ONTARIO
CROWN EMPLOYEES

GRIEVANCE
SETTLEMENT
BOARD

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

COMMISSION DE
RÈGLEMENT
DES GRIEFS

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GSB#0840/99

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Professional Engineers and Architects of the Ontario Public Service
(Group Grievance)

Grievor

- and -

The Crown in Right of Ontario
(Ministry of Transportation)

Employer

BEFORE	Felicity D. Briggs	Vice-Chair
FOR THE GRIEVOR	Larry Robins, Counsel Labour Consultant	
FOR THE EMPLOYER	Kelly Burke, Counsel Legal Services Branch Management Board Secretariat	
HEARING	October 30, 1999, March 29, 2000, March 30, 2000 and September 25, 2000.	

DECISION

In the expired collective agreement between the parties article 13 stated:

> 13.1 Employees shall be credited for ministry-authorized time spent in travelling outside of working hours to work locations.
>
> 13.2 When an employee is required to travel on his/her regular day off or a paid holiday listed in Article 40 (Holidays), he/she shall be credited with a minimum of four (4) hours.

Grievances were filed during the life of that collective agreement regarding the issue of time credits while travelling beyond normal hours of work (hereinafter referred to as "travel credits" or "travel pay"). In November of 1998, the parties entered into a memorandum of settlement regarding Article 13 of the collective agreement. That memorandum stated:

> In the matter of PEGO's grievance over the implementation of Article 13 Time Credits While Travelling, the parties have agreed to the following terms as full and final settlement in respect of all employees whose positions are were in the PEGO bargaining unit since the 1996-1998 Collective Agreement was ratified:
>
> 1. Article 13 of the 1996-1998 Collective Agreement shall be re-worded as follows:
>
> 13.1 Eligible employees shall be credited for ministry-authorized time spent in travelling (sic) over and above 36.25 working hours per week.
>
> 13.2 When an employee is required to travel on his/her regular day off or a paid holiday listed in Article 40 (Holidays), he/she shall be credited with a minimum of four hours.
>
> 13.3 All time credits shall be taken as a reduction on a straight time basis to the employee's working hours, at a time to be mutually agreed upon, and at the latest by the end of the quarter following the quarter that the travel occurred.
>
> 2. In all ministries except for the Ministry of Transportation, where the Employer has recognized an employee's eligibility and made an accommodation for the time in question, the Employer is saved harmless from interpretation and implementation of the

prior wording of this Article in ways that did not conform to the amended language in paragraph 1.

3. Employees who are eligible for time credits prior to the date of this agreement shall be notified that they are entitled to:

a) a credit of half a day where no proof of time spent is required (Ministry of Transportation only), or

b) where proof is presented, a credit the employee and the Ministry agree to (all ministries), or

c) a determination of the credits owed to that employee by the ministry PEGO-Management Committee where agreement under b) has not been achieved.

d) All credits taken within twelve weeks of the date of notification, so scheduling shall take operational considerations into account.

4. This is a full and final settlement of PEGO's association grievance. Any and all grievances relating to the interpretation or implementation of this Article prior to the signing of this settlement are withdrawn.

5. Employees retain the right to grieve to determine eligibility, e.g. whether travel is an inherent part of their position. If successful, the grievor shall be eligible for the settlement in paragraph 3. The grievor shall continue to record claims until the grievance is resolved.

6. By March 31, 1999 at the latest PEGO shall be notified of the Employer's determination of whether or not positions are eligible for time credits while travelling (sic) in the Ministries of Transportation, Municipal Affairs and Housing, and Ontario Clean Water Agency.

The parties inserted article 13 as set out above into the present collective agreement. Subsequent to the signing of the above memorandum of settlement a large number of disputes arose regarding whether certain PEGO members working in the Ministry of Transportation were "eligible" for the travel allowance provided by article 13.1 and 13.2. At the hearing, it was common ground that the grievances might have differing results. That is to say that it is possible for some grievances succeed while others fail. Accordingly, the parties agreed that I would hear four specific fact situations

and issue a decision that hopefully would provide guidance to the parties allowing them to resolve the other outstanding matters.

The Employer's position is set out in a letter it sent to Mr. David Manning, one of the grievors, dated March 30, 1999. It stated:

> Further to the Agreement between PEGO and the Employer dated November 20, 1998, this is to advise that the ministry has determined that travel is inherent to the work of your position. Consequently, your position is ineligible for time credits while travelling (reference Term 6 of the Memorandum of Agreement).
>
> Specific to your position, some examples of travel to perform the duties of your position are to attend meetings with Ministry staff in Queen's Park, Regions and District and to attend meetings with external stakeholders. Such travel may also include field site visits. Travel is also required for training sessions and conference/seminar attendance.
>
> Although it has been determined that your position is ineligible for travel time credits, there may be occasional circumstances where the nature of travel differs from that travel is inherent to the function of your position. These types of trips will be reviewed on a case by case basis with your supervisor. If you have any questions or concerns, please do not hesitate to contact me.

In large measure, the parties agreed on the facts. Each of the grievors gave additional evidence, but it is fair to say that there was no significant dispute regarding the facts. I will set out the facts that were agreed and the relevant *viva voce* evidence.

Ms. Maria Bianchin

1. Ms. Bianchin is a Concrete Engineer at the PBE 8 Level, working out of the Downsview Complex in the Materials Engineering and Research Office.

2. The majority of her work is related to supporting the construction program. Her duties involve monitoring concrete construction and repair activities to ensure consistency with specifications, advising regional staff,

identifying any problem areas or quality issues that would require changes in specifications. In the winter months, most of her work is in Downsview, with occasional travel to St. Catharines, regional offices and to conferences and seminars.

3. During the summer months, she travels from time to time to work sites to investigate, observe, or monitor a variety of construction projects. She may visit more than one site on any given trip. In some cases the work involved is during the evening, night or weekends, e.g. during a concrete pour.

4. In her case most of the travel involved is to work sites. This travel was mostly within the Central, Southwest and Eastern regions of the province. Some of this travel takes place outside normal working hours.

5. A list of her recorded time for the period from June to September/99 is attached together with the relevant time sheets. Travel outside normal hours of work is generally recorded on these time sheets. Travel regularly occurs during normal hours of work.

6. She normally uses her own car, but on occasion will use a ministry vehicle. In most cases, she travels alone.

7. She received a similar letter to the one sent to Mr. Manning and filed a grievance.

Ms. Bianchin testified that virtually all of her travel for the period June to September of 1999 listed was outside of normal working hours and for visits to various work sites. Most travel was from her home to a work site and return to her home. She usually has some equipment with her including a cell phone, digital camera, hard hat, flashlight, safety boots and occasionally a lap top computer. In her cross-examination she conceded that travel was necessary to perform certain aspects of her work. Further, she agreed that monitoring construction sites was a core part of her summer work and that she could not perform that work if she did not travel.

Ms. Lynda Boyd

1. Ms. Boyd is a Geotechnical Engineer, Soils at the PBE 8 Level, working out of the Northern Regional Engineering Office, Operations Division in North Bay.

2. In that position she is responsible for Pavement Management (review of the road system and development of an appropriate rehabilitation strategy) and Project Management (hiring and selection of consultants to do field investigations, pavement selection and design). She supervises some staff who do field work and deals with problems that arise in construction.

3. She is responsible for an area which includes 4700 km of highways in the Northern region extending from Elliot Lake in the west on Highway 176, Hornepayne Highway in the north on Highway 11, the Severn River in the south along Highways 11 and 400 and Chalk river in the east along Highway 17.

4. Travel is required for the purpose of meetings, most of which take place in the Toronto area. The meetings are mostly with various MTO committees and usually take place in the Downsview complex. In some cases, Ms. Boyd attends meetings in the place of her supervisor, the Head of Geotechnical.

5. Occasionally, there are symposia (brainstorming sessions on various issues) and training sessions, which usually take place in the Toronto area.

6. Ms. Boyd would normally make one such trip to Toronto per month on average. The trips are usually for 1 or 2 day meetings. There are various travel options available to her, however she would mostly drive, using either a Ministry vehicle which is available about 50% of the time, her own vehicle, or a rented one. She would normally travel alone.

7. Travel to attend these meetings occurs both within and outside her normal hours of work.

8. Approximately 40% of her travel would be project site specific, to examine a problem anywhere in the Northern region, such as a construction problem, or a slope failure (side of a road falling down), etc. She would go to the site, make an assessment and decide whether any further investigation is required. The other 10% of her travel would be in connection with her Pavement Management function, which includes inspecting/observing sections of pavement from a moving or stationary vehicle.

9. There would normally not be any such trips during the winter months (Dec. - Mar.) but from April to November she would have one or two such trips per month. The shorter trips would normally take place within normal hours of work. However, the longer trips may require some amount of travel outside of normal hours of work. These trips could take her anywhere in the Northern region. For example, it's about an 8 hour drive from North Bay to Hearst.

10. For site trips, she would normally take some equipment with her, such as a straight edge to look at ruts, a smart level, a rod for depth of rock falls, a chain, a computer, some paint, safety equipment, and a camera.

11. Part of her job responsibilities requires that she observe and remain vigilant of pavement conditions during any road trip. On the longer site visit trips, she would typically visit a number of sites on one trip.

12. If Ms. Boyd does not travel, she will be unable to carry out the primary duties of her job as a Geotechnical Engineer, Soils.

13. A list of her recorded travel in 1999 is attached, together with monthly time sheets.

14. She received a similar letter to Mr. Manning and filed a grievance.

According to Ms. Boyd, approximately fifty percent of her claim results from travel to and from Toronto, most of which in during the evening hours. She estimated that about five percent of her travel is outside normal working hours. In cross-examination she agreed that she must travel sometimes in order to do her job and she estimated that she is out of the office two days

per week. There was some discussion about why Ms. Boyd always drives to Toronto rather than flying. It was her understanding that it was expected of her to take the most economical travel option. Mr. Mantha is Ms.Boyd's supervisor and he was of the view that the restrictions on travelling were that travel should be via the most practical and economical method. Further, he was unaware of any policy that indicated such travel was to be via automobile. However, he could not contradict that she was once told to use a car for travel to Toronto.

Mr. Dan Conte

1. Mr. Conte is a Senior Structural Engineer at the PBE 8 level out of the Downsview complex in the Structural Engineering Section of the Central Region Engineering Office.

2. He is responsible for the management of various pre-engineering and liaison on construction projects, including making recommendations with respect to the hiring and selection of consultants, and reviewing their work on an ongoing basis. These projects deal almost exclusively with structures, including bridges, culverts, retaining walls, and high mast lighting foundations.

3. He also administers the work of consultants who do detailed structural condition surveys, which are done to assess the condition of a structure, and to determine the appropriate methodology of any repair required.

4. Part of his responsibility is to do routine inspection of bridges and other structures. Over the course of a year, he will observe approximately 50 such structures.

5. A significant portion of his travel is for the above inspection of structures. He would normally make about 7 trips per year, and on each trip would carry out a visual assessment of between 5 and 9 structures. While he generally travels during normal hours of work, on rare occasions, he may

also travel outside those hours. Mr. Conte may also visit more than one construction site on the same trip.

6. Much of his travel is in the Niagara Region, and most would be day trips. For the above visual inspections of structures, usually two engineers would travel together. Mr. Conte could either be the driver or the passenger.

7. Mr. Conte also sits on a number of committees (e.g. Bearings Committees, and Bridge Management Systems Committee). At these meetings, he would typically meet with other ministry employees, and sometimes consultants, in St. Catharines. These meetings normally take place once or twice a month, and they may last for several full consecutive days. He would normally elect to commute home at the end of each day which is less costly to the ministry than staying overnight in St. Catharines.

8. On rare occasions, he may be also be required to travel outside of normal hours of work for emergency situations, e.g. where a crack is discovered in a structure. In one case he was recently required to inspect such a structure on a Sunday, and spent three hours doing so.

9. Occasionally, he is also required to travel for site visits or for courses and seminars.

10. Aside from the inspection trips described in paragraph 5 and 6 above, he would normally travel alone. He also normally uses his own vehicle and the expenses incurred are charged back to the ministry. In some cases, if a ministry vehicle is available and it's convenient, he may use a ministry vehicle for the inspection trips.

11. On the inspection trips described in paragraph 5 and 6 above, he would normally have more than one structure to inspect on a given trip, and would travel from one structure to the next.

12. He received a similar letter to Mr. Manning and filed a grievance. In his case, there is no specific claim for travel time which has been denied in 1999. He simply grieves because he received the letter declaring him ineligible for time credits while travelling.

Mr. Conte testified that he spends approximately ninety percent of his time in his office. He made seven day trips in 1999. When he makes his inspection trips he travels with another technical employee. Once at the site, he would issue instructions regarding the work needed to be done at that time, however, he does not supervise that employee. In cross-examination he testified that he travelled in excess of 4000 kilometers during the period April of 1999 and February of 2000.

Mr. David Manning

1. Mr. Manning is a Construction Engineer at the PBE 10 level, working out of the ministry's head office in St. Catharines.

2. In that position he is responsible for the recommendation of policies through which the ministry's Capital Program is delivered, which covers some $500 million annually in construction projects across the province.

3. His regular place of work is at his office in St. Catharines.

4. The majority of his travel is for meetings which take place outside of St. Catharines. From time to time he has meetings with Industry Associations such as the Ontario Road Builders Association and the Ready Mix Concrete Association of Ontario, both of which are in Mississauga.

5. He also has meetings at the Downsview Complex from time to time with his colleagues in the ministry, or meetings at Queen's Park to see the Assistant Deputy Minister.

6. He also meets monthly with the 5 Regional Managers of Construction. These meetings are usually held at Downsview, but can be elsewhere. He may attend at regional spring construction meetings in each region.

7. From time to time he also attends at meetings and conferences which are held outside the province (e.g. Chicago and Washington). He attended one course on Value Engineering in 1999, which was held in North York.

8. As part of his job responsibilities he is required to review application of new technologies, investigate concerns/problems and to monitor effectiveness of policies and procedures.

9. A list of his recorded travel from January to July 1999 is attached, together with five of his monthly time sheets. Mr. Manning's supervisor signed the May and July 1999 time sheets. Management has not signed the ones from January to March 1999. Time sheet for April and June/99 are not included.

10. He normally uses his own car for travel, but he may also use public transportation including Go Train. His trips to the United States are by air. In most cases he travels on his own, but on occasion he may get a ride with someone or give someone a ride.

11. On March 30/99 he received a letter from the Employer declaring him ineligible for time credits while travelling. As a result, he filed a grievance.

Mr. Manning testified that he spent less than ten percent of his time outside his office. He attended only one work site in 1999 and one in 2000. He said that many meetings he attended were useful but not essential to his work. When he travels he takes whatever paperwork is necessary for his business. He does not take a cell phone or other implements.

UNION SUBMISSIONS

Mr. Robbins, for the Association, reminded the Board that the grievances outlined above are representative of many filed by other engineers. It is hoped that the four instant fact situations are varied enough to allow the Board to make a decision that will provide sufficient guidance to the parties as to when, if ever, transportation allowance is to be paid. Clearly this is a fundamental disagreement between the parties. There is presently no jurisprudence regarding this matter at the Board from the PEGO collective

agreement. However, the matter of overtime versus travel pay has been considered by the Board for members of the Ontario Public Service Employees' Union in a variety of circumstances. In the collective agreement at hand, article 9 contemplates hours of work without any reference to payment of overtime, either in money or in compensating time off in lieu of compensation. This fact is important and it is a significant distinction between this collective agreement and the collective agreement for OPSEU employees.

These grievances all result from the parties' disagreement concerning which employees are "eligible" for the transportation allowance. It was the Union's position that article 13 has criteria. First, the time spent must be authorized. Second, it has to be in excess of 36.25 hours in a week. Finally, entitlement is only for "eligible" employees.

The parties addressed the issue of eligibility when they settled grievances filed under the first collective agreement. The parties stated at paragraph 5 of the memorandum of settlement resolving those grievances:

> Employees retain the right to grieve to determine eligibility, e.g. whether travel is an inherent part of their position. If successful, the grievor shall be eligible for payment under paragraph 3. The grievor shall continue to record claims until the grievance is resolved.

The memorandum of settlement signed in November of 1998 clarified a number of matters regarding travel credits. However, they failed to agree on what constitutes an “eligible employee”. The Association urged that eligibility must be interpreted in a purposive manner that makes sense in terms of this bargaining unit. It must be read so as to provide a meaningful benefit. The

Employer's position would render the article without benefit because virtually every bargaining unit member would be disentitled. Indeed, presently the Employer pays this allowance only to employees who virtually never travel. It makes no sense that the parties would insert a benefit that no one would receive.

It was conceded by Mr. Robbins that it is difficult to ascertain what the parties meant in the wording of the memorandum. If work is itself the travel to the extent that it cannot be distinguished from travel then it is inherent. However, there is a difference when travel is done to get to the work. That is the case in the instant matter. The most obvious example of this would be a bus driver. In that instance, the work and the travel cannot be separated. In these grievances we know that the work is engineering work, not travelling. It is true that the grievors have to travel because they are going to a seminar or there is work to do at a location other than their office. In all of the evidence provided, the travel was not the work at hand but the means of getting to the work to be done.

The Union relied upon the **Random House Unabridged 2nd Edition Dictionary** that defines “inherent” as "existing in someone or something as a permanent and inseparable element, quality or attribute". The attribute has to be part and parcel of the position so as not to be able to separate out the travel. That is not the instant case. Here the grievors are professional engineers. There is no dispute that they have to travel to enable them to perform some aspects of their jobs. However, it is not the essence of their

work, but incidental to the work. That distinction must find this Board to allow the grievance.

With that definition in mind, a review of the evidence is helpful. Ms. Bianchin traveled more than the other grievors but her travel was confined to the summer months, in large measure. She traveled to construction sites to review the work being done by outside contractors. Her work was not traveling to those sites. Rather, her work was performed after she arrived at her destination. Ms. Boyd works in a regional office and travels to various work sites and to Toronto for regular meetings. All of her claims for travel in 1999 were for her traveling to Toronto. Mr. Conte travels less time than other engineers. His single claim was for time spent travelling to a work site on a Sunday. Finally, Mr. Manning has virtually no site visits during the course of his employment. His travel is for meetings held at the head office and other locations. It is simply ludicrous to suggest that any of these engineers are doing work during their travels.

It was conceded by the Association that Ms. Boyd who is responsible for pavement management sometimes uses her vehicle to observe the quality of the pavement. However, the travel needed to take her to the area of pavement that she will observe is not inherent to her work.

The Association provided me with **re The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU (Dymond)** (April 19, 1983), unreported (Roberts); **re The Crown in Right of Ontario (Ministry of Transportation and Communications and OPSEU (Fawcett)** (May 1,

1984), unreported (Draper); **re The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU (Buchanan)** October 29, 1980), unreported (Kennedy); **re The Crown in Right of Ontario (Ministry of Correctional Services) and Cowie** (May 3, 1979), unreported (Adams); **re The Crown in Right of Ontario (Ministry of Transportation and Communication and OPSEU (Eaton)** (July 12, 1984), unreported (Samuels); **re The Crown in Right of Ontario (Ministry of Transportation) and OPSEU (Churchill)** (April 22, 1988), unreported (Springate); **re The Crown in Right of Ontario (Ministry of Consumer and Commercial Relations) and OPSEU (Wang et al)** (August 7, 1991), unreported (Samuels); and **re The Crown in Right of Ontario (Ministry of Transportation and Communications) and OPSEU (Tomasini)** (July 6, 1978), unreported (Adams).

Mr. Robbins suggested that the Board's jurisprudence for the members of OPSEU is helpful and can be taken into account but must be considered in context. Members of OPSEU are entitled to overtime at the rate of time and one half for hours worked in excess of their normal hours. There is also a travel allowance provided in their collective agreement. Much of the jurisprudence considers which of these two allowances is appropriate in certain circumstances. In most instances, OPSEU members were grieving that they were entitled to overtime and not travel pay that is compensated at a lessor rate. However, it is fair to say that grievors received either travel time or overtime.

The Union urged me to find that nothing turns on the issue of the vehicle's ownership, whether equipment was in the grievors' possession, whether the grievor was alone or what issues were discussed during the trip if s/he was accompanied by another person.

EMPLOYER SUBMISSIONS

Ms. Burke, for the Employer, suggested that in determining the issue of eligibility the Board must look to the fifth paragraph of the Memorandum of Settlement for guidance. That provision, in part, states, "employees retain the right to grieve to determine eligibility, eg. whether travel is an inherent part of their position". Therefore, the relevant consideration is whether travel is inherent to the work of the grievors. The agreed facts and evidence clearly reveal that travel is significant and essential. Accordingly, the grievances must be denied.

The Employer asserted that travel is an integral element of the grievors' work. A review of the definition of "inherent" that was provided by the Union is helpful. There can be no doubt after considering the agreed statement of facts and the evidence that travel is a "permanent and inseparable element" of the engineering work at issue.

Mr. Manning testified that if he did not travel he would not be as effective. Ms. Biachin's evidence was clear that many of the core duties of her work required travel. Ms. Boyd testified that she travels one to two days per week. This represents a significant percentage of her time and it must be very apparent that travel is inherent in what she does. Finally, Mr. Conte testified

that he is responsible for many bridges around the province. In order for him to perform that fundamental aspect of his work he must travel. Mr. Conte travelled 4260 km in a ten-month period. Again, this is so significant that it must be seen to be inherent to the position. Indeed, all of the grievors' evidence indicated that travel is an inseparable component of their work.

In support of its position the Employer provided **re The Crown in Right of Ontario (Ministry of Government Services) and OPSEU (Anwyll)** (January 19, 1994), unreported (Samuels); **re The Crown in Right of Ontario (Ministry of Transportation) and OPSEU (Churchill et al)** (April 22, 1988), unreported (Springate); **re The Crown in Right of Ontario (Ministry of Transportation and Communications and OPSEU (Clements)** (June 11, 1984), unreported (Samuels); **re The Crown in Right of Ontario (Ministry of Labour) and OPSEU (Elliot)** January 4, 1991), unreported (Dissanayake); **re The Crown in Right of Ontario (Ministry of Revenue) and OPSEU (Gabriel et al)** (November 10, 1993), unreported (Finley); **re The Crown in Right of Ontario (Ministry of Environment) and OPSEU (McColl)** (July 12, 1993), unreported (Finley**); re The Crown in Right of Ontario (Ministry of Environment) and OPSEU (Malette)** (July 5, 1988), unreported (Forbes-Roberts); **re The Crown in Right of Ontario (Ministry of Transportation) and OPSEU (Rutherford)** (August 21, 1990), unreported (Keller**); re The Crown in Right of Ontario (Ministry of Labour) and OPSEU (Wright)** (June 18, 1990), unreported (Fisher).

Ms. Burke suggested that the language of the OPSEU collective agreement virtually mirrors the instant agreement and therefore that body of jurisprudence is of much assistance. This is particularly true of those cases that consider grievances filed by employees who were "schedule 6" employees. The Board has established a two-part test in determining the issue of whether travel pay is owing. This test can be found at **Gabriel (supra)**, at page 12:

> The Grievance Settlement Board jurisprudence has arrived at two criteria to be used in determining whether time spent travelling outside normal working hours is work. These are:
>
> 1. Travel during the employee's regular hours or work must be an inherent part of his or her job, and/or
> 2. There must be a continuing responsibility on the part of the employee during the period of travel to care for either Ministry property or personnel.
>
> This Board accepts the conclusion in the Wright Decision, that only one of these criteria need be satisfied for the time spent to be considered work. (emphasis not mine)

It was later stated at page 14 of the **Gabriel** decision:

> The evaluation of responsibility to the Employer for Ministry property during time spent travelling must take into account the level of responsibility, and assignment of the responsibility. It is the linking of the possession of the property to the assignment of responsibility which must be evaluated to determine whether or not, and if so, to what degree, the possession of Ministry property creates a responsibility in the employee to the Employer which in its turn constitutes work.
>
> The signing out of a Ministry vehicle, the driving of such a vehicle and the supervision of personnel have all been found to create a responsibility to the Employer and consequently to be work. The ongoing possession and use of a Ministry vehicle have been distinguished from the time-limited use of a vehicle for specifically assigned duties. The value of the property has not been a determining factor. The computers are, in the opinion of this Board, in this situation, analogous to the "company car" situation. They do not create a responsibility which can be characterized as work.

The Employer directed the Board's attention to the **Churchill** decision that established when a grievor travels with another employee they are not responsibility free. Each of the grievors in the instant matter occasionally

travel with others. It is not necessary to find that the grievors are responsible for the supervision of those they travel with in order to find that the travel is work.

In closing, the Employer agreed with a conjecture made by Mr. Robbins that the affect of its position is that only four or five of the members of the entire PEGO bargaining unit will be eligible for travel pay.

In reply, the Association stated that the issue of eligibility is narrow. It depends on whether the grievors meet the requirements of the collective agreement. The two-part test relied upon by the Employer makes no sense in these circumstances because there will never be an instance when a member of the bargaining unit is without some ministry equipment. The parties did not agree that the two-prong test as the appropriate consideration. It must be remembered that the OPSEU jurisprudence was established with Boards determining whether employees should receive travel pay or overtime. In the instant case, this Board will decide between travel pay and no compensation or credit of any sort. That context is essential to the Board's determination.

DECISION

This issue for this Board to determine is whether time spent travelling outside the regular hours of work for the grievors attracts the travel credits as provided at article 13 of the collective agreement. All of the jurisprudence provided flows from the collective agreement between the Employer and

Ontario Public Service Employees Union. While that case law is interesting, and I will turn to it shortly, I agree with the Union that it is important to remember that there are some fundamental and important distinctions between the two collective agreements. The first difference is that the “normal hours of work” are “a minimum of 36 ¼” in this collective agreement, while in the OPSEU collective agreement hours are specifically quantified for all employees except those classified as "schedule 6" employees. The second difference is that for members of the OPSEU bargaining unit there is a provision for overtime to be paid at premium rates for all hours spent outside regular working hours for employees other than "schedule 6" employees. OPSEU members, including schedule 6 employees are also entitled to travel pay in certain circumstances.

The jurisprudence must be read in this context. Generally speaking, the GSB decisions are a consideration of whether the work at issue is properly "overtime" or "travel pay" in a variety of different fact situations. Certainly overtime is a more lucrative premium than travel pay, but travel pay attracts a form of compensation that would not otherwise be owing to the employee.

One of the leading cases at the Grievance Settlement Board that contemplated the issue of travel pay was **Anwyll** (supra) almost twenty years ago. That decision considered whether the grievor, a Fire Alarm Mechanic, was entitled to overtime or travel pay for time he spent travelling outside his regular working hours. In that case the grievor spent one third of his regular working hours travelling from one job site to another. He always used a

Ministry vehicle that was “specially equipped and stocked”. Mr. Anwyll had actually worked four and a quarter hours of time beyond his regular hours of work and he was paid overtime for the first three and a quarter hours. He received travel pay for the last hour that was spent travelling home. He argued that he should have received overtime for the entire period. It was the Employer’s position that overtime was not appropriate because the grievor was not driving and so was “responsibility-free”. The Board decided that the grievor was entitled to overtime pay. It was said, at page 6:

> In our view, this jurisprudence leads to the conclusion that, in principle, the issue of whether an employee is entitled to overtime pay or travel pay depends on whether or not the employee is undertaking responsibilities during the course of the journey. And this would accord with the collective agreement. Article 13.2 defines "overtime" as a "period of work". Under Article 23.1, travel time is spent travelling "when authorized by the ministry". In each particular case, the issue becomes what is the "work" of the employee involved.
>
> However, we have no doubt that the grievor here, even though a passenger, was still at work from Sarnia to London on April 7, 1983. We have come to this conclusion for a number of reasons:
>
> a) Travel is an inherent part of the grievor's job. While his job description does not refer expressly to travel or driving Ministry vehicles, it is obvious that he can't perform any of the functions mentioned unless he does travel. He cannot fulfil (sic) the purpose of his position without going from place to place in a specifically equipped and stocked vehicle. Indeed, the grievor's uncontradicted evidence that he travels one-third of his regular working hours.
>
> b) Whether driving or not, the grievor is clearly responsible to the Ministry for the vehicle and its contents. Whether driving or not, the grievor bears a certain responsibility to get the vehicle back safely. If the grievor was a passenger and the driver had a heart attack, obviously the grievor would have to get the vehicle back to headquarters. At a gas station, or a coffee stop, the grievor would have equal responsibility to see that the vehicle and its contents were safe. Surely the Ministry would not want the grievor to relax and turn a blind eye "because he wasn't at work any longer, he was "responsibility-free".
>
> His responsibility would continue until the vehicle, equipment and parts were safely returned.

> It is one thing to be travelling on public transport or in one's own vehicle, when there is no responsibility towards the employer. It is another to be travelling in a Ministry vehicle, engaged on the employer's business, doing a necessary part of one's job, and having a measure of responsibility for the employer's property. In the latter case, one would expect that normally the employee is still "at work" and entitled to overtime pay. The grievor was not a passenger in a chauffeur-driven vehicle, where the chauffeur bore the sole responsibility for the vehicle. He happened to be the passenger, but he was part of a two-man team at work with a vehicle necessary to the work, and both men had a measure of responsibility for the vehicle and its contents.

The Employer was ordered to pay the grievor the difference between the overtime that he was entitled to and the travel pay that he was initially paid. It is interesting to note that the Board found travel was an inherent part of the grievor's job because "it is obvious that he can't perform **any** of the functions mentioned unless he does travel" (emphasis mine). It was also important to the decision that the vehicle the grievor used was "specially equipped and stocked" and that virtually none of his work could be performed without travel. Such is not the case in the case at hand.

In the instant matter, the Employer also argued that I should apply two tests. An analysis of the jurisprudence in that regard was undertaken by Vice Chair Fisher. In **Wright** (**supra**), the grievor was an Occupational Health Technician. The time claimed by the grievor occurred while he was travelling by a public carrier and was therefore "responsibility-free with respect to government equipment under his care". In its analysis the Board stated, at page 1:

> Both parties agree that the Board has applied two tests to determine whether or not an employee is "working" or "travelling" within the terms of the Collective Agreement.
>
> 1. Is travel during the employee's regular hours of work an inherent (i.e. substantial) part of her job? In this case, the answer is "yes".

2. Is there a continuing responsibility on the part of the employee during the period of travel to care for Ministry property (vehicle, equipment) or other personnel (inmates, co-workers)? In this case the answer is "no".

The problem here lies in determining the result where the answers to the questions are, as we have here, one "yes" and one "no". Clearly, where the answers are both yes, the time is characterized as "work". Also, clearly when both the answers are no, the answer is "travel".

In the course of this case, we reviewed a large number of Grievance Settlement Board cases involving the determination of whether the time was characterized as "work" or "travel".

Attached as Appendix "A" to this decision in an analysis of those cases in chart form.

The cases with Yes, Yes or No, No give us little insight into whether the test is "either/or" or "both". However, an examination of the Yes, No cases should give us some insight.

In Marcotte, the grievor was responsible for returning a Ministry vehicle and his co-workers to the place of work. He was held to be working even though travel was not an inherent part of the job.

Similarly, in **Churchill**, the driver of a Ministry vehicle carrying co-workers was held to be working while the passengers were merely travelling.

In **Pileggi**, travel was held to be an inherent part of the grievor's job and it was therefore work even though he drove his own car and carried no Ministry equipment.

However, in **Fawcett,** the grievor was given travel credits when he drove his own vehicle, even though travel during his regular hours was an inherent part of his job. However, in **Pingue**, it was noted that "numerous subsequent decisions of the Board clearly depart from that view". It seems that in **Fawcett** a major consideration was that as the grievor was a Schedule 6 employee and if the time was characterized as work he would not have been paid for it, as Schedule 6 employees do not earn overtime. In the case before us, the grievor is compensated for overtime if his accumulated hours exceed 1885 per year.

Also in **Eaton**, the grievor appears to have had his time count as travel even though he was driving a Ministry vehicle. **Eaton** was written by Vice-Chair Samuels, the author of **Anwyll**, **Stahl** and **Clements**, which are the cases most often cited by the later decisions. Eaton might seem distinguishable on its facts because although the grievor was responsible for a Ministry vehicle, he neither carried any passengers or equipment.

However, in **Stahl**, Samuels characterized the time as "work" even though the grievor had no passengers nor was he carrying any Ministry equipment, but travel was an inherent part of his job.

We see, therefore, to have a clear split in the cases, with three of the cases seeming to say that both elements are necessary in order for the time to be characterized as work and two cases which seem to say that if either element is present then it is work.

Which then is the Board to choose? It cannot be said that either line of cases is patently wrong, nor will the outcome of this case "harm" either the employee or the Union because each of the parties routinely switch sides depending on whether or not the individual grievor will benefit. Some grievors desire overtime, other want travel time, depending on their individual schedule classification.

Certainty in labour relations is an important goal. Sometimes, it is more important to have a clear and definite decision, one way or another, rather than to continue a series of confusing and contradictory arbitral decisions. If the parties want to change the rules, they do so at the bargaining table, but at least they should a clear understanding, where possible, of what the rules are today.

This Board therefore determines the appropriate rule should be as in the **Marcotte, Pileggi** and **Churchill** cases, in other words, that the time is properly characterized as "work" if either:

a) travel during the employee's regular hours of work is an inherent part of his job, or,
b) there is a continuing responsibility on the part of the employee during the period of travel to care for either Ministry property or other personnel.

Vice Chair Fisher referred to the **Fawcett** decision and noted that "a major consideration was that as the grievor was a Schedule 6 employee and if the time was characterized as work he would not have been paid for it, as Schedule 6 employees do not earn overtime". A review of the **Fawcett** decision is useful. The grievor was a Quality Assurance Officer with the Ministry of Transportation and responsible for concrete inspections. He visited plants and construction sites. From the period November to March,

thirty eight percent of his time was spent in the field and ninety-eight percent of the time during the rest of the year. It was said at page 9:

> It is important to note that this is not a case in which the issue is whether an employee, who is eligible for both, is entitled to pay at the overtime rate or compensating leave under Article 13, or to credits for time spent in travelling under Article 23. Here they are not available as alternatives; under article 13 the Grievor is not eligible for overtime pay or compensating leave in any circumstances, and is eligible for equivalent time off only, for work performed on a day off. We see no authority in the collective agreement for the characterization of time spent by the Grievor in travelling as overtime work.

And later at page 13:

> Under the present practice the Grievor is already paid for time spent in travelling on days off and on holidays, since the Employer classifies it as "work". The practical effect of this decision, therefore, is that the Grievor is also eligible for credits for time spent daily during his normal work week in travelling outside the greater of 7 ¼ hours or the number of hours actually spent in performing his job duties, when authorized by the ministry.

Another decision that considered "Schedule 6" employees was **Wang et al**. The grievors were elevator inspectors and their claims for travel pay ranged from ten to over two hundred hours per year. The grievors travelled in their own cars as well as via public transit. They carried various equipment, tachometer, measuring tape, safety boots and pagers. Most of their time was spent away from their office. The Board stated at page 6:

> Travel is not "work" merely because the employee in question does a lot of travelling. This is where the Ministry went wrong when it changed its practice. The Ministry issued a bulletin stating, among other things, that "when travel is an inherent part of the employee's job, travel outside of normal working hours is considered work, not travel, and is compensated as such. This statement obviously comes from the first part of the reasons in **Anwyll** quoted above (from page 7). But the Board in **Anwyll** did not say that the fact that travel is an inherent part of an employee's job is sufficient on its own to classify a period of travel as "working hours". The central point is that there must be some job-related responsibility during the period of travel. The Board in **Anwyll** was clear that the grievor's travel was "work" because of his responsibilities relating to the Ministry vehicle and its contents. ***Travelling outside normal hours is not "work", unless during the travel the employee has some responsibility towards the Employer*****.** When the grievors in our case go to Thunder Bay to inspect a site, and then, when day

> is done, board a commercial aircraft for the trip home, they are not "working" in any sense of the term while the pilot and crew take them back to Toronto. They do not have the responsibilities that **Anwyll** had when he had to get his specially-equipped vehicle back to base safely. And it is no different if their out-of-normal-hours is on a bus, in a taxi, or in their own vehicles. The grievors do not have work related responsibilities during this transit. They are not "working" during this time. (emphasis not mine)

I found this decision to be the most helpful and persuasive. Specifically I agree that "travelling outside normal hours of is not "work", unless during the travel the employee has some responsibility towards the Employer". Indeed, I would go further and say that the responsibility towards the Employer has to be something more than being in possession of certain nominal "tools of the trade".

I cannot agree with the Employer that because travel is sometimes needed to get to the work, it follows that travel is inherent to the work. I also concur with the above comments that travel is not work merely because an employee does a lot of travelling. In the instant case, the Employer is attempting to convert travel from the transportation to and from a location where work is performed to the actual and real engineering work that is performed and I do not think that view, once scrutinized, can be sustained. Travel time outside normal working hours is not work unless there is a real job responsibility that is being discharged. Merely transporting oneself from one location to another is not sufficient. The vast majority of the travel at issue in these grievances is, as referred to by Vice Chair Adams in **Tomasini**, "incidental" to primary job duties.

The parties submitted the job specifications for each of the four engineering positions. The Employer suggested that a review of this documentary

evidence would reveal that travel is a significant percentage of the work. I considered that material and I must disagree. One of the primary sections of each job specification is entitled “statement of major responsibilities”. The number of major responsibilities ranged from five to nine for the various positions. None of the four job specifications had more than two references to a task that would require travel. For example, for senior structural engineer the second listed major responsibility was:

> Inspects and investigates existing structures and prepares maintenance contract packages by visiting sites, evaluating existing conditions, assessing capability, potential usefulness and degree of deterioration and defects, reporting on findings and recommending corrective measures, and by designing repairs to structures and acting as a project manager for the preparation of construction contracts.

Notwithstanding his job specification, it was Mr. Manning’s evidence that he had only one site visit in 1999 and one in 2000.

The Employer contended that I am obliged to apply the two tests set out in OPSEU jurisprudence in determining this matter. Unlike much of that case law, I am not deciding which of two premiums properly apply. Accordingly, I am not convinced that an application of the two tests is necessary to decide the matter of travel credits for members of this bargaining unit. I do however have to consider the first question given the wording of the November 1998 memorandum of settlement that is whether travelling is an inherent part of the work. In my view, this issue is not a question of law but a question of fact. In my view, for the most part, travel is not an inherent part of the work. The travel merely got the grievors to their work. According to the evidence travel is not a core duty. It is a means of transporting the grievors to and from a worksite where they perform their work. Travel is an inherent part of the

work (and therefore not subject to travel credits) if there is an actual component of work being performed at the same time.

The Employer asserted that the fact engineers carried various pieces of equipment with them or travelled with other employees is sufficient reason for the grievances to fail. I think not. It is true that the grievors have some equipment with them in their cars like safety boots, hard hats or perhaps laptop computers. However, tape measures and paper documents in the trunk of either a Ministry vehicle or a personal vehicle cannot magically change travel into work. The carrying of implements is not a determinative criteria for these grievances.

I am of the view that if an engineer travels with someone they supervise then the journey is work, not travel. However, the engineer would have to have actual supervisory responsibility for the passenger, not merely a co-worker they assign usual tasks at the worksite.

It might be useful if I review the various fact situations of each grievors and indicate if they are successful in their claim for time credits resulting from travel. Generally speaking, as mentioned above, travel time should be considered work performed and therefore not eligible for time credits if there was actual responsibilities or tasks discharged during the travel.

Mr. Manning's claim was for travel to various meetings. All of that travel should attract time credits. He performed no actual work during his travelling. He did not work on an assignment or conduct business on a cell phone. He

merely travelled to get to his work. In my view, this travel is clearly incidental to his work.

Ms. Bianchin's claim was, in large measure, for travel to work sites. Some of her travel claim was for time spent travelling to or from meetings. As stated above, in my view, her work was performed at those various work sites. Travel to those sites was not performing work. She was merely getting to (and from) her work. She was not responsible for monitoring certain road conditions during that time nor did she supervise employees or perform engineering duties. Accordingly, her claims are allowed.

Ms. Boyd is somewhat different. She is a geotechnical engineer with clearly specified responsibilities. According to her evidence, Ms. Boyd was responsible for pavement inspections for a large section of the northern region. She was also responsible for monitoring pavement conditions during her travels in her designated area even when that is not the primary purpose of her journey such as when she is travelling to meetings held in Toronto. That monitoring and responsibility is, in my view, performing work. She was actually discharging specific and certain duties as an employee while travelling. Therefore, when she is travelling outside her normal hours by car she would only be entitled to travel credits when she is travelling outside her own designated area or at night when she cannot see the road to discharge that responsibility. Her claim is allowed to that extent.

Mr. Conte did not have a specific claim, he merely objected to the notion of being considered ineligible. He also testified about certain responsibilities for

the monitoring of bridges while travelling in certain areas. In that regard, it seems to me that his situation is similar to that of Ms. Boyd. However, any claim he might have in the future would be fact dependent.

The November 1998 memorandum of settlement stated that employees could grieve to "determine eligibility, eg whether travel is an inherent part of their position". The dictionary definition of "inherent" provided stated that inherent is "something as a permanent and inseparable element, quality or attribute". In my view, according to the evidence I cannot find that travel for these grievors is "a permanent and inseparable element" of the work at issue. While it is true that they travel to get to their work, the travel is not engineering work. As characterized in some of the earlier GSB decisions, the grievors' travel was, in large measure, incidental.

In the result, the grievances are allowed to the extent set out above. I remain seized in the event that there are problems implementing this decision.

Dated in Toronto, this 18th day of April, 2001.

Felicity D. Briggs, Vice-Chair.