

File No.: 166-2-9734

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

BETWEEN:

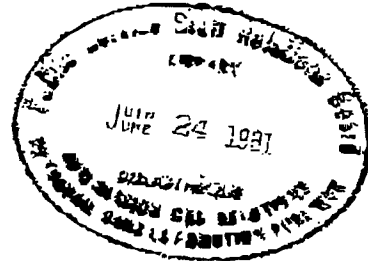
J.R. SAVAGE,

Grievor,

- and -

THE TREASURY BOARD
(Transport Canada),

Employer.



DECISION

BEFORE: S.J. Frankel, Board Member & Adjudicator

FOR THE GRIEVOR: D.J. Jewitt, Counsel

FOR THE EMPLOYER: H.A. Newman, Counsel

Heard at Ottawa on May 12th, 1981



DECISION

1. This is a reference to adjudication pursuant to paragraph 91(1)(a) of the Public Service Staff Relations Act. The grievor, Mr. J.R. Savage, was at all material times employed as an air traffic controller (AI-2) at North Bay's Control Tower, North Bay, Ontario. His supervisor was Mr. D. Cunningham, the Unit Chief. The grievance was filed on September 29, 1980. It was aptly noted by counsel for the employer that the details of the grievance failed to specify the articles or clauses of the collective agreement that were in issue. He did not however press the point, thus implying that allowance could be made for the grievor's inexperience in drafting a document of this kind with the requisite degree of precision. The substance of the grievance, as I see it, (based on the grievance form and the submission of the grievor's counsel) is that in refusing to authorize three days out of a leave request for ten days (three days compensatory and seven days vacation leave) solely on the grounds that those three days would have had to be covered by overtime, the employer was in violation of article 17.06(b) of the collective agreement which requires that "the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees." (The Treasury Board and the Canadian Air Traffic Control Association, Group: Air Traffic Control (All Employees), Code: 402/79, Expires: December 31, 1980.)

2. At the outset of the hearing counsel for the parties filed an "AGREED STATEMENT OF FACTS" the relevant parts of which are summarized below. No witnesses were called to testify at the hearing. The statement noted that during the summer and fall of 1980 only 8 of the 9 authorized positions for operational air traffic controllers had been staffed at North Bay. The tower was nevertheless able to ensure the safe operation of air traffic services which requires a minimum of two controllers on each of the day and evening shifts. In March 1980 there was a statement of management policy to the effect that overtime could not be used to cover a shift in order to approve

... /2

- 2 -

vacation leave. However, on the initiative of management and the agreement of the controllers at the North Bay Tower, it was arranged that for the summer of 1980 leave would be approved provided that any overtime required as a result would be taken by controllers as lieu days instead of cash. This made it possible to authorize a number of "back-to-back cycles of leave". The grievor was one of those whose request to take two back-to-back cycles - July 26 to 30 and August 3 to 7 (July 31 to August 2 being scheduled days off) - was approved. In the event, he took the July 26 to 30 leave period, but withdrew his leave request for August 3 to 7.

3. In the fall of 1980 management reinstated the policy that no leave would be granted if it required overtime to cover a shift. On August 20 Mr. Savage submitted two applications for leave - one for September 23 to 27 (September 23, 24 & 25 as compensatory, and 26 & 27 as vacation leave), the other for the period of October 2 to 6 - all of it as vacation leave. The application was refused with respect to September 25, 26 and 27 on the grounds that overtime would have been required to cover the shifts for those days. The grievor had been scheduled to work the evening shift of September 25 and the day shifts of September 26 and 27. On those days only two air traffic controllers had been scheduled to work each of the day and evening shifts, so that the absence of the grievor on leave would have required overtime replacements in order to maintain the minimum of two controllers on each shift.

4. It would be useful at this point to quote the clauses of the collective agreement that were referred to by either or both counsel in making their submissions:

... /3

- 3 -

13.04 Equally qualified employees may exchange shifts provided:

- (a) the provisions of clause 13.05(a) or clause 15.04 are not violated,
- (b) the employees shall make every reasonable effort to provide a minimum of twenty-four (24) hours' advance notice of the change,
- (c) the shift change receives the approval of the Employer, which shall not be unreasonably withheld,
- (d) it will not require the payment of overtime,
- (e) once such an exchange of shifts has been approved, it will be the responsibility of the employees involved to report for duty in accordance with the approved revision.

15.02

- (a) An employee shall be paid for overtime worked by him at one and one-half (1½) times his straight-time hourly rate except that if the overtime is worked by the employee on his second or subsequent day of rest where days of rest are consecutive, the employee shall be paid at two (2) times his straight-time hourly rate. An employee is entitled to overtime compensation for each completed fifteen (15) minute period of overtime worked by him. An employee at his request, shall be granted time off in lieu of overtime at the appropriate overtime rate. The employee and his supervisor shall attempt to

... /4

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.

.

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.

5. Counsel for the grievor stated that this reference arises out of the refusal of management to grant Mr. Savage's request for vacation leave over two consecutive shift cycles (September 23 to 27, four days off, October 2 to 6, three days off). I would note

... /5

- 5 -

immediately that the leave requested by the grievor combines three days of compensatory leave - September 23 to 25 - and seven days of vacation leave.

6. Counsel for the grievor emphasized that there was no question of entitlement to the number of days of leave requested. It was only a matter of how and when those days could be taken. Article 17.06(b) imposes an affirmative duty on the employer to examine each request and make every reasonable effort to schedule leave accordingly. The mechanical application of a management policy on overtime does not discharge this duty. It is clear from the Agreed Statement of Facts and the documents appended thereto that the only reason for refusing the entire period of leave requested by the grievor was that it would have been necessary to cover three of the shifts with overtime. It should be noted that the reply at the first level of the grievance procedure states that "as general policy Unit Chiefs may not schedule overtime to cover vacation leave." There is also the implication that in the case of the grievor the question of overtime might not have arisen had the tower been fully staffed - "The staff shortage in North Bay Tower is temporary; several avenues are being followed to return the unit to strength."

7. The second and final level replies focussed on "operational requirements" and make no reference to the fact of a staff shortage. Counsel argued that this is a more restrictive position than the one taken at the first level of the grievance procedure and that the first level reply must be seen as the operative one. It is evident from an examination of the shift schedules (Annexes F-1 to F-4) that with a complement of eight air traffic controllers instead of nine, any request for leave for consecutive shift cycles would entail between one and four days of overtime. Thus, given the stated policy of

... /6

- 6 -

management - except for the arrangements made for the summer months - no employee, regardless of entitlement, could expect approval of leave for two consecutive cycles.

8. Counsel contended that, in the grievor's case, the employer had not in fact made the reasonable effort to accommodate his request as contemplated in article 17.06(b). Management simply applied a unilateral general policy to a specific request. As for the qualification that the reasonable effort of the employer is to be guided by consistency with "efficient operating requirements", counsel referred to a number of Board decisions that deal with the interpretation of "operational requirements" in the context of a collective agreement. In Sumanik (File 166-2-395), a case which in the opinion of the then Chief Adjudicator, E.B. Jolliffe, turned on "the interpretation or application of the term 'operational requirements'", he concluded at page 15:

It has been argued on behalf of the employer that "operational requirements of the service" must be given a very broad meaning. Perhaps so, but the term cannot be interpreted so broadly or loosely that it ceases to have any meaning. I think it refers to the nature of the work required to be done and not the nature of the book-keeping and expense analysis performed at headquarters.

In Lee and Coulter (Files 166-2-741 & 742) the adjudicator, in keeping with Sumanik (supra) stated at page 7:

In this case before me I think the term refers to the nature of the work required to be done and not to the set of administrative rules drawn up by the Traffic Area Manager.

... /7

- 7 -

These administrative rules, understandably, may vary from time to time. The operational requirements of the service remain the same unless they are specifically added to or lessened by the government.

He further pointed out at page 9:

I cannot accept the position, which was apparently taken by Mr. Chalmers on behalf of the Employer, that the Employer's policy decision to cut down or drastically reduce a benefit conferred on the Employee by the Collective Agreement becomes an operational requirement of the service.

9. Counsel also referred to Jodozi et al (Files 166-2-1584 to 1597) for the proposition that article 17.06(b) imposes a dual obligation on the employer. The first sentence of the paragraph requires that an opportunity be given to representatives of the union to consult with representatives of the employer on vacation schedules. The second sentence, in the words of Adjudicator Abbott in Jodozi, is an obligation "imposed on the employer... to allocate leave periods to each employee with a special effort to meet the wishes of the employee, consistently with the operational requirements of the service." Such an effort was not made in the case of the grievor.

10. Finally, it was argued that the "efficient operating requirements" as perceived by management in this case (i.e. not to cover vacation leave with overtime) were the result of management's failure - for whatever reason - to fully staff the operation at the North Bay Tower. The obligation imposed on the employer by article 17.06(b) to "make every reasonable effort" should not be inhibited by the employer's "default" in staffing. He referred to Laves et al

... /8

6/9

representatives of the employer on general guidelines to be applied implies consultation between representatives of the employees and provision" for employees in general. The "manner" of scheduling fiscal year. Article 17.06(b), on the other hand, is a "scheduling that had not been "granted" to the employee into the following obligation on the employer to carry over any portion of the leave all of his vacation leave in the year it is earned and imposes an "operational requirements" may preclude an employee from using up granting vacation leave to individual employees. It recognizes that that is the "granting provision". It sets out the scheme for employer in respect of individual employees. It is article 17.04 17.06(b) cannot be interpreted as imposing an obligation on the first place, when read in the context of article 17 as a whole, demonstrating that the alleged violation had occurred. In the He contended, however, that the grievor had not succeeded in the interpretation of article 17.06(b) of the collective agreement. Counsel for the employer agreed that this case turned on

12. Counsel for the employer agreed that this case turned on article 17.06(b) - would satisfy the grievance. employer had been in breach of the collective agreement - specifically The simple finding that, in the circumstances of this case, the not be denied solely because it would cause overtime" - was unrealistic. grievance form - "I want written assurance that in future leave will He conceded, however, that the corrective action requested on the denied the opportunity of vacation leave over two shift cycles. where employees, regardless of their leave credits, are automatically employer to issue a blanket policy which results in a situation 11. In general, counsel asked whether it is reasonable for the

(Files 166-2-6437, etc.) which, at page 14, makes a useful distinction between "staffing" and "operational requirements".

... /10

14. As for the argument that the making of a reasonable effort could require the scheduling of overtime, counsel pointed out that adjudicators have not supported the proposition that the employer cannot reasonably refuse to accede to a request for leave on the grounds that it would have to be covered by overtime (Wessell, supra; Laberge, File 166-2-99). The present case is distinguishable from Sumank (File 166-2-395) in that Sumank refers to the

13. In the alternative, it is held that article 17.06(b) obliges the employer to make every reasonable effort to meet the requirements of individual employees, it was counsel's submission that there was still no evidence of a violation. It is clear that the summer arrangement for scheduling vacation leave was no longer in effect for the period requested by the grievor. The employer, in keeping with its responsibility to meet the efficient operating requirements of the unit, had reinstated its policy of not covering vacation leave with overtime. The grievor might have arranged an exchange of shifts as allowed for in article 13.04, but the evidence suggests that he had not made the effort to work this out (paragraph 16 of the Agreed Statement of Facts). Indeed, one might say that in seeking equity the grievor had not come before the Board with "clean hands".

to employees as a class. (Wessell, File 166-2-676). Article 17.06(b) does not give rights to individual employees. The only obligation it imposes on the employer is to give the local representatives of the bargaining agent the opportunity to consult with management on scheduling vacations and to make every reasonable effort - "consistent with efficient operating requirements" - to arrive at a "manner of scheduling" that is acceptable to employees.

- 10 -

specific obligation of the employer to distribute overtime on an equitable basis. There is no specific obligation, however, to grant the grievor's request for leave on particular days. It cannot be argued, therefore, that it is unreasonable to refuse such a request because of considerations of "efficient operating requirements" which, in this case, would have been the extra costs of overtime. Counsel also pointed out that Sumanik is distinguished in Gray, File 166-2-457, Graham, File 166-2-1678 and Godin, File 166-2-8123. The issue in Lawes et al (supra) was substantially different and has no bearing on the facts of the present case. Thus, it was submitted that the reference should be dismissed for both sets of reasons.

REASONS FOR DECISION

15. As indicated above, the grievor is asking the Board to find that in refusing him three of the ten days' leave (two successive shift cycles) requested by him, the employer was in violation of article 17.06(b) of the collective agreement. Because it has a bearing on the decision, it is important to emphasize that of the ten days requested by the grievor three days (September 23, 24 and 25) represented compensatory leave and seven days (September 26, 27, October 2, 3, 4, 5 and 6) represented vacation leave. Of the three days refused the grievor, September 25 would have been a day of compensatory leave and September 26 and 27 vacation days. It is evident from a reading of the collective agreement and the Agreed Statement of Facts that the term "compensatory leave" refers to time off in lieu of overtime (article 15.02) and "lieu days" refers to leave credits for work on designated holidays (articles 16.04 and 16.05). According to article 15.02 (see above pages 3 and 4) the employer would have been

... /11

- 11 -

within its right not to agree to any of the three days specified by the grievor as compensatory leave. In the event, it agreed to two of those days. The significant distinction between vacation leave and compensatory leave is noted in the reply to the grievance at the second level (Annex "D" to the Statement of Facts):

The efficient operational requirements did not permit the granting of two vacation days, i.e., September 26th and 27th. The manager did not approve the day of compensatory leave for September 25th.

It follows that in the circumstances of this case, the obligation imposed on the employer by article 17.06(b) does not apply to September 25th which was requested as compensatory leave and therefore came within the provisions of article 15.01.

16. With respect, I was not persuaded by Mr. Newman's designation of article 17.06(b) as a "scheduling provision" applicable to the employees as a group and not as individuals. I agree with Mr. Jewitt, relying on Adjudicator Abbott's decision in Jodozi et al (Files 166-2-1584, etc., at pages 15 to 18) that the second sentence of article 17.06(b) must be interpreted as imposing an obligation on the employer, qualified by considerations of efficient operating requirements, to make every reasonable effort to accommodate the scheduling requests of individual employees. The question, then, is whether in refusing to allow the grievor vacation leave on September 26 and 27 on the grounds of its general policy not to cover such leave with overtime, the employer failed to discharge its obligation. I would not rule out the appropriateness,

... /12

- 12 -

under normal conditions, of a general policy not to cover vacation leave with overtime. This could be a legitimate consideration of efficient operating requirements by the employer.

17. The facts in this case, however, suggest that the need for overtime on the two (or three) days in question was due, at least in part, to the "temporary" staff shortage at the North Bay Tower. The evidence is that this shortage persisted through the summer and fall of 1980 (only eight of the nine authorized positions were staffed). Thus, it could be inferred that but for the employer's failure to staff the ninth position at the Tower, it would have been possible to accommodate the grievor's request for vacation leave without having to cover it with overtime. The evidence does not allow me to reach a definitive conclusion in this regard and my finding is therefore conditional. To the extent that overtime would have been required to cover the grievor's absence on vacation leave on September 26 and 27 because of the persistent staff shortage, the employer must be seen as not having met its obligation under article 17.06(b) "to make every reasonable effort" to schedule the grievor's vacation leave in a manner acceptable to him. The distinction made by Deputy Chairman Mitchell in Lawes et al (Files 166-2-6437, etc., at pages 14 and 15) between the staffing policy of the employer and the operational requirements of a given operational unit is one that I would subscribe to and is pertinent to my finding in the present case.

18. On the other hand, I cannot ignore the possibility that the grievor himself must bear some of the responsibility for the overtime situation that impelled the employer to refuse vacation leave for the days in question. He might have been able to work out an exchange of shifts pursuant to article 13.04 of the collective

... /13

- 13 -

agreement which would have obviated the need for overtime during his leave. The evidence states "The grievor did not request the approval of management for shift exchanges for September 25, 26 or 27, 1980". As noted in paragraph 13 above, counsel for the employer argued that the grievor had not made the effort to work out such arrangements. This assertion was not disputed in the rebuttal argument of counsel for the grievor.

19. In summary, this grievance succeeds only in part.

- (1) Article 17.06(b) imposed no obligation on the employer in respect of the leave request for September 25, 1980.
- (2) To the extent that overtime would have been required to cover the grievor's absence of September 26 and 27 because of the persisting staff shortage, the employer's reliance on the general policy not to cover vacation leave with overtime falls short of making the reasonable efforts envisaged in article 17.06(b).
- (3) Notwithstanding the employer's deviation from the requirements of article 17.06(b), the grievor's plans for leave might still have been viable had he taken the initiative to exchange shifts as allowed for under article 13.04.

For the Board,

S.J. Frankel,
Board Member &
Adjudicator.

OTTAWA, June 9, 1981.