

2019 CarswellOnt 18593
Ontario Arbitration

OPEIU and Ornge Air (005-RWP-15), Re

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**OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL
UNION (the "Union") and ORNGE AIR (the "Employer")**

M.G. Mitchnick Member

Heard: September 24, 2019; October 28, 2019

Judgment: November 13, 2019

Docket: None given.

Counsel: Micheil Russell, for Union
Simon Mortimer, for Employer

Subject: Labour; Public

Headnote

Labour and employment law

M.G. Mitchnick Member:

1 These consolidated grievances arise out of a change instituted by the company in the way that it calculates travel time.

2 The unit is composed of Rotor Wing pilots formerly employed by Canadian Helicopters Limited (CHL), which operated air-ambulance services, from 7 bases in Ontario, for the Ministry of Health. As of January 2012 the operation (and unit) was taken over by Ornge Air, who then negotiated a new collective agreement with the incumbent Union.

3 The Union's evidence was given by Angus Gauld, a pilot in the operation since 2002, and currently the acting President of the Local. Mr. Gauld testified that CHL had a travel policy applying to its general body of employees, including these pilots, whereby employees required by the employer to travel on an off-day, i.e., apart from normal commuting for their scheduled shift, were paid from the time they left home until arrival at their hotel. And the reverse on their return. Mr. Gauld identified three types of situations where this might arise:

- 1) Training at locations away from Base. For example, the pilots are required to re-certify every year, and for that purpose must attend annually for training on one of the two rotor-wing simulators in North America, being in Florida and Louisiana.
- 2) "Ferry flights". Aircraft from time to time need to be re-positioned at another base, and this may directed to be done on a scheduled off-day.
- 3) "Floater" pilots. These are "spare" pilots with a notional home base, but who may be directed to report at any base they are needed. Re-positioning of the pilotis most often done during a scheduled day of work, but the pilot may at times be asked to make the trip on the week-end, in order to be in position to start the assigned shift on the Monday.

Mr. Gauld testified that this pay practice was continued by Ornge when it took over the operation in 2012. He was part of the Union's bargaining team, and testified that at no time did the company ever raise this travel policy, or indicate that it was planning to change it. In cross-examination a document on Ornge letterhead and entitled "Ornge Travel, Business Expense and Hospitality Reimbursement Policy" was shown to Mr. Gauld, and Mr. Gauld indicated he had no recollection of having ever seen the document. Asked if he had reviewed Ornge Air's policies in general, he responded that the only ones he could say for certain that he had were any ones that the company had identified in the negotiations specifically. (The Policy is silent on travel time in any event.)

4 The collective agreement was ultimately consummated in January of 2014. Pilots travelling on their off-days continued to put in their time cards in the same way they always had, and continued to be paid without question. That changed for the first time in March of 2015, when a pilot who was required to do an off-day ferry flight had his time card adjusted by the Base Administrator. When that was queried by the pilot and the Union, the response back from the Administrator was:

Hi, guys. OT for ferrying does not include travel time so your hours were changed to 10.5.

That was, the Union says, the first time it heard of any change in policy. The first of these grievances was filed, and the response from Peter Cunnington, the Director of RW Flight Operations, was:

It is the Company's position that the employees accepted an overtime Ferry Shift with a scheduled report time at the base and were paid from when they reported to base, therefore no violation of Article 21.05 has occurred.

Another travel-time grievance was filed in September, and the response from Mr. Cunnington this time read:

We have a pending agreement with the Union in regards to this matter to clear up any misunderstanding. Essentially the agreement will align with the Company travel policy that

is mirrored to the Ontario Broader Public Sector's Policy. In the policy, travel time is not calculated from your home but rather from the point of check in (Hanger/Airport/Office/etc).

The Union knew nothing of a "pending agreement", and the issue was taken up, following a third grievance in October, with Foster Brown, the Director of Employee and Labour Relations. Mr. Brown wrote to Paul Bohelski, the Union's staff representative, as follows:

Hi Paul,

Our recollection — we discussed the travel policy at our May 12th LMC. The question was raised as to payment for time when traveling. I believe we agreed to follow the practice used with the Paramedics; specifically that we would pay for Travel Policy, which provides for time paid, from the lesser of home or base.

We were to draft an LOU for your review, which we will do.

For your consideration.

The LOU ultimately offered by the company put forward yet another measure of payment, setting out the following:

LOU #6 TRAVEL TIME COMPENSATION

Employees required to travel will be compensated for travel time between Ornge bases or airport of arrival/departure.

Travel time shall commence at the required report time determined by the Company or the required report time prior to departure determined by the airline for scheduled flights.

Travel time shall end 30 minutes following aircraft shut down as per the COM or 30 minutes following arrival of a scheduled airline flight. The Company will meet to discuss and consider arrival airports that may require more than 30 minutes to "clear the airport" due to specific issues or customs post clearance.

If the employee is approved to use their own private vehicle to travel, then mileage will be compensated as per the Company's Travel & Expense policy. All other travel and expenses will be in accordance with Article 45 and other applicable articles.

Note: Applicable to all bases with the exception of Moosonee.

5 The company's only witness was LeeAnne Leo, Business Partner for Paramedicine and Aviation. It was her role, along with the Director, Mr. Brown, to head up the transition of the CHL pilots to Ornge. Ms. Leo indicated that all of the incoming staff were either handed a copy of an Ornge policy, or told to go online and review them. She could not be sure whether the Ornge Travel

Policy, mentioned earlier, was handed to any of the incoming pilots specifically, nor that it was posted on the company web-site at the time, but believed it likely was. Ms. Leo testified in chief that she believed the Policy addressed the question of when your hours start; but in any event she indicated that the practice at Ornge was to start from your base — in her case being her office. In cross-examination Ms. Leo acknowledged that the Policy only dealt with Expenses, and did not address payment for travel time itself. In that regard the Policy states:

Kilometres are calculated using the distance from Primary Work Location or home, whichever is less. Kilometrage to or from a public carrier terminal (e.g. airport, bus or train station) on weekends is paid to or from home, as applicable.

Counsel pointed out to Ms. Leo that the second sentence indicates that mileage on week-ends is paid from home, and asked if by analogy time should not be calculated that way as well. Ms. Leo did not disagree, but also noted that the those are two different payments.

6 Ms. Leo acknowledged as well that Ornge continued to pay travel time to the pilots in accordance with the way it had been done at CHL, until March of 2015. She indicated that it was the company's intent to move away from that practice through the negotiation of the new collective agreement; and that in her view the company had done that, insofar as it negotiated all new language on travel expenses (being Article 45) and hours of work (Article 21), neither of which had been dealt with at all in the CHL Agreement. Asked where in Article 45 the language addressed travel time, Ms. Leo acknowledged that it was silent on that. Counsel pointed out to Ms. Leo that the collective agreement was signed in January of 2104, and asked why, if it was the company's view that it had bargained a change, why it was not until March of 2015 for the company to alter the practice. Ms. Leo responded that there were a lot of things going on at Ornge Air, and paperwork to be prepared, but that once things settled down, the company ended the old practice.

7 To begin with, Article 6 of the new collective agreement specifically provides:

MAINTENANCE OF STANDARDS

6.01 All wages and benefits in existence on the date of this Agreement shall be continued, except as amended or modified herein.

6.02 The current practices with respect to existing policies shall not be altered during the term of this Agreement without consultation with the Union.

6.03 Nothing in this Agreement shall prohibit the parties from bargaining on any issue they desire if both parties mutually agree to do so during the term of this Agreement

Apart from the arguable scope of Article 6.01, the consultation in 6.02 clearly did not happen, at least before the change in practice was introduced and grievances filed. But beyond that, the

parties did include in the collective agreement language specifically dealing with pay for travel on a day off, being Article 21.05 (d). All of Article 21 provides:

HOURS OF WORK & OVERTIME

21.01 Compressed Work Week

The Kenora, London, Ottawa, Sudbury, Thunder Bay, Toronto bases work under a "Compressed Work Week" System.

Hours of work, shift rotation, shift length, shift start and stop times are subject to change based on the requirements of the Contracting Agency and in accordance with applicable employment statutes.

Current duration of a shift is twelve (12) hours per day. All employees shall receive a 36 minute (0.6 hour) lunch break, paid at the appropriate overtime rate. Work year shall consist of 2080 hours in a calendar year.

21.02 Overtime will be paid at time and one half (1.5) the hourly rate in accordance with the appropriate legislation or this Agreement, whichever is greater.

21.03 A shift or assignment will end at the completion of all post flight duties.

21.04 Minimum rest periods — the minimum rest period at assigned base shall be ten (10) hours and thirty (30) minutes.

At bases where ten (10) hours and thirty (30) minutes is inadequate to achieve the time for meals, personal hygiene and an opportunity for eight (8) hours of prone rest, the parties will meet to discuss and address an appropriate adjustment to the minimum rest period.

21.05 Pay — Pilots will be paid as follows:

- (a) Straight time rate for regularly scheduled shifts.
- (b) All hours worked past twelve (12) hours, will be paid at one and one half (1.5) times regular rate of pay.
- (c) When asked to work on a day off, such hours worked will be paid at one and one half (1.5) times regular rate of pay, with a minimum guarantee of four (4) hours.
- (d) If requested to travel on a day off, the employee shall be paid for such hours worked at one and one half (1.5) times regular rate of pay, with a minimum guarantee of four (4) hours.
- (e) If a training day falls outside a regularly scheduled work day, the employee shall be paid overtime, with a minimum of eight (8) hours. If the training day falls on a scheduled

work day, the employee shall be paid at his regular wage for the duration of the regular shift, then overtime.

(f) If a Pilot is away from his home base, he will be considered to be in training for the duration of his time away, regardless of whether or not he is assigned to train on a specific day.

21.06 Banked Overtime

Overtime will only be compensated either by pay or as banked time subject to the following:

(a) The maximum amount of overtime that can be accumulated in an employee's bank is 79.80 hours (7×11.4).

(b) For greater clarity, eight (8) hours of worked overtime will be banked at twelve (12) hours.

(c) Banked time can only be provided as time off when availability to replace the employee is adequate. Every effort will be made to accommodate.

(d) If banked time off cannot be accommodated, management reserves the right to pay out the overtime.

The sole issue here is, for these parties and this collective agreement, what should the term "hours worked" be taken to mean.

8 The company relies on a case like *Canadian General Tower and USWA, Local 862*, 2011 CanLii 73194 (Brown), for the proposition that any compensation for employees must be specifically negotiated. But Article 21.05 (d) arguably does that, subject to a determination of what "hours worked" encompassed for the parties here. The company relies as well on the *Renfrew County and ONA* decision of Arbitrator Baxter as authority for the proposition (also noted in some of the Union's cases) that it is outside the labour-relations norm for an employer to pay for normal commute time. No authority is needed for that proposition as it is clearly correct, and the Union and employees here make no such claim; the claim is simply for travel time to a place other than the pilot's normal base for work, on a day when the employee is scheduled to be off. That is what 21.05(d) addresses by its own terms. The company queries why the Union believes "hours worked" can have a different meaning in (d), than it would in the "normal" daily situation covered by (a) or (b); but it is precisely because the travel is the result of an unscheduled imposition on the employee's own time, beginning when the employee is required to leave his home, that gives rise to the Union's claim, and presumably the manner of compensating that disruption under the policy inherited from CHL. As was stated by Arbitrator Adams in *Canadian National Railway and CTU*, (1978) 17 L.A.C. (2d) 142, quoting the comments of MrWeatherill in what is really the seminal decision for the Union's line of cases, *Wiberg v. Treasury Board*, at page 147:

We start with the proposition that the term "work" includes time spent by an employee in travel to a distant location for the purpose of carrying out his or her particular function. While, generally speaking, an employee is not "at work" until he actually arrives at his office, plant or job site, we accept that time spent traveling to an unusual and distant location at the employer's request falls within the ordinary and accepted meaning of the term "work". This view was well put in *Wiberg v. Treasury Board (Ministry of Transport)* where, at pp. 4-5, the adjudicator wrote:

Generally speaking, when an employee travels to his work each day, he is not "at work" until he actually arrives at his office or plant or job site. If his residence is at some distant location, that is his own affair. Once he does arrive at the office, however, he is said to be at work even though he may not actually be performing the particular tasks appropriate to his classification. He may simply be sitting at his desk waiting for an assignment, and yet he is indeed "at work" and entitled to be paid. Likewise where, in the course of the day, he travels from one location to another for the purpose of performing his job, he is "at work" throughout that time. In the instant case, the essence of the employer's case is that the grievor did not begin work on December 2 until he arrived in Collingwood at 7:30 a.m. that morning. The underlying assumption is that his getting to work at Collingwood that day was the grievor's own business, just as his getting to work in Toronto on any other day was his own business. Luckily for the grievor he was not asked to report in Vancouver or Halifax that day!

Merely to state this assumption is surely sufficient. It is obviously false. When the grievor drove to Collingwood in the early hours of December 2, and returned that evening, he was not just driving to and from work in the usual sense, he was travelling on the employer's business, at the employer's particular request, at some inconvenience to himself and on an assignment for which special permission had to be obtained.

Similarly see *London and District Association for the Mentally Retarded*, (1984) 16 L.A.C. (3d) 165; *Simon Fraser Health Region and British Columbia Nurses' Union*, (2000) 94 L.A.C. (4th) 115; *Corporation of the County of Oxford and CUPE, Local Sub-Unit 1146*, (2003) 117 L.A.C. (4th) 215.

9 As for the company's argument that there are other provisions in the collective agreement that demonstrate that this inherited benefit was "negotiated out", I am hard-pressed to agree. Article 45 provides:

TRAVEL AND EXPENSES

45.01 Per Diems

Employees will receive the per diem amounts below while working away from their assigned base (other than for an operational day).

	Per Diems
Breakfast	\$ 12.00
Lunch	\$ 15.00
Dinner	\$ 35.00

International exchange rates will be recognized and adjusted based on the quarterly rate established on the first day of each quarter Jan 1st; Apr 1st; Jul 1st and Sept 1st, and paid in Canadian Dollars. The employee will never receive less than per diem amounts above.

When an employee overnights he will also receive a **\$10.00** allowance to cover such incidentals as laundry or telephone.

All accommodation, vehicles, flight etc will be booked and paid for in accordance with the Company's Travel & Expense Policy. (Located on Life Line)

NOTE 1: Expense accounts must be sent for processing normally within thirty (30) days.

NOTE 2: At the end of each contract, any outstanding balance on expense account advances must be paid either by cheque or pay deduction.

NOTE 3: The employee may claim reimbursement for breakfast on the first day of the tour or business trip, when the departing aircraft has a scheduled take-off time of 8:00 A.M. or earlier. To obtain reimbursement for dinner, the employee must be away from his base until at least 6:00 P.M.

NOTE 4: Moosonee Base Per Diem's will be paid as per Appendix "C".

45.02 Employee Provided Accommodations

Expenses for room and meals provided by the employee are a fixed allocation of \$130.00 Per Diem without a receipt.

45.03 Scheduled Air Travel

To minimize an employee's travel day, scheduled air travel shall be by way of the most economical and direct flight available.

45.04 Use Of Personal Vehicles

Mileage reimbursement expense for the use of a personal vehicle while on approved Company business shall be paid at the current Revenue Canada rate per kilometre.

45.05 Rental Vehicles

- (a) The Company will arrange all rental vehicles when necessary for an employee to travel for business purposes. However, when employees are required to use a rental vehicle for the purpose of traveling to and from a work location, the minimum of a Standard Class vehicle shall be utilized.
- (b) Where vehicles are required in northern Ontario and driving times are in excess of one (1) hour, a four-wheel drive vehicle shall be used.
- (c) Actual cost of the rental shall be reimbursed to an employee upon submission of receipts.

As can be seen, as detailed as it is, none of it touches on the matter here dealt with.

Article 25.04 Travel For Training

Where a pilot has travelled to arrive at the simulator facility, he will be given sufficient rest time prior to the check ride or training to recover from the travel.

Once again, the clause deals only with the provision of appropriate rest time before a pilot is required to perform on the simulator, and not in any way the issue here.

10 Company counsel makes reference to Article 19 as well. But as can be seen, it does no more than provide special rules for the special situation of a "Duty out" required by the CAR:

DUTY OUT

19.01

- (a) If an employee duties out in a place other than their home base, the employee will be paid regular time until the end of the scheduled shift and time and one half (1.5) for any subsequent hours worked past the regular shift, plus an additional hour at time and one half (1.5). The employee shall receive eleven (11) hours free from duty starting at shut down to report time, which is considered adequate time for transportation to and from the hotel, time for meals, personal hygiene and eight (8) hours of prone rest. The Pilot in Command will advise if the eleven hours does not meet the requirements of the CARs
- (b) If the employee(s) is on a scheduled day off, then the employee will be paid time and one half (1.5) their regular hourly rate from the end of the rest period until the employee returns to base and completes all post flight duties. Minimum of four (4) hours at time and one half (1.5) or actual time worked at time and one half (1.5), whichever is greater. If a pilot duties out prior to the start of scheduled days off and requests to return home

immediately, the Company will make every effort to get him back to his home base as soon as possible via scheduled carrier or ground transportation.

19.02 If an employee incurs a financial loss on scheduled time off due to a duty out then the Company will reimburse the employee for the loss. Reimbursement will be subject to proof that a financial loss was booked prior to the duty out. Financial loss includes:

1. Travel change or cancellation fees on scheduled time off; or
2. Non-refundable travel arrangements; or
3. Tickets for events on scheduled time off; or
4. Additional childcare with receipts; or
5. Medical appointment cancellation fee with receipts.

19.03 All necessary expenses and meal per diems will be paid for during duty outs and for the following day if on shift. The Company will make all hotel and travel arrangements for the employee(s) when they are expected to duty out.

11 The closest the company comes to the parties arguably having addressed this matter is in Article 21.03, which again reads:

21.03 A shift or assignment will end at the completion of all post flight duties.

But this clause would have only limited application to the scenario's here in question, and would appear to be contemplating simply the normal shift situation, as opposed to the specific "off duty" travel situation covered in 21.05(d) specifically.

12 At the end of the day the case appears to me to come back to Mr. Russell's submission in Opening, being that the present situation bears strong analogy to the line of cases initiated by *Russelsteel*: the parties knew when bargaining the new language what the former practice had been; and they did nothing between them to expressly change it. Mr. Cunningham, I have to note, was a long-time pilot in the Rotor Wing division at CHL; and though part of the company team at the hearing throughout, was not put forward to testify.

13 On all of the evidence, therefore, I have no hesitation in concluding that it was well known on both sides what meaning had historically been given to the notion of "hours worked", as that term appears in Article 21.05(d), when a pilot is directed on an off day to a location other than his home base, and I find nothing in the new collective agreement that can fairly be said to have effected a change to that.

14 I accordingly find that the term "hours worked" in Article 21.05(d) of the collective agreement continued to carry the meaning that it always had when the unit was operated by CHL, and the company is directed to compensate its pilots under this collective agreement accordingly.

15 I remain seized in the usual way should there be any differences between the parties as to the appropriate manner in which to implement the terms of this award.