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86-001

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

(hereinafter called the "Employer")

AND:

THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION

(hereinafter called the "Association ")

(OVERTIME POLICY GRIEVANCE)

BOARD OF ARBITRATION

Mervin I. Chertkow - Single Arbitrator

COUNSEL

Gerard Phillips - for the Employer
Evelyne Henry - for the Association

DATE AND PLACE OF HEARINGS

October 21st, 1982 at Yellowknife, N.W.T.

DATE OF AWARD

November 10th, 1982

A W A R D

This Board of Arbitration convened at Yellowknife, N.W.T. on October 21st, 1982 to hear a policy grievance filed by the Association in which it alleges that the Employer's overtime policy at Yellowknife Correctional Centre in the fall of 1980, when it used casual and part time employees to fill overtime duties normally performed by Correctional Officer I indeterminate employees, was contrary to the Collective Agreement between the parties.

Counsel agreed this Board was properly constituted and had jurisdiction to hear the matter in dispute.

The original grievance filed by the Association, Exhibit 2 in these proceedings, alleged that the Employer proposed to use "part time employees" to fulfill overtime duties at the Yellowknife Correctional Institute. By letter from the Employer directed the Executive Secretary of the Association and dated November 24th, 1980, the Employer acknowledged that its original Memorandum of October 30th, 1980 which gave rise to the filing by the Association of its grievance the next day, was erroneous when it used the term "part time" employees. As set out in the said letter, the Superintendent of the Correctional Centre stated that he intended to refer to "casual" employees only. The Employer conceded that it would have been contrary to the Collective Agreement to use "part time" employees but took the position that it had the right to use "casual" employees and that such policy was not contrary to the terms of the Collective Agreement.

The specific sections of the Collective Agreement applicable to this dispute are the definition of "overtime" which is found in Article 2.01 (v) and which states;

"(v) "Overtime" means work performed by an employee with the prior approval of his supervisor, in excess or outside of his regularly scheduled hours of work but excludes time worked on a designated paid holiday;"

and Article 23.01 (a) which further defines "overtime" as;

"OVERTIME

23.01 In this Article:

(a) "Overtime" means work performed by an employee in excess or outside of his regularly scheduled hours of work."

In addition, Article 23.04 (1) (a) is also in issue. This Article states;

"23.04 (1) Subject to the operational requirements of the service the Employer shall make every reasonable effort:

(a) to allocate overtime work on an equitable basis among readily available qualified employees who are normally required in their regular duties to perform that work."

Appendix A2 to the Collective Agreement - HOURS OF WORK AND OVERTIME - CORRECTIONS OFFICERS is also material to this dispute. This provision states;

"APPENDIX A2

HOURS OF WORK AND OVERTIME - CORRECTIONS OFFICERS

A2.01 Article 16 and Clauses 22.04 (1), 22.05, 22.06, and 22.07 do not apply to Corrections Officers.

A2.02 (a) Every Officer shall be assigned to a shift in accordance with the operational requirements of the Service; the Employer

shall make every reasonable effort to schedule shifts so that employees rotate between shifts on an equitable basis.

(b) The Employer shall make every reasonable effort to allocate overtime work on an equitable basis among readily available qualified employees who are normally required, in their regular duties, to perform that work.

A2.03 The hours of duty for Corrections Officers I and II shall be scheduled so that:

(a) in every six day period, work thirty-two hours and four (4) days out of every six (6); and

(b) on a daily basis, work eight (8) hours inclusive of a paid meal period of one-half hour; and

(c) obtain two consecutive days of rest following each four day work period.

The facts which gave rise to this grievance are not in dispute. In the fall of 1980 the Employer was experiencing a high level of absenteeism amongst its Correctional Officer employees at the Yellowknife Correctional Centre. It was having a difficult time in getting its regular employees to cover shifts which were missed by reason of absenteeism of other employees.

The evidence of Mr. Joseph Melanson, who is presently the Superintendent of the Correctional Centre and who was Chief Supervisor of the Institution at the material time in question, was that on numerous occasions the Employer went through the list of regular Correctional Officers who were off shift or on days of rest and that all refused to work overtime. Evidence was given, however, by two Correctional Officer I's; namely, Mr. John Barnet and Mr. Donald Edl that they were available for

overtime work but were not called by the Employer for that purpose.

In the case of Mr. Barnet, he testified that he was available to work overtime on November 2nd, 8th, 15th and 16th, 1980 when the Employer used a casual employee to fill a shift where another employee was absent and that he was not called and given the opportunity to work that overtime. Mr. Edl testified that on November 2nd and 8th of 1980, he was also available to work a shift of another employee who was absent, as both of these days were his days of rest but he was not called in to do the work, which was in fact performed by a casual employee.

It is the position of the Association that Article 23 and Appendix A2.02 of the Collective Agreement require that the Employer offer overtime work on an equitable basis to those employees who work regular hours of work as Correctional Officers. Further, it alleges that the Employer is barred by these provisions from offering such work to casual employees until it has exhausted the list of available Correctional Officers who work regular hours of work under the provisions of Article 23. In addition, it takes the position that because regularly scheduled work, when an employee was absent, was not being filled by a regular employee, it <u>became</u> overtime work for any other employee who worked regular hours of work under the provisions of Article 23 and thus, attracted overtime rates. Finally, says the Association, the Employer by offering such work to a casual employee was discriminating against other Correctional Officers who work on a regular rotating shift and thus was contrary to the Collective Agreement.

The Employer takes the position that nothing in the Collective Agreement prohibits it from replacing regular employees who are absent on a shift, with casual employees. It

says further that whether or not overtime work is required or will be authorized is a management decision and that it is not obligated to pay overtime merely because a regularly scheduled Correctional Officer was absent from his scheduled shift. While it concedes that Appendix A2.02 (b) of the Collective Agreement is a method of insuring that overtime work be distributed equally amongst qualified staff, it argues that such provision is only applicable when the Employer determines that overtime work is necessary. If it has not identified a requirement for overtime work, then there is nothing to be equitably distributed. The Employer argues further that this provision does not create an obligation on it to designate such work as overtime work; nor does it give any employee an entitlement to overtime work on such an occasion. The Employer also takes the position that it has the right to treat each situation of absence of a regularly scheduled Correctional Officer by not filling his work with another employee and run short on that shift, by calling in a casual employee to do the work, or to have another regular Correctional Officer do the work which, in the last case, would be overtime for such Officer if he was held over from his previous shift or was called in on a day of rest. It is only when it elects the last course of action would overtime be payable, but nothing in the Collective Agreement bars it from choosing in any particular instance, either the first or second course of action.

I am satisifed on a careful perusal of the provisions of the Collective Agreement applicable to this dispute, the cases cited by Counsel and the evidence adduced at these proceedings, that the position of the Association is not well founded.

The issue of alleged proprietary rights of employees to overtime assignments is dealt with by the learned authors

Brown & Beatty in their text Canadian Labour Arbitration at page 217 where they state;

> "It is generally agreed that unless there are specific provisions in the agreement to the contrary, or unless the assignment to a particular employee would be unsafe, employees do not have any right to have work assigned to them as overtime. Rather, overtime is perceived as simply one manner in which management may have its work performed. Thus, unless the agreement provides otherwise, it is assumed that management is free to have such work performed by reallocating it, rescheduling operations, recalling employees or by instituting temporary transfers or promotions of personnel. Indeed, there appears to be a general consensus that management's ability to assign the work in such ways, rather than have it performed on an overtime basis, is not restricted by a provision in the agreement requiring it to distribute overtime equitably amongst the employees who normally perform the work."

The assertion by the Association that the provisions of Appendix A2 - HOURS OF WORK AND OVERTIME - CORRECTIONS OFFICERS bars the Employer from filling work caused by the absence of a Correctional Officer by use of a casual employee, because the casual employee does not work the regular hours of work in accordance with the rotational shift scheduling as set out in Articles A2.02 and A2.03, is, in my judgment, not correct. The provisions with respect to hours of work for Correctional Officers addresses only the manner in which hours of duty shall be scheduled. It provides that every Officer shall be assigned to a shift in accordance with the operational requirements of the service and that the Employer will make every reasonable effort to schedule shifts so that employees rotate between shifts on an equitable basis.

Nothing in these provisions can be construed, in my view, so as to fetter management's discretion to fill a shift caused by the absence of a Correctional Officer who works a

regular rotational shift schedule, with a casual employee. What the Association in effect is arguing is that a casual employee fulfilling the duties of a Correctional Officer can only be scheduled to work the hours of duty set out in Articles A2.02 and A2.03 and thus, cannot work casual overtime. In my judgment, this position is untenable, as casual employees by definition under Article 2.01, are hired to fill a casual vacancy of a temporary nature. This, in fact, is exactly what happened on the evidence given to this Board when casual employees filled in for the Correctional Officers who were absent from their duties. Nothing in the wording of Article A2.02 and A2.03 of Appendix A2 of the Collective Agreement can be construed, in my judgment, to operate as an absolute bar to the Employer in using casual employees for the purposes set out above. In my judgment, these kind of decisions of the Employer are encompassed within the exclusionary provision of the first part of Article A2.02 (a) as being necessary for the "operational requirements of the service".

With respect to the application of Article 23.04 (1) (a) to this dispute, the decision of Adjudicator E.B. Jolliffe, Q.C., in a case under the Public Service Staff Relations Act - Therese Martel, et al and Treasury Board (File: 166-2-593) is of significance. In that case the adjudicator was required to interpret the provisions of Article 27.02 (a) of the Collective Agreement between Treasury Board and the Clerical and Regulatory Group of The Public Service Alliance of Canada. Article 27.02 (a) in that agreement said;

> "27.02
>
> (a) Subject to the operational requirements of the Service, the Employer shall make every reasonable effort to avoid excessive overtime and to allocate overtime work on an equitable basis among readily available qualified employees."

while the wording of Article 23.04 (1) (a) in the Collective Agreement before me does not contain the concept of avoidance of extensive overtime, it is similar in other respects to the wording of Article 27.02 in the Martel case.

What happened in the Martel case was that a number of casual employees had been used by the Employer on overtime work on weekends when, it was alleged, regular employees were available and qualified to do the work and were not given the opportunity to do so.

At page 14 of his award, Adjudicator Jolliffe said;

> "In effect, I have been asked to read into 27.02 (a) words signifying that overtime will be allocated fairly among all available and qualified employees before calling on any casuals. To my mind, that would require an amendment to the agreement, by the insertion or addition of certain words, rather than the discovery of an "implied term"."

The adjudicator dismissed the grievance for those reasons and concurred with a decision of Adjudicator Pierre Verge in a previous arbitration between the same parties, the Tardif Grievance (166-2-464 dated 26th August 1971). In the Tardif case, the adjudicator was also required to interpret Article 27.02 (a) of that agreement. After an extensive review of the authorities he held that that provision did not give regular employees any right of ownership with respect to overtime work. While in the Tardif case the casual employees were not members of the bargaining unit, that does not, in my view, affect the principles outlined in these two cases. Finally, Adjudicator Verge determined at page 16 of his award that if management's power to assign such work to casual employees is to be limited, explicit provision must be found in

the Collective Agreement which was not be found in that case. He said;

> "Hence the need for explicit provisions if management's power to assign work to casual or supernumerary employees is to be limited. Article 27.02, on which this grievance is based, contains no specific provision to that effect."

I adopt the principles as enunciated by the adjudicators in the above cases and I find that there are no explicit provisions in Article 23.04 of the Collective Agreement before me, that bars the Employer from assigning the work in question to casual employees.

In my view, the Employer is correct in its contention that overtime work need only be distributed equitably after it makes the determination that work will be assigned to an employee or employees who, as a result of their particular situation with respect to the hours they have already worked in the day or the week, are entitled to a premium rate. It is not the work that creates the overtime; it is the status of the employee offered the work that might make it work that gives rise to the payment of the overtime premium.

This can only occur after the Employer determines that it will not exercise its first two options; namely, to work the scheduled shift with a short staff, if a regular employee is absent, or to call in a casual employee to do the work. It is only after it goes to its third option, to have the work done by an employee on an overtime basis, that its requirement to distribute that work equitably under the provisions of Article 23.04 (1) (a) comes into play. That provision deals strictly with the distribution of <u>required</u> overtime work and does not, in my view, bar the Employer from assigning such work in such a way

that it can be done by a casual employee without attracting overtime rates.

The case of Re Canadian Union of Operating Engineers, Local 104 and University of Guelph (Weatherill) 24 L.A.C. 48 supports the position taken by the Employer. In that case the grievor alleged that a shift normally performed by a third class engineer was performed by a fourth class engineer, eliminating an overtime situation to which the grievor claimed he was entitled. The work in question was normally performed by either a second or third class engineer. At page 50 that board noted;

> "The grievor, to succeed in his claim, must first show, then, that the work in question was overtime work."

and further at page 51;

> "The decisive consideration, in our view, is that the work in question was part of a regular shift schedule. If Mr. Diebel had performed the work, as he had been scheduled to do, he certainly would not have been paid at overtime rates. It was not, in our view, a case of overtime work, but rather a case of filling a regular shift with an available employee. The university was not obliged, as the grievance implies, to create "an overtime situation" where none existed. The situation was that of a regular situation on the rotating schedule, involving the standard hours referred to in the agreement."

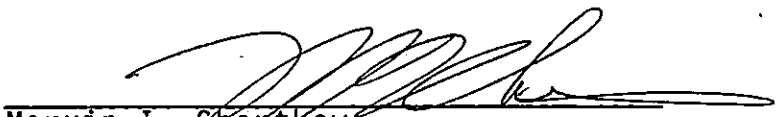
In my judgment, the reasoning in the University of Guelph case, supra, is applicable to this dispute. The Employer is not required under the terms of the Collective Agreement before me to create an overtime situation by having a regular Correctional Officer do work on a shift which was occasioned by the absence of another regular Correctional Officer, rather than

assigning the work to a casual employee who was capable of performing it.

Finally, having found that the Employer was under no obligation to create an overtime work situation, it cannot be said that any of the regular Correctional Officers were discriminated against, in any manner.

The grievance of the Association is therefore denied and it is so awarded.

DATED at Kamloops, British Columbia this 10th day of November, A.D. 1982.



Mervin I. Chertkow
Arbitrator