

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

GOVERNMENT OF NEWFOUNDLAND AND LABRADOR
(Government Services, Motor Registration Division)
(hereinafter called the "Employer")

GRIEVANCE: Group Grievance - Overtime

COUNSEL: For the Union

Trudi Brake

For the Employer

David Martin

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on October 8 and 16, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance. The Employer raised an objection regarding the Arbitrator's jurisdiction to order the redress claimed by the Union. This issue was heard as part of the hearing on the merits of the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for ninety (90) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

- Consent 1 - General Service Collective Agreement between Her Majesty the Queen in Right of Newfoundland, C.A. Pippy Park Commission and Municipal Assessment Agency and The Newfoundland and Labrador Association of Public & Private Employees, date of signing - May 4, 2004, expires - March 31, 2008
- Consent 2 - Grievance Form dated June 11, 2004
- Consent 3 - Letter dated November 24, 2004 from David Norman, Registrar of Motor Vehicles to Chris Henley, Union Employee Relations Officer with attached list of names of processing MRD employees, paid overtime amounts and time off in lieu for 2004/2005 to date
- BH - 1 Memorandum dated June 2, 2004 from David Norman, Registrar of Motor Vehicles to processing staff

Nature of the Grievance

The Union grieves that the Employer failed to allocate overtime on an equitable basis, when it offered overtime to employees on condition they would accept time off in lieu of pay for overtime. The Union filed a group grievance on behalf of employees claiming they were denied access to

overtime. The Employer submits that there was no evidence of an inequitable allocation of overtime, and the filing of the grievance was premature.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 15 Overtime

...

- 15.02 All overtime shall be authorized and scheduled by the permanent head, or his/her designated representative.
- 15.03 The permanent head may at any time require an employee to work overtime.
- 15.04 Subject to Clause 15.09, an employee shall be compensated at time and one-half (1fi) for all time worked in excess of the scheduled work week or work day as specified in Article 14.
- 15.05 Subject to Clause 15.09, the permanent head may, upon the request of the employee, grant time off in lieu of compensation for any overtime worked. Such time off shall be granted at the rates prescribed in Clause 15.04.
- 15.06 Subject to the operational requirements of the public service, the permanent head shall make every reasonable effort:
 - (a) to give employees who are required to work overtime adequate notice of this requirement;
 - (b) to allocate overtime work on an equitable basis among readily available qualified employees; and
 - (c) Where operational requirements permit, an employee shall receive a fifteen (15) minute paid break for every three (3) hours of overtime.
- 15.07 Subject to Clause 15.09, an employee's overtime rate shall be calculated by dividing his/her annual salary by eighteen hundred and twenty (1820) and multiplying this figure by 1.5.
- 15.08 Subject to Clause 15.09, every effort will be made to pay overtime no later than the second pay period from the pay period when the overtime was worked.

Evidence

The witnesses called by the Union were Boyd Hillier and Chris Henley. The Employer did not call any witnesses.

The grievance concerns employees who process applications filed with the Motor Registration Division (“MRD”), Department of Government Services. Applications to MRD, may be filed in various ways, such as by attending in person at the MRD offices, sending by mail, filing on the internet, or filing at car dealerships or banks. In June, 2004, Boyd Hillier was employed in the position of automobile dealer representative at MRD. His duties included handling the licensing of automobile dealers, responding to inquiries and processing applications. He was familiar with the work of other MRD employees who processed different types of applications. He was a Union shop steward at that time.

The bargaining unit employees were on strike from April 1 to April 28, 2004. When the employees returned to work after the strike, there was a backlog of processing work to be done. To clear up the backlog, the Employer offered overtime work to employees interested in using time off in lieu of overtime pay. A memorandum dated June 2, 2004, from David Norman, Registrar of Motor Vehicles, to processing staff, stated as follows:

I am writing to determine if there are any processing Clerk IV's interested in clearing up the backlog in Banking and Dealers and, to a lesser degree, in the mailroom by using time off in lieu of overtime.

I was able to obtain some funding from Treasury Board earlier this fiscal year to help clear up the backlog. Unfortunately all of these monies have been expended and there is still a substantial backlog.

Please let me know by close of work on Friday if you are interested.

Boyd Hillier testified that, as shop steward, he believed that the memorandum was a violation of the Collective Agreement, because it did not allow employees to be paid for overtime. Mr. Hillier said that he asked his manager if he could work overtime and be paid compensation, and he was told that it was not allowed. After the memorandum was circulated, the first overtime work opportunity was on or about June 10, 2004. Mr. Hillier testified that he and several other employees decided not to

work overtime for time off in lieu. He said that other employees decided to work overtime. He said that some of these employees felt pressured to work. Some worked only a couple of shifts for time off in lieu.

Chris Henley, Employee Relations Officer for the Union, testified that he was informed about the June 2, 2004 memorandum by Boyd Hillier. Mr. Henley advised Mr. Hillier that it was a violation of the Collective Agreement for the Employer to offer overtime with a condition that it was only available to employees willing to work for time off in lieu of compensation. Mr. Hillier filed the grievance on June 11, 2004. The grievance claimed violation of Article 15 and all pertinent Articles of the Collective Agreement. The Employer's position at that time was that there was no money available to pay compensation and overtime opportunities were only available for time off in lieu. Mr. Henley testified that by filing the grievance in June, 2004, the Union gave the Employer the opportunity to fix the problem. The Employer could assign overtime so that it would be allocated on an equitable basis before the end of the fiscal year, ending March 31, 2005. The amount of compensation required to resolve the issue would increase if the Employer continued to allocate overtime on an inequitable basis. Mr. Henley testified that the allocation of overtime was inequitable because employees not willing to work for time off in lieu of compensation were not given the opportunity to work. He said the choice of receiving overtime pay, or time off in lieu of pay, is the choice of the employee, and not the choice of the Employer, according to the Collective Agreement.

At the request of the Union, the Employer provided a list of processing employees with overtime for the fiscal year 2004/05 to date. The list was attached to a letter dated November 24, 2004 from David Norman, Registrar of Motor Vehicles, to Chris Henley, which stated as follows:

I am writing further to the Grievance Committee Meeting held on September 21, 2004, in which the Employer agreed to provide a list of processing employee overtime (paid and time-off-in-lieu) for fiscal year 2004/05 to date.

Please find attached a list of the names of processing MRD employees, paid overtime amounts and time off-in-lieu for 2004/2005 to date. It is noted that all processing employees were given an equal opportunity to work for time off in lieu as there were no monies approved for overtime for this department as part of the 04/05 budget process. Not all staff availed of this opportunity for a variety of reasons, such as geographic location of their home, medical condition, family commitments, etc. No employee was required by the Employer to work. We have endeavored to allocate

overtime amongst interested employees as equitably as possible, given their personal circumstances and availability.

The list attached to the letter was dated November 19, 2004 and set out names of employees, total hours of processing overtime, paid overtime hours and time off in lieu of overtime hours. There were 33 employees on the list. Total overtime hours ranged from a low of 4.4 hours to a high of 208.75 hours. The list showed that Boyd Hillier had 30.5 hours. The Union did not dispute the accuracy of the list, although some employees on the list did not do processing work on a day to day basis. The list did not indicate when the overtime hours were worked, what date the hours of overtime were offered, or what date an employee either refused or accepted overtime.

Union Submission

The Union submitted that Article 15 required the Employer to compensate employees for overtime. Under Article 15.05, an employee has the option to work for compensation or time off in lieu, subject to approval of the permanent head. The Employer does not have the option to direct employees to work overtime for time off in lieu of compensation. The Employer violated the Collective Agreement by its memorandum to employees on June 2, 2004, in which it offered an overtime opportunity subject to the condition that employees work for time off in lieu. Boyd Hillier, one of the Grievors, asked to work overtime for compensation. He was told by his manager that he could only work overtime if he agreed to work for time off in lieu. Mr. Hillier was unable to “work now grieve later” because the Employer refused to schedule an employee for overtime who did not agree to work for time off in lieu. The first overtime opportunity to work on the processing backlog was on June 10, 2004. Boyd Hillier and six other employees were denied the opportunity to work overtime at that time. The Union filed a grievance at the first opportunity. The issue had crystallized at the time that the Employer would not permit employees to work overtime for compensation. Mr. Hillier represented all 33 employees who were on the list of employees. The list was evidence of an inequitable allocation of overtime. The appropriate redress was compensation. Compensation may be calculated on the basis of the average amount of overtime worked by employees in the group, having regard to the method of calculation described in *Newfoundland Association of Public Employees v. Her Majesty the Queen in right of Newfoundland, Department of Public Works, Services and Transportation*, unreported, May 25, 1994 (Oakley) (the “*Works Services and Transportation*” case). The Union requested that the grievance be allowed and that compensation be paid for lost overtime opportunity.

Employer Submission

The Employer submitted that the onus was on the Union to prove a violation of the Collective Agreement. The Collective Agreement contemplates that employees who work overtime, may be paid compensation or receive time off in lieu of compensation. Overtime was offered to employees. Some employees declined the offer and chose not to work. Declining an overtime opportunity was equivalent to having worked the overtime for the purpose of calculating the equitable allocation of overtime. Boyd Hillier was offered overtime and he declined the offer. The “work now grieve later” principle applied. Employees could have worked overtime and then filed a grievance claiming compensation, if they believed there was a violation of the Collective Agreement. The Employer raised an issue of jurisdiction. The Arbitrator had jurisdiction to declare whether the Employer could make overtime available only to those employees interested in working for time off in lieu of compensation. However, the Arbitrator did not have jurisdiction to order any compensation or other redress. The filing of the grievance on June 11, 2004 was premature. The grievance claimed inequitable allocation of overtime. To determine if overtime has been allocated equitably, it is necessary to consider the allocation over a one year period ending at the end of the fiscal year on March 31 (*Works Services and Transportation*). On June 11, 2004, the actual allocation of overtime over the fiscal year was unknown. Evidence of the actual allocation would require post grievance evidence which was not admissible. The list dated November 19, 2004, does not indicate allocation of overtime at the end of the fiscal year. Some of the employees on the list do not usually do processing work. The list did not prove violation of the Collective Agreement. The Employer requested that the grievance be denied.

Considerations

The grievance arises from a memorandum from the Registrar of Motor Vehicles dated June 2, 2004. The memorandum stated that overtime to clear up a backlog of processing work was available to employees interested in working for time off in lieu of overtime. The Union alleges violation of Article 15 of the Collective Agreement. The Union alleges that overtime was not allocated on an equitable basis. The Employer has raised issues of the jurisdiction of the Arbitrator to award the redress claimed by the Union, and submits that the grievance was premature.

The issues are as follows: (1) Is the grievance premature? (2) Does the Employer’s memorandum violate Article 15 of the Collective Agreement? (3) Does the Arbitrator have jurisdiction to order

compensation for inequitable allocation of overtime, and to consider post grievance evidence if required to prove the claim for compensation? (4) In the event the Arbitrator has jurisdiction, what is the method of calculating compensation? and (5) In the event the Arbitrator has jurisdiction, is a claim for compensation proven?

The Employer submits that the grievance is premature, because, on the date of the grievance, it was unknown whether or not overtime work would be allocated on an equitable basis. It follows from the Employer's submission that the Union ought to have delayed filing the grievance until the end of the fiscal year. At the end of the year, information would be available to disclose overtime allocation for one full year. The Employer submits that this information is required in order to know whether or not there was an equitable allocation. The Union submits that it was appropriate to file the grievance in response to the Employer's memorandum of June 2, 2004. The Union claims that the grievance put the Employer on notice that if it continued to follow the practice set out in the memorandum, there would be an inequitable allocation of overtime, and a violation of the Collective Agreement. The Union also submits that, had it waited until the end of the fiscal year to file the grievance, then the Employer might then object that the grievance was filed out of time, or that a retroactive award of compensation was limited by time limits.

I have considered the factual background. The Employer's memorandum was issued on June 2, 2004. At that time there was a backlog of processing work to be done by the Motor Registration Division, resulting from a strike by the bargaining unit employees in the month of April. The Union considered the memorandum to be a violation of the Collective Agreement. According to the shop steward, Boyd Hillier, overtime was scheduled on June 10, 2004. Mr. Hillier said he was told by his manager that he was not permitted to work overtime unless he agreed to work for time off in lieu of compensation. Mr. Hillier declined the overtime offer under that condition. He would have worked overtime for compensation. The grievance was filed on June 11, 2004 as a group grievance. The statement of grievance on the grievance form states "violation of GS Collective Agreement Article 15 and all pertinent Articles". The requested adjustment states "full redress - monetary compensation". The grievance put the Employer on notice that the Union was claiming compensation for any monetary loss suffered by an employee as a result of the practice stated in the memorandum. Mr. Hillier testified that other processing employees at MRD would not work overtime for time off in lieu, but would have worked overtime for compensation. On June 11, 2004, the date the grievance was filed, the parties would not have known how overtime would be allocated to the processing employees at the end of the fiscal year on March 31, 2005. A list was entered in

evidence showing the allocation of overtime to processing employees as of November 19, 2004. The list shows that the amount of overtime allocated to processing employees varied from a low of 4.4 hours to a high of 208.75 hours. When the Union filed the grievance on June 11, 2004, it would not have known the allocation of overtime hours as of November, 2004.

Arbitrators have considered the issue of whether or not a grievance is premature. The issue is considered in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 2:3240, where the authors state that arbitrators may rule a grievance to be inarbitrable, and decline jurisdiction to hear it, where the grievance is premature in the sense that the difference between the parties has not yet crystallized. The Brown & Beatty text also states at paragraph 2:3128, under the heading “Time-limits”, as follows:

Many collective agreements fix time-limits within which a grievance is to be filed and within which the various steps established by the grievance procedure must be taken. And where they do, questions may arise as to when the grievance first arose. In that regard, it has been held that a grievor need not anticipate a breach of the agreement and can wait until the issue crystallizes. Indeed, where a grievance is premature it may be inarbitrable on the ground that a dispute did not exist at the time it was brought.

One of the arbitral authorities cited in the above paragraph 2:3128 is *Canada (Treasury Board - Department of Human Resources and Skills Development)* (2007) 165 L.A.C. (4th) 192 (Public Service Labour Relations Board, Done). In that case the employer gave notice that it would not offer overtime to employees in one of its offices, until the productivity of that office improved. The collective agreement provided that the employer make every reasonable effort to offer overtime work on an equitable basis. It was held that the notice to employees crystallized the grievance, and it was not necessary to wait until the overtime was actually missed to file the grievance. The board considered the allocation of overtime and determined that the failure to offer overtime to a group of employees during an overtime freeze period violated the requirement for equitable allocation of overtime. The board issued a declaratory order and referred the issue of compensation to the parties to resolve.

In this case, the Employer issued a memorandum stating that overtime was offered to employees who agreed to the condition that they work overtime for time off in lieu of compensation. It is alleged that the condition established by the Employer violated the Collective Agreement. Boyd Hillier and

other employees were denied the overtime opportunity because they did not agree to the condition. At the time the grievance was filed, there was a dispute between the parties as to whether or not the Employer had authority under the Collective Agreement to offer overtime subject to the condition. The condition allegedly breached Article 15. There was also a dispute between the parties with respect to the equitable allocation of overtime, because it was alleged that the condition would cause employees to miss overtime opportunities. At the time the grievance was filed, the issue had crystallized. It was not necessary for the Union to wait until the end of the fiscal year, or some other appropriate period of time, to file a grievance. Also, the filing of the grievance, on the date it was filed, put the Employer on notice of the Union's allegation that the memorandum, and the assignment of overtime pursuant to the memorandum, was a violation of the Collective Agreement. By filing the grievance when it did, the Union gave the Employer an opportunity to address the dispute at the earliest possible time. In the event that the practice would result in an inequitable allocation of overtime, then it would benefit both parties if the Employer corrected the practice to comply with the Collective Agreement. The grievance was not premature. The Arbitrator has jurisdiction to hear the grievance.

Did the memorandum violate Article 15 of the Collective Agreement? The memorandum, dated June 2, 2004, offers overtime to employees interested in using time off in lieu of compensation. It is implied by the memorandum that employees interested in working for compensation will not be offered the overtime opportunity. The effect of the memorandum was apparent when overtime was assigned on June 10, 2004. One of the employees, Boyd Hillier, was told by his manager that he was not permitted to work overtime unless he agreed to work for time off in lieu of compensation. There was a condition placed on the offer of overtime. The reason for the condition was stated in the memorandum, namely, that there was a backlog of processing work, but there was no money available to pay compensation for overtime.

The Collective Agreement addresses overtime in Article 15. Overtime is authorized and scheduled by the permanent head or designated representative (Article 15.02). An employee may be required to work overtime (Article 15.03). Article 15.04 states that "an employee shall be compensated at time and one half for all time worked in excess of the scheduled work week or work day". Article 15.05 states that upon request of the employee, and approval of the permanent head, an employee may be granted time off in lieu of compensation for overtime worked. Article 15.04 clearly states that an employee who works overtime shall be compensated at time and one half. The memorandum of June 2, 2004 stated an intention by the Employer to violate Article 15.04. The memorandum

stated an intention to schedule employees to work overtime and stated that the employees would not be compensated but would only be entitled to work for time off in lieu of compensation. The Employer does not have discretion, under Articles 15.04 and 15.05, to schedule employees to work overtime on condition they work for time off in lieu of compensation. The option of receiving time off in lieu of compensation only arises upon request of the employee under Article 15.05. Under Article 15.05, the Employer may approve or decline the request for time off in lieu of compensation, but the Employer does not have authority to approve or decline time off in lieu of compensation unless the employee first makes the request for time off in lieu. The statement in the memorandum, that employees scheduled to work overtime would only be entitled to receive time off in lieu of compensation, violates Articles 15.04 and 15.05.

Article 15.06 states that the Employer “shall make every reasonable effort . . . to allocate overtime work on an equitable basis among readily available qualified employees”. The memorandum indicates an intent to allocate overtime on a basis that is not authorized by Article 15.06. The memorandum is inconsistent with Article 15.06. If overtime is allocated only to employees interested in working for time off in lieu of compensation, and such an allocation continues over the appropriate time period, then overtime would not be allocated on an equitable basis among readily available qualified employees.

The memorandum violates Articles 15.04 and 15.05. An allocation of overtime pursuant to the memorandum is inconsistent with Article 15.06. The memorandum itself does not establish as a matter of fact whether or not overtime was allocated on an equitable basis. The issue of equitable allocation is a matter subject to proof of facts with respect to the hours of overtime allocated to each employee, the reasons for the allocation and other factors. This is an issue that will be examined later in the Award.

Does the Arbitrator have jurisdiction to order compensation for inequitable allocation of overtime, and to consider post grievance evidence if required to prove the claim for compensation? The Arbitrator may consider post grievance evidence where it is relevant to an issue in dispute between the parties (*Maple Leaf Pork and U.F.C.W. Loc. 175* (2002) 112 L.A.C. (4th) 97 (Abramsky), *Toronto Board of Education v. Ontario Secondary School Teachers’ Federation, District 15* [1997] 1 S.C.R. 487, *Religious Hospitaliers of Hotel-Dieu of St. Joseph of the Diocese of London and O.N.A. (Curtis)* (1995) 47 L.A.C. (4th) 84 (Watters)). Is the equitable allocation of overtime an issue in dispute? As noted above, the proposed allocation of overtime in the memorandum is inconsistent

with Article 15.06 of the Collective Agreement. An allocation of overtime pursuant to the memorandum would not be made on an equitable basis. It is relevant to the grievance to examine how overtime was allocated and whether or not a claim for compensation arises from an inequitable allocation of overtime pursuant to the memorandum. Whether or not the Union could have filed a grievance at the end of the relevant time period, such as the end of the fiscal year, is not determinative of the redress that may be claimed under this grievance. The grievance gave the Employer notice of the Union's allegation that the memorandum violated Article 15 of the Collective Agreement. The grievance included an allegation of inequitable allocation of overtime. The equitable allocation of overtime is an issue in dispute. Therefore, the Arbitrator has jurisdiction to order compensation for inequitable allocation of overtime, and to consider post grievance evidence related to the actual allocation of overtime.

What is the method of calculating compensation for violation of Article 15 in this case? The Union claims compensation on the basis of an inequitable allocation of overtime contrary to Article 15.06. The method of calculating compensation for missed overtime is discussed in *Re United Automobile Workers, Local 195 and Kelsey-Hayes Canada Ltd.* (1971) 23 L.A.C. 13 (Simmons) where the arbitrator states as follows:

Therefore the most satisfactory solution it seems to me is as follows. Employees who have worked below the average number of overtime hours in classifications where violations occurred are to receive compensation for the difference in overtime hours between the overtime hours they actually worked and the average in the classification.

The method of calculating compensation for inequitable allocation of overtime was discussed in *Newfoundland Association of Public Employees and Her Majesty the Queen in Right of Newfoundland, Department of Works, Services and Transportation*, May 25, 1994 (Oakley) (the "Works, Services and Transportation" case) where the majority of the arbitration board stated as follows:

It is reasonable to review the overtime distribution on a calendar year basis. At the end of the year, the distribution may need to be adjusted. In these situations, the appropriate redress would be compensation to the affected employees. Awarding redress in the form of future opportunity to work overtime is more appropriate in the case of employees who missed a shift and ought to receive the next overtime shift.

Providing an opportunity to work overtime is not appropriate for employees who may have received substantially fewer hours of overtime over a period of one year. The affected employees ought to be put in the position they would have been in had overtime been distributed as evenly as possible and the Collective Agreement followed. If overtime was distributed evenly, the Employees would have received approximately the average number of hours that were available. Each employee's overtime hours should be compared with the average overtime hours available to determine if there is a distribution that is reasonably close to even.

Having regard to the arbitral authorities, it is appropriate to calculate compensation for missed overtime by comparing the records for an individual employee with the average overtime hours available. However, when calculating compensation in this case, there are related issues to be considered before making any calculation. The Employer submits that no compensation is payable because the employees were obligated to “work now grieve later”. In other words, the employees should have worked the overtime, and then grieved the failure to pay compensation. However, based on the evidence of Boyd Hillier, the employees did not have the opportunity to “work now grieve later”, because the Employer would not schedule an employee to work overtime unless the employee agreed to work for time off in lieu. Once an employee indicated an intention to claim compensation for overtime, then the employee would not be scheduled to work overtime. This is not a case where the “work now grieve later” principle applies.

Another issue related to compensation is whether an employee who declines the offer of overtime, is deemed to have worked the overtime. When considering an issue of equitable allocation of overtime, arbitrators usually consider that declining an overtime opportunity is equivalent to having worked the hours available, when calculating compensation. In this case, employees declined the offer of overtime because they would not accept the condition that they work for time off in lieu of compensation. The Arbitrator has found that the condition violated the Collective Agreement. In these circumstances, where an employee declines the overtime offer for the reason that the employee will not accept such a condition, the hours declined for that reason will not be counted as hours worked, for the purpose of the calculation of the equitable allocation of overtime.

In order to make any calculation of the amount of compensation payable for an inequitable allocation of overtime, it is necessary to determine the appropriate time period. The *Works, Services and Transportation Award* found that a reasonable time period was one year, with the year ending at the fiscal year end, on March 31. The length of the appropriate period will depend on the circumstances

of each case. Factors to consider include the frequency and amount of the overtime usually allocated. A time period of one year is reasonable, unless there is a good reason to apply another time period. In this case, the appropriate period for determining whether or not there has been an equitable allocation of overtime is one year ending March 31, 2005. This period will include the period when overtime was offered to employees subject to the condition found to have been a violation of the Collective Agreement.

Is the claim for compensation proven on the facts of this case? The proof required to be submitted by the Union to establish an inequitable allocation of overtime is discussed in the arbitral authorities. In *Brown & Beatty, Canadian Labour Arbitration*, 4th edition, at paragraph 3:2417, the authors state as follows:

Generally, the union must prove that the employer was in breach of the agreement in allocating overtime work. . . . Moreover, one arbitrator has held that, in the presence of an “overtime equalization plan” under a collective agreement, a union does not discharge the onus by merely showing that there was a substantial difference in overtime hours worked by employees. Rather, it must show that the employees in question were actually bypassed according to the terms of the collective agreement.

In *Re Northern Telecom Canada Ltd. and United Automobile Workers, Local 1839* (1983) 11 L.A.C. (3d) 7 (Kennedy), the arbitrator states, at page 12, as follows:

I would accept the position asserted by counsel for the company that in order for a grievance to succeed, the onus is on the union to show the company has bypassed an employee in the allocation of overtime before there can be considered to exist a breach of the collective agreement. It is substantially the position of the union that such a bypass can be inferred from the fact that there exists a significant differential in the number of hours of credited overtime for employees at a specific point in time. With respect, I cannot accept that argument. The mere fact that there is a difference of hours does not of itself prove that a particular employee has been bypassed in the allocation of overtime.

In this case, the evidence does not indicate the allocation of overtime for the one year period ending March 31, 2005. A list showing the overtime hours allocated as of November 19, 2004 was entered as an exhibit. However, that list does not indicate the allocation at the end of the year. The list does not indicate what overtime hours were declined or the reason for any decline of an overtime

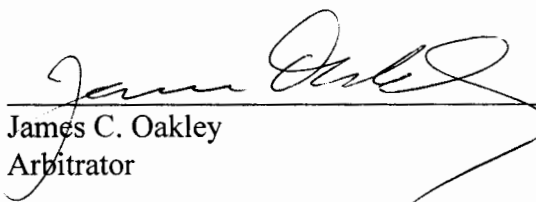
opportunity. The letter from the Registrar of Motor Vehicles that was sent to the Union, with the list attached, indicated that employees declined overtime opportunities for various reasons, such as geographic location of home, family commitments and medical reasons. The list does not indicate which employees declined overtime because they would not work for time off in lieu of compensation. The list does not establish which employees were readily available qualified employees, and thereby entitled to equitable allocation of overtime under Article 15.06. The evidence is not sufficient to establish an inequitable allocation of overtime during the appropriate period. Therefore, on the evidence presented, the claim for compensation was not proven.

In summary, the memorandum dated June 2, 2004 violated Article 15 of the Collective Agreement. The grievance was not premature. The Arbitrator has jurisdiction to order compensation for inequitable allocation of overtime. The Arbitrator may consider post grievance evidence relevant to the issue of compensation. The appropriate period for determining whether or not there was an inequitable allocation of overtime is the fiscal year ending March 31, 2005. Having regard to the evidence of allocation of overtime during the appropriate period, the claim for compensation was not proven.

Decision

The grievance is allowed in part, for the reasons stated in the Award. It is declared that the memorandum dated June 2, 2004 violated Article 15 of the Collective Agreement. The claim for compensation was not proven, and therefore there is no order for compensation.

DATED this 4th day of February, 2010.


James C. Oakley
Arbitrator