1982

File: 166-2-11958

No. 69

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

D. CRAVEN et al.

Grievors,

AND:

TREASURY BOARD
(Department of Transport)

Employer,

DECISION

Before: S.J. Frankel, Board Member and Adjudicator.

For the Grievors: Catherine H. MacLean, Counsel
John C. Butt, Canadian Air Traffic Control Association

For the Employer: Luc Leduc, Counsel

ART 14
CODE 402/79

Heard at Toronto, Ontario, March 16, 1982.

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<u>DECISION</u>

1. This is a reference to adjudication pursuant to paragraph 91(1)(a) of the Public Service Staff Relations Act. The grievance was presented at the first level of the grievance procedure on February 24, 1981 in the name of Douglas E. Craven "and attached". A typewritten list containing 15 names including that of Mr. Craven was attached to the grievance form. It was noted that while Mr. Craven had signed the grievance form there were no signatures for the persons whose names appear on the attachment as being associated with this grievance. Counsel for the parties agreed, however, that the decision in respect of Mr. Craven's grievance would apply *mutatis mutandis* to the other persons on the list and, to the extent that I might find in favour of the grievor, I would remain seized of the matter while the parties worked out the details of application to the various individuals concerned.

2. Section 1 of the grievance form presented by Mr. Craven is made up of three parts. Part A provides space for the name, address, department of employment, etc. of the grievor. Part B asks for the details of the grievance and, where relevant the article(s) or clause(s) of the collective agreement or arbitral award in question. In Mr. Craven's grievance the statement in Part B is as follows:

> This grievance is being filed under article 14 of the collective agreement #402/79 between Treasury Board and The Canadian Air Traffic Controller Association.
>
> The grievors are presently classified at the AI3 level. Since January 18, 1981 the grievors have been performing the duties of an AI4 controller specifically those of an area controller in the Toronto Acc.

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Part C of the grievance form provides space for a statement of the corrective action requested. In this case Mr. Craven asked:

> That the grievors be appointed to an AI4 position effective January 18, 1981.

I will not, at this point, summarize the replies to this grievance at the various levels of the grievance procedure. They have little bearing on the issues raised in this reference.

3. In a letter dated December 11, 1981, addressed to the employer (with a copy to the Board), counsel for the grievor and the bargaining agent gave notice as follows:

> RE: Canadian Air Traffic Control Association and Douglas Craven et al Our File No. 10171
>
> This is to advise you that the Reference To Adjudication, rather than the corrective action requested on behalf of these individuals in the grievance form, we will in fact be making a claim for acting pay for the period from January 18th, 1981. The reference pertaining to Article 14 or the grievance is in fact a reference to Article 14.03.

On March 5, 1982, counsel for the employer wrote to counsel for the grievor (with a copy to the Board) as follows:

> RE: Canadian Air Traffic Control Association and Douglas Craven et al
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> The Department of Transport will not grant acting pay for the period from January 18th, 1981. Furthermore, it is

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> the Department's position that the new corrective action requested (i.e. acting pay) constitutes an entirely different grievance than the one which was originally filed (i.e. appointment).
>
> Therefore, I will be making a preliminary objection and will request the adjudicator to reject the grievance on that basis.

4. In light of this exchange of letters the Board advised the parties that it would hear the submissions on the preliminary objection of counsel for the employer at the outset of the hearing. The parties were instructed, however, to be prepared to proceed on the merits of the case in the event that the adjudicator would find it necessary to reserve the decision on the preliminary objection.

5. The basic argument of counsel for the employer is that the grievance filed by Mr. Craven on March 4, 1981 was directed against the alleged failure of the employer to reclassify his position to the AI-4 level as of January 14, 1981, when he was relocated from Sault-Ste-Marie to the Air Control Centre (ACC) in Toronto. No other conclusion is possible when the statement of grievance is read together with the corrective action requested. The replies to the grievance at the three levels of the grievance procedure were clearly directed to the claim for appointment to a higher classification. The statement of grievance, while it refers to Article 14, makes no mention of pay or acting pay. It simply asserts that the grievors "have been performing the duties of an AI-4 controller" and asks, by way of corrective action, that they be appointed to AI-4 positions. The grievance is thus clearly concerned with appointment or reclassification, neither of which is a matter that can be referred to adjudication under the Act. Article 14 of the collective agreement is headed "Pay".

Clause 14.02 deals with entitlement to pay, based on the relationship between the classification of the employee's certificate of appointment, and the classification of the position to which he is or may be appointed. It is Clause 14.03 that provides for acting pay when the employee is required to perform the duties of a higher classification level. The grievance does not cite Clause 14.03; its claim is not for acting pay but for an upward classification of the grievor's certificate of appointment from AI-3 to AI-4.

6. In her letter of December 11, 1981, counsel for the grievor(s) was seeking to change the nature and substance of the grievance in order to make it adjudicable. It is the employer's contention that this cannot be done unilaterally. Since the employer does not agree to any change in the grievance and the Board is without jurisdiction to deal with it in its present form, the adjudicator has no alternative but to reject it.

7. The position of counsel for the grievor(s) was, essentially, that the grievor should not be prejudiced by what might be conceded to have been a technical flaw (or omission) in the wording of the grievance form. She adduced evidence from Mr. Craven and from Mr. J.C. Butt, Vice-President, Administration of the Canadian Air Traffic Control Association (CATCA). In his testimony, Mr. Craven conceded that he and his colleagues felt that they should have been reclassified as AI-4's upon their relocation to the Toronto ACC and that this would have been their preferred corrective action. In filing the grievance, however, they were seeking the remedy that was possible under the terms of the collective agreement. Mr. Craven, who had some experience in handling grievances for members of the bargaining unit, did not know how this grievance should be worded. He sought advice from the Regional Director of CACTA who, in turn, consulted the President

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of the Association. It was Mr. Craven's contention that he followed their advice in setting up the statement of the grievance. However, he alone composed and typed the wording that appears in Part C dealing with corrective action. Basically, the grievors wanted to be paid for the work that they were doing.

8. Counsel for the grievor(s) admitted that there was an apparent contradiction between Parts B and C of the grievance form that had been filled out by Mr. Craven. In her submission, the employer had noticed this "dichotomy" at the first level of the grievance procedure and had recognized that the grievance had something to do with acting pay. As well, the testimony of Mr. Butt who dealt with the employer at the third level was that he had informed the employer that the corrective action requested would be satisfied by granting the grievors acting pay. The employer should have made its objection at that time - October, 1981. Since it had not done so, one must conclude that it had waived its right to raise the matter on the threshold of the hearing. Counsel pointed out that arbitral opinion holds that the parties should not be "unduly restricted by technical pitfalls" that might trip up an unwary grievor. She conceded that there could be situations in which changing the language of a grievance would have the effect of nullifying it; this was not the situation in the present case. Part B of the grievance form in which the substance of the grievance appears is not as clear as it might have been, but the employer knew at the time it had reached the third level that the grievors were seeking acting pay. As for the change in the corrective action requested, Ms. MacLean argued that the employer was not prejudiced by it, since the change "moderated" the request that had been made in Part C of the grievance form. (Re City of Toronto and Canadian Union of Public Employees, Local 43, (1974) 7 L.A.C. (2d) 53.

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9. I reserved my decision on this preliminary objection at the time of the hearing. However, it is unnecessary for me to determine this issue in light of my conclusions on the merits of this reference even on the basis of the changes requested by the grievor's counsel. A summary of the evidence follows.

10. Between February 1978 and January 18, 1981, Mr. Craven was employed as an Air Traffic Controller whose specific duties were those of providing enroute radar control over the air space which was referred to, at the time, as the Sault-Ste-Marie Enroute Radar Area. Mr. Craven was classified at the AI-3 level and the position that he occupied (#8191) was also classified as AI-3. The Sault-Ste-Marie Enroute Radar Area was part of the Toronto Flight Information Region (FIR) and while the control functions were carried out by air traffic controllers in the Sault-Ste-Marie tower the operation came under the authority of the Toronto Air Control Centre (ACC). During the period that Craven was stationed at Sault-Ste-Marie his control duties were directed exclusively to the air space over the Sault-Ste-Marie Enroute Radar Area (Exhibit G-3). It was known by Mr. Craven (and his colleagues) that their location in Sault-Ste-Marie was temporary. Enhanced equipment for radar operations was being put into place at the Toronto ACC and as soon as it became operational he would be moved to the Toronto ACC. His relocation to Toronto became effective on January 18, 1981.

11. Before moving to Toronto, Craven took a short course in "automation training" so that he would be able to operate the new computer system in Toronto. It was his judgment that apart from the operation of this new equipment, his duties at Toronto ACC were similar to those at Sault-Ste-Marie. It should be noted that with the centralization in the Toronto ACC of all enroute radar control

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for the Toronto FIR, the former Sault-Ste-Marie Enroute Radar Area - with some minor modifications - became one of the twelve or thirteen sectors controlled from the Toronto ACC (Exhibit E-2). The sectors, in turn, were apparently grouped in three Enroute Specialty Areas (Exhibit G-4).

12. Mr. Craven testified that in November of 1980 he had been advised by his unit chief in Sault-Ste-Marie that he would require "cross-training" at Toronto ACC before his classification would be upgraded to AI-4. During the first two months or so at Toronto ACC, Mr. Craven continued to be responsible for what was essentially the same area of enroute radar control as at Sault-Ste-Marie. It was not until April that he began his cross-training for the Cobalt and Wiarton sectors (in the Toronto North Enroute Specialty Area).

13. Mr. Craven (and his colleagues) knew that the air traffic controllers involved in enroute radar control at Toronto ACC were classified as AI-4's and he believed that his particular position had been reclassified as AI-4 upon its relocation in Toronto ACC. Several weeks after the move to Toronto, Craven and some of his fellow controllers from Sault-Ste-Marie had a meeting with management representatives at which they complained about the fact that while they were performing the duties of an AI-4 position they were not receiving the acting pay for this position. They also wanted to know why the upward classification of their positions to AI-4 was being delayed. According to Mr. Craven's recollection of the meeting, someone from management indicated that there was concern that the Toronto AI-4's would react negatively if the Sault-Ste-Marie controllers were to be upgraded immediately.

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13. In cross-examination, Mr. Craven was asked whether there were any differences between his duties from January to June 1981 when he was still classified as a AI-3 and those after June 10, 1981 when he and his position were reclassified to AI-4. In Craven's judgement the "work" was more or less the same, but he now "knew" two more sectors. He testified that in order to control a particular sector the air traffic controller required a current endorsement for that sector. He has had an endorsement for the Sault-Ste-Marie sector since June 1978. His endorsements for the Cobalt and Wiarton sectors were issued June 10, 1981. Craven is now assigned to "work" any one of the three sectors for which he has been "checked out". He also conceded that the AI-4's working out of Toronto ACC had been required to check out for more than one sector, although he was aware of one Toronto AI-4 who does not control more than one sector.

14. The employer's evidence was adduced through Mr. K. Riseborough, who had been the Unit Chief of the enroute radar control group at Sault-Ste-Marie and who coordinated the relocation of that group from Sault-Ste-Marie to Toronto ACC. The coming into operation of the Joint Enroute Terminal System (JETS) at the Toronto ACC required the centralization of enroute radar control functions at Toronto. Mr. Riseborough testified that between January 18 and early April 1981, Mr. Craven "worked" the JETS keyboard with responsibility for controlling essentially the same air space that he had controlled when he was located at Sault-Ste-Marie. Mr. Riseborough pointed out that the mere fact of working the new JETS equipment had no effect on the classification of the AI-4's who had been working at Toronto ACC before the equipment came into use. To his knowledge, the factors that distinguished a controller at the AI-3 level at Sault-Ste-Marie from one at the AI-4 level at Toronto were the greater complexity of the Toronto ACC operations and the broader knowledge base that was required by the

Toronto controllers. The AI-4 controllers in Toronto (before the arrival of the Sault-Ste-Marie group) were required to qualify (check out) in more than one sector - normally in three. As soon as the relocated controllers from Sault-Ste-Marie had qualified in the additional sectors, both their positions and individual classifications were raised to AI-4. Mr. Craven began his cross-training on April 13, 1981 (Exhibit E-4) and was certified for Cobalt and Wiarton sectors on June 10, 1981. Exhibit E-5 shows that Mr. Craven's position #8191 had been reclassified to the AI-4 level as of June 10, 1981.

15. In cross-examination, Mr. Riseborough discussed the possibility that a position classification in an ACC could be independent of the classification of the incumbent. This was not the case, however, in respect of Mr. Craven and his colleagues. Management policy was that as soon as Craven qualified in the higher capacity i.e., that his licence was endorsed for the two additional sectors, both his individual classification and that of his position would be raised to the AI-4 level. In reply to a direct question from counsel for the employer, Mr. Riseborough stated that Craven was not performing the duties of an AI-4 from January 18 to April 13, since he was only working the Sault-Ste-Marie sector. From April 13 to June 10, he was undergoing the training in two new sectors under the supervision and responsibility of a qualified AI-4. It was not until June 10, 1981 that he was certified to work these additional sectors on his own responsibility.

<u>Argument</u>

16. Counsel for the grievor emphasized that what is in issue is the application of clause 14.03 of the collective agreement to the facts of this case:

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> 14.03(a) When an employee is required by the Employer to perform the duties of a higher classification level for a period of at least four (4) consecutive working days, he shall be paid the pay of the higher level, calculated from the date on which he commenced to perform the duties of the higher level.

In counsel's submission, the facts show that Mr. Craven was required to perform enroute radar control duties at the Toronto ACC for more than four days and these were the duties of a higher classification - AI-4. Thus, Mr. Craven's entitlement to acting pay is established in accordance with clause 14.03(a). Ms. MacLean adverted to Mr. Riseborough's testimony to the effect that classifications are tied to the Air Control Centre. The Toronto ACC is recognized as an AI-4 facility and all enroute radar control positions there are normally classified at the AI-4 level. When Mr. Craven was relocated to the Toronto ACC, an AI-4 facility, he should have been paid at the AI-4 rate of pay. Counsel argued that Mr. Craven's duties at the Toronto ACC, when he was controlling the Sault-Ste-Marie sector, were identical to the duties performed by the Toronto AI-4's in respect of any other sector in the Toronto FIR at a given time. The only difference was that Mr. Craven was temporarily restricted to the control of the Sault-Ste-Marie sector. During the intermediate period between Mr. Craven's relocation to Toronto (January 18, 1981) and the commencement of his cross-training (April 13, 1981) he was performing the same kind of duties as a Toronto AI-4. It was only while he was undergoing the cross-training between April 13 and June 10, that he was not performing AI-4 duties independently, except during those periods when he was scheduled to control the Sault-Ste-Marie sector. The fact that an employee in a particular ACC is performing identical duties but in another geographic sector than other employees in the same ACC does not mean that he is not performing the duties of their classification.

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11. Counsel for the employer, in making his submission on the merits, indicated that this was without prejudice to his preliminary objection on jurisdiction. Assuming that the grievance refers to clause 14.03(a) of the collective agreement, the question is whether Mr. Craven was required to perform (or substantially perform) the duties of a higher classification - in this case the duties of the Toronto controllers classified at the AI-4 level. The testimony of Mr. Riseborough indicates that the group of controllers relocated from Sault-Ste-Marie to Toronto were considered to be "tenants" in the Toronto ACC building until such time as they qualified to perform the range of duties that were being performed by the Toronto AI-4's. The evidence is clear that an AI-4 controller at the Toronto ACC was required to be proficient in more than one sector. It was not sufficient for the grievor to perform duties in one sector only in order to be considered as being required to perform the duties of an AI-4 controller who had been checked out to provide enroute radar control in several sectors, and who could be assigned by the employer to work any one of those sectors. It could not be said that the grievor was substantially performing AI-4 duties when he was restricted by the endorsement on his licence to performing the enroute radar control function for the Sault-Ste-Marie sector only. Counsel pointed out that the onus on a grievor to establish that he is actually (or substantially) performing the duties of a higher classification has been dealt with in a number of board decisions - Cartier and Dowie (Board Files 166-2-9290/9291); Griffiths (Board Files 166-2-8443 to 8445); and Lalancette (Board File 166-2-3372). In counsel's submission, the grievor has not met this onus.

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Reasons for Decision

12. On the assumption that this grievance is properly referred to adjudication as pertaining to the application or interpretation of clause 14.03(a) of the collective agreement between Treasury Board and CATCA (Code: 402/79), the only question is whether the grievor (and, by inference, the persons whose names were attached to the grievance form) was in fact required to perform the duties of a higher classification for a period or periods of more than four days. As long as Mr. Craven was working out of Sault-Ste-Marie both he and his position were classified at the AI-3 level and the endorsement on his licence was restricted to enroute radar control for the Sault-Ste-Marie Enroute Radar Area, as it was then called. When all the enroute radar control operations were centralized in the Toronto ACC as of January 18, 1981, the Sault-Ste-Marie Enroute Radar Area was incorporated into the North Specialty Area and became (with minor changes) one of the sectors within it. The designation of this sector, as it is shown in Exhibit E-2, became "AM". The endorsement on Mr. Craven's licence continued to apply to this newly designated sector which was roughly congruent with the former Sault-Ste-Marie Enroute Radar Area. At the time of the relocation of the Sault-Ste-Marie controllers to the Toronto ACC the controllers already working out of the Toronto ACC were classified at the AI-4 level. Their licences were endorsed for more than one sector (normally three) and their duties included assignment to "work" any one of the several sectors for which they were certified.

13. As indicated, when Mr. Craven was relocated to the Toronto ACC on January 18, 1981, the endorsement on his licence applied to the Sault-Ste-Marie area only. Between January 18 and April 13 his enroute radar control duties were restricted to the AM (that is the former Sault-Ste-Marie) sector and he was essentially performing the same

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duties that he had been performing at Sault-Ste-Marie. It was only after his period of cross-training that he qualified for the additional endorsements on his licence (for the Wiarton and Cobalt sectors) and became qualified for assignment to the same range of duties as the established AI-4's at Toronto ACC. The evidence is uncontradicted that as of June 10, 1981 - the day on which Mr. Craven was checked out for Wiarton and Cobalt - both his position and his personal classifications were upgraded to the AI-4 level.

14. While it may be true, as argued by his counsel, that on a given day the functions and responsibilities of Mr. Craven for enroute radar control of the Sault-Ste-Marie air space were the same as those of a Toronto AI-4 controller in respect of the air space that he was assigned to control on that particular day, Mr. Craven was precluded from working any sector other than Sault-Ste-Marie. The duties of the AI-4 at Toronto ACC, on the other hand, required endorsements for more than one sector so that the AI-4 could be assigned to work other sectors in accordance with operational requirements. Can it be said that a controller whose licence is endorsed for only one sector in a FIR that includes twelve or thirteen sectors is substantially performing the duties of controllers who are licenced to control, and may be assigned to work any one of two or more sectors? The answer can only be in the negative, particularly in the case of air traffic control where the rigorous requirements of licencing forbid the employer to assign, and the employee to accept duties that fall outside of the endorsements on the controller's licence.

15. In the present case, the facts indicate that Mr. Craven had been certified to control only the Sault-Ste-Marie air space at the time of his relocation to Toronto ACC. He underwent a period of adjustment to the new environment and equipment while his duties were

restricted to the control of the Sault-Ste-Marie air space to which the endorsement on his licence applied. This "intermediate" period was followed by about two months of cross-training during which Mr. Craven was learning to qualify in two additional sectors - Wiarton and Cobalt. He was checked out for these sectors on June 10, the additional endorsements were placed on his licence and both he and his position were reclassified at the AI-4 level. In my opinion, it cannot be said that at any time between January 18 and June 10, 1981, Mr. Craven was required to perform the duties of a higher classification.

16. For all of these reasons Mr. Craven's grievance must be denied and this reference to adjudication is hereby dismissed. As agreed by counsel at the outset of the hearing, this decision applies *mutatis mutandis* to the persons whose names are listed on the attachment to Mr. Craven's grievance form.

For the Board,

S. Frankel,
Adjudicator and Board Member.

OTTAWA, April 8, 1982.