

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

JUL 25 1983

BETWEEN:

L. DERRIEN
K.G.A. KIRKPATRICK
M.E. O'SULLIVAN

Grievors,

AND:

TREASURY BOARD
(Transport Canada),

Employer.

DECISION

Before: C. Brian Williams, Board Member and Adjudicator.

For the grievors: Ms. Catherine H. MacLean, counsel.

For the employer: Ms. Sheila Ray, counsel.

Heard in Victoria, British Columbia, on May 5, 1983.

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UNILATERAL SCHEDULING OF
HOLIDAYS BY EMPLOYER

DECISION

Summary of Proceedings

These three cases were referred to this adjudicator on April 15, 1983. A hearing into each case was convened commencing at 10:00 a.m. on Thursday, May 5, 1983 in the County Courthouse Building, Victoria, British Columbia. Counsel for the parties acknowledged that the adjudicator was properly appointed and that in all respects it was right and proper that he serve the parties in these cases. In response to questions concerning my authority and jurisdiction to hear and dispose of these cases counsel responded as follows: With respect to the reference to adjudication of the grievance of Michael E. O'Sullivan (Board file 166-2-13807) this matter was in all respects properly before me and I was with authority and jurisdiction to hear and dispose of it. With respect to the reference to adjudication of the grievance of Laurent Derrien (Board file 166-2-13805) counsel for the employer entered a preliminary objection based upon untimeliness and as such requested that this reference be dismissed for lack of jurisdiction. Upon hearing full representation from counsel, I elected to reserve decision on this objection and directed that the matter be heard on its substantive merits. My response to the objection is set out below. With respect to the reference to adjudication of the grievance of K.G.A. Kirkpatrick (Board file 166-2-13806) I was advised at the outset by counsel that they wished to speak to a withdrawal of this matter.

Upon convening, counsel reported that recent discussions had led to a settlement of the grievance referred on behalf of K.G.A. Kirkpatrick and, accordingly, advised that the reference was withdrawn. In response to questions addressed to both counsel and grievor Kirkpatrick I am satisfied that the settlement was in all respects satisfactory to grievor Kirkpatrick and as such he wished his grievance withdrawn. Subsequent proceedings were limited to

representations on the grievances of L. Derrien and M.E. O'Sullivan. As agreed by counsel these two cases proceeded concurrently.

Nature of Grievances

The grievance of Michael E. O'Sullivan was entered on or about January 28, 1982. Grievor O'Sullivan is employed by Transport Canada in the Air Traffic Services, Operations Branch as an air traffic controller in the Victoria tower. His job classification is AI-2. His grievance in part reads as follows:

With respect to the details of the grievance:

On December 14, 1981, I was advised by the Unit Chief that I was scheduled lieu leave from 7th to 11th January, 1982, inclusive.

I advised the Unit Chief that I did not wish to use my lieu days for the dates scheduled by him, but that I had been willing to use my lieu leave from 21st to 25th December, 1981, inclusive, from 29th December, 1981, to 2nd January, 1982, inclusive, and on 31st December, 1981, I indicated that I was willing to use it in March which is in the fiscal year in which the lieu credits were earned. On 31st December, the Unit Chief advised me that my request was denied. As a result of this, five lieu leave credits have been deducted from my leave record.

I feel aggrieved by the employers' actions and feel that they have acted contrary to the provisions of Articles 1 and 16 of the Treasury Board, C.A.T.C.A. collective agreement.

With respect to the corrective action requested:

1. A declaration that the employer was in breach of Article 16 of the Treasury Board/C.A.T.C.A. collective agreement when it scheduled my lieu leave days without my having requested them and after I had indicated my willingness to utilize my lieu leave credits at other times during the fiscal year in which they were earned.
2. That the lieu days which were deducted from my lieu leave credits be reinstated to my credit.

The grievance of Laurent Derrien was entered on or about April 12, 1982. Grievor Derrien is employed by Transport Canada in the Air Traffic Services, Operations Branch as an air traffic controller in the Victoria tower. His job classification is AI-2. His grievance in part reads as follows:

With respect to the details of the grievance:

On April 6/82 I was advised that I was being charged for five days of leave credits for a period Jan. 9 to 13 for which I had previously, on Jan. 4, refused to sign a leave request for, on the grounds that the employer had no right to assign these lieu days to me. I had indicated that I would like to have leave through Christmas and in March. Since the employer could not approve these times he had no right to assign the leave.

With respect to the corrective action requested:

I request that the five days leave be returned to my leave credits.

Preliminary Objection (Derrien Grievance)

Counsel for the employer set out her objection as follows:

1. Article 5.03 of the applicable collective agreement, Code: 402/79 between the Canadian Air Traffic Control Association and Treasury Board, expiry date December 31, 1980, speaks to the right of an employee to present grievances. The terms and conditions of employment embodied in the collective agreement remained in force at all material times by virtue of section 51 of the Act. Article 5.03 of the collective agreement reads as follows:

5.03 Right to Present Grievances

Subject to and as provided in Section 90 of the Public Service Staff Relations Act an employee who feels that he has been treated unjustly or considers himself aggrieved by any action or lack of action by the Employer in matters other than those which are dealt within the classification grievance process is entitled to present a grievance in accordance with the procedure provided by this Article except that:

- (a) where there is another administrative procedure provided in or under any Act of Parliament to deal with his specific complaint such procedures must be followed,
- and
- (b) where the grievance relates to the interpretation or application of this Collective Agreement or an arbitral award relating thereto he is not entitled to present the grievance unless he has the

approval of and is represented by the Association.

A grievance must be presented not later than twenty-five (25) days from the day on which the employee was notified or informed of the decision or circumstance that is the subject of his grievance.

2. The entry date for the Derrien grievance is April 12, 1982.
3. Grievor Derrien was informed of the lieu days scheduled by his employer for the month of January, 1982 in an employee shift schedule posted on the bulletin board on or about December 15, 1981. This schedule showed that the employer had scheduled him for five lieu days commencing January 9 to 13, 1982 inclusive.
4. As he was aware of the contents of this employee shift schedule on or about December 15, 1981, he did not file his grievance within the 25 day period provided for in article 5.03 as reproduced above.
5. The employer's concern over the timeliness of his grievance was introduced into proceedings at level 3 of the grievance procedure.
6. In the result, this grievance is untimely. You do not have jurisdiction. The matter should be dismissed.

Counsel for grievor Derrien responded as follows:

1. The proper determination of this objection calls for a

review of the nature of the grievance filed by grievor Derrien. On April 6, 1982 grievor Derrien was given a copy of a leave reporting document and was asked to sign it by the supervisor. Grievor Derrien refused to do so. The employer processed the document anyhow and charged the five days against his lieu credits as shown in his leave record documents. (Exhibit #15). It is this action of the employer that precipitated his grievance. Grievor Derrien did not work on January 9 to 13, 1982 inclusive. Each day he reported for work but was told to go home.

2. In the alternative, if there is a defect, it is solely a procedural defect. The employer proceeded to accept and consider the Derrien grievance at levels 1 and 2 of the grievance procedure and did not at that time raise a timeliness objection. As such, the principal of waiver based on conduct should apply. Either way this grievance is timely and you do have authority and jurisdiction to hear it.

Decision on Preliminary Objection

It seems to me that the outcome of this objection turns on the words used in article 5.03 and the originating statement of grievance commenced April 12, 1982. Both are set out above. With respect to article 5.03 the operative term is: "...the day on which the employee was notified or informed of the decision or circumstance that is the subject of his grievance." The clock starts running that day. From the grievance itself, we learn that it was on January 4, 1982 that he was presented with a request to sign the leave record document which reported the five day leave period scheduled by the employer for January 9 to 13, 1982 inclusive. He refused to sign it. From the evidence we know that earlier a shift

schedule for January showing the lieu days as scheduled by the employer was posted on or about December 15, 1981 and Derrien was aware of this schedule and its contents. It seems to me that this is the date that counsel for the employer relies on with respect to the application of article 5.03. That is to say, that the "...decision or circumstance..." referred to in article 5.03 was the knowledge of the lieu days scheduled by the employer and as reported in the employee's shift schedule on December 15, 1981. On the other hand, it was on April 6th that he was advised that the five days would be charged against his lieu credits in his leave document. It seems to me that the substantive grievance brought forward is not the employer's scheduling of lieu days but the employer's charge of five days against his lieu day credits as reported in his leave documents. Having regard to the wording of his grievance, and particularly the corrective action requested, I am satisfied that the "...decision or circumstance that is the subject of his grievance..." is the April 6, 1982 advice that the five days had been charged against his leave credits. The references made in his grievance to earlier dates and events is constructed as explanatory commentary and does not, in my view, set out the substantive complaint arising from an employer "...decision or circumstance..." In my opinion, the operative date is April 6, 1982. As such a grievance filed on April 12, 1982 is timely. The preliminary objection is dismissed. In passing, I should point out at this time that, although both counsel wished the Derrien and O'Sullivan cases to proceed concurrently, the substantive nature of the two

grievances, while similar, should not be considered as identical. Distinctions are noted in the words that follow.

Summary of Evidence (O'Sullivan Grievance)

Michael E. O'Sullivan joined the Victoria tower staff in 1973 after having served at Abbotsford, Kamloops, and Vancouver. He claims that upon joining the Victoria tower staff employees were able to use their leave credits of all types as they saw fit. The practice was simply to advise the unit chief of the leave requested and to complete the appropriate leave request forms and documents. At that time it was not necessary for the employee to specify what form of leave they were using such as annual or lieu day credits. He claims that on or about 1974 the practice changed in that supervision advised employees to use their annual leave first and then their lieu days. This was because lieu days could be carried forward to the following fiscal year. Up until December, 1981 supervision did not specify when employees were to take their lieu days. Lieu days were used up as the employees saw fit. The employer did not assign lieu days. He identified Exhibit #5 as a notice to staff dated November 5, 1981 and posted on the bulletin board by supervisor Bob Readings. This notice reads in part as follows:

Staff

Nov 5/81

As a result of a recent Federal Court of Appeal's decision, we have received instructions that employees will be required to utilise lieu days during the fiscal year, if possible. We will attempt to grant your lieu days on the dates requested, but if we are

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unable, or if you make no request, lieu days will be assigned. You are requested to submit your choices ASAP. Lieu day assignments will commence with the posting of the December schedule, so get your choice in before then if you have any preference. If you wish, you may submit a choice in very general terms only, and this will give me greater flexibility in scheduling, and a better chance of satisfying more requests. Conflicting requests will be resolved through the usual leave allocation method, so use the leave list on the other clipboard if you have choices remaining. Otherwise, enter your choice below. NOTE So far, we are assuming that the above ruling applies only to the current year's lieu days and does not affect lieu days which have been carried over from previous years. We are expecting clarification from Region shortly.

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The shift schedule for December, 1981 would normally be posted on or about November 15, 1981. He identified Exhibit #6 as the "leave list" referred to in Exhibit #5. He explained the functioning of the leave list system and the method employed for resolving conflicts between dates of leave requested by employees. He claims that the November 5 notice posted by supervision was proceeded with without prior discussion with the employees affected. He discussed the substance of the November 5, 1981 posting with his supervisor Smith. He was told that it was supervision's position that current lieu days were to be used up during the current fiscal year. He indicated his preferences for lieu days on the notice shortly after it was posted on November 5, 1981. He requested that lieu days be scheduled from December 21-25 inclusive, December 29-January 2 inclusive, and one midnight shift. He identified Exhibit #7 as the December shift schedule posted on or about November 15, 1981 and explained at length the notations on the schedule and interpreted its functioning as it relates to the shifts he worked during that month. Subsequently, he compared the lieu

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dates requested pursuant to the notice of November 5, 1981 with his actual work schedule on those dates. From December 21 to December 25 inclusive he actually worked as follows: December 21 and 22 - evening shift, December 23 - evening shift, December 24 - day shift, and on December 25 while scheduled for a night shift he changed with a fellow employee and actually worked the day shift. For the December 29 to January 2 inclusive lieu day period request he worked as follows: December 29 - evening shift, December 30 - scheduled for a swing shift but exchanged with a fellow employee and worked an evening shift, December 31 - day shift, January 1 - day shift, and January 2 - day shift. With respect to the request for a lieu day instead of a scheduled midnight shift he advised that he worked only one midnight shift in December. The shifts scheduled for January, 1982 on or about December 15, 1981. It shows scheduled lieu days for January 7, 8, 9, 10, and 11. He identified Exhibit #9 as a memorandum he wrote to unit chief C.O.P. Smith re assignment of lieu days credits and dated December 30, 1981 and Exhibit #10 as Mr. Smith's reply to his request. Exhibit #9 reads in part as follows:

This memo is to confirm our conversations of Dec. 15 and Dec. 21 regarding your assignment of leave to me for the period of Jan 7 - 11 inclusive. During those discussions, I advised you that:

1. I had not requested leave for this period.
2. In November, I had requested leave for the periods of Dec. 21-25 inc., Dec. 29-Jan 2 inc. and one midnight shift.
3. I am not prepared to take the January assigned leave.

I believe that contrary to managements interpretation of the Federal Court of Appeals decision, you do not have the right to arbitrarily assign leave once the employee had indicated when he wishes leave and you are unable to grant the requested leave. I also

believe that you are being unreasonable in attempting to change the rules regarding use of lieu day credits eight months into a year, leaving only four months available to employees in which to exhaust leave credits. For these reasons and the simple fact that leave from Jan 7-11 is of no use to me, I intend to; (1) report for duty at the following times. Jan 7. eve shift, Jan 8 eve shift, Jan 9 day shift, Jan 10 day shift and Jan 11 day shift. (2) not sign a leave form requesting this period or accepting it, and (3) file a grievance immediately after the five days are deducted from my lieu day credits.

Exhibit #10 (Smith reply) reads in part as follows:

ATS Branch have interpreted the Federal Court of Appeals decision that management has the right to assign lieu days to be taken as leave at a time period that may differ from that which the employee requested when the employer is unable to meet the dates desired. Lieu days may also be assigned when the employee has not requested leave.

You are advised that you will be considered as being on leave from 7-11 Jan 82 incl & if you elect to report for duty during that period, no duties of any nature shall be undertaken by yourself.

He explained that upon noticing the posting of December 15, 1981 and its comments, particularly the lieu days scheduled by the employer, he talked to supervisor Smith on December 15 and 21. He states that he advised him that he did not want the time off and was not prepared to take the leave on the dates scheduled. He did not recall Smith's response. He had a third discussion on the subject matter with Smith on December 31 in his office. He claims that they discussed lieu day leave administration and advised he was filing a grievance on the

matter. Smith asked him whether there was some other time that he would like to take the leave and the month of March was suggested. Grievor O'Sullivan was not prepared to discuss specific dates at that time. They also discussed the system of paying out for lieu day credits. O'Sullivan indicated that he does have a preference to be paid out in most situations but in this case he was prepared to take days in March. On January 7 through 11, 1982 inclusive he reported for work at the tower and he spent each shift in the tower. However supervision told him that there was no work for him. He identified Exhibit #11 re Lieu Days as a document posted in the clipboard on the bulletin board. Exhibit #11 reads in part as follows:

LIEU DAYS

Reference is made to item 12 of the Unit Chiefs Conference Minutes, October 28-31, 1981, Item 20 of the CATCA Management Consultation meeting November 18, 1981 and Federal Court of Appeal decision No. A-157-81.

While we are awaiting further direction from Staff Relations particularly as it relates to the liquidation of lieu days carried over from previous years, it seemed to me that the referenced minutes were relatively clear in stating that this Region's position would be that Unit Chiefs would endeavour to liquidate this current year's lieu days.

To ensure there is no misunderstanding, our position is as follows:

The recent Federal Court of Appeal decision setting aside the adjudicators earlier decision is interpreted to mean that management has the right to determine when lieu days shall be taken, and that management has an obligation to endeavour to liquidate lieu days in the year they are earned.

Accordingly, all units shall commence a program designed to liquidate the 1981/82 lieu days,

consistent with the Federal Court of Appeal decision and the provision of the collective agreement.

Exhibit #12 was identified as a shift schedule for the month of February, 1982 as posted on January 15, 1982 and Exhibit #13 as the shifts schedule for March, 1982 as posted on February 15, 1982. He identified Exhibit #14 as his "attendance and leave record" for the fiscal year 1981-1982. He advised that towards the end of the fiscal year it was given to him to certify to its correctness and to sign it. He reviewed its contents and the leave taken during this fiscal year. It shows a reduction in lieu day credits of five days covering January 7 to 11, 1982 inclusive, a four day reduction for days or parts of days taken in January, February, or March of 1982 and ten days paid out in February of 1982. He claims that a review of the March, 1982 shift schedule (Exhibit #13) shows that he could have taken lieu days on the 7th, 8th and half a lieu day on the 13th, 14th, 21st, 22nd, and 30th without reducing staff below its normal complement. These days were in addition to the one-half day taken on the 4th and a full day taken on the 6th of March.

Summary of Evidence (Derrien Grievance)

Laurent Derrien commenced employment with Transport Canada in February, 1966. Following a number of postings, he joined the Victoria Tower in November, 1976. His classification is AI-2. During his tenure at Victoria and until November of 1981, his practice was to use up his annual leave credits first and then the lieu day credits last. These days were taken towards the end of the fiscal year or he carried them over to the following year. About four years ago he started to accumulate his lieu day credits in

anticipation of an extended vacation. He identified Exhibits #5 and #6 in these proceedings as the posted notice calling for employees to indicate lieu day preferences and the associated annual leave schedules respectively. Upon noting Exhibit #5 and before November 15, 1981, he decided to apply for lieu days off for the period December 22 to December 27 inclusive and for days in March. The December 22 to December 27 period and the month of March also appear in Exhibit #6. Prior to the November 15th scheduling for the month of December, 1981, he was called by Bob Readings and advised that he could take off December 24 and 25 but the other dates requested were simply not available. In response, Derrien told Readings that he would take December 25 but not December 24. The shift schedule for December, 1981 (Exhibit #7) shows shifts worked as: December 23, evening shift; December 24, day shift; December 25, day off; December 26 and 27, day shifts. It shows Derrien scheduled for leave on both December 24 and December 25 but in fact only December 25 was taken. On or about December 15 the January shift schedule was posted. He noted lieu days scheduled for him from January 9 to 13 inclusive (Exhibit #8). On January 4, while on day shift, he was asked twice to sign a leave document. He refused to sign it. On the days of January 9 to 13 inclusive, 1982 he simply stayed home. He was aware that O'Sullivan was going to report for work but chose to proceed as he did. He identified Exhibit #13 as the March, 1982 operating shift schedule. He reviewed this schedule at length and asserted that there were days in March that he could have been granted a day off and still maintain the required operating complement. These days were March 1, 7, 8, 9, 10, 24, 25, 26, and 27. He identified Exhibit #15 as his attendance and leave record for the fiscal year 1981-1982. It shows scheduled lieu days off from January 9 to 13, 1982

inclusive. This document was presented to him on April 6 by unit chief Carl Smith and he was asked to sign it. He refused to sign it because it showed a five day charge against his lieu credits and he did not feel that that was proper. He said to Smith that if he was charged the five days, he would grieve it. This document shows a 27 day carryover from fiscal year 1980-1981 and 11 days of credit for the fiscal year 1981-1982. He claims that during early January Bob Readings told him that they needed a "...couple of test cases..." over the assigned lieu day matter. He recalled hearing similar references a couple of times since that occurrence. Under cross-examination he acknowledged that he had not requested specific days in the month of March. He claimed that the lieu day question was frequently discussed amongst the controllers staff and that his relationship with supervision is "...fairly restrained." He claims that although he does not expect it from supervisor Readings, Readings does from time to time cover an operational shift for one reason or another. He seemed to feel that Readings could have covered his lieu days requested depending upon "...how anxious he was to liquidate the lieu days."

Summary of Evidence (O'Sullivan and Derrien Grievances)

Robert J. (Bob) Readings does the operational scheduling as directed by unit chief Carl Smith. It specifies the days and shifts of work and days or periods of leave or absence. It is prepared monthly. He is a supervisor in the unit but also a member of the bargaining unit. Operational requirements call for a normal complement of 17 controllers: one on midnight shift, three on day shift, one on swing shift, and three on the afternoon shift at least until 8:00 p.m.. With no one scheduled away on leave he has two

extra people available each day. He outlined at length the efforts he made to meet the O'Sullivan and Derrien leave requests. With respect to O'Sullivan's request for December 21 to 25 inclusive he explained, using the December shift schedule, that he already had two people scheduled off for all or part of the December 21 to 25 period. The same process concluded that the December 29 to January 2 period could not be made available either. He believed that if people would be flexible on the days taken he would be able to get the lieu days scheduled and still meet the operational requirement test. If employees are not flexible it is very difficult to do so. He believed that most employees want a full cycle off at a time and not simply a single or a few days at a time. Conflicts over the days requested among employees are resolved by applying the leave priority system in effect for the year in question. With respect to Derrien's request for the December 23 to 27 period inclusive, it was not available for the same reasons as stated for O'Sullivan. He called Derrien to offer the 24th and the 25th but Derrien responded that he wanted the 25th only. He could not offer a cycle in March but could have given a day here or there if requested. With respect to Derrien's suggestion that he could have substituted for him in March, he stated that he has his job to do and is pressed into service only when there is a staff shortage. He will not create a shortage to do so. He confirmed that there were a few March dates available but he does not recall Derrien asking for them.

At one time there was a policy that employees would use their annual vacation leave credits in the fiscal year that they were earned. With respect to lieu days, there "...seemed to be acceptance generally that lieu days were entirely up to the employee. He could use them in the year in which they were earned or, if he chose, he could keep

them until the end of the year and cash them in or carry them over to the following year. We all generally understood that...." If he was asked what days to use, he would suggest using up the annual leave because of the greater flexibility available in the use of the lieu day credits. On posting the notice of November 5, 1981 (Exhibit #5) it was notification that the rules were changed because of the Federal Court of Appeal's decision. As it was posted in November, most employees had been using up their annual leave credits leaving their lieu day credits untouched for this year and the previous years. A number of controllers expressed concern upon learning of the November 5, 1981 announcement. He advised that he did not plan to schedule isolated days but would try to schedule only full five day cycles. Readings believed that it was his responsibility to follow the rules and make an effort to implement the policy as stated. He suggested to them that if they did not agree it may be best for them to file a grievance in order to get the matter resolved.

Under cross-examination he acknowledged that he receives many leave requests for the Christmas and New Year period as well as the month of March. The months of January or February are not particularly popular. He prepared Exhibit #5 as a result of Carl Smith's directive to get the lieu days used up as soon as possible. He prepared the notice in order to advise employees of the change in policy and to get on with the lieu day scheduling. He believes that the prior policy of unrestricted use of lieu days was changed because of the enormous number of lieu day credits accumulated by employees in the service and the problems that would result in getting the lieu day credits used up. However, he was not able to identify clearly

what these problems were. He pointed out that with two-thirds of the fiscal year already gone by November and with the leaves already agreed to it would not be possible to liquidate all lieu day credits by the end of the fiscal year. It was for this reason that we said they were to be used up "...if possible." His instructions were to get as many current lieu day credits used up as possible. He believes he scheduled as many days as possible short of assigning single days off which he did not want to do as he knew employees generally did not want them. He believes he scheduled all the days possible and all that had been requested. He advised that some employees like to take as many lieu days as possible while others do not. In his scheduling he tried to avoid short periods less than a full cycle, avoided times people did not want, and tried to schedule times that they did want. In the result, he had to assign days to approximately five employees. O'Sullivan and Derrien were two of these employees. He claims that employees were made aware of when there were days available. When O'Sullivan put down December 21 to 25 inclusive he knew darn well that he could not meet that request. He could not assign all the outstanding lieu days because sufficient days were simply not available. He admits that some employees "suffered" more as a result of the unilateral scheduling than did other employees. The maximum days assigned were five days or a full cycle. In cases where employees had used up their lieu day credits no assignment was made. He advised that the operational work schedule is worked out months in advance and employees can determine their days off and shifts well in advance. He advised that it is possible to schedule all lieu day credits within a given fiscal year.

Central Arguments of the Parties

On behalf of the grievors it was argued as follows:

1. The issue is whether, in the circumstances of these cases, the employer was justified in unilaterally forcing the grievors to liquidate lieu days and charging the lieu days assigned against their lieu day credits. In each case the grievor did not request them, did not want them, refused to sign the leave document, and refused to sign the leave record document. Both grievors want the lieu day credits returned to their account and that they be made whole.

2. This case goes beyond the decision of the Federal Court of Appeal in Attorney General of Canada v. David K. Anderson et al 1982 1 F.C. 714 referred to in the documents before you (Exhibit #5). In these cases we are moving beyond it. However, the Federal Court of Appeal decision does give us some guideposts to follow.

3. In the Anderson case the employees worked at St. John's, Newfoundland tower. At page 716 of the decision, Mr. Justice Pratte summarizes the facts as follows:

In September and December 1979, the respondents were requested by their employer to indicate at what time, before the end of the fiscal year expiring on March 31, they desired to use the lieu days that were accumulated to their credit. They refused to accede to that request. They did not wish to use their lieu days before the end of the year; they wanted either to use them in a subsequent year or to exchange

them for cash at the end of the year. The employer thereupon unilaterally fixed the dates when the respondents were to use their lieu days.

At page 716 he frames the issue thus:

The sole issue raised by the respondents' grievances was whether the employer had the right to unilaterally determine the dates before the end of the year when the respondents had to use their lieu days in view of the respondents' refusal to indicate their wishes in that respect.

At pages 717 and 718 he states by way of conclusion:

...I would allow the application, set aside the decision of the Adjudicator and refer the matter back to him for decision on the basis that, under articles 16.04 and 16.05 of the collective agreement, when employees refuse to indicate when, during the current fiscal year, they wish to use their lieu days, the employer has the right to unilaterally determine when those lieu days shall be used.

4. The similarity in the Anderson case with the cases before you is that in both the employer unilaterally assigned lieu days. The difference is that in the Anderson case the employees had refused to indicate dates when requested by the employer to do so. This is a basic distinction and it is relevant to the cases before you.

5. The Anderson decision was rendered on September 18, 1981. We know from the evidence that up until November 5, 1981 no one had ever been forced to use up lieu day credits and no unilateral assignments had been made. The unwritten policy in the unit was that you carry over lieu days if you wish. It was never a problem and the practice followed is very clear. From Readings evidence we know that a meeting of management followed the Anderson decision and from that meeting came the directive to Readings that employees will be required to use up their current lieu day credits in the current fiscal year. Readings proceeded accordingly. The decision taken by the employer is clarified in Exhibit #11 as reproduced at page twelve supra. This memorandum was received by the unit chiefs in the region.

6. As a result of Readings efforts to comply with the directive, five individuals had periods of leave scheduled for them. They did not ask for it nor did they want it.

7. We submit that the employer's interpretation of the Court of Appeal decision and the manner in which they chose to implement it at the Victoria tower is simply not consistent with the decision taken by the court. The facts are very different. However, there are signposts in the court's decision that tell of management's rights and obligations in assigning lieu days. The collective agreement provisions in article 16.04 and 16.05, as before the court, are identical in all respects to the agreement before you in this case.

8. It is our opinion that the court's decision states that the right of the employer to "...unilaterally decide when lieu days will be granted..." is limited by article 16.05 (d)

"...which obliges the employer to make every reasonable effort to grant lieu days at times desired by the employee...." This is a restriction on the employer's right to unilaterally designate lieu days.

9. We submit that the action taken--posting of a notice and asking people to sign up--does not satisfy the obligation of the employer to make every reasonable effort to grant lieu days at times desired by the employee. This is because the policy was introduced some two-thirds of the way through the fiscal year. Prior to this time, employees had proceeded in accordance with past practice. The change in policy so late in the fiscal year was blatantly in breach of article 16.05 (d) and its requirements that the employer proceed reasonably. In our view it is obviously unreasonable to believe that a majority of employees could get what they wanted in the time remaining. They had only four months in which to do it. Recognizing the demand for days off during Christmas and New Year's as well as the other more desirable dates already taken up, the time available is extremely limited. The time available simply made the task impossible and quite unreasonable.

10. Earlier Board cases have dealt with the lieu day credit question. These cases are not too helpful because of different facts and different agreement language. However, these cases commit themselves to the so-called six month rule i.e. give employees six months to select their dates and then schedule unilaterally. This rule gave employees a greater period of time in order to get their requests in.

11. The statement of policy in Exhibit #11 does not refer to the need to consider the employees' wishes for dates. Readings and

Smith did their best to comply with employees' wishes. However, the policy as stated was in effect: "we do not care what employees want or don't want. You are going to liquidate it." This memorandum on its very face does not meet the needs of reasonableness as stated in article 16.05 (d).

12. Did supervisor Readings comply with article 16.05 (d) in these cases? We think not. He did not fully discuss employee wishes and discuss alternate dates or proposals with the grievors. He did not make available dates known to the grievors for their consideration. Admittedly, full cycles were very scarce but individual days or less than full cycle periods were available.

13. The employer acted very rigidly in these cases. O'Sullivan showed up to work but they would not put him to work. This refusal is an act of rigidity.

14. The employer did not act reasonably in these cases. By leaving it so late in the fiscal year, it was impossible to meet the reasonableness requirement. The grievances should be allowed.

On behalf of the employer counsel argued:

1. There is no evidence to support a finding that all lieu days held by employees were used up. The evidence is that they were used up wherever possible. The employer did not force employees to use up all of their lieu days.

2. Exhibit #11 does not suggest employer rigidity with respect to implementing the new policy. It says that action is to be

consistent with the Court of Appeal decision as well as the collective agreement.

3. The grievors have a duty to establish a breach of the collective agreement. They have not met that duty. They allege a breach of article 16.05 (d). However, the evidence supports a finding that the employer did indeed act reasonably. They gave employees an opportunity to select dates of their choices and if not available alternate dates were discussed with them. The procedures used by Readings were quite fair and proper. In addition, in interpreting and applying article 16.05 (d) we must also note articles 1.02 dealing with the purpose of the agreement and article 3.01 dealing with management's rights. Articles 1.02 and 3.01 read as follows:

1.02 The parties to this Agreement share a desire to improve the quality and to increase the efficiency of the Air Traffic Control Service and to promote the well-being of its employees so as to provide safe and efficient services to the public.

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

- (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to

which these facilities or parts thereof shall operate;

- (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

Management is obliged to provide a service and to do this it must consider the operational requirements in order to do so. The scheduling of lieu days relates to and has an effect on the ability of the service to maintain operational requirements. If lieu days accumulate it can affect our ability to meet our operational requirements.

4. The Anderson et al decision at page 717 states that "...it would be an abuse of language, in my view, to say that lieu days cannot be liquidated for the sole reason that the employee would prefer not to use them." We had evidence that the employees in this case preferred not to use up their lieu days. The Federal Court of Appeal's decision decided that the employer had the right to schedule lieu days. This conclusion is quite proper as it is the employer that is responsible for ensuring that operational requirements are met. The cases of Tremblay (Board File: 166-2-9742) and Graham, (Board File: 166-2-1678) established that the employer can give precedence to operational

requirements over employee wishes for days off. We cannot sacrifice operational requirements in favour of employee wishes for leave.

5. In these cases, operational requirements dictated the liquidation of lieu day credits before the end of the fiscal year. The grievances should be dismissed.

Conclusions

1. I have reviewed at length a number of Board cases dealing with the administration of a lieu day credit system as well as the Federal Court of Appeal decision in Anderson et al. Because of differing facts and agreement language, I do not find prior Board cases of much assistance. The Federal Court of Appeal decision in Anderson et al. is relevant and indeed determinative. Its relevance is explained below.

2. My point of departure is the identification of the scheme of things contemplated under the terms of the collective agreement with respect to the substantive benefit and the system for the administration of this benefit. It is clear to me that it is the administration of the benefit that has brought these two grievances before me.

3. The substantive benefit is set out in article 16 of the collective agreement. It reads as follows:

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.

4. With respect to the substantive benefit set out in article 16, I conclude as follows: "Designated holidays" are set out in article 16.01 as days listed from (a) to (1). It contemplates a total of eleven days and any other days proclaimed by law as a National holiday. This, in my view, is the substantive benefit.

5. With respect to benefit administration, the article distinguishes between an employee's "non-operating" and "operating" status. Article 16.03 has application to a non-operating employee. Articles 16.04 and 16.05 have application to an operating employee. Articles 16.02 and 16.06 apply to both. As the employees before me are both operating employees, the relevant articles are 16.01, 16.02, 16.04, 16.05, and 16.06. It seems to me that article 16.01 confers the substantive benefit. Articles 16.02, 16.04, 16.05, and 16.06 all relate to the administration of that benefit.

6. It is clear to me in this case and others that I have reviewed, that the nature of the substantive grievance before me arises because the collective agreement is not totally definitive with respect to benefit administration to operating employees. i.e. Who has the right to do what to whom?

7. With respect to the substantive benefit available to an operating employee, I conclude as follows:

- 1) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established.
- 2) The lieu day credit system is established to facilitate the substantive benefit set out in article 16.01 because of the work schedule of an operating employee.

3) In the cases before me, the evidence is that both grievors were credited eleven days as of April 1, 1981, the start of the 1981-82 fiscal year, as contemplated by article 16.05 (a) (Exhibits #14 and #15).

8. Given the establishment of the lieu day credit of eleven days, the agreement speaks to the consumption or liquidation of the benefit by an operating employee in articles 16.02 (holidays falling on a day of rest), article 16.05 (c) (extension to vacation leave or occasional days), and 16.05 (e) (carried over to the following year or paid off). However, it is clear to me that the combined effect of articles 16.02 and 16.05 (c) is such that they do not insure that the eleven day lieu day credit is completely consumed or liquidated before the end of the fiscal year. As a result, it provides for the carryover or payoff in article 16.05 (e). It is this construction that leads to the grievance before me. I view it thus: Inasmuch as article 16 does not provide for the total consumption or liquidation, (a) can the employer intervene in support of its desire that lieu day credits are used up during the fiscal year thus relieving the need for a carryover or payoff, or, (b) must consumption or liquidation be limited by that provided by articles 16.02 and 16.05 (c) and at times requested by the employee only and, as such, leaving any lieu day credits not consumed or liquidated to the carryover or payoff provision. In other words, what happens if the employee, for one reason or another, does not take advantage of the lieu day credit consumption or liquidation available in article 16.05 (c).

9. I believe the Federal Court of Appeal decision in Anderson et al is helpful in providing an answer. First, as I read it, it stands for the proposition that, as a matter of agreement language,

the employer can schedule employees for lieu days off and in the absence of the employee taking advantage of article 16.05 (c). The court had under review an alleged misinterpretation of the verb "to grant" as used in article 16.04 (b) when it says "...be granted a day of leave with pay at a later date in lieu of the holiday." In articles 16.05 (c) and (e) it reads "granted" and in article 16.05 (d) it reads "grant." It is my view that the meaning of the verb form used in articles 16.05 (c), (e), and (d) is the same as that available in article 16.04. The court concluded at page 717:

Under article 16.04, the employee who has worked on a holiday is given the right to "be granted a day of leave with pay at a later date". In my opinion, contrary to what was held by the adjudicator, the word "granted", in that provision, does not imply any request by the employee so that, if that provision stood alone, I would have no hesitation to say that the employer would always have the right to unilaterally decide when lieu days will be granted.

10. In the light of the foregoing, it is my view that the verb forms of "to grant" as used in article 16.05 (c), (e), and (d) should similarly be interpreted not to imply any request by the employee.

11. However, the court went on to say:

Is this right modified or limited by other provisions of the agreement? ... The sole limitation that article 16.05 places upon the right of the employer to determine when lieu days will be used is contained in paragraph (d)

which obliges the employer to make every reasonable effort to grant lieu days "at times desired by the employee." Does that paragraph impose on the employer the duty to make every reasonable effort to accede to an employee's request that his lieu days be carried over to a subsequent year? In my view, it does not because it merely refers to the granting of lieu days on precise dates requested by employees within the current fiscal year. I would add that insofar as article 16.05 gives employees the right to exchange lieu days for cash, this right is clearly limited to lieu days "which cannot be liquidated by the end of the fiscal year". It would be an abuse of language, in my view, to say that lieu days cannot be liquidated for the sole reason that the employee would prefer not to use them.

Inasmuch as the word "grant" in article 16.05 (d) does not imply any request by the employee and embraces a unilateral decision to schedule on the part of the employer, as I believe the court held, I conclude that the limitation to "...make every reasonable effort to grant lieu days at times desired by the employee" has application to lieu days scheduled unilaterally by the employer. The question thus becomes: In the facts of these cases, and given that the employer acted unilaterally to schedule and debit each grievor's lieu day credits, did the employer "...make every reasonable effort to grant lieu days at times desired by the employee." I think not. I reason as follows.

12. First, as noted from the review of the scheme of things set out in article 16, the substantive benefit is established at the

start of the fiscal year. At that time, the time frame available for lieu day credit consumption or liquidation is twelve months, i.e. through use under article 16.05 (c) including unilateral scheduling by the employer. That is, the time frame for consumption or liquidation is clearly a full twelve months. As the court noted: "...the computation and liquidation of lieu days is an annual affair and that, normally, lieu days are used in the year when they have been earned." (emphasis added). According to the evidence, at the time of the November 5, 1981 notice of the "change in policy" neither grievor had used any current lieu day credits. Further, the notice of November 5, 1981 (Exhibit #11) clearly announced that the time frame of the program to consume or liquidate the 1981-1982 lieu day credits was the balance of the fiscal year, i.e. from November 5, 1981 to March 31, 1982. It is my view that upon the establishment of the substantive benefit, its consumption or liquidation should proceed as an annual affair. While the employer has the unilateral right to schedule, I do not believe an effort to consume or liquidate the substance of an annual affair (twelve months) in a four month period meets the reasonable test contemplated in article 16.05 (d).

13. Second, while the employer did quite properly call upon each employee to indicate his choice of dates and while both grievors quite properly did so, it is my view that the employer is obliged under the reasonableness test contemplated in article 16.05 (d) to make employees more fully aware of the dates it has available for lieu day credits use. While the employer did speak to alternative dates, I do not believe it went far enough. I hold this view in part because of the obvious inability of the employer to accede to all employee requests for the more popular dates and, in part, because, as the court held, the right of the employer to unilaterally schedule

must be balanced by its duty to make every reasonable effort to grant lieu days at times desired by the employee. In the facts of these cases, I believe the employer acted too hastily in assigning dates and without "...every reasonable effort to grant lieu days at times desired by the employee." In addition, the employer in these cases worked towards lieu day scheduling within the five day cycle. Article 16 does not contemplate such a practice. I believe it is unnecessarily restrictive.

14. In the result, I find that, while the employer has the right to determine when lieu days will be used, in the facts of these cases it failed in its obligation, pursuant to article 16.05 (d) to make "...every reasonable effort to grant lieu days at times desired by the employee." These grievances shall succeed. With respect to the grievance of Michael E. O'Sullivan, I direct that the five day lieu credit charged against him in January, 1982 during the fiscal year 1981-1982 be returned to his lieu day account. With respect to the grievance of Laurent Derrien, I direct that the five day lieu credits charged against him in January, 1982 during the fiscal year 1981-1982 be returned to his lieu day account. It is so ordered. I retain jurisdiction with respect to all aspects in the implementation of this decision.

All of which is respectfully submitted.

For the Board,

C. Brian Williams,
Board Member and Adjudicator.

EDMONTON, July 15, 1983.