

Crown Employees  
**Grievance Settlement  
Board**

Suite 600  
180 Dundas St. West  
Toronto, Ontario M5G 1Z8  
Tel. (416) 326-1388  
Fax (416) 326-1396

**Commission de  
règlement des griefs**  
*des employés de la  
Couronne*

Bureau 600  
180, rue Dundas Ouest  
Toronto (Ontario) M5G 1Z8  
Tél. : (416) 326-1388  
Télééc. : (416) 326-1396



GSB# 2005-0133, 2005-0134, 2005-0391, 2005-1421, 2005-2037, 2005-2038, 2005-2039,  
2005-2040, 2005-2041, 2005-2042, 2006-1523, 2006-1524, 2006-1525, 2006-1526  
UNION# 2004-0506-0009, 2005-0506-0001, 2005-0204-0002, 2005-0506-0003, 2005-0506-0007,  
2005-0506-0008, 2005-0506-0009, 2005-0506-0010, 2005-0506-0011, 2005-0506-0012,  
2005-0506-0016, 2005-0506-0017, 2005-0506-0018, 2005-0506-0019

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(Wozniak *et al.*)

**Union**

**- and -**

The Crown in Right of Ontario  
(Ministry of Transportation)

**Employer**

**BEFORE**

Reva Devins

**Vice-Chair**

**FOR THE UNION**

Peter Schklanka  
Grievance Officer  
Ontario Public Service Employees Union

**FOR THE EMPLOYER**

Sean Kearney  
Senior Counsel  
Ministry of Government Services

**HEARING**

September 18, 2006.

## Decision

These grievances allege that the employer has violated Article 2.1 and Articles UN 13.4 and 13.5 of the Collective Agreement by failing to assign regular days off on Statutory Holidays.

### Agreed Statement of Fact

The parties submitted an Agreed Statement of Fact<sup>1</sup> which provided as follows:

- 1) ...
- 2) ...
- 3) The grievors are employed as Transportation Enforcement Officers (“TEO’s”) in the Ministry-designated “Central Region” of the Province which includes, *inter alia*, the areas of Toronto, Hamilton, Durham, York, Peel, Halton, Oakville, 407 and Trafalgar. The grievors are covered by the terms and conditions of the OPS collective agreements, including but not limited to the “Unified Bargaining Unit” agreement.
- 4) As TEO2’s, the grievors are assigned to truck inspection stations throughout their region which include weigh scales for commercial vehicles. Staff are required to either work at the inspection stations or perform area patrol within their districts. TEO’s are responsible for the inspection of commercial vehicles and the enforcement of legislation governing highway safety including the *Highway Traffic Act*, *Provincial Offences Act*, *Dangerous Goods Transportation Act*, *Compulsory Automobile Insurance Act* and the *Public Vehicles Act*. In addition to assignments at inspection stations, TEO2’s also conduct mobile patrols on the road in specially designated cruisers and are responsible in this capacity for enforcing legislation relating to road safety. They also conduct accident investigations.
- 5) As TEO3’s the grievors are primarily assigned duties to perform audits on CVOR operators in the commercial transportation industry.
- 6) TEO2’s report to their shift leaders at inspection stations as scheduled and the shift leader generally assigns them to work either in the mobile units or at the inspection stations during the shift.
- 7) TEO3’s report for their shifts at their assigned district office.

---

<sup>1</sup> Paragraph 1 and 2 of the Agreed Statement set out the grievances to be determined by this Award

- 8) The TEO2's work in platoons which operate out of the inspection stations and are generally comprised of 3-6 TEO's. The employees will work rotating shifts that cover a 7 day and 24 hour period. The stations are not normally manned twenty-four hours a day, seven days a week, although the union considers failure to provide 24/7 coverage to be understaffing. The platoons are scheduled to work on "Compressed Work Week" schedules determined by the Ministry.
- 9) The TEO3's report to their district office and work regular business hours of Monday to Friday from 0700 hours to 1600 hours or 0800 hours to 1700 hours. They may be required to work shifts for a special district or program initiative.
- 10) Prior to the changes giving rise to these grievances, the Compressed Work Week schedules followed a rotation of various shifts across the Region. For example, in the Durham Region shift rotations typically consist of a scheduled rotation of five weeks' of three 12 hour shifts followed by five weeks' of four nine-hour shifts. Those shift rotations were maintained for holiday periods. This practice still occurs outside the Central Region.
- 11) Prior to the changes giving rise to these grievances, the Compressed Work Week schedules for TEO3's followed a rotation of Monday to Thursday, or Tuesday to Friday with the employees working 9 hour shifts. There has been no change to this rotation.
- 12) According to the TEO2's shift schedules under the former practice in Central Region, individuals who were scheduled to have a regular day off ("RDO") on the same day as a statutory holiday would be credited with compensating leave or pay *in lieu* thereof for that day in accordance with article UN13 and in particular, article UN 13.4. Simply put, those employees who were scheduled to be on a RDO on the statutory holiday received equivalent credit for the hours that were worked by those employees who were scheduled to work the holiday, ie. if the employees scheduled to work on the holiday worked 9 hours then the employees scheduled off on a RDO on the statutory holiday would receive compensating leave for 9 hours. There was no general alteration of their schedule after the initial posting and the scheduling of work on statutory holidays was entirely random.
- 13) TEO3's are generally not scheduled to work on statutory holidays because the District office is closed as are most of the offices of the CVOR operators.
- 14) Starting in 2004, the Central Region began identifying specific statutory holidays on which the Truck Inspection Stations ("TIS") would be operational, meaning that the TIS would be closed on a number of statutory holidays. In addition, the Central Region also began posting shift rotation schedules, replacing the previously posted schedules for 2004, indicating that the statutory holidays were to be regarded as statutory holidays for TEO2's rather than RDO's or scheduled work days. Consequently, statutory holidays were no longer denoted as workdays for some TEO2's and RDO's for other TEO2's but were instead reflected as statutory holidays for all.
- 15) TEO3's whose schedules had their RDO fall on a statutory holiday would by mutual agreement take the statutory holiday on the statutory holiday and take a RDO the next day or before the end of that week. TEO3's are generally not scheduled to work on statutory holidays because the District office is closed as are most of the offices of the CVOR operators.

- 16) The TEO2's shift schedules began utilizing the term "stat" or the letter "H" to denote the statutory holiday as a holiday for the TEO's. For example, a copy of the Enforcement Staff Schedule for the Durham District for the period of February 21 to November 27, 2005 is attached as Exhibit "1." As reflected in those schedules the statutory holidays on March 25, March 28, May 23, July 1, August 1, September 5 and October 10 are all denoted as "stat." Similarly, the shift schedules for Halton District for 2005 are attached as Exhibit "2" and denote the aforementioned statutory holidays as "H."
- 17) For the Durham District, there had been original TEO2's shift schedules prepared and posted for the 2005 calendar year prior to the revision of the shift schedules to reflect all statutory holidays as "stat" in Durham District. Those original shift schedules denoted TEO2's as either being scheduled to work or having a RDO on statutory holidays and are reflected in the schedules for February 21 to June 5, 2005 attached as Exhibit "3."
- 18) The TEO3's schedules have not altered since the revisions implemented for the TEO2's regarding the statutory holidays.
- 19) The shift schedules are prepared and provided to TEO2s prior to the commencement of the calendar year so that, for example, the TEO2s would receive their schedules for 2006 in 2005. Any changes to the rotation will be indicated on revised schedules issued prior to the rotation (in Durham, for example, prior to the particular five week rotation). As aforementioned all the statutory holidays would be denoted as "stat" or "H." Consequently, the employees would enjoy the statutory holiday, apart from one platoon of TEO2's who would be assigned to work on the statutory holiday. That platoon which would be working on the stat would be provided with advance notice that they would be scheduled to work on a particular upcoming statutory holiday. Any such notice would be confirmed in writing and has always been in compliance with any posting obligations under the collective agreement, including article UN 5.1. Those TEO2's who did work the statutory holiday would receive premium payment as set out in UN 13.1 and UN 13.2 of the collective agreement. As aforementioned, employees who were not scheduled to perform work on the statutory holiday were advised that they were to enjoy the statutory holiday and were treated in accordance with Article 47.
- 20) According to TEO3's shift schedules, individuals who were scheduled on those schedules to have a RDO on the same day as a statutory holiday would by mutual agreement take the statutory holiday on the statutory holiday and take their RDO the next day or prior to the end of that week. No TEO3's have worked on any statutory holidays in either Halton or Durham District during the period in dispute.
- 21) All those TEO2's who have been asked to work on a statutory holiday from late 2004 to the present, have been notified in writing several weeks prior to the statutory holiday. For example, for 2005 in Halton Region, the memos dated March 14, May 6, June 16, July 21 and September 30, which are attached as Exhibit "4" illustrate the advance notice provided in writing to the platoon officers of their scheduled work assignment on an upcoming statutory holiday.
- 22) Attached as Exhibit "5" are the Central Region Holiday Coverage Plan and Deployment Strategy documents for 2005 and 2006. This listing of the deployment/assignment of

statutory holidays throughout the Central Region distributes the workload in order to meet what the Ministry determines to be operational requirements by indicating the various TIS that were or will be operational on the statutory holidays in Central Region in 2005 and 2006.

- 23) As stated in the Deployment Strategy for 2005 document in Exhibit “5,” the plan allows all platoons to work at least one Holiday. There are 7 statutory holidays in total meaning that each of the seven platoons that constitute Halton District (Oakville S, Oakville N, Traf. N and Traf. S) would be assigned to perform work on one statutory holiday in 2005 and 2006, and they would observe the remaining 10 statutory holidays on those holidays.
- 24) The change in shift scheduling around statutory holidays in Central Region, as described herein, has been described by the Ministry as a cost-saving measure.

### **Collective Agreement - Unified Bargaining Unit Agreement**

The relevant provisions of the collective agreement are as follows:

#### **Article 2 – MANAGEMENT RIGHTS**

2.1 For the purposes of this Central Collective Agreement and any other Collective Agreement to which the parties are subject, the right and authority to manage the business and direct the workforce, including the right to hire and lay-off, appoint, assign and direct employees; evaluate and classify positions; discipline, dismiss or suspend employees for just cause; determine organisation, staffing levels, work methods, the location of the workplace, the kinds and locations of equipment, the merit system, training and development and appraisal; and make reasonable rules and regulations; shall be vested exclusively in the Employer. It is agreed that these rights are subject only to the provisions of this Central Collective Agreement.

#### **Article UN 13 – HOLIDAY PAYMENT**

- UN 13.4 When a holiday included under Article 47 (Holidays) of the Central Collective Agreement coincides with an employee’s scheduled day off and he or she does not work on that day, the employee shall be entitled to receive another day off.
- UN 13.5 Any compensating leave accumulated under UN 13.2 and UN 13.4 may be taken off at a time mutually agreed upon. Failing agreement, such time off may be taken in conjunction with the employee’s vacation leave or regular day(s) off, if requested one (1) day in advance.
- UN 13.6 Any compensating leave accumulated under 13.2 and UN 13.4 in a calendar year which is not used before March 31 of the following year shall be paid at the rate it was earned. The March 31 date may be extended by agreement at the local or ministry level.

## Submissions

The Union asserts that the Employer has breached the Collective Agreement by failing to assign regular days off on Statutory Holidays. It submitted that the Employer varied its scheduling practise solely to avoid the accrual of benefits under Article UN 13 and that by manipulating the schedule in this way, the Employer's conduct amounted to bad faith per sé.

The Union relied on the Employer's previous practise, which was to set the schedule without regard to whether a regular day off would fall on a statutory holiday, and noted that this practise was still followed in other regions. It also pointed out the nature of the grievors' schedule, which, it submitted, provided the context for the appropriate pattern of scheduling. The grievors are assigned to work a compressed work week on a regular, rotating schedule. It was argued that, in these circumstances, management must adhere to its established pattern of scheduling and ignore the timing of statutory holidays. The Union cites the decision of the Grievance Settlement Board in *OPSEU (Nicol) v. Min of Community & Social Services* (1995), GSB No. 394/91 (McCamus) in support of its submission that the Employer cannot alter a regular, rotating schedule solely to defeat an employee's rights under Article UN 13.

By way of remedy, the Union seeks a declaration that the collective agreement has been breached and asks that I remain seized in the event that the parties cannot agree on individual remedies.

The Employer submitted that the Union has not demonstrated that the Employer violated a specific provision of the collective agreement and has failed to adduce sufficient evidence to demonstrate bad faith. In 2004, the Employer determined that it did not need to schedule a full

complement of TEO's on statutory holidays and it revised the schedule accordingly. The revised schedule was designed to ensure a fair and equitable distribution of work on statutory holidays. Employees were provided with ample notice of whether they would be working on the statutory holiday and were not subject to ad hoc revisions to their days off. In the Employer's submission, *Nicol* does not stand for the proposition that the Employer cannot schedule to avoid a conflict between days off and holidays, nor does it support a finding that the Employer has acted in bad faith in this case. In management's view, the operational changes to staffing levels on statutory holidays was a material change to setting the grievors' schedule.

The Employer relied on the following cases: *OPSEU (Ferguson) v. Ministry of Correctional Services* (1982), GSB No.78/82 (Jolliffe); *OPSEU (McCormick) v. Ministry of Correctional Services* (1981), GSB No. 386/81 (Barton); *OPSEU (Birse) v. Ministry of Correctional Services* (1993), GSB No. 38/93 and 339/84 (Samuels); *OPSEU (Sim) v. Ministry of Correctional Services* (1987), GSB No. 1293/87 (A. Barrett); *OPSEU (Gillies and Botham) v. Ministry of Correctional Services*, (1988), GSB No. 0316/88 and 0339/88 (Samuels).

## **Analysis**

As set out in the Agreed Statement of Fact, the grievors are employed as Transportation Enforcement Officers ("TEO's")<sup>2</sup> in the Ministry-designated "Central Region". TEO 2's are assigned to work at truck inspection stations or mobile units and are responsible for enforcing legislation relating to road safety. Although stations are not normally manned twenty-four hours a day, seven days a week, the grievors are scheduled to rotating shifts that cover a 7 day and 24 hour period. The schedule is determined by the Ministry and constitutes a "Compressed Work

---

<sup>2</sup> The grievors are variously classified as either a TEO 2 or TEO 3. The parties were in agreement that the issue in the instant grievance pertains to TEO 2s.

Week”. The shift schedule is prepared and provided to TEO 2s prior to the commencement of the calendar year; any changes to the schedule are made in advance and employees are notified in writing.

Prior to 2004, the schedule did not distinguish between regular weeks and weeks in which there was a statutory holiday. The schedule designated every day, regardless of whether it was a holiday, as either a work day or a regular day off. Pursuant to Article UN 13.4 and 13.5, when statutory holidays fell on a regular day off, employees were entitled to a compensating day on a date mutually agreed to by management and the employee. Pursuant to UN 13.6, accumulated credits were paid out at the end of the fiscal year.

In 2004, the Ministry determined that it would no longer operate all of its weigh stations on holidays. Based on historic volume of commercial vehicles at Truck Inspection Stations, the Ministry prepared a holiday coverage plan to “strategically operate” the Stations. The Central Region Holiday Deployment Strategy ranks each holiday, noting the traditional level of industry activity, and sets out which stations will remain open on each of the statutory holidays. Management determined that it would distribute the workload throughout the Region in a manner that met its operational requirements and allowed all crews to work at least one Holiday. The Deployment Strategy has remained constant in both 2005 and 2006.

When the Deployment Strategy was implemented, the manner in which the Regular Rotating Schedule was formulated was also changed. Under the new scheduling system, every statutory holiday is assigned as a holiday and individual platoons are informed in advance if they are required to work on that day. As a result, regular days off are no longer scheduled to fall on statutory holidays.

The Union does not take issue with the manner in which the Employer is assigning work on holidays, the adequacy of the notice provided to those who are asked to work nor whether there has been an equitable distribution of assignments<sup>3</sup>. The sole issue to be determined is whether the Employer is entitled to schedule in a manner that deprives the grievors of an opportunity to have a statutory holiday fall on a regular day off with the consequent benefit that would accrue in those circumstances.

This Board has consistently determined that there is no right to work on statutory holidays<sup>4</sup>. The Union in this case, however, is not challenging the Employer's failure to assign work. Rather it argues that, in the context of a regular, rotating schedule, days off must be scheduled without regard to the occurrence of statutory holidays. It submits that the Employer has manipulated the annual schedule for the sole purpose of avoiding a conflict between a statutory holiday and a regular day off. The Union maintains that this amounts to bad faith *per se*.

The Union does not dispute management's right to determine employee schedules. It does, however, suggest that the revision made in 2004 amounts to an ad hoc change to the schedule and that the sole reason for the change was to defeat the grievors' rights under Article UN 13. It was submitted that the decision of this Board in *Nicol* supports the Union's argument that such a change amounts to bad faith and is not permitted.

After a careful consideration of the Board's decision in *Nicol*, I do not agree that it supports the Union's position. In my view, the Board in *Nicol* clearly stated that the Employer is entitled, in

---

<sup>3</sup> The equitable assignment of work on statutory holidays is the subject of a separate grievance, however, is not an issue in the instant matter.

<sup>4</sup>See *Birse; Ferguson, Sim; Gillies and Botham, supra*.

principle, to schedule days off in a manner that avoids conflict with statutory holidays. In allowing the grievance, the Board emphasised that the Employer's conduct was not permissible to the extent that it engaged in an ad hoc change to the schedule *and* made those changes on the basis of unreasonably short notice.

The facts in *Nicol* were markedly different than those that pertain in the instant matter. In that case, employees were regularly scheduled to work Monday to Friday, with one weekend shift every several weeks. When scheduled to work on a Saturday and Sunday, employees always took their days off on Thursday and Friday. On the Tuesday preceding Easter weekend, the grievor was advised that her schedule was being changed to accommodate another employee and that she would be working the weekend shift. In the normal course, the grievor would have worked on Tuesday and Wednesday, taken Thursday and Friday as days off and consequently accrued the right to be consulted with respect to the lieu day arising from the statutory holiday on Good Friday. Despite their existing practise, the Employer advised the grievor to take the Wednesday and Thursday as her days off, thus avoiding a conflict with the statutory holiday.

In arriving at its decision, the Board first considered the evil that the relevant provisions were intended to address, these provisions were found at Article 19.4 and 19.5, but were worded in identical terms to those now found at UN 13.4 and 13.5:

... the evil ... is not a lack of employee involvement in the scheduling of lieu days as a general matter, but, rather a lack of employee involvement in the scheduling of lieu days where they arise on an ad hoc basis with very little notice. The problem which Articles 19.4 and 19.5 appear to be designed to resolve, then is not the general problem of Employer scheduling of days off so as to avoid conflict with holidays, but rather, the problem of ad hoc and short term scheduling of what are, in effect, lieu days in a way which does not take into account employee preferences.

The Board concluded that the Employer was subject to a good faith standard in the exercise of its discretion to reschedule; however, it expressly rejected the Union's argument that "any scheduling by the Employer which is designed to avoid a conflict between what would normally

be a day off and a statutory holiday is, by definition, bad faith ...”. The Board ultimately found that the Employer was precluded from rescheduling to avoid conflict when the rescheduling occurs on an ad-hoc basis and on very short notice:

...it is our view that in principle, the scheduling of days off in such a way as to avoid conflict between scheduled days off and statutory holidays is an exercise the Employer can properly undertake in the exercise of its Section 18 rights concerning scheduling. On the other hand, where the Employer wishes to reschedule a day off, on an ad hoc basis and on the basis of unreasonably short notice, in order to avoid such a conflict, it can only do so on the basis of the scheme set out in Articles 19.4 and 19.5.

The Board in *Nicol* was ultimately concerned with insufficient notice and the consequent impact on an employee’s opportunity to make full use of their statutory holiday, especially where the holiday follows or precedes regular days off. The grievor in *Nicol* originally anticipated a three day weekend, commencing on Friday. She was then informed on Tuesday that she must take off Wednesday, Thursday and Friday instead. She would have had virtually no time to rearrange her plans or to make new ones. In these circumstances, the Board concluded that the Employer effectively re-scheduled a lieu day without input from the grievor.

The schedule at issue before me is prepared on an annual basis and the Union has acknowledged that these grievances do not give rise to any concern with respect to the sufficiency of the notice provided to the grievors. Nonetheless, the Union argued that even if there was adequate notice, the changes were ‘ad hoc’. I do not agree. The change in practise was precipitated by a reassessment of the Employer’s operational needs. Management concluded that the volume of traffic during statutory holidays did not warrant operating at the same level as it does on non-holidays. A new schedule was drafted to take into account the reduced holiday complement and distribute work in an equitable manner. Inevitably, the decision to treat holidays differently for staffing purposes, translated into a change in the manner that holidays were scheduled.

In my view, the new calendar is not the result of an ad hoc change. The current practise pertains to all holidays and reflects a variation in TEO complement; it applies equally across the Region and has been used consistently since staffing levels were reduced. These changes are not being made on a case by case basis where individual employees are being singled out for differential treatment. Unlike *Nicol*, where there was an ad hoc change to a single employee's schedule, the changes to the grievors' schedule are made well in advance as part of an overall holiday deployment strategy. While there has been a change in the way holidays are staffed and scheduled, it is a systemic change, not an ad hoc revision.

Nor am I persuaded that there is any other basis to find that the change made by the Employer amounts to bad faith. While I appreciate the grievors' perception that they have been deprived of a benefit that was previously made available to them, I do not accept the assertion that the scheduling change was made solely for the purpose of depriving them of their contractual rights. The Employer decided that statutory holidays would no longer be staffed at the same level as other days. Although the Union maintained that the weigh stations and mobile units should be fully staffed on a continuous basis, for the purposes of this arbitration, it did not take issue with management's decision to implement a holiday deployment strategy. Once the decision was taken to operate on holidays at a reduced level, the schedule would have to be modified to take into account the new staffing model. Arguably, there is any number of ways that the Employer could have arranged the schedule to reflect the closure of certain stations and equitably distribute the work that was available on statutory holidays. Those scheduling choices, however, are within the legitimate exercise of the Employer's discretion to manage. Ultimately, I accept the employer's characterisation that the operational change in complement on statutory holidays was a material change with respect to scheduling.

Article UN 13 sets out the consequences when certain events coincide with statutory holidays: it determines the appropriate premium pay if employees must work on statutory holidays and establishes the protocol if a day off falls on a holiday. It does not, however, confer any obligation on the Employer to create the conditions which will give rise to the accrual of those benefits. Nor has the Union suggested that any other provision of the Collective Agreement confers the right to have days off scheduled on a statutory holiday. I agree with the reasons provided by this Board in *Nicol* that the Employer is, in principle, entitled to avoid a conflict between regular days off and statutory holidays. While there are recognised limits to the exercise of the Employer's discretion, I do not find that the Employer in this case has acted in bad faith when it exercised its discretion to set the grievors' schedule. Accordingly, the grievances are dismissed.

Dated at Toronto, Ontario, November 17, 2006

A handwritten signature in black ink, appearing to read 'Reva Devins', written over a horizontal line.

Reva Devins  
Vice-Chair