

Leahy

File: 166-2-10526
166-2-10527

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

G.L.B. HOLLIER & R.W. WILLIS,

Grievors,

AND:

TREASURY BOARD
(Department of Transport),

Employer.

DECISION

Before: Kenneth E. Norman, Board Member & Adjudicator.

For the Grievors: Carl Fisher, Canadian Air Traffic
Control Association.

For the Employer: Craig Henderson, Counsel.

*ART 10
Code 402/79
JB Jan 25/82*

Heard in Winnipeg, November 20, 1981.

*Leave without pay for ICAO. Requests denied by Employer.
Adjudicator found the operational requirements argument
presented by the Employer as sufficient reasons to
deny the requests. Grievances dismissed.*

DECISION

The grievances filed by Messrs. Hollier and Willis arise out of identical circumstances. They involve the following provision of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association. (Code: 402/79)

10.07 It is agreed that, operational requirements permitting, employees in the Air Traffic Control Group who are selected for employment by ICAO, CUSO, or under Canada's External Aid Programme, will be granted leave of absence without pay on presentation of a letter indicating their acceptance by such an organization.

(Emphasis added.)

It was agreed at the outset of the hearing that evidence would be called with regard only to Garry Hollier's case, and would be taken to apply entirely to Robert Willis'.

The material facts may be stated in just a few words. On March 5, 1981, Mr. Hollier sought a years' leave under Article 10.07. By letter addressed to R. McFarlane, Chief, Winnipeg Area Control Centre, he said:

Reference: Cablegram CIA 968, March 3rd
Letter dated January 7th
from ICAO.

Dear Sir:

Please consider this as a request for leave to go on loan to ICAO (International Civil Aviation Association) for a minimum period of one year to fill an ATS Instructor position for Misurata, Libya.

The following memorandum of reply was authored by Mr. Norman Addaway, Acting Regional Manager of Air Traffic Services, on March 11, 1981.

TO: CHIEF, WINNIPEG AREA CONTROL CENTRE
FROM: CAT WINNIPEG.
SUBJECT: LEAVE OF ABSENCE REQUEST -
G.L. HOLLIER

A one-year leave of absence from Transport Canada for Mr. Hollier to act as ATS Instructor in Misurata, Libya is not approved.

Staff shortages anticipated during the implementation of JETS (Joint EnRoute Terminal System) precludes the release of control personnel from the Region at this time.

In his evidence at the hearing into this matter, Mr. Addaway proffered three reasons for the above decision that "operational requirements" simply did not permit the requested leaves to be granted. First, he knew that his region was facing JETS ORD (Operational Readiness Display) in the summer months. JETS was a new computerized air traffic control system which involved consolidating controllers in centres, such as Winnipeg. ORD was a sophisticated demonstration exercise designed to prove that the regional control system was technically ready to cross the threshold into JETS. Mr. Addaway knew that JETS required him to have 103 controllers in Winnipeg Centre. In March of 1981, he was facing a shortage of six controllers.

Second, pending publication of the final volume of the Dubin Commission's report, Mr. Addaway was under instructions not to phase out Kenora Tower. Controllers had given evidence to Mr. Justice Dubin to the effect that it would

be unsafe to close down Kenora. Maintaining the status quo at Kenora entailed keeping Thunder Bay Tower operational for the time being. This situation left a requirement of 81 controllers in Winnipeg Centre. At very best, by moving controllers out of Saskatoon and Regina, Mr. Addaway would be able to achieve a level of 76 controllers in Winnipeg Centre. In addition, Mr. Addaway explained that during ORD, it was necessary to 'double-bank' controllers. For a week the actual control of aircraft would continue to emanate from the various towers, with the Winnipeg Centre JETS controllers simply standing by with their system functioning but without their hands actually being on the aircraft in question. For the next week of ORD, Winnipeg Centre would be in control, with the tower controllers serving only a monitoring function. All of this called for a good deal of additional manpower at the various controls.

Third, Mr. Addaway testified that he was aware that new legislation enabling controllers to seek early retirement would be implemented in the very near future. He calculated that some 28 of the controllers in his region would be eligible to take advantage of this new provision regarding retirement in the coming eighteen months.

Thus, in a nutshell, in March of this year, Mr. Addaway was facing, to use his word, a "horrendous" operational situation, three months down the road, with the JETS ORD, the Dubin Report and the spectre of a number of early retirements. He felt that he simply could not afford to lose two controllers for a year or more, in the face of all these potential difficulties.

The Grievors' position was essentially that all of the factors cited by Mr. Addaway were a matter of management responsibility. JETS had been on the way for something like a decade. Given the training time necessary to qualify a controller for JETS, management might well have put its energies into schooling more controllers, so as to avoid the shortages faced by Winnipeg Centre this summer. By the same token, the other factors concerning Mr. Addaway might have been eliminated by better planning on the part of management. This point aside, Mr. Fisher, for the Grievors, suggested that the work could be handled on an overtime basis. He relied upon the recent decision in Savage (166-2-9734) for the proposition that consideration of overtime costs were not proper management concerns in deciding whether operational requirements permitted the granting of a requested leave.

Mr. Henderson, for the Employer, submitted that Savage was quite a different case in that it had to do with article 17.06(b) of the collective agreement which puts a much heavier burden on the Employer, in the case of requested vacation leave. The key difference appears in the following sentence:

Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

In addition, Mr. Henderson argued that overtime was not a basis for management's decision in March of 1981 to refuse the requested leaves. Rather, for the reasons advanced by Mr Addaway, it was a matter of significant staff shortages.

Although Mr. Fisher did not present his argument explicitly on this basis, I understand his position to be essentially the same as that which was successfully advanced by the grievors in Lawes et al (166-2-6437-6440,6666,6473/74, & 7026-7029). The article in question was very like the one before me in this case. It stated:

Where operational requirements permit,
the Employer will provide operating
employees with meal and relief breaks.

The grievors asserted that this article entitled them to be provided with meal and relief breaks and that this entitlement could not be set to one side, simply on the footing that management at the Control Tower, in Victoria, had only a minimal complement of staff at its disposal. Mr. Leon Mitchell, Q.C., Deputy Chairman, ruled in the grievors' favour. He states, at page 15 of his decision, that he doubts that anyone would seriously argue that meal and relief breaks for controllers are not essential. In short, he said that the grievors were given rights by the article in question and that it would not suffice for the employer to assert that "staffing", as opposed to operational requirements, made it impossible to grant the requested breaks. In Savage, S.J. Frankel, Board Member and Adjudicator, referred, with approval to this "useful distinction between 'staffing' and 'operational requirements'", at page 8.

I take as my starting point, just as Mr. Mitchell did in Lawes et al., that the article before me for adjudication does indeed create rights for controllers. Upon filing proof with the Employer that they had offers from ICAO, the grievors were entitled to expect that their requested leaves

would be granted, "operational requirements permitting". The burden on the Employer is clearly not as great as that which was before Mr. Frankel in Savage. But, the Employer must objectively apply its mind to the matter of operational requirements. It is at this vital point that the case at hand differs from Lawes et al. For, the employer chose to offer no evidence at all to Mr. Mitchell on this issue. He states at page 17 of his decision:

... I am faced with the fact that the employer called no evidence to explain the refusal to provide relief breaks or the circumstances under which relief breaks cannot be made available to operating employees. It decided to rely entirely on the principle that an operating employee is not entitled to any meal and relief break pursuant to the words used in Article 13.02(d). At the same time counsel submitted that it was my duty to determine whether the employer acted reasonably. Needless to say, in the absence of any evidence from the employer as to the reason the employer refused to provide relief on each of these days it is difficult to determine whether the employer acted reasonably.

On the evidence given by Mr. Addaway, I am of the opinion that I ought not to strike down his refusal to grant the requested leaves, as being an unreasonable exercise of discretion, on his part. I did not easily come to this conclusion because I was persuaded by Mr. Fisher's argument that JETS had been planned for over a very long period of time. The burden of staffing-up for JETS ought to fall squarely on the shoulders of the Employer. Thus, the over-all implementation of the new system does not, in and of

itself, amount to a sufficient basis for the conclusion that "operational requirements" did not permit approval of the two requested leaves under article 10.07. To take Mr. Mitchell's useful distinction, this is a matter of 'staffing' rather than one of 'operational requirements'. But, when one looks at the short-run problems caused by double-banking during the JETS ORD, coupled with the indefinite uncertainties at Kenora and Thunder Bay pending the publication of the Dubin Report's final volume and the initial impact of some controllers opting for early retirement, under Bill 60, one perceives issues which transcend 'staffing' and ought properly to be considered under the heading of 'operational requirements'.

There remains the matter of overtime. I take this to be a rather different case from Savage and the adjudications cited therein. Savage involved two (possibly three) days of vacation time. Lawes et al was concerned with an average of two and one-half days per month when the aggrieved controllers were deprived of opportunities to take meal and relief breaks. It seems to me to be one thing to say that the cost of overtime is not a relevant consideration in such cases, but quite another thing to make the same assertion where, as in the cases before me, the employer is facing the need to get along without two controllers for a period of a year or more. In any case, I accept Mr. Addaway's three reasons as the sole bases upon which his decision to refuse the requested leaves stood in March of this year. To the extent that the cost of overtime was present to his mind at the time, I must say that I am sympathetic to such concerns, in all of the circumstances of the decision which he faced. But, so far as this adjudication is concerned, in my opinion

the three reasons advanced by Mr. Addaway suffice to justify the decision reached.

For the reasons which I have given, I am satisfied that no proper basis exists for reversing the Employer's considered opinion that operational requirements did not permit approval of the requested leaves. Accordingly, the grievances are dismissed.

For the Board,

Kenneth E. Norman,
Board Member and Adjudicator.

SASKATOON, December 17, 1981.

