File: 169-2-396

No. 125.

THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

Canadian Air Traffic Control Association,

Bargaining Agent,

- and -

Treasury Board
(Transport Canada),

Employer.

RE: Reference under section 98 of the Act - Air Traffic Control Group

BEFORE: J. Harold Brown, Q.C., Chairman.

APPEARANCES AT THE HEARING: Mr. D. Brown and Mr. R. Marchand for the Bargaining Agent.

Mr. R. Cousineau and Ms. L. Brutesco for the Employer.

ART 19
CODE 402/82

Heard at Ottawa on September 13, 1983.

POSTING OF MATERIAL ON BULLETIN BOARD

1. This is a reference under section 98 of the Public Service Staff Relations Act which concerns employees in the Air Traffic Control Group bargaining unit.

2. The Bargaining Agent is alleging that the Employer contravened Article 19.02 of the collective agreement in effect between them. That article provides:

> Reasonable space on bulletin boards will be made available to the Association for the posting of official Association notices in convenient locations as determined by the Employer. Notices or other material shall require the prior approval of the Employer, except notices of meetings of their members and elections, the names of Association representatives and social and recreational affairs. Notices or other material pertaining to political matters or membership recruiting, or material which may be interpreted to reflect discredit upon the integrity or motives of the Employer, representatives of management, other employee organizations, or individuals shall not be posted.

3. The only evidence before me is an Agreed Statement of Fact filed at the hearing by counsel for the two parties, the contents of which read:

> The Canadian Air Traffic Control Association ("the Association") is the Bargaining Agent for Air Traffic Controllers employed by the Ministry of Transport.
>
> The respective rights and obligations of the Association and the Ministry of Transport at all material times are contained in Collective Agreement 402/82.
>
> On or about March 30th, 1983, Mr. J.M. Pinsent, Chairman of the Gander Branch of the Association, posted on the bulletin board at the Gander Area Control Centre a message to Association members, a copy of which is attached as Exhibit "A" to this Agreed Statement.

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On March 31st, 1983, Mr. Ed Dohaney, Unit Chief at the Gander Area Control Centre, removed the message from the bulletin board after having attempted, without success, to contact the Association's representatives.

On April 11th, 1983, Mr. J.M. Tonner, Regional Director of the Association, protested the removal of the message to Mr. Ed Smith, Regional Manager of Air Traffic Services. Mr. Tonner asked Mr. Smith to rescind the earlier decision to remove the message and to permit it to be re-posted. Mr. Smith refused to allow the message to be re-posted.

This Agreement is entered into without prejudice to the rights of either party to introduce further evidence at the hearing of this reference.

4. Exhibit "A", referred to in the Agreed Statement of Fact, and bearing the signature of Mr. Pinsent, reads as follows:

To: Shop Stewards and CATCA Members

Subject: Overtime Callout for less than seven hours

It is CATCA's opinion that any overtime callout is considered as overtime scheduled with short notice. The collective agreement states that no shift shall be scheduled for less than seven hours. The situation has occurred where callout has taken place for a four hour shift and this is being grieved by the individual. Until a resolution is reached all members are advised that working an overtime shift less than seven hours in duration is in violation of the collective agreement.

POSITION OF THE BARGAINING AGENT

5. Counsel for the Bargaining Agent submitted that, although there was no specific provision to that effect in Article 19.02 of the collective agreement, there is an implied obligation on the Employer not to act arbitrarily but rather to have some reasonable basis for refusing a request made by the Bargaining Agent to post a notice on a bulletin

board. In this regard counsel relied on the following arbitration cases: Re United Automobile Workers, Local 112, & de Havilland Aircraft Ltd. (1959) 9 L.A.C. 338; Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500 (1977) 14 L.A.C. (2d) 13; Re Canadian Union of Postal Workers and Treasury Board (Post Office Department (1978) 21 L.A.C. (2d) 96. In respect of the above awards he drew analogies between the fact situations and/or quoted statements contained therein that he argued were applicable to the instant reference.

6. Counsel also cited and relied on section 2(b) of the Canadian Charter of Rights and Freedoms which inter alia provides that "Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". He asserted that Mr. Pinsent, on behalf of the Bargaining Agent, simply was giving his interpretation to a provision of the collective agreement in effect between the parties relating to the scheduling of overtime. To deny him this entitlement contravenes section 2(b) of the Charter quoted above. In this regard, moreover, it cannot be said that Mr. Pinsent's memorandum reflects "...discredit upon the integrity or motives of the Employer" to use the language of Article 19.02.

POSITION OF THE EMPLOYER

7. Counsel agreed that the Employer cannot act arbitrarily in refusing permission to the Bargaining Agent to post a notice on a bulletin board. However, except in specified circumstances set out in Article 19.02 discretion for giving or withholding approval to post a notice rests with the Employer. What the Bargaining Agent was attempting to do by posting its own interpretation of the provision of the collective agreement relating to the scheduling of overtime shifts was to usurp the function of an adjudicator appointed under the Act.

In this regard, counsel asserts that an adjudicator already has interpreted the provision in question in a manner contrary to the interpretation placed on it by the Bargaining Agent in the Robertson and Parson Case (Board file 166-2-8797/98). Be that as it may, counsel argues that Mr. Pinsent's memorandum, quoted in paragraph 4 above, creates a climate of insubordination since the opinion expressed was not shared by the Employer. At the least the memorandum placed the integrity of the Employer in question. Accordingly, the Employer's refusal to accede to the request of the Bargaining Agent was neither arbitrary nor unreasonable.

8. Counsel distinguished the private sector awards and the adjudication decision of the Board cited by counsel for the Bargaining Agent on their facts and the circumstances in which the quoted passages relied on therein were made. Counsel also rejected the allegation that the Employer's refusal to approve posting of the notice on the bulletin board violated the cited provision of the Canadian Charter of Rights and Freedoms. In this regard he pointed out that the requirements of Article 19.02 were negotiated by the parties themselves and that in the context of the instant reference freedom of expression is not in issue.

DETERMINATION OF THE BOARD

9. I propose to deal first with the cases relied on by counsel for the Bargaining Agent to support the proposition that there is an implied obligation on the Employer to act reasonably in exercising any discretion granted to it by a provision of a collective agreement.

10. The article of the collective agreement before adjudicator P.A. Lachapelle in Re Canadian Union of Postal Workers and Treasury Board (Post Office Department) (supra) dealt with the posting of notices by the union on bulletin boards that required the prior approval of the

employer. However, unlike the instant reference, the article stated that the employer's approval "...shall not be unreasonably withheld". In light of this latter explicit provision, the decision is not authority for the proposition of any implied need for justification on the part of the employer for withholding approval.

11. In Re United Automobile Workers Local 112, & de Havilland Aircraft Ltd. (supra) the collective agreement provided that all notices had to be submitted to a company representative for approval before being posted on bulletin boards. In that case the union objected to a bulletin posted by the company setting out a work schedule covering the Christmas or New Year's holidays. The union thereupon presented its own bulletin to the company stating its position on the scheduling and requested authorization to post it which was refused. The union grieved this action by the company. His Honour Judge Cross found that the company had the right to post any bulletins it saw fit, although it possibly might become the subject of a policy grievance by the union. However, he further found that the fact that a company bulletin contains material to which the union objects does not confer on it the right to post its own position since the provision confined the subject matter of its notices to union activities. Accordingly, he dismissed the grievance. In the course of his decision C.C.J. Cross stated at page 340: "The company's authority still was a requisite of posting and the question before me is whether or not that authority was improperly or unreasonably withheld so as to constitute a violation of the agreement". While there is a similarity between the facts of that case and those in the instant reference, I do not find the above quoted statement, taken by itself, to be determinative of the issue before me.

12. Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500 (supra) is an award in respect of a grievance

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alleging unjust discharge. The grievor had been convicted of a criminal offence and had been sentenced to a term of imprisonment as a result. The employer refused to grant a leave of absence to serve the sentence and after the grievor had been absent for fourteen days the employer treated the absence as a quit. In regard to collective agreements the arbitrator in that case, O.B. Shime, Q.C., expressed the view at page 18 that, contained within the boundaries of collective agreements is "...an implicit assumption that the terms and provisions of the agreement must be construed so as to operate reasonably and with good faith during the life of the collective agreement...". Dealing with the issue before him inter alia at page 19 he went on to say that "...the company's discretionary right to grant a leave of absence must be exercised on a rational or reasonably objective basis". He concluded that the employer had not acted unreasonably in refusing to grant the leave of absence in question.

13. In my view there is, at the least, an implied obligation on the Employer not to exercise its discretionary authority under Article 19.02 arbitrarily or in bad faith. After saying that, care must be taken not to add duties or obligations to provisions of collective agreements which were neither negotiated nor intended by the parties. With this concern in mind I have reviewed other provisions of the collective agreement involving the exercise of discretion by the Employer.

14. Article 10.04 under the heading "Leave for Other Reasons" reads:

> At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the employee, including illness in the immediate family, as defined in clause 10.02, prevent his reporting for duty. Such leave shall not be unreasonably withheld.
>
> (underlining added for emphasis)

The same explicit obligation on the Employer not to unreasonably withhold leave appears also in Article 11.02 governing leaves of absences for employees to attend Association Executive Council Meetings, congresses and conventions. Further, in respect of changes in shift cycles, the last part of Article 13.02(c) reads:

> The parties shall consult on any request. A party shall not withhold its consent unreasonably. A party who refuses to consent shall deliver in a timely fashion its reasons in writing for withholding its consent.

15. By contrast, Article 19.02 gives the Bargaining Agent the unfettered right to post notices of "meeting of their members and elections, the names of Association representatives and social and recreational affairs". On the other hand it explicitly forbids the posting of "notices or other material pertaining to political matters or membership recruiting, or material which may be interpreted to reflect discredit upon the integrity or motives of the Employer, representatives of management, other employee organizations, or individuals". All other notices or material require the prior approval of the Employer.

16. In light of the above provisions of the collective agreement that explicitly require the employer not to "unreasonably" withhold its approval in a variety of situations and the clear cut delineation in Article 19.02 as to those notices that can or cannot be posted which involve no employer discretion, I must conclude that the absence of a requirement that the employer not unreasonably withhold its approval for the posting of notices, where it has a discretion, was an omission which the parties intended. Therefore, in the application of Article 19.02, I am prepared to find no greater an implied obligation on the Employer than not to act arbitrarily or in bad faith. The

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evidence does not warrant a finding that the Employer acted in such a manner in refusing its consent to the posting of the disputed notice. I would add that, based on the conclusion expressed above, it is not necessary for me to determine whether or not the Employer acted reasonably. Accordingly, I do not find that the Employer contravened Article 19.02 of the collective agreement.

17. I would finally mention that I accept the argument of counsel for the Employer as it relates to the Canadian Charter of Rights and Freedoms. In other words, I find no breach of the Charter by the Employer.

18. In the result, the reference is dismissed.

DATED AT OTTAWA this 18th day of October, 1983.

J. Harold Brown, Q.C.,
for the Board.