APR 16 1985

No. 105

Files: 161-2-322 and
161-2-323

THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

ROBERT FRADENBURGH,

Complainant,

AND:

D.A. LANE and CANADIAN AIR
TRAFFIC CONTROL ASSOCIATION,

Respondents.

RE: Complaint under Section 20 of the
Public Service Staff Relations Act

BEFORE: Michael Bendel, Deputy Chairman.

APPEARANCES AT THE HEARING: Robert Fradenburgh, Complainant.
Lois Lehmann, Counsel, and
Janet Delaat for D.A. Lane;
Catherine MacLean, Counsel, and
Robert Marchand for Canadian
Air Traffic Control Association.

Heard at Toronto, Ontario, February 14, 1985.

ART 5
CODE 402/82
EXTENSION OF TIME
LIMITS

DECISION

1. In his complaint, Mr. Robert Fradenburgh, an air traffic controller employed in the Department of Transport, alleged that Mr. D.A. Lane, Regional Administrator, Canadian Air Transportation Administration, had failed to comply with the regulations respecting grievances made by the Board pursuant to section 99 of the Act, in that he did not respond to two grievances within the stipulated time limits. The grievances related to alleged violations of a collective agreement. He also named his bargaining agent, the Canadian Air Traffic Control Association (hereinafter referred to as "CATCA") as respondent, alleging principally that, in respect of one of his grievances, CATCA had given its approval to an extension of the time within which Mr. Lane had to respond to the grievance without seeking his approval for such an extension.

2. At the outset of the hearing, counsel for CATCA requested that the complaint against CATCA be dismissed without a hearing since it did not, on its face, disclose grounds for a hearing. Ms. MacLean pointed out that Mr. Fradenburgh's complaint was framed in terms of paragraph 20(1)(d) of the Act, which reads as follows:

> 20.(1) The Board shall examine and inquire into any complaint made to it that the employer, or any person acting on its behalf, or that an employee organization, or any person acting on its behalf, has failed ...
>
> (d) to comply with any regulation respecting grievances made by the Board pursuant to section 99.

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It was not alleged by Mr. Fradenburgh that CATCA had violated any regulations issued by the Board. His real complaint against CATCA, she stated, was that, in granting an extension of time to Mr. Lane within which to respond to the grievance, CATCA had failed to obtain the complainant's consent. She observed that the basis for the extension of time was not to be found in the regulations, but in clause 5.17 of the collective agreement (code 402/82), which reads as follows:

> 5.17 Extension of Normal Time Limit
>
> The time limits stipulated in this procedure may be extended by mutual agreement between the Management representative and the employee, and the Association representative where the Association is representing the employee.

Ms. MacLean argued that Mr. Fradenburgh could not use a complaint under paragraph 20(1)(d) of the Act as a vehicle to question the granting of an extension of time by CATCA pursuant to clause 5.17 of the collective agreement.

3. The Board drew the attention of counsel for CATCA to the decision of the Supreme Court of Canada in Canadian Merchant Service Guild v. Gagnon (1984), 9 D.L.R. (4th) 641, in which the court expressed the view, at page 654, that "the exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent

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all employees comprised in the unit". This obligation flowed from a union's status as exclusive bargaining agent even in the absence of an express duty of fair representation and could thus be said to be an implicit statutory obligation. The Board pointed out that in previous decisions it had interpreted section 18 of the Act, which imposes on it a general duty to administer the Act, as giving it the power to inquire into and to remedy complaints relating to matters not mentioned in section 20. The Board asked counsel for CATCA why Mr. Fradenburgh could not show grounds for a hearing on his complaint against CATCA by alleging a breach of the duty of fair representation, relying on the dicta in the Gagnon decision (supra) and section 18 of the Act.

4. Counsel for CATCA responded by suggesting that the omission of a duty of fair representation from the Act was a deliberate one and that it would therefore not be proper to find an implicit duty of fair representation. She also pointed out that in Gagnon the plaintiff had sought his remedy before the civil courts and not before a labour relations board and she doubted that this Board could grant a remedy. Finally, she argued that Mr. Fradenburgh had brought his complaint pursuant to section 20 of the Act and the Board should not permit the proceedings to be transformed into a complaint under section 18.

5. In response to CATCA's preliminary objection, Mr. Fradenburgh acknowledged that the main thrust of his complaint was against Mr. Lane rather than CATCA. The

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Board asked him what remedy he sought against CATCA. He replied that he wanted the Board to make an order amending the forms used in relation to grievances, so as to spell out clearly that an extension of time limits for responses to grievances by employer representatives could only be granted with the grievor's consent. He pointed out that under subsection 73(2) of the PSSRB Regulations and Rules of Procedure (hereinafter referred to as the "Regulations"), the Board had the authority to require an amendment of the forms used in relation to grievances. He stated that he sought no other relief, not even a declaration, against CATCA.

6. The Board decided and announced at the hearing that CATCA's preliminary objection was well-founded and that the complaint against CATCA should be dismissed without a hearing. The Board stated that Mr. Fradenburgh's explanation of the relief he was seeking against CATCA had simplified its task of disposing of the preliminary objection. All that he sought against CATCA, he had said, was an order relating to forms to be used in relation to grievances. The Board pointed out that, even if it considered such an order an appropriate response to the complaint, the division of the Board hearing the complaint did not have the authority to require the employer to amend grievance forms. This was in essence a regulatory power belonging to the Board as a whole, which had not been delegated to this division of the Board. In any event, the Board stated that it did not see why an order to the employer to amend its forms, pursuant to subsection 73(2) of the Regulations, would be an order which would have to be

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addressed to a bargaining agent as well. The Board was thus satisfied that it had no power to grant the order sought by Mr. Fradenburgh against CATCA, the only relief asked for against the bargaining agent, and that the complaint against CATCA should therefore be dismissed. This conclusion, the Board stated, made it unnecessary to pursue the question of the bargaining agent's possible implied duty of fair representation or of the Board's power to treat this complaint as a complaint under section 18.

7. After the Board had announced its dismissal of the complaint against CATCA and after CATCA's counsel and other representatives had, with the Board's consent, withdrawn from the hearing room, counsel for Mr. Lane requested that the complaint against Mr. Lane also be dismissed without a hearing. Counsel explained that Mr. Fradenburgh's allegation was that a regulation made by the Board pursuant to section 99 of the Act, specifically subsection 77(1) of the Regulations, had not been complied with. Counsel pointed out that, in accordance with subsection 99(2) of the Act, regulations relating to grievances did not apply to employees "to the extent that such regulations are inconsistent with any provisions contained in a collective agreement entered into by the bargaining agent and the employer applicable to those employees". She submitted that subsection 77(1) of the Regulations, the violation of which was alleged by Mr. Fradenburgh, did not apply in this case because it was inconsistent with clause 5.17 of the collective agreement (reproduced earlier in this decision), which permits time limits to be extended. Subsection 77(1) of the Regulations is as follows:

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> 77. (1) Subject to subsection (2), where a grievance has been presented by an employee at any level in the grievance process in accordance with sections 74 and 75 and within the time prescribed by section 75 or 76, as the case may be, the authorized representative of the employer at that level shall serve upon the employee a reply to the grievance in writing not later than the 15th day after the day on which the grievance was presented at that level.

The Regulations make no provision for an extension of this 15-day period. A further inconsistency between the Regulations and the collective agreement, according to Ms. Lehmann, related to the recourse of an employee whose grievance was not responded to within the prescribed time limit. Under paragraph 76(b) of the Regulations, such an employee had 30 days after the last day on which the employer should have responded to the grievance within which to present the grievance at the next higher level, while under clause 5.08 of the agreement the employee had a 15-day period.

8. Counsel for the employer also referred the Board to the decision in Evans and the Commissioner of Corrections (Board File 161-2-177). There, the Board dismissed a complaint of failure to reply to two grievances within the prescribed time limits, after noting that, as of the date of the decision, the complainant had received replies and that there was no indication of bad faith on the part

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of the employer. Ms. Lehmann suggested that even if all of Mr. Fradenburgh's allegations were substantiated, his case would be no stronger than that of the complainant in Evans and the results should be the same.

9. In response, Mr. Fradenburgh took issue with the alleged existence of an inconsistency between subsection 77(1) of the Regulations and clause 5.17 of the collective agreement. His position was that clause 5.17 of the collective agreement was not relevant to his grievances since, in his view, clause 5.17 required that an extension had to be granted by the grievor and since he had granted no such extension. Mr. Fradenburgh also indicated that he intended to adduce evidence showing that Mr. Lane's failure to respond to his grievances on time was not an isolated incident but part of a pattern of disregard by Mr. Lane for his obligations under the Regulations.

10. Following the presentation of the submissions relating to the preliminary objection, the Board announced that it could not proceed further with the complaint at that stage. In particular, it appeared to the Board that the preliminary objection by Mr. Lane's counsel could not be disposed of without the Board interpreting clause 5.17 of the collective agreement. If, as alleged by Mr. Fradenburgh, clause 5.17, on its true construction, required the consent of the grievor to an extension of time limits, then there would have been no valid extension of time which Mr. Lane had available for the purposes of replying to the grievances; clause 5.17 could thus, arguably, not be invoked as a basis for denying the applicability of subsection 77(1)

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of the Regulations. If, on the other hand, a valid extension of time could be granted by the bargaining agent without the concurrence of the grievor, subsection 77(1) of the Regulations would be inapplicable to Mr. Fradenburgh and there would thus be no basis for a complaint that Mr. Lane had violated the Regulations. The Board stated that it would be improper for it to embark on an interpretation of clause 5.17 of the collective agreement without the parties to the agreement being given notice and an opportunity to participate. The bargaining agent, it will be recalled, had been named as a respondent and had been represented at the hearing, but, following the dismissal of the complaint against it, its counsel and representatives had left the hearing room. The other party to the collective agreement, the Treasury Board, had not been given notice as such, although Mr. Lane was represented by counsel from the Department of Justice, who was being assisted by staff relations officers from the Department of Transport. The Board therefore decided to adjourn the hearing with a view to permitting notice to be given to the parties to the collective agreement.

11. Since adjourning the hearing, however, the Board has decided that the complaint against Mr. Lane should be dismissed without a hearing on the merits.

12. In order to put things in a proper perspective, some further details of the complaint should perhaps be recited. Mr. Fradenburgh alleged that his first grievance was submitted at the second level, i.e. to Mr. Lane, on July 16, 1984. The material filed discloses that

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Mr. Fradenburgh acknowledged receipt of a reply on August 24, although the reply was signed by Mr. Lane on August 15. Under both the Regulations and the collective agreement, Mr. Lane had, exclusive of extensions, 15 days within which to reply, the word "days" being defined in both cases so as to exclude Saturdays, Sundays and designated holidays. In the absence of extensions, therefore, Mr. Lane should have replied by August 7. It was common ground that CATCA had consented to an extension, although the period of extension was not made clear by the material. As for his second grievance, it was presented at the second level, according to Mr. Fradenburgh, on September 17, 1984 and a response was received by him on October 22. In the absence of extensions, it should have been replied to by October 9. Mr. Fradenburgh claimed no knowledge of any extension of the time limit by CATCA for this second grievance, but Mr. Lane's counsel indicated her intention to adduce evidence, if necessary, to establish that an extension had been granted. Both of the grievances related to the same matter, namely familiarization flights, which are provided for under article 8 of the collective agreement. The responses to the second of these grievances indicated that, in management's view, Mr. Fradenburgh had presented his grievance too late, as it related to his failure to have a familiarization flight approved during the 1983 calendar year. A similar response was also given at the first level in respect of his first grievance. In order to complete the picture, it should perhaps be mentioned that Mr. Fradenburgh also presented a grievance relating to Mr. Lane's alleged failure to respond on time to his first grievance.

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13. If the Board heard evidence and further argument in relation to the preliminary objection, including the positions of the Treasury Board and the bargaining agent, it seems to the Board that the case would necessarily reveal one or more of the following possible sets of circumstances, to the exclusion of all others.

14. The first possibility would be that there had indeed been a valid extension of time for the response by Mr. Lane at the second level. If such were the case, the Board would clearly not have jurisdiction under paragraph 20(1)(d) in view of the inconsistency between the collective agreement and the regulations, as argued by Ms. Lehmann. Mr. Fradenburgh, moreover, would obviously have nothing to criticize as regards Mr. Lane's handling of the grievance, provided, of course, that he replied within the extended time limit.

15. The second possibility would be that there had merely been an invalid extension of time, invalid because, on its true construction, clause 5.17 of the collective agreement required the grievor's consent, which was never given. The Board will assume, without deciding, that in such a situation subsection 77(1) of the Regulations would apply as there would be no relevant inconsistency with clause 5.17 of the collective agreement. On the basis of this assumption, there may therefore have been a violation of the Regulations. Mr. Lane, however, could scarcely be blamed for having taken the purported extension at face value and having regarded it as valid. The Evans decision (supra) would suggest that, other things being

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equal, the appropriate disposition would be to dismiss the complaint, at least if the response was given within the extended time limit.

16. The third possibility would be that there had been an invalid extension of time and that the reply had been given beyond the new deadline. A final possibility would be that there had been no extension of time at all, as Mr. Fradenburgh claimed in respect of his second grievance. In either of such cases, obviously the scenarios most conducive to some blame being attributed to Mr. Lane, the Board would still be of the view that the complaint should be dismissed without a hearing. Both the Regulations and the collective agreement provide that, upon non-receipt of a reply within the stipulated time limits, a grievor may present his grievance at the next higher level without having to wait for a reply, as noted by counsel for Mr. Lane. While this does not relieve an employer representative of his obligation to respond to a grievance within a certain time frame, his failure to do so would not prejudice the employee's pursuit of the grievance, at least where, as in the case of Mr. Fradenburgh, the grievance was referrable to adjudication. It would therefore seem reasonable to conclude that both the Regulations and the collective agreement envisage that the proper recourse for a grievor in the position of Mr. Fradenburgh would be to present the grievance at the next higher level without waiting for a reply, rather than to seek to compel a response from the tardy management representative in question.

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17. Even if Mr. Fradenburgh succeeded in establishing that there was no extension of time in respect of the second grievance, or that a reply was given beyond an extended deadline, there would, at worst, have been a minor violation of the Regulations by Mr. Lane. The extent of the delay, at the most, would have been about two weeks. Despite Mr. Fradenburgh's allegation that Mr. Lane had been late in responding to several other grievances, the Board would have difficulty in believing that his violation of the Regulations, if any, was in bad faith. Since Mr. Fradenburgh did receive a reply to the grievance, albeit a few days late, it is difficult to see what prejudice he might have suffered.

18. The Board wishes to emphasize that, in its view, its statutory powers in relation to complaints were designed to have a remedial focus. The primary concern of the Board must be to solve problems. Its objectives must never be to humiliate or punish. It follows, as a general proposition, that if a violation of the Act or Regulations is corrected before the Board renders a decision, the Board would be overstepping its true role in issuing any order under subsection 20(2). There might be cases where, notwithstanding the resolution of a problem, it would be desirable for the Board, in the interests of providing guidance to the parties for the future, to express its views on whether there has been a violation. This is not such a case. It appears to the Board that, even if there was a violation of the Regulations, no prejudice has been suffered by Mr. Fradenburgh and no valid purpose would be served at this stage by inquiring into the possible violation of the Regulations.

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19. For all these reasons, the complaint against Mr. Lane is dismissed without a hearing on its merits.

DATED AT OTTAWA, this 3rd day of April, 1985.

"Michael Bendel"
For the Board