MAR 12 1981

Files: 166-2-9005 to 9008

THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

David K. Anderson, Eric S. Bovard,
Larry V. Deveau, and D. Gary O'Keefe,

Grievors,

- and -

Treasury Board
(Transport Canada),

Employer.

DECISION

Before: R.D. Abbott, Board Member and Adjudicator.

For the Grievors: Ms. C.H. MacLean, Counsel.

APT16

For the Employer: David Olsen, Counsel.

CODE 402/78

Heard in St. John's, Newfoundland, on December 12, 1980.

RIGHT TO SCHEDULE LIEU DAYS

DECISION

These references once again place in issue the often-contested matter of the employer's right unilaterally to impose on employees the requirement to take days off work in lieu of holidays on which the employees worked (i.e., to take the so-called "lieu days"). The grievors, in spite of notification from the employer to do so in respect of the last half of fiscal year 1979-80, did not express a preference as to which days they wished to take off as lieu days. Thereupon, the employer designated specific days as their lieu days. The grievors indicated that they wished to have the assigned lieu days cancelled. The remedy they request is that the lieu days they were forced to use be reinstated to their credit, presumably to be used hereafter or paid off in cash.

The grievors are air traffic controllers, "operating employees" in the terms of the pertinent collective agreement, employed at the St. John's, Newfoundland, Control Tower and governed by the collective agreement between Treasury Board (Ministry of Transport) and the Air Traffic Control Association (Code 402/79) expiring December 31, 1980. Their grievances concern the interpretation and application of Clause 16.05 of that agreement, set out as Appendix "A" to this Decision. Arguments submitted on behalf of the parties also dealt with other provisions of

Article 16 as well as certain provisions of Article 17 of the same collective agreement. These other provisions are likewise included in Appendix "A".

The facts out of which each grievance arose are almost identical and were the subject of Agreed Statements of Fact. I will rephrase the Agreed Statements in order to generalize those statements to cover all the grievors' situations. On two occasions (September and December, 1979) the employees at the St. John's Control Tower were asked to indicate their annual leave and lieu days requests for the balance of the fiscal year 1979-80, ending March 31, 1980. (Mr. O'Keefe, having commenced his employment at the Control Tower on October 29, 1979, was affected only by the December request to indicate his preference.) None of the grievors indicated any preference as to either annual vacation or lieu days. Each grievor was then scheduled to take off lieu days, already credited to him, on dates he neither requested nor desired. Messrs. Anderson and Deveau requested that their scheduled lieu days be cancelled. Messrs. Bovard and O'Keefe notified the employer they did not wish to use lieu days before the end of the fiscal year. Mr. Anderson indicated in addition that he wished to carry over his lieu days into the following fiscal year, or, in the alternative, to be paid off in cash for them. In

response, the employer informed each grievor that he must request when he wished to utilize his lieu days, or else the days would be scheduled for him. The grievors' requests regarding the assigned lieu days were denied. None of the grievors signed a leave form in respect of his assigned lieu days. Ultimately, each grievor was off work on the assigned days and the appropriate number of lieu days were deducted from his credit. (One grievor, Mr. Bovard, attempted unsuccessfully to report for work on the first of his assigned lieu days.)

The grievors seek a declaration that the employer was in breach of Clause 16.05 of the collective agreement and the reinstatement to their credit of the assigned lieu days. The employer's representative at the hearing of this reference did not challenge the propriety of the requested remedy.

Clearly, this recital of the facts establishes that the issue between the parties is not whether the employer made reasonable efforts to grant lieu days at times desired by the grievors. Rather, the facts starkly place in issue the authority of the employer unilaterally to force employees to take lieu days at times they neither requested nor desired, in the face of requests from the employees that lieu days assigned to them be cancelled or indications

that they did not wish to take lieu days that year.

Submissions for the Grievors

Since the factual basis for these grievances was not in issue, the arguments submitted for the parties concerned competing interpretations of the provisions of the pertinent collective agreement. This, in turn, led to detailed analyses of a number of previous Decisions under the Public Service Staff Relations Act relating to the unilateral requirement imposed by the employer to take lieu days and vacation leave.

For the grievors, Ms. MacLean argued that the provisions of Article 16 of the pertinent collective agreement do not entitle the employer to unilaterally assign lieu days to be taken on dates not requested by the employees concerned. She rested her case squarely on the 1979 Decision of Adjudicator Carrothers in Watson (166-2-5940). In that case, the parties, collective agreement, and issue were identical to those in the present case. The grievor there requested three days of special leave. His superior first considered using some of the grievor's annual leave, and upon finding he had insufficient annual leave credits, unilaterally substituted three days credited as lieu days. The grievance requested restoration to the grievor's credit

of three days of annual leave and that the three days in question be "converted to special leave". While it is not clear from the Decision, Adjudicator Carrothers appears to have treated the remedial action requested as being a claim for special leave in place of the unilaterally assigned lieu days. He held, at page 8 of the Decision, that the employer had no power to allocate lieu days unilaterally.

Ms. MacLean urged me to treat the issue of unilateral imposition of lieu days as res judicata, a matter already determined between the parties, not to be reversed in this subsequent reference to adjudication between the same parties under the same collective agreement.

Ms. MacLean candidly called my attention to the Decisions in Webb (166-2-113) and Kenna et al. (166-2-111, 112 and 119). In Webb, Chief Adjudicator Jolliffe determined, amongst other things, that it was not open to an employee governed by the collective agreement there in question (Firefighters Unit, Non-Supervisory, Code 602/4/68) to choose not to take off his lieu days and to claim cash compensation instead at the end of the fiscal year (at page 13 of the Decision). The Chief Adjudicator established a principle that after six months of the fiscal year had elapsed without an indication from the employee as to his preference for the dates on which to take off his lieu days,

the employer could unilaterally assign those dates (at page 19 of the Decision). While this Decision stands squarely against the position of the present grievors, Ms. MacLean argued that the Chief Adjudicator's Decision placed special emphasis on the availability of premium payment for unused lieu days for employees governed by the Firefighters agreement. Such a premium benefit is not available under the agreement here in question.

Kenna et al. also arose under the Firefighters agreement. The grievors were unilaterally required by the employer to liquidate lieu days. Significantly different from the Webb situation, the lieu days assigned in Kenna et al. were for dates in the last six months of the fiscal year. Pursuant to the principle he had enunciated in Webb, the Chief Adjudicator found that the employer had properly exercised its unilateral right to assign lieu days in the absence of an expression of a preference by the grievors. Again, Ms. MacLean would distinguish this case on the basis of the provision there for premium cash payment for lieu days unused by the end of the fiscal year, relying on Mr. Jolliffe's statement (at page 9 of the Kenna et al. Decision) that it was not the intention of the parties to that collective agreement ". . . to convert statutory holidays into commodities negotiable for cash at

a premium rate and on a later date at the option of the employee." In the present case, as noted above, while there is provision for cash payment for unused lieu days, it is not at a premium rate. Furthermore, she pointed out, the collective agreement here, in Article 16.05(e)(second sentence), provides that "At the employee's option . . ." [emphasis supplied] unliquidated lieu days are to be compensated in cash (though not at a premium rate). These provisions indicate that the parties to this agreement did have an intention, different from that in the Firefighters agreement, that holidays need not be holidays: they are convertible into cash at the employere's option or can be carried over to the following year.

Ms. MacLean went on to urge me to adopt again in the present case the meaning I attached to the word "grant" as it appeared in the collective agreement provisions in question in Low and Duggan (166-2-855). There, I held that "grant" means acceding to a request, and that therefore vacation leave (and Ms. MacLean argued, by implication, lieu days) cannot be considered to have been "granted" unless there had been a previous request for the leave by the employee. In my Decision in Low and Duggan, I emphasized (at page 17) the importance of the presence in the agreement there in question of a provision for automatic

carry-over of unused vacation leave. This distinguished the situation before me from that in cases decided under the Firefighters agreement, where unused lieu days could only be paid off in cash at a premium rate. Ms. MacLean pointed out that here, as in Low and Duggan, there is provision for automatic carry-over.

Of course, Ms. MacLean had to cope with the unanimous Decision of a seven-person panel of the Public Service Staff Relations Board (168-2-56) reversing my Decision in Low and Duggan. In the Board Decision, it was held that in its context, the word "grant" did not imply a precedent request. There was specific separate provision for carry-over of vacation leave at the request of the employee. Thus, if the automatic carry-over provision was to have any meaning at all, it must only be to insure that there would not be a forfeiture of leave which could not be used in the fiscal year (page 24 of the Board's Decision). In the present case, Ms. MacLean pointed out the provision for automatic carry-over of lieu days (Article 16.05(e) (first sentence) is modified by the provision for compensation in cash for unused lieu days at the option of the employee. Hence, the automatic carry-over provision is not intended here to prevent forfeiture. It must follow that "grant" here can bear the meaning of acceding to

a prior request.

Turning away from the jurisprudence on the issue, Ms. MacLean considered the context of the lieu day provisions of the agreement here in question. First, while there is express provision for the accumulation of lieu day credits, there is no express provision for the unilateral liquidation of unused lieu days at the option of the employer. On the contrary, Article 16.05(e) provides either for their automatic carry-over, or for their compensation in cash at the option of the employee. Secondly, the exercise of the alleged power of the employer unilaterally to assign lieu days could leave no unused lieu days to be carried over or to be compensated for in cash, thereby rendering meaningless the provisions of Article 16.05(e). Thirdly, Article 15.02(a) (last sentence) provides that time off in lieu of overtime which has not been utilized by an employee by the end of the fiscal year must be paid off at the appropriate overtime rate; Article 16.03 (last sentence) provides for non-operating employees that their time off in lieu of holidays worked must be paid off in cash if not utilized by the end of the fiscal year. It therefore is apparent that when the parties intended to do so, to "clear the slate" at the end of each fiscal year, they so provided expressly. But,

they omitted to do so in regard to unused lieu days of operating employees, demonstrating an intention against a power of the employer to "clear the slate" by unilaterally assigning lieu days for operating employees under Article 16.05.

Fourthly, Ms. MacLean contended, the vacation provisions of Article 17 significantly imply a power in the employer unilaterally to schedule unused vacation leave. Article 17.06(a) refers to the employer's power to "schedule" such leave. Article 17.06(c) expresses the parties' recognition of the desirability that vacation leave be used in the year in which it is earned. No such power to "schedule" lieu days, nor a recognition of the desirability of their use in the year they are credited, appears in Article 16.05. The implication must be that lieu days cannot be required by the employer to be taken in the year they are credited.

Submissions for the Employer

Mr. Olsen, for the employer, argued that there existed a consistent trend in previous Decisions upholding the right of the employer unilaterally to assign lieu days or vacation leave at times not desired by the employees concerned. Webb [supra] established this trend. The

collective agreement provisions there in question were basically similar or identical to those in question in the present case. At page 11 of the Webb Decision, Chief Adjudicator Jolliffe held that a provision almost identical to Article 16.05(d), requiring "advance" notice of the employee's preferences of lieu dates, imposed on the employee a continuing obligation to state his preferences, within a reasonable period of time. After an employee's failure to carry out that obligation the employer was free to unilaterally schedule lieu days for the employee. Kenna et al. [supra] confirmed the Webb reasoning, adding on the observation that the provision for the cash pay-off alternative was only intended to protect employees who could not take their lieu days.

Mr. Olsen cited other similar cases: Battcock (166-2-244) where Webb was approved but the employer's failure to use reasonable efforts to reconcile operational requirements and the grievor's preference resulted in the grievance succeeding; and Gannon (166-2-417) which adopted and followed Webb, Kenna et al. and Battcock.

Mr. Olsen next turned to the Decision of Adjudicator Meyer in Verge (166-2-1470) in which the principle of the employer's right to unilaterally assign lieu days was confirmed again, but it was found that the employer had not

made a reasonable effort to meet the employee's preferences. Only a declaratory remedy was granted. The Board, in its review Decision (168-2-75 and 78), dealing with the issue of "reasonable effort", found that the Adjudicator had erred in basing his decision in part on facts which came into existence after the facts giving rise to the grievance. However, the Board also appeared, at Paragraphs 23 and 25 of its Decision, to endorse Adjudicator Meyer's holding that an employee may be forced by the employer to liquidate his lieu days on dates specified by the employer. An application for review of the Board's Decision sought by the grievor was dismissed without reasons by the Federal Court of Appeal (Court file A-737-76).

Mr. Olsen, of course, placed heavy reliance on the Decision of the Public Service Staff Relations Board in which it reversed my Decision in Low and Duggan [supra]. There, the Board defined the issue in the same way as the issue has emerged in this case, although there vacation leave, not lieu days, was what had been unilaterally assigned. The Board found that the sole reason for the automatic carry-over provision, similar to Article 16.05 (e) (first sentence), here, was to prevent forfeiture. The Board held that this did not restrict the management right to compel the liquidation of vacation leave. Mr.

Olsen urged me to adopt the same reasoning in the present case.

Mr. Olsen called my attention to a recent Federal Court of Appeal judgement concerning Adjudicator Norman's Decision (166-2-3323 and 3324) in the case of Grant and Stoykewich [1979] 2 F.C. 258. There, the grievors had been required to take their annual leave at a time other than that which they desired. Adjudicator Norman dealt with the case on the principle enunciated in Low and Duggan by the Board, i.e., that the employer had the right to compel the liquidation of annual leave. He did not deal expressly with the question of whether the employer had made reasonable efforts to grant the employee's requests. The Court found that the latter was the real issue to be determined and remitted the case back to Adjudicator Norman. Chief Justice Jackett, although dissenting on other grounds, expressly approved the Board's determination in Low and Duggan. (The other two Justices, although referring extensively to the Board's Decision, did not either approve or disapprove of it.)

Finally, in his review of the pertinent jurisprudence, Mr. Olsen turned to the Decision in Watson [supra]. First, he suggested, the case is distinguishable on the basis that the issue there was whether the grievor should have

been granted special leave to cover his absence rather than having lieu days assigned. The question of the employer's right to unilaterally assign lieu days was only corollary to that main issue. Secondly, nowhere in Watson is there a reference to Webb and the cases that followed it. Furthermore, although Adjudicator Carrothers referred to the Board's Decision in Low and Duggan, he did not choose to apply the principles and reasoning contained in that Decision, relating to provisions similar or identical to the provisions in issue before him.

Mr. Olsen replied briefly to Ms. MacLean's comparison of Article 17 (Vacation Leave) with Article 16.05. In Article 17 the parties provided for carry-over of leave on request (Article 17.06(c)) and also for automatic carry-over of unused leave (Article 17.04). The automatic carry-over provision appearing in Article 16.05(e) is in almost identical terms and must have the same effect, namely, to prevent forfeiture. It does not have the effect in only one place (Article 16.05(e) of prohibiting compulsory liquidation. In other words, if the carry-over provisions in the two Articles have the same meaning, that meaning cannot be the broad one sought by the grievors here, because that would make superfluous the provision for carry-over of vacation leave on request.

Furthermore, considering that the bargaining agent probably would have sought, in negotiations, the carry-over right in respect of both lieu days and vacation leave, it is unexpected to find the limitation on carry-over established in Article 17.06(c) (i.e., to carry over only upon request). No such provision for carry-over on request was negotiated in respect of lieu days. This confirms that the intention of the parties in providing for automatic carry-over of both vacation leave and lieu days was solely to protect employees from the forfeiture of leave on lieu days they had not been able to use during the fiscal year.

Reply for the Grievors

In reply, Ms. MacLean first sought to distinguish the Board's Decision in Low and Duggan [supra] on a new basis. The collective agreement provisions in Low and Duggan first dealt with the carry-over of vacation leave on request and only later provided for the automatic carry-over of unused vacation leave. This led the Board to view the automatic carry-over provision as a "mop up" provision, preventing forfeiture. The order in the present case is reversed so that the automatic carry-over is given preeminence. Also, in the present collective

agreement, the parties made clear, in Article 17.06(c), their recognition of the desirability of taking leave in the year it is earned and have emphasized the right of the employer to schedule vacation leave. These aspects were absent in the Low and Duggan situation, leaving the Board there with a stronger basis for holding that the automatic carry-over provision was intended solely to prevent forfeiture. The same approach should not be taken to the significantly different lieu day provisions here.

As to Webb, and its imposed obligation on employees to state their preferences as to lieu days within a reasonable time, Ms. MacLean asserted that in the present case the employer was not entitled to assume these grievors had no preferences; they had notified the employer that they simply did not want to take their lieu days this year, thereby relying on their right pursuant to Article 16.05 to have those days carried forward to the next year. Once the obligation to take lieu days is removed, the obligation to give advance notice of desired dates is likewise removed.

Decision on the Grievance

At first impression, it would appear that the determination of this reference is entirely governed by the

Board's Decision in Low and Duggan and the opinions of members of the Federal Court of Appeal expressly or implicitly approving that Decision. I recognize the desirability of maintaining consistency in the jurisprudence relating to the issue before me, and this is an especially heavy obligation in view of the fact that the collective agreement here in question came into force well after the trend had been established in Webb and the Decisions that relied on it. The parties to this agreement could have recognized the trend of the jurisprudence and expressly adopted it or rejected it. Instead, they have chosen to repeat many provisions which have been the subject of previous controversy without making clear their intention. One is tempted simply to hold that the trend in favour of the employer's right to unilaterally assign lieu days--or vacation leave--has been authoritatively established and the parties might be taken to have accepted the established trend.

However, in the present collective agreement, there occurs a combination of provisions which in my opinion give me the latitude to provide a new beginning. In the cases cited by counsel for the parties, I have identified a number of variables which occur singly or in combination and which appear to have influenced the outcome in each case.

Initially, however, I must point out what I consider to be a highly significant distinction that must be kept in mind, namely, that between lieu days and vacation leave. "Lieu days" are days which are to be days of leave with pay in lieu of a holiday on which an operating employee works (Article 16.04(b)). In respect of holidays worked, the employee is also entitled to be paid at a premium rate for the hours worked on the holiday (Article 16.04(a)). The obvious intention in these provisions is to compensate the employee for being unable to enjoy a day free from work obligations at the same time as other members of the work force and his community. To my way of thinking, the day of leave with pay, the "lieu day", is compensation in the nature of a vested right, to be enjoyed subject to whatever restrictions are established in the collective agreement. In the present agreement, whatever restrictions there are are those set out in Article 16.05 (and 16.06, which is irrelevant to the present case).

Vacation leave stands on a different footing. It is earned by service and not by work on days enjoyed as free days by others (Articles 17.01 to 17.03). No doubt reflecting the pressures of the job, the parties to the present collective agreement have expressly recognized that normally vacation leave should be taken as a time away from

the job for refreshment and renewal, balancing the commitment to the job, during the year in which the leave is earned (Article 17.06(c) (first sentence)). It is in the interest of both the employer and the employee that this balancing period occur.

On the one hand, lieu days are closely linked to work actually performed on specified days; on the other hand, vacation leave is not so much a reward or compensation as it is a mechanism for achieving continued good performance on the job and an antidote for service already provided. It would therefore not be unexpected to find that the parties to this, or any other, collective agreement chose to treat quite differently lieu days on the one hand and vacation leave on the other. In my opinion, they have so chosen in this agreement.

(Parenthetically, I have to admit that the foregoing discourse has little or no foundation in the jurisprudence on the subject nor even in the agreed facts of this case. It is a reflection of this Adjudicator's assessment of the working environment in which the collective agreement he must interpret and apply is meant to operate. It seems to me that there must be occasions when a reasonable assessment of the working environment, and a reconciliation of collective agreement provisions with that environment, is

precisely what grievance arbitration or adjudication is all about. This, I think, is one of those occasions.)

If, as I have said, differing treatments of lieu days and vacation leave can be expected, it also is possible that words and phrases used in relation to one may not be intended to mean the same in relation to the other. The issue in Low and Duggan revolved around the employer's right unilaterally to require the liquidation of vacation leave. The Board found that, contrary to my view, provisions for the carrying forward to the next fiscal year of vacation leave entitlements on request of the employee did not concern the carrying forward of vacation leave to specific periods. I had thought that this sort of provision was intended to facilitate the enjoyment by an employee of an extended vacation in the following year for such purposes as travel, framing-in a house, and similar pursuits requiring more time than the normal vacation entitlement. But, having found that there was no foundation for my view, the Board went on to determine that the provisions for automatic carryover of unused vacation leave would make no sense if in addition the employee could obtain the carryover on request. The automatic carryover provision therefore must have some other meaning, which the Board found to be, protection against forfeiture. Finally, if

the automatic carryover provision had this limited meaning, the Board was prepared to find that vacation leave which had been "granted", i.e., unilaterally imposed, was leave which had been "used" and was no longer available to be carried forward.

In the context of the difference between lieu days and vacation leave, protection against forfeiture makes sense. If an employee has not obtained the rest, refreshment and renewal of vacation in the current year, it is arguable that the deficiency cannot be remedied by a lengthened vacation in the following year brought about by carried-over vacation entitlement, and therefore, forfeiture of the leave could be justified. It thus is logical to provide protection expressly or by implication against the forfeiture of the leave simply because it could not be used. In the context of vacation leave, with respect, the Board's determination that the automatic carryover of vacation leave is a protection against forfeiture, seems to be in accord with what I think was the parties' overall intention as to the purposes of vacation leave. It should be taken in the year earned, as implied in Low and Duggan, or as expressly provided in the collective agreement here in question, and if it cannot be taken, then and only then should it be carried forward to the next year instead of

being forfeited.

As a result of these considerations, I feel free to treat a provision for the automatic carryover of lieu days differently from the board's treatment of a similar provision relating to vacation leave. If I am correct in treating lieu days as being in the nature of vested rights, compenstion for work done, then forfeiture of unused lieu days at the end of the fiscal year is definitely not to be expected. Hence, there is no need to guard expressly or by implication against forfeiture. It must follow that a provision for automatic carryover of unused lieu days such as that in Article 16.05(e) (first sentence) could have some purpose other than guarding against forfeiture. In my opinion, the other provisions of Article 16 together with the wider context, confirm that an alternative purpose was indeed intended.

As I mentioned earlier, a number of variables, in the form of express or implied agreement provisions, appear to have influenced the development of a trend in the cases favouring the employer's right to force unilaterally the liquidation of vacation leave or lieu days. A provision for carryover of vacation leave on request led the Board in Low and Duggan to conclude that a provision for automatic carryover was only intended as a protection against

forfeiture. But, as I have just concluded, there need be no protection against forfeiture of lieu days as contrasted with vacation leave. A provision for cash payment at a premium for unused lieu days, together with a requirement of advance notice of the employee's preference as to the days to be taken as lieu days clearly persuaded Chief Adjudicator Jolliffe in Webb and in Kenna et al. that employees were obliged to express their preferences within a reasonable time and were not free to convert their lieu days into cash at their option. But, in the present collective agreement, the payment for unused lieu days is to be made at the employee's option, thereby negating the reasoning in Webb and in Kenna et al.

In the present collective agreement, the context of the lieu days provisions is important. As suggested by Ms. MacLean, where the parties to this agreement intended there to be a "clearing of the slate" at the end of the fiscal year, they provided for that expressly, as for non-operating employees in Article 16.03 (last sentence). Pursuant to the Board's Decision in Low and Duggan, and adjudication and court cases following it or referring to it, the parties have repeated in Article 17 provisions which they must have known would be taken to confirm their intention that vacation leave is to be taken in the year it is

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earned and is to be carried over to the next year only on request or in the event that it cannot be used. But they were silent as to lieu days, either as to an intention that they be cleared away by the end of the fiscal year or that they be carried over only on request or as a protection against forfeiture. Furthermore, the parties provided protection for the employer's interests by making the enjoyment of lieu days conditional on "adequate notice" and "operational requirements of the service". I find nothing here which would negate the right of an employee to have his unused lieu days carried forward automatically or on request to receive payment for them in cash at his regular rate of pay, without the interposition of the employer forcing him to take the days as days off work.

What I said in Low and Duggan as to the meaning of the word "grant" is to be taken as repeated here. I do not wish to be seen, in so doing, as challenging the Board's reversal of my Decision nor the Court's approval of the Board's Decision. It is my respectful opinion that the context of the vacation leave provisions led to the Board and Court Decisions, following the reasoning I set out earlier. In relation to vacation leave, if the only purpose of the automatic carryover provision was protection against forfeiture of "unused" or "ungranted" leave, then

the words "used" or "granted" need not act as restrictions on the employer's right unilaterally to require leave to be taken in the year it was earned. All this is consistent with the purpose of vacation leave, i.e., periodic rest, relaxation and refreshment, as I discussed earlier. But the same word, "grant" used in relation to lieu days here, is more likely to have the meaning of "accede to a request", rather than a meaning which could include "impose unilaterally".

When one turns to the lieu day provisions here in question, the following aspects are noteworthy. First, there is no provision for the carryover of lieu days on request; it follows that the provision for automatic carryover may have a purpose other than protection against forfeiture. Secondly, forfeiture of lieu days is not what one would expect when one compares the purpose of vacation leave with the vested nature of lieu days; hence, there is no need to protect against forfeiture of lieu days either expressly or by implication. Thirdly, unlike the collective agreement in question in Webb and in Kenna et al., the provision for payment in cash for lieu days here is provision for payment at straight time rate, not a premium rate; there is no windfall benefit in not using up lieu days. Fourthly, in the present collective agreement,

payment in cash for unused lieu days is to be at the option of the employee; the parties have thereby expressly negated the presumption set out in Webb and in Kenna et al., that "holidays are holidays" and are not "negotiable for cash". The employee is left free to choose how to enjoy the fruits of his labour on a holiday, either as free time at a time of his choosing sooner or later (subject to "operational requirements" and "adequate notice") or as cash. Unilateral imposition of lieu days renders worthless the option of free time or cash. Finally, the parties' silence as to the employer's right to unilaterally impose the liquidation of lieu days may be taken as reflecting an intention against that right in view of the express provision for "clearing the slate" for non-operating employees (Article 16.03, last sentence) and the implicit power to unilaterally impose the liquidation of vacation leave (due to the presumed adoption of the Board's Decision in Low and Duggan and the express recognition in Article 17.06(c), first sentence).

I have not ignored the French version of Article 16.05. In Article 16.05(c) and (d) the English verb "to grant" is translated as "accorder". But in Article 16.05(e) (first sentence), the verb "to grant" becomes "bénéficier", which I understand to mean "to benefit [from]"

or "to profit [from]". While the significance of this change is not entirely clear to me, I think that this French version of the automatic carryover provision confirms my earlier determination that "grant" in relation to lieu days cannot encompass the meaning "impose unilaterally", since unilateral imposition of unwanted lieu days could scarcely be seen as a "benefit" or "profit" to the affected employee.

My conclusion from the foregoing considerations is that the employer under the collective agreement here in question cannot unilaterally require operating employees to take lieu days on dates neither requested nor desired by them. The employees are entitled either to have their unused lieu days carried forward automatically to the next fiscal year, or, on request, to have them paid off.

It will be recalled that the responses of these grievors to the employer's initiative in scheduling unrequested lieu days differed to some extent. Two grievors requested the cancellation of the assigned days, and one of these, in addition, indicated that he wished to carry over his lieu days, or, in the alternative, to be paid off in cash. The two other grievors indicated that they did not wish to use lieu days before the end of the fiscal year. I attach no significance to these differences, in respect of the appropriate remedy. Each grievor has requested

that the employer be declared to be in breach of Article 16. I have so determined. Each grievor requested the reinstatement to his credit of the unilaterally assigned lieu days. Mr. Olsen, for the employer, had no objection to this remedy. Therefore, it is ordered that the employer reinstate to the credit of each of these grievors the number of lieu days unilaterally assigned to him in fiscal year 1979-80, after he had notified the employer he wished to have the assigned days cancelled or that he did not wish to use his lieu days before the end of that fiscal year.

To sum up, I have distinguished between lieu days and vacation leave, finding that they are different in their nature and purpose. I have analyzed the Decision of the Public Service Staff Relations Board in Low and Duggan in the light of this distinction, finding that the provision there for carryover of vacation leave on request led the Board to hold that the provision for automatic carryover was intended only to protect against forfeiture. Due to their nature, as compensation for work done, there is no need to protect against the forfeiture of lieu days, so that the automatic carryover provision here (Article 16.05 (3), first sentence) could be intended as providing an option for the affected employee. The absence of a

provision for carryover of lieu days on request and the presence of an express provision for compensation in cash at the option of the employee, distinghishes this case from the situations in Webb and in Kenna et al.,and confirms an intention of the parties here to provide for operating employees the choice of automatic carryover or compensation in cash for unused lieu days. The provisions of Article 16.05, together with the French version thereof, indicate that the word "grant" was meant to mean "accede to a request" and not "impose unilaterally" so that there is no implicit right of the employer in this Article to unilaterally require lieu days to be taken. The silence of Article 16.05 as to this right of the employer can be taken to reflect an intention against that right when elsewhere there is express provision for automatic compensation in cash for lieu days (Article 16.03, last sentence, in relation to non-opearating employees) and an express recognition of the desirability of using vacation leave in the year earned (Article 17.06(c), first sentence). It follows that the employer was in breach of Article 16.05 when it unilaterally assigned lieu days to be taken by these employees, contrary to their known wishes, and the lieu days so assigned must be restored to their credit.

For the Board,

R.D. Abbott,
Board Member and Adjudicator.

OTTAWA, March 6, 1981.

Addendum as to a Procedural Ruling

(This Addendum is included at the request of Mr. Olsen, counsel for the employer.)

Mr. Olsen drew my attention to the grievance case of Verge (166-2-1470, Meyer), (168-2-75 and 78, Falardeau-Ramsay, O'Connor and Pyle). In that case, arising under the firefighters' agreement, Adjudicator Meyer, as he then was, found that the employer had not made a reasonable effort to meet the employee's preferences, without doubting the principle established in Webb that it is not open to the employee to require the substitution of cash for days off work and that the employer had, under that agreement, the right to unilaterally assign lieu days. The Board, on a reference on a question of law or jurisdiction pursuant to Section 23 of the Act, found that the Adjudicator had erred in basing his decision regarding the employer's "reasonable efforts" in part on facts which came into existence after the facts giving rise to the grievance. The questions which had been referred to the Board by the grievor were, in essence, first, whether the Adjudicator erred in holding that it was open to the grievor to refuse to take assigned lieu days, and secondly, whether the Adjudicator erred in holding that he could only grant a declaratory remedy. The employer's cross-reference raised two other issues: first, whether the Adjudicator erred

in finding that the employer's actions were arbitrary and not based on operational requirements, and secondly, whether the Adjudicator based his decision on inadmissible evidence, namely, evidence as to events a year after the time when the employee had indicated he wanted to take three of his lieu days.

The Board's Decision proceeded as follows. First, as to the Adjudicator's presumption that the grievor could have refused to take the lieu days assigned to him, the Board held that ". . . if an employee who is directed to liquidate his lieu days on certain dates, is of the opinion that the employer has not complied with the collective agreement, his only recourse is the presentation of a grievance under the grievance procedure of the collective agreement." (Paragraph 23) Later, at Paragraph 25, the Board limited its inquiry in the following terms:

> 25. We will now consider the cross-reference presented by the employer. First, it is important to stress the point that neither reference questions the determination of the adjudicator that the employer had the authority to require employees to liquidate their lieu days. Thus, the only issue in this regard is whether or not the employer, under the circumstances of this case, made every reasonable effort to grant the aggrieved employee his lieu days at the dates they were

. . . 32

requested.

It will be seen that in neither Paragraph 23 or 25 is there an outright endorsement of the principle that the employer has the right to unilaterally assign lieu days. Clearly, Mr. Olsen could not rely on either Adjudicator Meyer's Decision or on the Board's Decision as support for his contentions on the issue in the present case.

On the issue of reliance on inadmissible evidence, the Board held as follows:

> 29. Consequently, it is our opinion, with respect, that the adjudicator erred in law in basing his decision on facts which did not become known until March 1974, i.e. after the material time.

The Board finally concluded that it did not have to determine the issue as to the remedy:

> 30. In the light of the foregoing finding, the Board does not have to decide if the adjudicator could have granted compensation.

What is important for the purposes of the present Decision is that on an application for review by the grievor, the Federal Court of Appeal dismissed the reference without written reasons (Court file A-737-76). Neither Adjudicator Meyer's Decision nor the Board's Decision could assist Mr. Olsen either as persuasive or binding authorities on the issue of the employer's right unilaterally

to assign lieu days. The Court's dismissal of the grievor's reference might have assisted him had the Court either expressly in written reasons, or by necessary implication, dealt with that issue. He therefore made the following request: that he be permitted to peruse the factums filed with the Court to see whether or not the issue had been raised before the Court. He undertook to report back to me and to Ms. MacLean, the grievor's counsel, if he found that the issue had been raised.

I denied Mr. Olsen's request. My reasons, stated orally at the time, were these. First, regardless of what issues were raised by the parties' factums, it could only be a matter of speculation as to what motivated the Court to dismiss the grievor's application. Parties have been known to abandon issues raised in their factums, and Courts have, upon occasion, raised other issues of their own motion. Secondly, granting Mr. Olsen's request would potentially give rise to a confusion of issues for determination here. Thirdly, a Court judgment without recorded reasons has questionable binding authority. Fourthly, it is doubtful whether the facts and the collective agreement provisions in question in Verge are sufficiently similar to those in question here. Indeed, upon reviewing the lower decisions in Verge, I am now prepared to find that the collective

agreement provisions there in question were quite different in that there was no provision for automatic carry-over of unused lieu days or for compensation for them in cash at the option of the employee. There, any unused lieu days had to be paid off in cash at a premium rate. The situation there was much closer to that in Webb and in Kenna et al., cases which I have found to be distinguishable from the present one.

Of course, any assistance offered by parties' representatives on matters of law is to be welcomed. However, Mr. Olsen's offer was one I thought it best not to accept in the circumstances, for the reasons I have just stated.

For the Board,

R.D. Abbott,
Board Member and Adjudicator.

OTTAWA, March 6, 1981.

Appendix "A"

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ARTICLE 16

HOLIDAYS

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.

16.03 When a non-operating employee works on a holiday he shall be paid, in addition to the pay he would have received had he not worked on the holiday, one and one-half (1½) times his straight-time hourly rate for all hours worked by him on the holiday.

An employee at his request, shall be granted time off in lieu of cash payment at that rate. The employee and his supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated.

Where an employee requests time off in lieu of cash payment he must indicate this to his supervisor prior to the end of the month in which he worked on the holiday.

Where an employee has not utilized this accumulated time off by the end of the fiscal year, the unused portion will be paid off at the appropriate rate.

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

(a) be paid at one and one-half (1½) times his straight-time hourly rate for all hours worked by him on the holiday,

and

(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.

(b) For the purpose of paragraph (a) above only, in those years wherein Good Friday and/or Easter Monday fall in the month of March they shall be deemed to fall in the month of April, except in any case where the application of this paragraph would cause an employee to lose credit for the holiday(s).

(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.

At the employee's option any lieu days which cannot be liquidated by the end of the fiscal year will be paid off at the employee's daily rate of pay in effect at that time.

(f) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or commencement of retiring leave or after he becomes subject to clause 13.01 shall be subject to recovery of pay.

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.

ARTICLE 17

VACATIONS

17.01 An employee who has earned at least ten (10) days' pay for each calendar month of a fiscal year shall earn vacation leave at the following rates:

(a) fifteen (15) working days per fiscal year if he has completed less than ten (10) years of continuous employment;

(b) twenty (20) working days per fiscal year if he has completed ten (10) years of continuous employment, except that an employee who has received or is entitled to receive furlough leave shall accumulate fifteen (15) working days only per fiscal year between the completion of his twentieth (20th) and twenty-fifth (25th) years of continuous employment;

(c) twenty-five (25) working days per fiscal year if he has completed twenty-five (25) years of continuous employment.

17.02 An employee who has not received at least ten (10) days' pay for each calendar month of a fiscal year will earn vacation leave at one-twelfth (1/12) of the rate referred to in 17.01 for each calendar month for which he receives at least ten (10) days' pay.

17.03 An employee earns but is not entitled to receive vacation leave with pay during his first six (6) months of continuous employment.

17.04 Subject to operational requirements the Employer shall make every reasonable effort to grant an employee his vacation leave during the fiscal year it is earned. Where in any fiscal year an employee has not been granted all of the vacation leave credited to him, the unused portion of his vacation leave shall be carried over into the following fiscal year.

17.05 Employees shall take vacation leave on the basis of the schedule being worked.

17.06

(a) The vacation year extends from April 1 to March 31 and vacation may be scheduled by the Employer at any time during this period.

(b) Local representatives of the Association shall be given the opportunity to consult with representatives of the Employer on vacation schedules. Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

(c) It is agreed by the parties, in accordance with the intent of Article 17 that it is both appropriate and desirable that each employee utilize his full vacation entitlement during the vacation year in which such vacation entitlement is earned. However, an employee may elect, for vacation periods scheduled to be taken after October 1, to carry forward into the next vacation year unused vacation up to a maximum of ten (10) working days subject to the following conditions:

(i) that any vacation period carried forward from the previous vacation year and utilized by any employee does not disrupt vacation schedules in the current vacation year nor prevent another employee from taking his regularly scheduled vacation for that year;

(ii) that the days which are carried over from the previous vacation year are taken at a time which is acceptable to both the Employer and the employee;

(iii) that an employee's vacation earned in the vacation year will be utilized before days carried forward from the previous vacation year;

(iv) that in cases where vacation credits from the previous vacation year have not been fully utilized by the end of the next vacation year any outstanding carry-over vacation credits will be paid off at the employee's daily rate of pay in effect at that time. This provision does not apply to vacation leave accumulated prior to April 1, 1976.