

IN THE MATTER OF AN ARBITRATION
OF A GRIEVANCE

CONCERNING **RICK ANDERSON**

BETWEEN:

NAV CANADA

Corporation,

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,

Union

A W A R D

For the Employer: George Rontiris., Counsel

For the Union: Sean McGee, Counsel

Before: Ken Norman

Heard in Vancouver on April 5, 2001

On July 21, 1998, Rick Anderson, ATC, Vancouver ACC, West Complex, filed a grievance challenging Shift Manager Joseph Russo's demand for a medical certificate on June 14, 1998. The essential facts are not in dispute. On the day in question Rick Anderson was scheduled to work from 6:00 a.m. to 2:00 p.m.. The following day, June 15, was a scheduled day off for him. During the course of his shift on June 14, Mr.

Anderson was asked if he would work an overtime midnight shift that night beginning at 10:30 p.m. and running through to 6:00 a.m.. He agreed to take on this extra shift. However, around 8:00 p.m. that evening he called in saying that he was not able to work the shift. Joseph Russo called the grievor at his home advising that he would require a medical certificate. He asked no questions about Mr. Anderson's state of health. The next morning, Mr. Anderson took a couple of hours out of his day off in order to obtain such a note from his doctor.

Rick Anderson's testimony was that he had planned to sleep for four hours during the early evening of June 14 so that he would be well enough rested for the midnight shift. As it turned out he was unable to do so. Not only did sleep not come he began to acquire a headache. By 8:00 p.m. it was clear to him that the combination of no sleep coupled with the headache rendered him unfit to take on the overtime midnight shift. The next morning the trip to his doctor's office entailed driving some 38 kilometers and expending a couple of hours of his time.

Joseph Russo's evidence was that his challenged decision to call for a medical certificate flowed from an Ops Bulletin [No. 98-078] of April 7, 1998. This document was signed by Mr. Russo on behalf of David Dougherty, Manager of Operations, Vancouver ACC. This bulletin sets forth a number of new policies, for a trial period of May 1 to July 1, 1998, aimed at solving what Mr. Russo called in his testimony the "chaotic" midnight shift staffing situation which he had come to face in the West Complex. The material portions of the Ops Bulletin read as follows:

The West Complex argued very vigorously and successfully for a third person on the midnight shift. Having done so, it is now

very important that this shift be fully staffed. The present method of staffing it has clearly not been working. Far too frequently we are now engaged in what I refer to as the "**Midnight Dance**".

Sending people home from a shift so they can return for the midnight shift. Bringing people in at 2:00 a.m. to fill the balance of a shift. These and other creative but disruptive actions are thing we have been doing. You all know the routine. I believe you all know that I would not be doing my job if I could not solve this problem. No solution is perfect. I do not profess that my solution is perfect. It is better than what we are doing.

- 1) The staffing of the midnight shift will be at straight time unless the shift scheduler is faced with a difficult scheduling problem.
- 2) The supervisors will be fully integrated into the midnight shift scheduling rotation.
- 3) **A controller cannot move or be moved off or cancel his/her scheduled (including overtime) midnight shift (this includes the taking of ad hoc leave) without ensuring guaranteed coverage of the vacancy the move would create.**
[emphasis added]

Mr. Russo's testimony was that these three steps were the foundation of his design to put an end to the "Midnight Dance". During the month of May Mr. Russo's careful tracking of the midnight shift situation in the West Complex showed that the new system was working. There were no cancellations of overtime midnight shifts and no short notice shift changes.

As of the afternoon of June 14, for the midnight shift commencing at 10:30 p.m., Mr. Russo had two scheduled straight time ATC's, Steve Connelly and Greg Patchet, and one volunteer overtime ATC, Rick Anderson. Thus, the shift was fully staffed. However, at some point prior to the phone call from Rick Anderson, Steve Connelly

called in sick. A note was made that this was a casual sick claim and no medical certification was called for. Mr. Russo then looked around for someone to step in to cover. With two out of three positions still filled, this was not a crisis situation. As it turned out, Mr. Russo had no volunteers to fill Mr. Connelly's shoes. So, he began working on arranging a couple of post and prior shift extensions to piece together coverage of Mr. Connelly's vacated position. In the midst of this Rick Anderson called in sick. At this point, Mr. Russo believed he had not yet arranged shift extensions to cover for Mr. Connelly. So, with only one ATC in place where three should have been, once again, Mr. Russo found himself dancing with the prospect of a chaotic midnight shift. This prompted him to respond differently to Rick Anderson's call than he had to Steve Connelly's. He demanded a medical certificate from Mr. Anderson.

In a memorandum of June 20, 1998, Mr. Russo explained this decision to Rick Anderson as follows:

I acknowledge receipt of your letter dated June 20, 1998 and thank you for the medical certificate.

As you know, Operations Bulletin 98-078 which you have read, states that a controller on a midnight shift cannot move or be moved or cancel a scheduled shift including an overtime shift without ensuring guaranteed coverage of the vacancy that would be created by such a cancellation. This directive had been made necessary because of the unusually high number of Midnight Shifts which had been staffed with less than the required number of staff due to illness, shift exchanges, or the unavailability of replacement staff. I think it is fair to say that the staff views the results generated by that Ops Bulletin as generally positive.

When you called in sick for the shift, you were asked to bring in a medical certificate in order to substantiate that you were

indeed sick. I had not made this request because I doubted that you were sick.

I had received reports from the staff that traffic levels over the previous several nights had been heavier than normal. The fact that you were calling in sick would impact the other staff who would be working that evening and possibly the users of the airspace for which our Complex is responsible.

As a manager I have the right to ask you to substantiate your inability to report for any work you have been assigned. This includes work assigned on overtime. Such a request is based on my need to document, with concrete data, the reasons for the disruption of the other staff and if need be, to justify any traffic delays that might have been generated by your absence. I'm sure you understand that it is as important for me as a manager to document accurately as it is for you as a controller to document accurately. We are all working in a new environment. Attention to detail is now more important than ever before.

I want you to know that I value you as an employee and do appreciate the fact that you work very hard, both on regular time and overtime.

In other words, Mr. Russo's call for a medical certificate was aimed at enforcing the provision in Ops Bulletin 98-078 which I have earlier emphasized. Joseph Russo's interpretation of this requirement was that ATC's scheduled for a midnight shift or who had volunteered for an overtime midnight shift who elect to back out, and who thereby cause significant problems, must shoulder the burden of "guaranteeing coverage of the vacancy the move would create". The only controllers not so obliged were those who called in sick. This policy applied to Rick Anderson because he was the second man to call in sick. At that point, Mr. Russo had only one controller that he knew for sure was coming in for the upcoming three-controller midnight shift. Thus, Greg Patchet, the lone controller, and management and Nav Canada's customers about to fly through the West

Complex airspace that night were all facing "significant problems". This situation, among others, was what the Ops Bulletin was designed to prevent.

Counsel for the union began by acknowledging that Ops Bulletin 98-078 was appropriately aimed at avoiding scenarios where one ATC, such as Greg Patchet on the night of June 14, 1998, faced being left in the lurch by coworkers opting out of the shift on short notice. However, he submitted that the requirement of a medical certificate was not a legitimate enforcement tool to achieve this objective. In light of *Nav Canada and C.A.T.C.A. (Swann)* (1998), 74 L.A.C. (4th) 241 and *Nav Canada and C.A.T.C.A. (Brault)* (2000), 86 L.A.C. (4th) 370, the determination of whether or not to demand a medical certificate under article 24 of the collective agreement entails a reasonable exercise of discretion. This means that proper consideration must be given to the actual circumstances giving rise to an employee's claim for sick leave. On the facts at hand, it is clear that Joseph Russo did not engage in any such exercise of discretion before requiring Rick Anderson to produce a medical certificate.

Counsel for the corporation's contention is that this case is not about article 24 at all. Arbitrator Hope decided in *Nav Canada v. Canadian Air Traffic Control Assoc.* (2000) C.L.A.D. No 697 that, where there is no loss of earnings, no claim for sick pay can be made. Sick pay does not include compensation for loss of an opportunity to earn premium pay. In other words, such a loss does not amount to a "loss of earnings". It follows from this ruling that this matter is not governed by the sick leave provisions of the collective agreement. Rather, it falls under article 26, "Other leave with or without pay", which provides:

26.01 In respect of any requests for leave under this Article, the employee, when required by NAV CANADA, must provide satisfactory validation of the circumstances necessitating such requests, in such manner and at such time as may be determined by NAV CANADA and confirmed in writing.

This language is broader than that of article 24. Further, even if this language is interpreted as obliging management to consider individual circumstances, what Mr. Russo applied his mind to were the individual circumstances contributing to the looming crisis which he faced on learning of that the grievor had phoned in sick.

In response to these submissions, counsel for the union argued that, even if article 26 does apply to the circumstances at hand, it simply makes no sense to read article 26.01 as not requiring management to engage in a reasonable exercise of discretion. On the facts giving rise to this grievance what is at stake is identical to that in a sick pay situation. Arbitrator Swann's reasoning applies just the same.

ANALYSIS

I take the corporation's point that the Hope award establishes that this is not a "sick leave" case. Rather it is a "leave without pay" matter. However, I am persuaded by counsel for the union that nonetheless article 26.01 requires the exercise of a reasonable discretion. Arbitrator Swann rightly rejected the idea that a medical certificate could be demanded on an arbitrary basis. Arbitrator Brault appropriately applied this proposition in concluding that a blanket requirement for a medical certificate for each and every case of sick leave regardless of individual circumstances contravenes the collective agreement. On principle, whether an employee is calling in sick in order to get sick pay under article

24 or calling in sick in order to get leave without pay from an overtime shift for which he had volunteered, management may not require a medical certificate without exercising a reasonable discretion based on that employee's individual circumstances. The relevant individual circumstances are those which have to do with the employee's state of health. I reject the corporation's submission that "individual circumstances" can be seen to encompass the staffing dance caused by Rick Anderson's phone call.

Before concluding this portion of my award, I want to address a point made by Joseph Russo in his testimony and reinforced by counsel for the corporation in argument. Mr. Russo felt that questioning the grievor about the nature of his illness would not be a respectful thing for him to have done. Mr. Rontiris argued that such a question would hardly contribute to good relations in the Vancouver ACC. That may be. However, that is a choice which management will have to make if it wishes to invoke its right to require a medical certificate. Arbitrators Swann and Brault were right to insist that a medical certificate not be demanded without attention being paid to the individual circumstances of the employee calling in sick. All that I am saying in this case is that it follows that medical certificates cannot be used instrumentally. In other words, a call for a medical certificate must have to do with a challenge by management of an employee's assertion that he is too sick to work. Management's right in this regard cannot properly be utilized as an enforcement tool to implement a staffing policy. Accordingly, this grievance is sustained. In the absence of proof of a proper exercise of subjective discretion concerning Rick Anderson's state of health on the evening of June 14, 1998, management violated the collective agreement by requiring that he produce a medical certificate.

REMEDY

As I noted during the course of argument, it seems to me that such a finding makes Mr. Russo's demand null and void. On this footing, it is not appropriate for me to accept the union's invitation to treat the demand as a call "for services rendered" under article 17.02, the pay clause of the collective agreement. By the same token it makes no good sense to treat the grievor's mileage claim as a "cost" of obtaining the medical certificate. The contentious question of whether new ground ought to be broken by an arbitral inference that this collective agreement obliges the corporation to shoulder the costs of obtaining a required medical certificate is not properly before me for determination. That said, I am left with what to do about the fact that, as a consequence of a demand for medical certification made in violation of the collective agreement, Rick Anderson took a couple of hours out of a rest day in order to comply by visiting his doctor. By way of an alternative argument, counsel for the union submitted that a suitable measure of damages would be the applicable call-in and mileage rates for which he argued at some length. I reject this suggestion as it amounts to doing by the back door what I have just said is not properly before me to do via the front. However, I do not feel comfortable leaving Rick Anderson, who was faultless throughout, without any form of compensation for his efforts in promptly obtaining medical certification on a day of rest. Accordingly, I award him general damages in the amount of \$100.00, with interest, for his time and trouble in responding to management's impermissible instrumental demand for medical certification as a way to enforce Ops Bulletin 98-078 of April 7, 1998.

I will remain seized of this remedy should the parties fail to arrive at an appropriate compensation amount.

Dated at Saskatoon this
23 day of April, 2001.

"Ken Norman"

Arbitrator