen v. Canadian Food Inspection Agency

In the matter of individual grievances referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Kourosh Farrokhzad, Public Service Alliance of Canada

For the Employer: Amanda Bergmann and Elizabeth Matheson, counsel

Heard by videoconference,
August 2 and 3, 2022, and February 27 and 28, 2023.

REASONS FOR DECISION

I. Introduction

[1] Before me is a group grievance composed of six individual grievances. All involve the same question, which is the interpretation and application of an overtime provision in the collective agreement between the Canadian Food Inspection Agency ("the employer") and the Public Service Alliance of Canada ("the bargaining agent") for the PSAC bargaining unit that expired on December 31, 2014 ("the collective agreement").

[2] Norman Allen, Zamira Cicko, John Harland, Donal Irons, Marc Van Gageldonk, and John Wachnik ("the grievors") were food processing supervisors (classified EG-05) employed by the employer in its Toronto Region of Ontario. They grieved that in March 2013, the employer instituted what they alleged was a new policy that denied EG-05 supervisors the same opportunities to overtime work that were available to food inspectors (classified EG-03 and EG-04) in that region. The grievors alleged that by denying them the right to place their names on overtime lists for inspection work, the employer breached clause 27.03 of the collective agreement, which provided as follows:

> ***27.03*** *Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *(a) to avoid excessive overtime work and to offer overtime work on an equitable basis amongst readily available, qualified employees;*
>
> *and*
>
> *(b) to give employees who are required to work overtime reasonable advance notice of the requirement.*

[3] The grievors stated that they were available and qualified to do the work of inspectors and that accordingly, they should have had access "on an equitable basis" to overtime for it. The employer, for its part, denied that it breached clause 27.03 for a variety of reasons, including (a) operational requirements, and (b) the policy in question did in fact represent an equitable allocation of access to premium pay.

[4] On November 1, 2014, the "*Public Service Labour Relations and Employment Board Act*" (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace

the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40; *EAP2*) also came into force (SI/2014-84). Pursuant to s. 393 of the *EAP2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *EAP2*.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

II. The evidence

[6] The parties presented evidence by way of the testimonies of a few witnesses and an agreed statement of facts, to provide the context for their submissions as to the interpretation and application of clause 27.03.

[7] The witnesses' testimonies stretched over two days that were separated by quite a bit of time. On the grievors' behalf, on August 2, 2022, I heard the testimonies of two of the grievors, Marc Van Gageldonk and Zamira Cicko.

[8] On the employer's behalf, on February 27, 2023, I heard the testimony of Judy Strazds, who was at the time material to these grievances the inspection manager for meat processing and fresh fruit in the employer's Toronto Region.

[9] The positions, duties, and responsibilities of those witnesses and of the grievors who did not testify are described in the agreed statement of facts (Exhibit 1), which will be set out later in this decision.

[10] The parties really had little if any dispute as to the facts. The central issue turned on the interpretation of clause 27.03 and, given that interpretation, how it ought to apply to the facts at the time. That being the case, I will set out my findings of

fact without an extensive paraphrase of each witness's testimony. I will refer to it only when it is necessary to explain a particular finding. I will start first with the agreed statement of facts. I will set it out in its entirety, the only change being in the paragraph numbering.

III. Agreed statement of facts

[11] When they filed their respective grievances, the grievors were employed by the employer as food processing supervisors (EG-05) in its Toronto Region meat hygiene food processing (MHFP) facilities.

A. Background: Toronto Region operations

[12] The employer divides its operations in the province of Ontario into four specific regions: Northeast, Southwest, Central, and Toronto.

[13] The grievors all worked in the employer's Toronto Region MHFP facilities. MHFP pertains to the post-slaughter handling of meat, such as cutting, freezing, curing, cooking, and grinding and preparing certain foods containing meat (e.g., pizzas, lasagnas, bacon, etc.).

[14] The employer logistically grouped all its Toronto Region MHFP facilities into larger entities called "complexes", which were delineated based on specific geographic areas. Inspectors and supervisors normally worked within one so-called "home" complex but could be asked to work in another complex if operational requirements demanded it.

[15] In response to several factors, the employer modified the conformation of these complexes significantly between 2008 and 2013, including reorganizing from 3 mega-complexes to 6 smaller ones. When these grievances were filed, the Toronto Region contained between 120 and 140 processing facilities organized into 6 complexes, as follows:

…

> *a. Complex Three, representing the industrial district of Concord in the city of Vaughan and the neighborhood of Weston in the city of Toronto;*
>
> *b. Complex Four, representing the geographic region of Northwest Toronto, including parts of Brampton and Mississauga;*

> *c. Complex Five, representing mainly the cities of Brampton and Mississauga;*
>
> *d. Complex Six, representing North Mississauga and parts of Brampton;*
>
> *e. Complex Seven, representing the geographic region of south Toronto, along the lakeshore area; and*
>
> *f. Complex Eleven, mostly representing the remainder of the neighborhood of Weston in the city of Toronto.*
>
> *…*

[16] When the grievances were filed, overtime schedules were developed and managed by the supervisor (EG-05) in charge of each complex. Inspection overtime opportunities varied based on a number of factors, including but not limited to the nature of the facilities in a complex, the time of year (and associated seasonal demands), and the general staffing levels.

[17] The parties agree that overtime was often used in the Toronto Region as follows:

> *…*
>
> *a. To allow registered facilities to operate on evenings and weekends (i.e. outside of their formal work shift agreements with the Employer) to meet supply/demand needs; and/or*
>
> *b. During emergency situations (for example, food recalls following pathogen outbreaks).*
>
> *…*

B. Roles of each substantive group and level

[18] Inspectors (EG-03 and EG-04) were responsible for inspecting meat processing and storage facilities, to ensure industry compliance to all applicable regulations and employer-approved industry food safety systems. This inspection process, known as the Compliance Verification System ("CVS"), required those inspectors to do the following:

> *…*
>
> *a. Ensure each operating MHPF facility has an inspectional visit of at least 15 minutes on each shift of their work shift agreement, as per CFIA program requirements;*

> *b. Collect and prepared samples from production, harvest and processing areas for subsequent laboratory analysis to test for residues, disease agents and contaminants in food products;*
>
> *c. Verify facilities are effectively controlling the risks associated with contamination by pathogens or other specific hazards by adhering to their facility-specific Hazard Analysis Critical Control Point ("HACCP") procedures. Inspectors (EG-03 and EG-04) verify such by conducting interviews, reviewing records, and directly observing operations.*
>
> > *(* Of note, some HACCP verification tasks require the Inspector(s) to have undergone additional training (for example, for thermal processing specific to retort operations). As such, these tasks could be conducted only by Inspectors (EG-04) and Supervisors (EG-05) whom had received this training.)*
>
> *d. Verify that each facilities' HACCP procedures meets CFIA program requirements.*
>
> *e. Verify adherence to labelling and other domestic requirements through direct observation and records review.*
>
> *f. Verify compliance with export requirements through direct observation and records review.*
>
> *g. Verify compliance with import requirements through direct observation and records review.*
>
> …
>
> [*Sic* throughout]

[19] Inspectors (EG-03 and EG-04) were also responsible for following up on consumer-trade complaints at implicated facilities.

[20] If an inspector (EG-03 and EG-04) identified an area of non-compliance in a facility, they were likewise responsible for negotiating corrective actions, including warning letters and product rejections through to detention and seizure.

[21] Meanwhile, supervisors (EG-05) were responsible for program implementation. They were expected to manage the inspectors by clarifying expectations, assigning workloads, setting individual goals, and conducting Quality Management System evaluations of them in their complexes. That system required supervisors to visit MHFP facilities monthly and to directly observe each inspector conducting their tasks, to confirm that they adhered to their CVS requirements.

[22] Supervisors (EG-05) also managed the complexes by setting targets and reporting results to the employer. They were responsible for providing operational

management; problem resolutions, including monitoring investigations on a priority-response basis; information and guidance to industry clients; and ongoing training and development programs for the staff.

[23] Finally, as supervisors (EG-05) are designated as inspectors for the purpose of s. 13(3) of the *Canadian Food Inspection Agency Act* (S.C. 1997, c. 6), they could be (and in some cases, were) asked to conduct inspector duties.

C. Background: the grievors

[24] Mr. Allen became a substantive MHFP food processing supervisor in the Toronto Region on November 7, 2005. Before that appointment, he had no prior inspector (EG-04) experience in MHFP. He retired on September 9, 2017, but before that, he was the supervisor normally assigned to Complex 5.

[25] Ms. Cicko became a substantive MHFP food processing supervisor on September 28, 2012, and still was one as of the beginning of the hearing. Before that, her substantive position was as an inspector (EG-04) in MHFP. In that role, she occupied a supervisor (EG-05) position on an acting basis from August 4 to 13, 2010, and from October 7, 2010, to September 27, 2012. At all material times, she was the supervisor normally assigned to Complex 7.

[26] Mr. Harland became an MHFP food processing supervisor on September 28, 2012. Before that, his substantive position was as an inspector (EG-04) in MHFP. In that role, he occupied a supervisor (EG-05) position on an acting basis from April 6 to 8, 2011, and from April 26, 2011, to September 27, 2012. Mr. Harland retired on November 28, 2019, but before that, he was the supervisor normally assigned to Complex 11. Mr. Harland has been subsequently rehired to several employment terms as an inspector (EG-04).

[27] Mr. Irons became an MHFP food processing supervisor (EG-05) on June 30, 2000. Before that, he held a PI-04 position, which was eventually reclassified to EG-05 in or around the year 2000. Mr. Irons retired on November 21, 2013, but before that, he was the supervisor normally assigned to Complex 3.

[28] Mr. Van Gageldonk became an MHFP food processing supervisor (EG-05) on January 2, 2001. He also carried out acting duties at the EG-05 group and level for approximately one year before his promotion in early 2001. He was still employed as a

supervisor (EG-05) in MHFP as of the beginning of the hearing. At all material times, he was the supervisor normally assigned to Complex 6 and, later, Complex 4.

[29] Mr. Wachnik became an MHFP food processing supervisor (EG-05) on September 28, 2012. Before that, his substantive position was as an inspector (EG-04) in MHFP. In that role, he occupied a supervisor (EG-05) position on an acting basis from April 26, 2011, to September 27, 2012. At all material times, he was the supervisor normally assigned to Complex 6.

[30] When the grievances were filed, all the grievors reported to Ms. Strazds, Inspection Manager for the Toronto Region's MHFP facilities.

D. The grievances

[31] These grievances specifically relate to the grievors' allegation that the employer introduced a new directive through Ms. Strazds in late March 2013, which modified overtime practices for supervisors (EG-05) in the Toronto Region. The grievors collectively alleged that it amounted to a violation of article 27 of the collective agreement.

[32] The employer maintained that the directive introduced in late March 2013 did not modify supervisor (EG-05) overtime practices and that there has been no violation of article 27 of the collective agreement.

[33] The parties agree that the issues of standby and designated paid holidays are not before the Board.

[34] The language and text of each grievance is identical, but for clarity, they are identified as follows:

> …
>
> *a. Grievance 28863 was filed by Mr. Norman Allen;*
> *b. Grievance 28862 was filed by Ms. Zamira Cicko;*
> *c. Grievance 28866 was filed by Mr. John Harland;*
> *d. Grievance 28870 was filed by Mr. Donal Irons;*
> *e. Grievance 28875 was filed by Mr. Marc Van Gageldonk; and*
> *f. Grievance 28876 was filed by Mr. John Wachnik.*
>
> …

[35] All the grievances were filed on April 12, 2013.

E. Referrals to adjudication

[36] The grievances were dismissed at the first level on May 31, 2013.

[37] The grievances were dismissed at the second level, and each grievor received a specific and identical letter on July 12, 2013.

[38] The grievances were dismissed at the final level, and each grievor received a specific and identical letter on July 30, 2014.

[39] The grievances were collectively referred to adjudication before the PSLRB on September 4, 2014.

F. Other

[40] A joint book of documents was admitted on consent. The parties reserved the right to argue what weight should be given to the specific documents in it.

[41] The parties reserved the right to adduce additional oral and documentary evidence as required.

IV. Important contextual facts

[42] The Toronto Region had two types of MHFP facilities. First were those that I shall call the “simple” processing plants that processed meat products by, for example, cutting them into parts and packaging them for distribution or sale. No thermal processing — no cooking or heating — of meat was involved.

[43] Second were those that I shall call the “thermal” processing plants. They used thermal processing — that is, cooking or heating meat. So, for example, they might have been involved in preparing pepperoni or cooked hams. As already noted in the agreed statement of facts, only EG-04 inspectors or EG-05 supervisors were trained and qualified to inspect the thermal processing plants.

[44] I also note that on the evidence, it was clear that the actual day-to-day, hands-on inspection of both types of processing plants was carried out in normal course by EG-03 and EG-04 inspectors. EG-03s could inspect only simple processing plants. EG-04s could inspect both simple and thermal plants. Many of the processing plants operated

on multiple shifts, on weekends, or both, which meant that both EG-03 and EG-04 inspectors could end up working shifts that depended on the operations of the plants they inspected.

[45] Again, as already noted, the EG-03 and EG-04 inspectors both reported to and were supervised by EG-05 supervisors, who in turn reported to the inspection manager for the Toronto Region, who at the time was Ms. Strazds. Unlike the EG-03 and EG-04 inspectors, in ordinary course, the supervisors worked day shifts, Monday to Friday. Occasionally, they would work outside their normal days when, for example, they had to conduct a performance evaluation of an inspector who was working an afternoon or evening shift, if a processing plant had instituted a new process that had to be evaluated, or, the odd time, to fill in when no inspector was available to work a particular shift.

V. Past practice

[46] Mr. Van Gageldonk testified that during his time as an acting supervisor, he regularly worked overtime as an inspector. He explained that a rotational list was compiled with the names of those interested in working overtime. The list was not limited to the EG-03 and EG-04 inspectors — the EG-05 supervisors were also included; the rationale was that as EG-05s, they were able and qualified to do the inspectors' work. Overtime offers would then rotate through the list of names.

[47] He testified that the inspectors were under significant pressure and that many did not want to work overtime or were experiencing burnout. Accordingly, having supervisors on the list spread the burden and avoided or at least limited the times when an inspector could be ordered to do the work. Overtime on that basis did not have to be approved, although the regional manager did have sign it off. The manager would, monthly, see the overtime that all the staff had worked.

[48] Mr. Van Gageldonk also testified that working conditions changed in 2011, which impacted overtime. Standby (and hence standby pay) provisions were brought in. The collective agreement at that time prohibited pyramiding standby and overtime pay. Supervisors on standby could not work overtime at the same time, meaning that their overtime was limited to when they were not on standby. They could still be on the overtime list, and could still take it, as long as they were not also on standby at the same time.

[49] Ms. Strazds' testimony on this point was that while ordinarily, she would review the overtime claimed by all the staff, she had not understood that the EG-05 supervisors' overtime had come about because they had placed their names on the inspectors' overtime list. That is to say, she understood the supervisors' overtime to have been a function of their duties as supervisors, rather than as filling in for inspectors.

VI. The March 26, 2013, memo

[50] On March 26, 2013, Ms. Strazds issued a memo on the organization of standby for supervisors. Its gist and effect — it forms the basis of the grievances — was that EG-05 supervisors were not to be included on the overtime list that before then could include all EG-03s, EG-04s, and EG-05s who might have been interested in and were available for overtime.

VII. Summary of the submissions

A. For the grievors

[51] The bargaining agent submitted that the decision to exclude EG-05 supervisors from the inspection overtime rotation violated clause 27.03 of the collective agreement. Before March 2013, EG-05 supervisors had had access to the overtime rotation; after that date, their access was brought to an end. It argued that including the EG-05s would have better met the work-life balance of all the EG-03s, EG-04s, and EG-05s since it would have shared the burden — and the benefit — of overtime across everyone who was able and qualified to perform an inspector's work. No operational requirement made the change to what had been the practice until that point. Ms. Strazds unilaterally imposed it without consulting the bargaining agent.

[52] The bargaining agent acknowledged that supervisors who were on standby might on occasion be called back to work on an emergency basis, in which case they would receive overtime. But it happened rarely, as compared to the times it happened before the new policy was put in place.

[53] The bargaining agent also submitted that the practice of placing supervisors on the rotational overtime list before March 2013 was long-standing and routine and was well known to the employer. The manager (i.e., Ms. Strazds), reviewed and approved overtime, so she must have known that supervisors were routinely taking overtime for an inspector's work.

[54] The bargaining agent submitted that the parties' intent, as evidenced by clause 27.03, was to distribute overtime on an equitable basis to all employees who were qualified and available to do the work. EG-05s were clearly qualified to do the work of inspectors. They had been inspectors in the past; they had continued to perform inspections when, as supervisors, they took on inspection overtime assignments; and in an emergency, they did it after March 2013. It made no sense to suggest that supervisors were not qualified to do inspections. After all, to supervise inspectors, they had to know, to do, and to demonstrate the work of inspection to inspectors.

[55] The bargaining agent also submitted that no evidence suggested that letting supervisors perform inspection work added to any administrative burden. If anything, it made the task of finding someone to fill the gap caused by an inspector's absence easier by expanding the pool of possible replacements. Nor was there anything in the collective agreement that barred supervisors from doing inspectors' work.

[56] The bargaining agent then turned to the introductory caveat in clause 27.03, which states, "[s]ubject to the operational requirements of the service …". It submitted that the employer bore the onus of establishing that that caveat applied. It said that there was no evidence pointing to a "pressing operational requirement" that justified removing EG-05 supervisors from the EG-03 and EG-04 inspector overtime rotation. It relied on the decisions in *NAV Canada v. CATCA*, 2018 CarswellNat 8251; *Degaris v. Canada (Treasury Board - Transport Canada)*, PSSRB File Nos. 166-2-22490 and 22491 (19931102); *Calgary Airport Authority v. PSAC Local 30301*, 2004 CarswellNat 3318; and *Vancouver International Airport Authority and Public Service Alliance of Canada, Local 20221,* March 29, 2007 (Greyell).

[57] It submitted that the thrust of those decisions was to suggest that the phrase "operational requirements" had to relate to the work required to be done, not to a set of administrative rules that management drew up. In particular, an employer could not rely on "operational requirements" if the alleged need to be filled arose as a result of circumstances beyond its control. In this case, cost was never raised as a reason to remove the supervisors from the overtime rotation. Moreover, removing them (thus shrinking the pool of qualified substitutes) simply increased the stress on the inspectors.

[58] The bargaining agent relied upon excerpts from Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at paragraphs 4:20, 4:21, and 4:27; *Degaris*; *Treasury Board (Transport Canada) v. MacGregor*, PSSRB File No. 166-02-22489 (19921022); *Calgary Airport Authority*; and *NAV Canada*.

[59] The bargaining agent concluded by submitting that the grievances be allowed and that I retain jurisdiction to determine the damages, if any, to award.

B. For the employer

[60] The employer focussed its submissions on these three questions:

1) whether operational requirements meant that supervisors should not be placed on the inspectors' overtime list;
2) whether it would be equitable to include supervisors (EG-05s) on the inspectors' (EG-04s and EG-05s) overtime schedule; and
3) whether a past practice bound the employer to retaining supervisors on the inspectors' overtime list.

[61] Turning to the question of operational requirements, the employer emphasized that having supervisors on standby meant that they could not also be available for overtime. Moreover, the value of supervisors — and indeed their role and function — was **to manage** inspectors, not do the work of inspecting. It was an inappropriate use of their expertise (and an expensive one) when they carried out inspections at their (supervisor) overtime rate. Moreover, supervisors had access to overtime **as supervisors** when, for example, they had to meet an inspector outside their daily work schedule, to deal with performance issues or for annual performance reviews, or when they had to perform CVS tasks at a MFHP lant that could be performed only by a supervisor. Relying on *Doherty v. Treasury Board (Department of National Defence)*, 2014 PSLRB 77, the employer submitted that it was up to management to structure and manage the overtime work in a manner it believed was equitable.

[62] That in turn led the employer to the second question. On the strength of *Canada (Attorney General) v. Bucholtz*, 2011 FC 1259; *Brisebois v. Treasury Board (Department of National Defence)*, 2011 PSLRB 18; and *Barbour v. Treasury Board (Department of Transport)*, 2018 FPSLREB 80, it submitted that equity cuts both ways. It was permitted to maximize efficiency and minimize cost when allocating overtime. So, for example, fairness to the employer meant not assigning higher-level (and hence higher-paid) employees to do lower-level work *Brisebois, supra*. Fairness to the

employees meant not creating a single overtime list for them all, regardless of classification, since it would otherwise have meant that the higher-level employees would have had access to all the available overtime at their own levels as well as all of it at the lower levels. The employer also submitted that when considering what was equitable, it had to take into account the fact that supervisors had access to other forms of extra duty (such as standby) that was not available to inspectors.

[63] Turning to the past practice of approving the overtime of supervisors who filled in for inspectors, the employer noted that the collective agreement was of general application across the entire country. The employer could not be bound by the practice of managers in one of its regions. To be binding — or even to be useful as an aid to interpretation — the practice had to be open, notorious, and known to the employer, not just local supervisors or managers; see *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at para. 71.

[64] The employer concluded by submitting that the grievances be dismissed.

C. The grievors' reply

[65] The bargaining agent submitted that overtime was not a scarce resource and that there was no evidence to suggest that it was. That being the case, there was nothing to suggest that assigning overtime to EG-05s denied access to that benefit to EG-03s or EG-04s. It pointed again to the fact that in the past, managers had approved overtime for supervisors doing inspectors' work.

VIII. Analysis and decision

[66] The question before me is essentially one of interpreting the meaning of clause 27.03 within the context of the collective agreement. As both parties noted, I agree that determining the meaning is, at least in the first instance, to be sought in the express words used. I am to give the words they used their usual or common meanings, unless it would result in an absurdity or would be inconsistent with other collective agreement provisions or the context indicates that some different meaning was intended; see Brown and Beatty.

[67] I should also say that I did not find the decisions that the parties relied upon, with one or two exceptions, particularly helpful. The provisions interpreted were not identical to the one before me; nor did they involve similar fact situations. Nor did they

involve the same issues. That this should be so is not surprising. The circumstances under which overtime may be necessary, the employees who must do it and when, the historic practice of a particular employer, and how overtime is assigned are fact dependent and moreover are governed by the specific wording of the particular collective agreement that governs the allocation of overtime.

[68] The other point I would make is that so far as I could determine from the cases cited to me, all but one — *Brisebois, supra* — concerned same level employees. They did not involve employees who, while in the same classification, had moved up the scale into positions of greater and different responsibility — in essence, into different jobs and different job titles. And here, as in *Brisebois, supra*, at para.32, the question is whether the employer is required "to allocate overtime equitably among all qualified readily available employees, regardless of classification level, or can it first call on employees of the classification ***that normally do the work***, for reasons of efficiency and minimizing cost [emphasis added]?"

[69] Turning then to the issue before me, I repeat for convenience clause 27.03:

> ***27.03 Subject to the operational requirements of the service,*** *the Employer shall make* ***every reasonable effort****:*
>
> *(a) to avoid* ***excessive overtime*** *work* ***and*** *to offer overtime* ***work on an equitable basis*** *amongst readily available, qualified employees; and*
>
> *(b) to give employees who are required to work overtime reasonable advance notice of the requirement.*
>
> [Emphasis added]

[70] The other material provision in the collective agreement is article 6 (titled "Managerial Responsibilities"), which states this: "Except to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the Canadian Food Inspection Agency."

[71] I begin with the following observations, the first of which is that one must be careful in understanding the right established by clause 27.03. It is not a right to overtime. Indeed, as a general rule, employees do not have a right to overtime or, for that matter, to avoid its assignment. Absent wording in a collective agreement to the contrary, an employer has the right to assign compulsory overtime as it sees fit

(subject to any statutory limitations); see *Algoma Steel Corp Ltd. v. USWA, Local 2251* (1960), 11 L.A.C. 118.

[72] Second, overtime is not free-floating. It is a requirement that is attached to — and generated by — an operational need to perform a particular job by a particular classification of employee. The need arises because the employee who normally performs that job is unavailable (and so must be replaced by another employee who has already worked their regularly scheduled hours), or because the amount of work required to be performed by that job has swelled beyond the ability of those employees who are performing that work to complete it during their regular working hours. In either case, the overtime required is work of a particular job performed by a particular job classification. The fact that an employee in a different classification who performs a different job under a different title may also be able to perform the work or job requiring overtime does not change the fact that the overtime relates to a job that is not normally their job.

[73] There is also the point that clause 27.03 is a subset of the employer's overall right under clause 6.01 to manage its operations as it sees fit. Those operations include the need, from time to time, for overtime work, which in turn raises the question of how it should or can be assigned. From the employer's viewpoint, while the work has to be done, it should be assigned in a way that minimizes its cost, maximizes its value, and minimizes its impact on employee morale. The last is important, because from the employees' viewpoint, such work can be a benefit or a detriment (or both). It provides the opportunity for extra work at a premium (and hence extra income). But it also cuts into personal and family time (which represents a cost).

[74] With that in mind, we come to what the grievors called the central issue — the assignment of "… overtime work on an equitable basis amongst readily available, qualified employees …". They state that the work to be assigned is inspectors' work and that equal access to it should be afforded to all qualified to do it (that is, EG-03s, EG-04s, and EG-05s), regardless of whether it constitutes the core duties of their position. In other words, they state that **supervisors** have a right equal to inspectors to be offered overtime **as inspectors** because they have the technical ability to do it.

[75] I have several difficulties with that interpretation of clause 27.03.

[76] First, the offer of overtime in clause 27.03 is not required to be made on an "equal basis" but rather on an "equitable basis". The words, although similar, are not the same in meaning.

[77] Definitions of "equal" include the following:

> [From the online *Dictionary by Merriam-Webster*:]
>
> ***1a (1)** : of the same measure, quantity, amount, or number as another*
>
> ***(2)** : identical in mathematical value or logical denotation …*
>
> ***b** : like in quality, nature, or status*
>
> ***c** : like for each member of a group, class, or society*
>
> *provide* equal *employment opportunities*
>
> …
>
> [From the online *Cambridge Dictionary*:]
>
> ***the same in amount, number, or size** ….*
>
> …
>
> [From the *Free Dictionary Online*:]
>
> ***1.** Having the same quantity, measure, or value as another.*
>
> ***2.** … Being the same or identical to in value.*
>
> …
>
> [Emphasis in the original]

[78] Definitions of "equitable" include the following:

> [From the online *Dictionary by Merriam-Webster*:]
>
> ***1** : having or exhibiting equity : dealing fairly and equally with all concerned*
>
> ***2** : existing or valid in equity as distinguished from law*
>
> *an* equitable *defense*
>
> …
>
> [From the online *Cambridge Dictionary*:]
>
> ***treating everyone fairly and in the same way:***
>
> *• an equitable tax system*
>
> …
>
> [From the *Free Dictionary Online*:]
>
> *characterized by fairness; just and right; impartial; unbiased*
>
> …

[Emphasis in the original]

[79] The point then is that offering overtime inspector work on an **equal** basis to inspectors and supervisors alike is not the same as offering it on an **equitable** basis. Equity, like beauty, is in the eye of the beholder. The grievors are all supervisors. There was no evidence as to what **inspectors** might think about a supervisor taking overtime as an inspector that would otherwise be allocated to other inspectors. Inspectors might indeed consider the offer of such work to supervisors inequitable, given that supervisors already earn more and have access to other types of premium pay (such as standby) that are not available to inspectors.

[80] On this point, I find some support in the decision in *Brisebois*. The grievor in that case was employed as a heavy-vehicle operator and occupied a position classified GL-MDO-6. The MDO classification levels were differentiated on the basis of the weight, variety, and complexity of the heavy equipment to be operated.

[81] The employer offered overtime on a rotating basis to employees qualified to perform the normal work in question. If no one was available at that level, it was offered to those in the next-higher level, and so on until the overtime was assigned. The grievor grieved not being offered overtime on an equal basis to those at a lower level.

[82] The adjudicator noted that the classification levels were not interchangeable. They required different qualifications. If the employer was required to maintain a single list with all levels, then "… only two employees, including the grievor, would be able to perform the overtime at all levels, to the detriment of the nine other employees on the list." As the adjudicator observed at paragraph 40, such an overtime assignment list "… would then be inequitable for the majority of employees." He dismissed the grievance.

[83] This brings me to the second point. The grievors' interpretation glosses over the question of what exactly is to be assigned. It is of course **overtime** work, but what is the **work**? On the facts before me, the work in question was the work of an inspector **as an inspector**. It was not supervisor's work, despite that a supervisor might be able to do it. But the main tasks, duties, and responsibilities — the work and job — of an inspector are fundamentally different from that of a supervisor. When an inspector who has been scheduled for work cannot show up for some reason what is created is

the need for someone to do **that** work and **that** job, not a supervisor's work and job. The fact that a supervisor might in a pinch be able to do an inspector's work and job does not change the nature of the particular type of overtime work to be assigned.

[84] Third is the point that the offer of work pursuant to clause 27.03 is made expressly subject to the operational requirements of "the service". I accept that, as the bargaining agent argued, the term "operational requirements" has to relate to the work to be done and not to a set of administrative rules that management drew up. Nor can they be the result of short-staffing created by an employer's decision to reduce staffing levels; see *NAV Canada*, at paras. 33 and 34. But in this case, the operational requirement was for an inspector, not for a supervisor. As well, there is the employer's right and indeed obligation to minimize its cost of operations and thus to minimize the amount of overtime it has to pay; see, for example, *Calgary Airport Authority*, at para. 44; and *Doherty*, at para. 36.

[85] With that in mind, it does not make economic or administrative sense to assign supervisors to perform a different job with a different set of core job duties (even though they could perform them). Doing so on a regular basis (that is, when other inspectors would be available) would be contrary to operational requirements and hence contrary to the introductory words of Art. 27.03(a). The job requiring the overtime was the job of an inspector, not that of a supervisor, and there is nothing in the collective agreement or Art.27.03(a) that requires the employer to assign overtime for one job to an employee who normally performs a different job.

[86] As far as past practice is concerned, I was not persuaded on the evidence that what might have happened in the Toronto Region before March 2013 was relevant or could be relied upon as an interpretative tool in this case. The collective agreement governs the bargaining agent and the employer across the entire country. The fact that a particular practice might have developed in one employer region does not mean that the employer knows of — or condones or accepts — it; see *Chafe*, at para. 71; and *Doherty*, at para. 33.

[87] With these observations in hand, I was not persuaded that the bargaining agent's interpretation of clause 27.03 or of how it was to be applied was correct. As I interpret the provision and in particular the meaning of 'work' within the context of Art.27.03, the parties intended and agreed that subject to operational requirements

that took into account the importance of minimizing the cost of overtime as well as ensuring that as far as possible like should replace like, overtime was to be allocated on an equitable basis among those employees whose ‘work’---that is, whose job and classification---was the same as the work and classification of the employee to be replaced. It would not, in other words, be allocated in ordinary course to an employee with a different job — and a higher-level set of core duties and classification — simply because they might be able in a pinch to perform the duties of that lower-level position.

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

(The Order appears on the next page)

IX. Order

[89] The grievances are denied.

June 19, 2023

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board