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File No: 166-2-9004

THE PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

JAMES R. POTTINGER,

Grievor,

AND:

TREASURY BOARD
(Transport Canada),

Employer.

DECISION

Before: A.W.R. Carrothers, Board Member and Adjudicator.

For the Grievor: John Pottinger, Representative of Canadian
Air Traffic Control Association.

For the Employer: Harvey Newman, Counsel.

ART 9
CODE 402/79

Heard on May 1, 1981 at Vancouver, British Columbia.

*Grievance to have sick days changed
to sick leave. Grievance dismissed.
JUB 17/6/81*

DECISION

The hearing of the grievance was postponed from 28 April 1981 to 1 May 1981 at the request of the representatives of the parties.

The Grievor is employed as an air traffic controller at the Langley, B.C. control tower. The grievance, dated 23 January 1980, reads as follows: "The Employer refuses to grant 4 days sick leave after the presentation of a medical certificate. The Employer refuses to reinstate four lieu days. Articles 9 - 16 - 17 of the Collective Agreement. "

The corrective action requested reads as follows: "Sick leave be granted for the four days. The four lieu days be reinstated".

On 6 December 1979 the Grievor applied for leave in the form of compensatory time off in the form of lieu days from 27 - 30 December 1979 and 4 - 7 January 1980. The application was granted on 11 December 1979. During the first four days of leave the Grievor suffered an injury which required treatment by a chiropractor. The Grievor applied to have the lieu days converted into sick leave. The application was denied and this grievance follows.

The issue is, simply, whether under the collective agreement between Treasury Board (Transport Canada) and the Canadian Air Traffic Control Association (Code 402/79) an air traffic controller has the right to convert leave taken in the form of lieu days into sick leave.

The representatives of the parties referred particularly to the following provisions of the collective agreement:

9.02 An employee is eligible for sick leave with pay when he is unable to perform his duties because of illness or injury provided that:

- (a) he has the necessary sick leave credits,
- and
- (b) he satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

9.04 An employee is not eligible for sick leave with pay during any period in which he is on leave of absence without pay or under suspension.

16.01 Subject to 16.02 the following days shall be designated holidays for employees:

- (a) New Year's Day;
- (b) Good Friday;
- (c) Easter Monday;
- (d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;
- (e) Dominion Day;
- (f) Labour Day;
- (g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;
- (h) Remembrance Day;
- (i) Christmas Day;
- (j) Boxing Day;
- (k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August;
- (l) Any other day that is proclaimed by law as a national holiday.

16.02 When a day designated as a holiday under 16.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first working day following his day of rest.

16.04 Where an operating employee works on a holiday he shall:

- (a) be paid at one and one-half (1-1/2) times his straight-time hourly rate for all hours worked by him on the holiday,
- (b) be granted a day of leave with pay at a later date in lieu of the holiday.

16.05 For operating employees,

- (a) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established.
- (c) Lieu days may be granted as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on the basis of one shift for one day.
- (d) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to grant lieu days at times desired by the employee.
- (e) Where in any fiscal year an employee has not been granted all of the lieu days credited to him, the unused portion of his lieu days shall be carried over into the following fiscal year.

16.06

- (a) An employee who is absent without pay on both the working day immediately preceding and the working day following the holiday shall not be paid for the holiday.
- (b) An employee who is absent without permission and who is not on sick or special leave on a designated holiday, or the day to which the holiday is moved by reason of clause 16.02 on which he is scheduled to work, shall not be entitled to be paid for the holiday.

17.08 Where, in respect of any period of vacation leave, an employee:

- (a) is granted bereavement leave,
or
- (b) is granted special leave with pay because of illness in the immediate family,
or
- (c) is granted sick leave on production of a medical certificate,

the period of vacation leave so displaced shall either be added to the vacation period, if requested by the employee and approved by the Employer, or reinstated for use at a later date.

The essential argument on behalf of the Grievor runs as follows. Lieu days form part of an (operating) employee's hours of work. The Grievor was sick and was therefore eligible for sick leave under article 9.02. The Grievor does not fall into either case set out in Article 9.04 in which an employee is not entitled to sick leave. The Grievor is therefore not disentitled to sick leave. The Grievor is therefore entitled to sick leave. Further, an employee can convert vacation leave into sick leave under article 17.08(c). That entitlement ought by inference to be extended to an employee on lieu days leave. The express provision respecting vacation leave is not required in article 16 because vacation leave is scheduled by the Employer, whereas lieu days leave is in the first instance determined by the employee. The qualifying fact for sick leave is not the presence of duties to be performed (article 9.02) but the fact that the employee is being paid. Article 9.04 is exhaustive of the cases in which an employee is not eligible for sick leave. The Grievor could have requested that his lieu days leave be cancelled, by inference under article 16.05(d), and then immediately applied for sick leave.

The essential argument on behalf of the Employer runs as follows. If the Grievor had been scheduled to work on the

days he was incapacitated he could have taken sick leave. But an essential condition of entitlement to sick leave is that the employee be "unable to perform his duties because of illness or injury" under article 9.02. Here the employee was on leave and therefore did not have duties to perform. Article 16 addresses the subject of holidays and makes no provision for taking sick leave on holidays, on which lieu days are based. Article 17 addresses the subject of vacations, and specifically provides for shifting the loss of incapacity during vacation leave from the employee to the Employer. No such right is bargained for to the benefit of the employee during lieu day leave (time paid for), nor, for that matter, during days of rest (time not paid for), and no such right can be inferred. The protection of holiday entitlements are dealt with exhaustively in article 16 (see for example article 16.02). Article 9.04 sets out two cases in which an employee is not entitled to sick leave. But it is not exhaustive: for instance an employee cannot claim sick leave if he is incapacitated on a day of rest. The statement in article 9.04 of ineligibility does not mean that in all other cases the employee is eligible. Eligibility is dealt with in article 9.02, in which the existence of duties is an express condition. The inference of the right which the Grievor seeks to assert from article 9.04, 16.05 (d) and 17.08 is not a necessary inference and to make the inference would be to add to the collective agreement, which is beyond the jurisdiction of the adjudicator.

I agree with the arguments of counsel for the Employer. The collective agreement deals with the qualification for the right to sick leave in article 9.02. Article 9.04 is designed to eliminate rights, not to create them, and clearly is not exhaustive. Article 16.05 (d) is designed to create a duty in the Employer to grant lieu days leave at the employee's request, not to create a right in the employee to cancel an approved lieu days leave. There is nothing in article 16 to protect lieu days leave against incapacity, and I conclude that such protection would have to be expressed, as it is in article 17 to protect vacation leave.

The grievance is therefore dismissed.

For the Board,

A.W.R. Carrothers,
Board Member and Adjudicator.

VANCOUVER, May 21, 1981.

