94-703
94-798
94-892
95-501
93-759
93-817
94-684

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE UNION OF NORTHERN WORKERS

(The Union)

94-704
94-623
95-509

- and -

THE MINISTER OF PERSONNEL FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES

(The Employer)

Expedited Grievance Matters heard on June 19, 1995

M E M O R A N D U M

BEFORE:	Tom Jolliffe
APPEARING FOR THE EMPLOYER:	Guy Bisson - Spokesperson Joletta Larocque - Co-spokesperson
APPEARING FOR THE UNION:	Chris Dann - Spokesperson Scott Wiggs - Co-spokesperson
DATE OF HEARING:	June 19, 1995
LOCATION:	YELLOWKNIFE, Northwest Territories

Date Memorandum Issued:
June 23, 1995

The parties convened a day of expedited arbitration proceedings as held in Yellowknife on June 19, 1995. Evidence and argument was heard with respect to several grievance matters concerning which I was able to give oral decisions immediately following the parties' presentations. They have requested that I provide in writing a brief resume setting out the reasons and conclusions which I reached. These matters are detailed below as follows:

Union Local (Grievance No. 94-703/798)

In this matter the Union has grieved that the Employer failed to reply at the first level to a warning letter grievance submitted on behalf of an employee, and then after his grievance was submitted to the second level was late in its reply. The Employer was again late in its reply after the third level transmission was received. The Union further grieves that the Employer in similar fashion failed to respond to the grievance of another employee at the third level within time limits.

The Union in argument pointed out that the Employer has a described procedure to follow under the article 37 grievance article respecting advancing contested matters towards arbitration. In particular it cites the following provisions with respect to the Employer's obligation to reply and to do so in timely fashion at the various grievance levels.

37.08 An employee may present a grievance to the first level of the procedure in the manner prescribed in Article 37.04 not later than the

fifteenth (15th) calendar day after the date on which he/she is notified orally or in writing or on which he/she first becomes aware of the action or circumstances giving rise to the grievance, excepting only where the grievance arises out of the interpretation or application with respect to him/her of this Collective Agreement, in which case the grievance must be presented within thirty (3) calendar days.

37.09 The Employer shall reply in writing to an employee's grievance within twenty-one (21) calendar days at level one, within fourteen (14) calendar days at level two, and within forty-five calendar days at the Final Level.

37.10 An employee may present a grievance at each succeeding level in the grievance procedure beyond the first level,

(a) where the decision or settlement is not satisfactory to him/her, within fourteen (14) calendar days after that decision or settlement has been conveyed in writing to him/her by the Employer; or

(b) where the Employer has not conveyed a decision to him/her within the time prescribed in Article 37.10 within fourteen (14) calendar days after the day the reply was due.

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37.17 The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the employee, and where appropriate, the Union representative.

In its grievance the Union has raised the issue of whether the Employer's failure to respond in timely fashion on a step by step basis within the grievance procedure, or at all, constituted a breach of a mandatory provision such that it rendered the Employer's disciplinary action a nullity. The Employer holds to

the view the grievance procedure is directory only and where the Employer has failed to reply the Union then can advance the matter to the next step.

Having listened to the parties' respective spokespersons I indicated that I do not find helpful the caselaw distinguishing directory from mandatory provisions in the sense that a breach of the latter has been seen to render the initial disciplinary action a nullity. The collective agreement does not contemplate the Employer's failure to respond in timely fashion, or at all, as being so fundamental to the discipline process as causing it to be null and void at that point. Article 37.10 contemplates that in such circumstances the Union can present the grievance to the next succeeding level, which it invariably does.

However I also indicated that it is the Employer which administers the grievance response process on a level by level basis in that its obligation under article 37.09 stipulates that it "shall reply in writing ...". I stated my view to the parties that given this strong wording it is not enough for the Employer to simply rely on the Union to advance the grievance to the next level where it has failed to reply or has replied in untimely fashion. The Union has a right to rely on the grievance process being properly followed by the Employer in order that it can assess its own case on a step by step basis in meeting its own obligations to the bargaining unit members. The collective agreement contemplates a degree of interaction and communication between the parties as a grievance advances up the ladder towards the final level if

necessary. It does not allow the Employer to simply ignore a matter after the process has been initiated at the first step. As the Union spokesman pointed out this is especially significant in warning letter situations where the Union and the aggrieved employee are looking for some level by level reply inasmuch as there is no final right to arbitration.

Oral ruling delivered at hearing: A declaration is to issue that the Employer has violated the collective agreement by either not replying in writing or replying in untimely fashion at various levels of the grievance procedure, with accompanying direction that the Employer is to comply with its obligations under article 37.09.

John Chartrand (Grievance No. 94-892)

In this matter a Department of Public Works employee left Hay River on the morning of November 18, 1994, by pickup truck, with two friends for some caribou hunting in the Yellowknife area. The trip required that they cross the MacKenzie River by ferry on Highway 3 near Fort Providence and they did so when the ferry was running normally and the weather conditions were good. However on their return to the river crossing on Sunday evening November 20 the grievor learned that the ferry was not operating due to heavy ice conditions which had formed in the three days since he had crossed the river. The initial advice received was that the ferry would probably not be operating for another three days. The grievor drove his pickup truck back to Yellowknife where he had

relatives with whom he could stay while awaiting the ferry going back into operation. He notified the Employer of his difficulty and his expectation that it might take as long as three days before he was able to cross the river. By his estimation he realistically had no other way to get back to Hay River at that point, not wanting to abandon his pickup truck loaded with caribou meat and also having assessed his possible return by air to be prohibitively expensive. There was also the possibility existing of the ferry going back into operation within a day or two.

On Monday, November 21, a regularly scheduled work day, the grievor telephoned the ferry terminal several times before eventually learning at about 8:00 p.m. that the ferry service was scheduled to commence again in two hours time. Nevertheless, the grievor at that point decided to wait until the next morning before leaving for Hay River which resulted in him missing two scheduled work days. He then submitted an application requesting two days of paid special leave for Monday, November 21 and Tuesday, November 22, which request was denied. The relevant provisions on which the grievor based his application for special leave are set out below as follows:

19.01
(1) An employee shall earn special leave credits up to a maximum of twenty-five (25) days at the following rates:

(a) one-half (1/2) day for each calendar month in which he/she received pay for at least ten (10) days, or

(b) one-quarter (1/4) day for each calendar month in which he/she received pay for less than ten (10) days.

As credits are used, they may continue to be earned up to the maximum.

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19.02
(2) The Department Head may grant an employee special leave with pay for a period of up to five (5) consecutive working days:

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(b) where special circumstances not directly attributable to the employee prevent his/her reporting to duty, including:

(i) serious household or domestic emergencies;

(ii) a transportation problem caused by weather if the employee makes every reasonable effort to report for duty;

(iii) serious community emergencies, where the employee is required to render assistance;

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(e) Such leave will not be unreasonably withheld.

19.03 Special leave in excess of five (5) consecutive working days for the purposes enumerated in Clause 19.02 may only be granted with the Employer's approval.

There was testimony from long time resident of Hay River who now resides in Yellowknife, human resources officer Joletta

Larocque, that one requires approximately three hours to drive from Yellowknife to the ferry terminus in normal winter driving conditions, five or ten minutes to cross the river, and then another two hours to finish the drive to Hay River. She said that the longest time she would expect the total drive to take does not exceed the 5 1/2 hour range. She also remarked that in her view one would be wise in November to telephone ahead to the ferry terminus inasmuch as the ice conditions at that time of the year make the ferry unreliable.

The Union advanced the position that the grievor was entitled to two days paid special leave, a matter of calling upon his earned leave credits, on the basis that he faced a transportation problem caused by the weather amounting to circumstances not directly attributable to him. Despite his making every reasonable effort he required two days to return to Hay River. The Employer holds to the view that given the time of year it was reasonable for the grievor to have expected possible delays in crossing the river and should have made arrangements to utilize annual leave or lieu time for the entire amount of time away from work whatever that might turn out to be. It also raised the issue of whether the grievor made every reasonable effort to report for duty once becoming aware that recrossing of the river was temporarily prevented.

Having listened to the parties' representations on the evidence presented I noted that the wording under review provided employees with earned special leave credits to be drawn upon to

prevent loss of income in situations where special circumstances had occurred, not directly attributable to the employee, preventing him/her from reporting to work despite every reasonable effort. Further, the leave period requested cannot be unreasonably withheld. On my review of the facts I considered that despite the vagaries of the weather across the Employer's domain it was not reasonable in these circumstances to expect that the grievor should have known he would not be able to get back to Hay River once having crossed the MacKenzie River. The ferry was operating in normal fashion when he crossed on November 18 and his expectation was that he would be able to return to Hay River as scheduled on November 20. In my view the closing of the ferry due to the ice conditions amounted to a transportation problem caused by weather and were circumstances not directly attributable to the employee which prevented him from taking the ferry on the evening of November 20. However on the circumstances presented I also considered that the grievor did not make a satisfactory attempt to recross the river at the first reasonable opportunity. The grievor learned on the evening of November 21 that the ferry was about to go back into operation at 10:00 p.m.. In my view he should have immediately left Yellowknife at that point which would have put him in a position to cross the river at about 11:00 - 11:30 p.m. and would have put him back in Hay River by 1:00 - 1:30 a.m. later that same night. Setting out for Hay River at the first opportunity following advice from the ferry service that its operation was about to recommence would have fulfilled the grievor's obligations

under article 19.02 to have made every reasonable effort to report for duty the next day. It was the reasonable course of action even if it would have possibly required him to report somewhat later than his normal starting time the next morning. Accordingly in such circumstances it was appropriate to have withheld the special leave for the second day claimed, but not the first day.

Ruling delivered orally at hearing: This grievance partially succeeds to the extent that it was unreasonable to withhold the first day of requested special leave with pay under article 19.02(b) and the Employer is directed to monetarily compensate the grievor for Monday, November 21, 1994.

Khayan Nadji (Grievance No. 95-501):

This matter raises some of the same consideration as set out in the previous John Chartrand (94-892) grievance. One has reference to the same provisions as hereinbefore set out for that matter.

In this matter the grievor who is a Canadian citizen travelled to Iran, the country of his birth, on November 12, 1992 to visit with his ill grandmother. He was scheduled to return to Canada some nine days later, having made all the appropriate arrangements to do so. However upon the grievor attempting to board his return aircraft on November 21, 1992 he was advised by the Iranian airport authority that he would not be allowed to immediately leave while it considered his current status. While in

Canada the grievor some time ago had converted to the Bahai faith to which the Iranian government is not sympathetic. As matters turned out the grievor eventually was able to extricate himself from the situation, making several attempts to leave Iran before he was finally given permission to board an aircraft on December 22, 1992. Upon his return to work he presented a special leave application for 21.5 days to cover the entire period of the delay caused by his detention in Iran.

The Union submitted that it was a situation of special circumstances beyond the grievor's control preventing him from reporting to duty despite an undoubted continuing attempt on his part to get out of Iran. I should take note that article 19.02 in its reference to "special circumstances" was not exhaustive in setting out some examples. In these circumstances it should be considered unreasonable to have denied the leave application. The Employer advanced the view that travel delays while visiting abroad have a certain element of foreseeability about them especially with respect to certain countries. Further, the Employer was not unsympathetic having advanced the grievor an unpaid leave status at its discretion there being no issue of possible disciplinary action resulting from his failure to return when scheduled.

In the circumstances presented I determined that the delay in the grievor's return to work occasioned by the actions of Iranian authorities in detaining a Canadian citizen in Iran some 21 days past his scheduled and ticketed return date, probably as a matter of religious persecution, constituted the kind of special

circumstances contemplated by article 19.02(b) as giving one access to the earned special leave credits. I accepted that the circumstances were not directly attributable to the employee and that he had made every reasonable attempt to return to Canada. I considered that it was a situation of the Employer having unreasonably withheld the paid leave but only for a period of five consecutive work days, as any further period of time is governed by article 19.03 which refers to it being granted "only ... with the Employer's approval". Any additional period is not governed by the same kind of reasonableness test as contemplated under article 19.02. The sixth day onward is a matter of a management discretion, probably subject only to being exercised in good faith concerning which there was no testimony.

Ruling delivered orally at hearing: This grievance succeeds only to the extent that the Employer unreasonably withheld five consecutive work days of special leave with pay under article 19.02(b), with a direction given to monetarily compensate the grievor for this limited period of time.

Hugh MacLellan (Grievance No. 93-759)

This matter involved assessing the reasonableness of a five day suspension imposed against the grievor for workplace misconduct in the nature of directing racist and abusive language towards a co-worker as set out in a written complaint presented to the Employer by the co-worker on August 31, 1993. The Union agrees

that the grievor has a disciplinary record on which the Employer can rely which includes two written reprimands and a verbal reprimand within the previous year leading up to his five day suspension for making abusive and racist comments in the workplace. It is noted that following the complaint by a co-worker the grievor did not act in a remorseful or apologetic way but rather attempted to explain away his actions by twisting the circumstances giving rise to his remarks. Further, the grievor had previously completed some counselling sessions concerning the same issue.

While the Union in this matter submitted that the five day suspension was too harsh an application of progressive discipline the Employer views the grievor's actions as completely unacceptable, conduct which can have far reaching consequences in terms of poisoning the workplace atmosphere for co-workers. It referred to the grievor's unrepentant background and raises deterrence as an issue.

In viewing the five day suspension as reasonable under all the circumstances I noted that there was no indication of any remorse on the part of the grievor who in his written reply to the co-worker's complaint was more interested in explaining away the circumstances than recognizing the seriousness of his actions. There is no lockstep formula to be applied to progressive discipline. The seriousness of the grievor's actions was obvious from the facts as placed in evidence. The Employer has a large stake in ensuring that the workplace be free of abusive actions and need not tolerate racially motivated comments of any kind.

Ruling delivered orally at hearing: This grievance is respectfully dismissed.

Marilyn Lee (Grievance No.: 93-817)

The Union advised that this matter has been withdrawn from arbitration.

SNA Hay River (Grievance No.: 684) and SNA Fort Smith (Grievance No.: 94-704)

The parties have reached a tentative settlement with respect to these two grievances concerning which I am to remain seized pending the parties drafting and executing the appropriate language of their agreement.

Bill Norn (Grievance No.: 94-623)

In this matter the grievor an observer/communicator at Fort Resolution airport has grieved that the Employer has failed to comply with the provisions of article 29 in denying him standby pay for being required to be available for medivac call-outs during his off work hours. The grievance addresses article 29.01 of the collective agreement which in part reads as follows:

> **29.01**
> **(1) Where the Employer requires an employee to be available on standby during off-duty hours, an employee shall be entitled to a standby**

payment of $9.00 for each eight (8) consecutive hours or portion thereof that he/she is on standby, except on his/her days of rest and designated paid holidays.

For any period of standby on a day of rest or a designated paid holiday, he/she shall be paid $12.00.

(2) An employee designated by letter or by list for standby duty shall be available during his/her period of standby at a known telephone number and be available to return for duty as quickly as possible if called. In designating employees for standby the Employer will endeavour to provide for the equitable distribution of standby duties among readily available, qualified employees who are normally required, in their regular duties, to perform that work.

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The evidence disclosed that approximately once per month, on average, a medivac pilot or dispatcher will directly contact the grievor at his home by telephone during his off hours for a runway surface report. This requires him to return to the airport to obtain the weather report, check the conditions of the runway and turn on emergency lights if necessary. During this time of response to a medivac call on off duty hours the grievor is reimbursed under article 25 dealing with reporting pay but has never received any compensation under the article 29.01(1) standby pay provisions. The grievor, one of two observer/communicators at Fort Resolution and the one with a telephone in his home, has never been required to stay at home or remain in contact during his off hours for medivac situations as they might arise at any time, but

when reached he performs as requested. On one occasion when the grievor was reached at home during his off hours and thereafter failed to report to the airport to deal with a medivac situation, despite having indicated that he would report, he received a four day suspension.

In this matter the Union submitted that the grievor de facto is required to be available on a standby basis during his off work hours to deal with medivac situations which should have long since been recognized by the Employer as entitling him to a standby payment of $9.00 for each eight consecutive hours or portion thereof that he is on standby. It should be considered effectively an ongoing every day occurrence. The Employer cited the entirety of article 29.01 as contemplating standby duties only after designation of an employee by letter or by list and the reference to a person so designated as being "required" to report. It contended that there was no application to the grievor's situation. He had never been designated as being on standby or required to report for duty on any such basis. He had in the past on one occasion been disciplined only because he had agreed to report following a specific request and then had failed to do so. Despite the grievor's apparent availability to field requests for medivacs there was no indication of any obligation on his part to remain reachable during his off work hours or even answer his telephone. It contended that the fact he regularly responded to telephone calls during his off work hours was a matter of his personal choice not as a result of being named to any standby list.

Having reviewed the evidence and arguments submitted by the parties I agreed with the Employer's position that the evidence did not indicate that the grievor was on standby during his off work hours, whether or not he chose on an informal basis to be available to take telephone calls at his home to deal with medivac situations. There was no indication that he was actually required to take these calls nor can he be considered as having been designated to be on standby during off work hours whether by letter or list. He was simply under no contractual requirement to make himself available (reachable) in order to attend at his workplace during his usual off hours. This is distinct from committing himself to attend after receiving a specific request. There is no application of article 29.01 on these circumstances.

Ruling delivered orally at hearing: This grievance is respectfully dismissed.

Brenda Stephen (Grievance No.: 95-509)

In this matter the Union alleges that the Employer violated Appendix A12(E8) in that the grievor a registered nurse was denied an additional $40.00 per month payment for a special clinical preparation course which she had taken prior to commencing employment. The provision reads as follows:

E8 SPECIAL CLINICAL PREPARATION

(1) An indeterminate, term or part-time Registered Nurse with special preparation of not less than six (6) months approved by the Employer

and who is employed in the special service for which he/she is qualified, will be paid an additional forty ($40) dollars per month if he/she has utilized the course within four (4) years prior to employment.

The grievor has been employed in the position of nurse-in-charge for the MacKenzie Regional Health Board in Hay River since October 15, 1991. Following the Employer's advice to its nurses that they would receive a special clinical preparation allowance under Appendix A12(E8) on a retroactive basis upon providing proper documentation, the grievor requested recognition of her "community health in service training program" completed in 1986. In denying the application the Employer initially raised its understanding of the course in question being made up of four modules of two weeks in length plus one day per week for assignments completed over a nine month period. It understood the course to be less than six months in length and therefore not a subject for its approval. Since its initial denial it has also pointed out that the course on which the grievor relies has never been approved by the Employer as fitting within its guidelines. The Union has held to the view all along that the course on which the grievor relies should have been made subject to consideration as fulfilling the six month prerequisite.

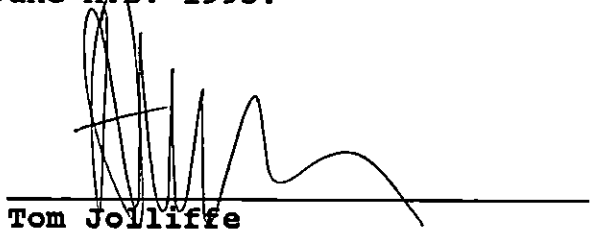
On my review of the matter I indicated that whatever the grievor's thoughts as to the nursing enhancement program she had taken in 1986, it was clearly not one which had ever been approved by the Employer as fitting within its guidelines, perhaps for obvious reasons inasmuch as it essentially consisted of four

modules of two weeks in length with periodic assignments to be handed in thereafter. I indicated that in my view there was a degree of management discretion available to the Employer in its choice of approved courses which in these circumstances it has following some consideration chosen to exercise against the course in question. There was no indication of any improper motive or other inadequate reason for exercising its discretion in the manner chosen so as to have wrongly denied its approval of the enhancement course in question.

Ruling delivered orally at hearing: This grievance is respectfully dismissed.

I remain seized of all these matters heard in expedited arbitration format at Yellowknife on June 19, 1995 pending implementation of the rulings in each case.

DATED and issued this 23rd day of June A.D. 1995.



Tom Jolliffe