

UNION POLICY GRIEVANCE (90-621)

GNWT

LEAVE OF ABSENCE - COURT LEAVE - REIMBURSEMENT OF FEES

The Employer continued to require the reimbursement of Court fees when granting court leave even after the Section of the Public Service Act dealing with other remuneration had been repealed. The Arbitrator found that the directive that imposed a monetary obligation on employees was contrary to the language of the collective agreement.

GRIEVANCE ALLOWED
NOVEMBER 27, 1992

CHERTKOW, MERVIN I.

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

**THE MINISTRY OF PERSONNEL for the GOVERNMENT
OF THE NORTHWEST TERRITORIES**

(hereinafter called the "employer")

AND:

THE UNION OF NORTHERN WORKERS

(hereinafter called the "union")

**(UNION POLICY GRIEVANCE - COURT LEAVE
- GRIEVANCE NO. 90-621)**

BOARD OF ARBITRATION

Mervin I. Chertkow - Single Arbitrator

ADVOCATES

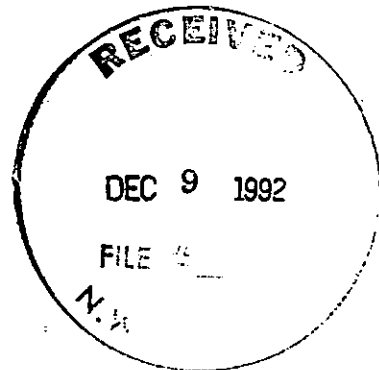
Joan Perry - for the employer
Georges Nadeau - for the union

DATE AND PLACE OF HEARINGS

November 18th, 1992 at Yellowknife, N.W.T.

DATE OF AWARD

November *27th*, 1992



A W A R D

I

On June 22nd, 1990 the union initiated a third level policy grievance. It alleged the policy of the employer that required employees who have been granted court leave with pay under article 21.01 to surrender any fees, other than expenses, paid to them in regards to the appearance to which leave with pay was granted, was contrary to the provisions of the collective agreement.

As remedy, the union seeks a declaration that the employer cease its violation of the collective agreement and further, that all employees who have been subject to surrendering fees received as a result of the violation, be reimbursed in the full amount.

This dispute requires an interpretation of ARTICLE 21.01 - COURT LEAVE which says;

COURT LEAVE

21.01

Leave of absence with pay shall be given to every employee, other than an employee on leave of absence without pay or under suspension, who is required:

- (a) to serve on a jury and the jury selection process; or
- (b) by subpoena or summons to attend as a witness in any proceeding held:
 - (i) in or under the authority of a court of justice or before a grand jury;
 - (ii) before a court, judge, justice, magistrate, or coroner;

- (iii) before the Senate or House of Commons of Canada, or a committee of the Senate or House of Commons, other than in the performance of the duties of his/her position;
- (iv) before the Executive Council or Legislative Assembly, or any committee thereof that is authorized by law to compel the attendance of witnesses before it;
- (v) before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.

The policy directive of the employer is contained in the Personnel Manual, Index No. 507-6 which says;

When leave of absence with pay is granted to an employee for the purpose of appearing before a court or other body, the employing department will require the employee to surrender to the Comptroller General any fees, other than expenses, paid to the employee in regards to the appearance to which leave with pay was granted.

II

The basic position advanced by the union is that there is no provision in the collective agreement which requires employees, who have been granted court leave, to surrender any fees paid to them as a result of their appearances before the bodies as set out in article 21.01.

The position of the employer is captured in a letter dated April 26th, 1990, (which preceded the union policy grievance) from Mr. Herb Hunt, Director, Staff Relations, to Mr. Joe Ahrens, the Senior Negotiator for the union. In paragraph two of that letter Mr. Hunt made the following observations;

The Collective Agreement at Article 21.01 states that the Employer shall grant leaves of absence with pay for court leave to every employee, other than an employee on leave of absence without pay or under suspension, for the purposes of attending various court functions. The Collective Agreement is silent on the issue of fees paid to employees who are required to attend these functions as jurors or in other capacities. As management is obligated to provide leave with pay in these instances, it has been long standing policy and past practice that any fees, other than expenses, paid to employees in these situations are to be surrendered to the Comptroller General. This action is based on the fact that it is prohibited under Section 10 (1) of the Public Service Act for an employee to receive payments in addition to the remuneration received by the Government for periods of time when the employee is receiving such remuneration. Should the employee be on leave without pay he/she would not be required to surrender these monies.

Section 10 (1) of the *Public Service Act* referred to by Mr. Hunt provided (Exhibit 7);

10.(1) Unless authorized by or under this Act or any other Act, no payment additional to the remuneration authorized by law shall be made to any employee in respect of any service rendered by him.

(2) Nothing in this section shall be construed to prohibit the

- (a) payment to an employee of remuneration in respect of each of two or more positions, if the remuneration in respect of one position is not sufficient to compensate him for his whole time and the total remuneration of the employee does not, in the opinion of the Minister, exceed reasonable remuneration for the duties performed; or
- (b) payment to an employee who is on leave of absence from his position and is performing other duties of remuneration in such amount or at such rate as the Minister may fix. 1965(2), c.9, s.8; 1985(1), c.4, s9; 1986(1), c.14, s.16.

However, it is common ground between the parties that section 10 of the *Public Service Act* was repealed by proclamation in 1991.

It is also the position of the employer that under its management rights, as contained in article 7.01, which states;

ARTICLE 7

MANAGERIAL RESPONSIBILITIES

7.01 Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.

it was within its rights to institute policy directive 507-6.

Further, that directive is not in conflict with article 5.03 of the collective agreement which provides;

CONFLICT OF PROVISIONS

5.03 Where there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

In response, the union argues there is now no statutory authority for the employer to demand reimbursement of fees paid to employees who have been granted paid court leave. Its action in continuing to invoke policy directive 507-6 is in conflict with and in contravention of article 21.01 of the collective agreement.

III

I have carefully considered the arguments of counsel, the authorities cited by them and the evidence adduced at these hearings.

In my judgment, the policy grievance of the union is well-founded and must be upheld.

The authority for the employer to require the surrendering of court fees from employee's who have been granted paid court leave was found in section 10 (1) of the *Public Service Act*. After the repeal of that section in 1991, the statutory authority of the employer to require employees to surrender court fees ceased. If section 10 were still in force I would have no hesitation in dismissing the union grievance.

However, absent such statutory authority, the employer cannot invoke its management rights as found in article 7.01 to justify the taking back of court fees. The payment of court fees as provided in the *Jury Act* is a matter of general law outside of the collective bargaining relationship between the parties. It is not a matter of management and direction of the public service which can be equated to "managerial responsibilities" of the employer under article 7.01 of the collective agreement.

If I were to accept the position of the employer I would, in effect, be amending the collective agreement by inserting the substance of the language found in the former section 10 (1) of the *Public Service Act* into article 21.01 of the collective agreement. That is something I cannot do and is specifically barred under the provisions of article 37.22 which says;

37.22**

The arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement, or to increase or decrease wages.

Further, I find that the directive in Policy Manual No. 507-6 is in conflict with the provisions of article 21.01. It seeks to impose a monetary obligation on employees who have been granted court leave with pay where no such obligation can be found in the language of that article. Nor can that concept be necessarily inferred by any other provision of the agreement.

While at first blush it might appear somewhat incongruous for an employee who has been granted paid court leave to keep court fees in addition to his or her regular pay and that might be perceived to be inequitable, the comments of Arbitrator D.R. Munroe in the case of *Re City of Trail and International Association of Firefighters, Local 941*, 10 L.A.C. (3d) 251 at page 262 are appropriate. There he said;

We are to interpret the agreement. Considerations of equity may be an aid to interpretation. But where the proper interpretation is clear, *ex post facto* examinations of the equities of the situation are for subsequent negotiations.

The employer, if it so desires, can address this situation in the next round of bargaining or, alternatively, re-enact section 10 (1) of the *Public Service Act*.

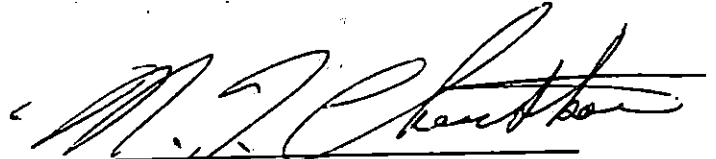
For all of the above reasons, the grievance of the union is upheld.

As to remedy, I was not provided with the actual date of the proclamation for the repeal of section 10 of the *Public Service Act* which occurred sometime in 1991. There will be a declaration that the employer is in breach of the provisions of article 21.01 after the date of such proclamation when it required employees, who had been granted leave of absence with pay for court leave, to surrender court fees to the Comptroller General. The directive in Policy Manual, No. 507-6 is therefore invalid from that date.

The individual employees who have surrendered court fees after the proclamation of the repeal of section 10 shall be reimbursed the same by the employer. Should the parties

encounter any difficulties in the implementation of this Award, including compensation to the employees affected thereby, I retain jurisdiction for that purpose. It is so awarded.

DATED at Kamloops, British Columbia, this 27th day of November, A.D. 1992.



Mervin I. Chertkow
Arbitrator