

IN THE MATTER OF ARBITRATION

BETWEEN:

**GOVERNMENT OF THE NORTHWEST TERRITORIES**  
as represented by the Minister responsible  
for the *Public Services Act*

Employer

- and -

**THE UNION OF NORTHERN WORKERS**

Union

**Grievance re: Flora Abraham (05-627)**

**AWARD**

BEFORE: Thomas Jolliffe, Q.C.

FOR THE EMPLOYER: Brad Patzer

FOR THE UNION: Debra Seaboyer

HEARING LOCATION: Yellowknife, NWT

HEARING DATE AND ORAL DECISION: June 27, 28, 2007

**DATE AWARD ISSUED:**  
**October 29, 2007**

This arbitration matter raises the issue of whether the aggrieved employee's application for paid special leave to cover two days time lost from work due to an alleged extreme event in the nature of road closure of the Dempster Highway, was wrongly denied. The pertinent language of the Collective Agreement read as follows:

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

- (b) where special circumstances not directly attributed to the employee prevent his/her reporting to duty including:**
- (ii) a transportation problem caused by weather if the employee makes every reasonable effort to report for duty;**
- - -
- (d) Such leave will not unreasonably withheld .**

Counsel also cited the Regulations to the *Public Service Act* as generally applicable to all employees of the Government of the Northwest Territories, in particular sec. 31 dealing with special leave which in part reads as follows:

- 31. A Deputy Minister may grant an employee special leave with pay for a period of up to one week, to the extent that it has been earned, under the following circumstances:**
- (ii) a general transportation tie-up caused by weather if the employee makes every reasonable effort to report for duty from his or her usual residence, but where transportation delays prevent an employee from reporting for duty from other than his or her usual residence, the circumstances may be considered attributable to the employee and the time should be charged to vacation leave or leave without pay.**

The Employer takes the view that sec.31, (d), (ii) of the Regulations must be read together with art.19.02 of the Collective Agreement and should not be seen as a matter of

applying the contract language alone. Rather, one can be taken as supplementing the other and suggests that in such cases where special leave is denied in a situation where circumstances have been considered attributable to the employee slowing in her return from a trip, it is not unreasonable to withhold the requested paid leave.

It is also perhaps worthy of note that under art.19.01, not reproduced herein, employees earn special leave credits up to a maximum of 30 days at the rate of .5 day per calendar month in which he or she receives pay for at least 10 days, or .25 day per calendar month in which he or she receives pay for less than 10 days. Ultimately, it can be seen that it would take a full time employee five years to earn the maximum accumulated paid leave credits, , to be drawn out by reference to the language in art.19.02.

The parties also made reference to the collectively bargained language dealing with conflicting provisions. It reads as follows:

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

In brief, the grievor is a court worker with the Department of Justice positioned in the Legal Aid office in Inuvik. In October, 2005, she together with her teenage son, and co-worker Candace Seddon Davies, planned to take a driving trip in the co-worker's van on the Dempster and Klondike highways, to Whitehorse and back, to be completed over the Thanksgiving Day long weekend. They had arranged to leave work early on Friday afternoon, October 7. It meant their traveling along some 736 Kilometres of gravel roadway and another 496 kilometres of paved highway in order to reach Whitehorse which was expected by them to take as long as 16 hours, perhaps another hour or two, in good seasonal driving conditions. They were counting in it taking roughly the same amount of time to return home along the same and only route. In short, the whole driving trip amounted to approximately 2464 kilometers (1531 miles) expected to be completed between Friday

afternoon and late Monday evening in order that the two co-workers could be back at their desks on Tuesday morning. She said that they did time calculations and felt comfortable that the return trip could be done in the time available, even leaving them two days planned visiting time with their friends in Whitehorse. By the grievor's version given in testimony, they considered the possibility of having a flat tire on the gravel road and accordingly took two spare tires with them.

By the grievor's description, they left Inuvik on Friday by about 5:00pm and took their first rest and refueling break at Eagle Plains, 367 kms along the gravel road, reached at about 11:00pm, after making two ferry crossings at Tsiigehtchic and Fort McPherson. With one or other of them driving throughout the night, they reached the Klondike Highway corner, some 40 km east of Dawson City at about 7:00am. Shortly thereafter took another refueling stop and were able to complete the last leg to Whitehorse by about 10:00am, all done without incident or delay. They had spent 17 hours on the road including rest stops.

The grievor testified that at she had at least a "vague" recollection of checking the road conditions prior to leaving Inuvik for the type of weather they would be facing both ways, and fully accepting the she was expected back to work on Tuesday morning. She said she had every confidence in fulfilling that expectation. By the grievor's description, there were no concerns presented in reference to the weather forecast, having checked with CBC North, the weather information source, and having made sure the ferry companies were running. She had verified their schedule. She said they had no concerns over the weather forecast, seasonable, with good driving conditions, and she was "confident" they would make their round trip successfully. The grievor saw themselves as having taken "all the necessary steps and preparations" in order for the driving trip to put them, successfully, back in Inuvik by late Monday evening.

The grievor testified that on Sunday mid-day they checked the likely weather for the return trip and discovered that a bulletin had been issued earlier that day regarding a road closure. It was placed in evidence as an archived bulletin from the Highways Department,

and reads as follows:

**Sunday, October 9, 2005 - The Dempster Highway is closed between Eagle Plains and McPherson due to high winds and heavy snow drifting. The remainder of the highway is open and is in fair winter driving condition. Please watch for and slow down at rough and slippery sections throughout.**

By the grievor's recollection, on becoming aware on Sunday that a road closure had been instituted by the Highways Department due to high winds and heavy snow drifting, she reasoned that it could open at any time, hopefully by the time they left for home on their return trip, or at least by the time they got to Eagle Plains, some ten hours into their drive. The grievor said that they decided against flying back to Inuvik at that point due the expense and also the fact that there was no expectation on their part that the winds and blowing snow might last for days. The snow clearing could be completed at any moment, they reasoned, and the road opened from Eagle Plains to the north. Further it made no sense to start back immediately on Sunday as the road was already closed waiting to be opened.

According to the grievor, on having visited with their friends, they prepared to leave for home on Monday at about 5:30am, and were planning on being able to reach Eagle Plains by about 4:30pm, where they would learn whether the road was yet opened. With the possibility existing that the road could open at any time, she said they were still expecting to reach Inuvik around midnight. They had set aside 18 hours for the return trip. Another way to put it, they were hoping for the best. The grievor and her co-worker started out making better time on the return trip, reaching Eagle Plains by about 3:30pm that afternoon. Had everything continued according to plan, they would have been back in Inuvik in about another 6 hours, which is to say by 10:00pm. However they discovered at that point that the Dempster Highway was still closed at Eagle Plains, no northbound traffic yet permitted from that point forward.

As matters developed, according the grievor, all the while they were sitting in Eagle Plains, they were thinking that the highway would open at any time, that road equipment

would finish clearing whatever blowing snow or drifts had accumulated. Some vehicles, they observed, even went beyond the road closure which they considered was not an appropriate approach. They ultimately sat there for two days. The highway did not open until Wednesday, mid afternoon, almost 48 hours later. At that point, setting off northbound even with the traffic considerably backed up, they were able to get home by about 8:30pm on Wednesday evening, which is to say two days after they would have arrived had it not been for the road closure. It had caused them to miss two days work.

In cross-examination the grievor held fast to her version that she and Ms. Seddon-Davies reasoned there was no point in leaving Whitehorse early in such circumstances as they had until at least 6:00pm on Monday afternoon to reach Eagle Plains in order to still get back to Inuvik by midnight were the road to have opened, which would have presented no problem in getting to work the next morning. The grievor's co-worker had taken the precaution of phoning their office on Monday afternoon to advise that due to the road closure they were "stuck" at Eagle Plains which was going to slow down their return trip. There was only an emergency landing strip at that location and no scheduled flights out. Unless they returned to Whitehorse or drove to Yellowknife in order to fly home, which they did not see as reasonable as the road could open at any time, they were stuck there for at least some period of time, hopefully only a few hours. However, the wind kept blowing, and the snow continued to pile up until it could be sufficiently cleared away to open the road two days later.

Subsequent to her reporting for work on Thursday morning after having gotten back to her home on the previous evening, the grievor applied for two days special leave with pay to cover the missed Tuesday and Wednesday, October 11 and 12. Thereon she stated the facts simply as she knew them to be namely, "the Dempster Highway closure prevented me from returning to work" and referencing on the request form "S-10 for bad weather". It is noted that only she, and not her co-worker, Candace Seddon-Davies, applied for the special leave. Her co-worker is an excluded employee, not a bargaining unit member, and

accordingly, would have had no access to the collectively bargained language.

The grievor's paid leave application was denied by her immediate superior, Lucy Austin, the Executive Director of the Northwest Territories Legal Services Board. She was aware that the grievor had some history in having failed to successfully deal with adverse weather, which had come to mind when the grievor made her application for paid special leave to cover the two days. In the course of her testimony the grievor acknowledged that approximately a month earlier, while returning to Inuvik by car from her annual leave spent in Fort Smith, she had miscalculated the length of the drive and had arrived back home late enough at night that she slept through her alarm the next morning. She requested 2 ½ hours paid annual leave. By the grievor's description, on this earlier trip, she had miscalculated the distance, and had been driving in foggy and rainy conditions, which resulted in a slower drive than she had anticipated. She was advised by Ms. Austin on this previous occasion that annual and special leave were not applicable to cover her arriving in Inuvik several hours later than she expected, and her sleeping through her alarm the next morning. The grievor testified that she saw no comparison with the current circumstance, where she felt comfortable with her co-worker as the main driver who was familiar with the highway, the distance involved and the travel time. She said they fully expected to be back in Inuvik early enough to report for work the next morning and would have, had it not been for the road closure.

The grievor's superior, Ms. Austin, in her testimony remarked upon the significance to the community of having the Inuvik legal aid office where the grievor and her non-bargaining unit co-worker were positioned, properly staffed during work days. When the grievor and Ms. Seddon-Davies successfully applied on Thursday to leave work early on Friday afternoon for their planned driving trip to Whitehorse and back over the long weekend, she pointed out to both that such an application involving the last 1 ½ hours of the work day should have been made well in advance, and that there should be no assumptions about such leave being approved in the future. She said that she made her preference clear

that she wanted them both there for the whole day, not wanting their remaining co-worker left alone in the office. Ms. Austin was plain enough in communicating her view at hearing that when the grievor only a month previously had been 2 ½ hours late for work after returning from a driving trip, there had been no satisfactory reason. She had stated in her assessment to the grievor at that time in a follow up e-mail that her lateness amounted to her having been absent without leave. The grievor had later applied for the missed 2 ½ hours to be considered as annual leave, which Ms. Austin knew had to be applied for in advance. The missed time in that previous instance was ultimately marked down as periodic leave without pay which the grievor accepted.

Ms. Austin in her testimony was clear enough that the grievor and Ms. Seddon-Davies heading off to Whitehorse on a driving trip over the Thanksgiving Day long weekend, left her concerned over their possibility of their not being back at work at 8:30am on Tuesday morning, and looking back to the previous occasion which she thought had been caused by the uncertain driving conditions existing on the Dempster Highway the previous month. She admittedly did not like the idea of her two staff members driving that far over the long weekend. She had observed that neither of them had asked for leave to carry them through to Wednesday or Thursday. After their leaving Inuvik, the next thing Ms. Austin heard was a voice mail message left for her on Monday by Ms. Seddon-Davis indicating that they were experiencing a road closure difficulty. Following their return home, admittedly, she was not about to approve any paid special leave due to what she described as “the entire circumstances”, including that they had apparently planned the trip at the last minute as indicated by them seeking 1 ½ half hours leave on Friday afternoon. They had been prepared to run the risk of being on the road over a great distance during the time of year when difficult weather conditions might be expected to materialize, and were apparently unconcerned that any kind of a problem encountered over such a long drive could cause a real difficulty returning on time. In short, they left no margin for error, as had occurred only a month earlier when the grievor had experienced some extreme distance difficulties in

