

JUN 20 1985

File: 166-2-14737

No. 161

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

BETWEEN:

WALTER S. GALKA,

grievor,

AND:

TREASURY BOARD  
(Transport Canada),

employer.

Before: Walter L. Nisbet, Q.C., Deputy Chairman.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Harvey A. Newman, counsel.

Heard at Ottawa, April 22, 1985.

LTR 3-82  
CODE 402/82

NO ASSIGNMENT OF NON CONTROL  
DUTIES + CHARGED LEAVE CREDITS

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## DECISION

1. Before February 8, 1983 the grievor was employed as an operational air traffic controller at the Regina Terminal Control Unit where he was a shift supervisor classified AI-04. The grievor is included in the Air Traffic Control Group bargaining unit for which the Canadian Air Traffic Control Association is certified as the bargaining agent.

2. At the hearing counsel for the grievor submitted a Statement of Fact signed by the parties on April 19, 1985 in which most of the facts material to this case are set out. It states as follows:

### AGREED STATEMENT OF FACT

1. The grievor is an AI4 employed by the Treasury Board within the Air Traffic Services Branch of the Department of Transport.
2. At all material times the terms and conditions of his employment were governed, inter alia by Collective Agreement 402/82 between Treasury Board and the Canadian Air Traffic Control Association ("CATCA"), expiry date December 31st, 1982 as extended by the Public Sector Compensation Restraint Act, S.C. 1980-81-82 c. 132 as amended.
3. Before becoming ill in 1983, the grievor performed the duties of an operating controller at the Regina Terminal Control Unit. He had performed active control duties for more than five years prior to 1983.

4. On January 24th, 1983, the grievor ceased to exercise active control duties for medical reasons.

5. In order to perform active control duties each air traffic controller is required to have a medical endorsement on his air traffic control licence. On February 8th, 1983, the grievor's medical endorsement was revoked because he no longer met the medical licensing standards for an air traffic controller.

6. By letter dated February 28th, 1983, Mr. N.R. Addaway, Acting Regional Manager, Air Traffic Services for the Central Region, advised the grievor that as a result of his medical endorsement having been revoked, he was being placed on salary maintenance pursuant to Letter of Understanding 3-82 of the CATCA/Treasury Board Collective Agreement from February 8th, 1983 to February 7th, 1984. See Annex "A". This letter was received by the grievor on March 2nd, 1983.

7. On March 3rd, 1983 the grievor telephoned Mr. S. Dewar, Unit Chief, for the Regina Terminal Control Unit and advised Mr. Dewar that he was available for work to perform other duties related to his technical background in accordance with Letter of Understanding 3-82.

8. Mr. Dewar advised the grievor to stay at home as he had no duties for him to perform. At no time during his year of salary maintenance was the grievor asked by the employer to perform any duties.

9. On April 2nd, 1983, the employer asked the grievor to apply for sick leave for the period from January 24th, 1983 to March 31st, 1983 (40 days). The grievor did so believing that this was in keeping with the 60 days referred to in Letter of Understanding 3-82 and in order to assist the office in cleaning up its leave records for the fiscal period ending March 31st, 1983.

10. In the first week of February, 1983, the Unit Chief asked the grievor to sign leave forms for the period of salary maintenance back to April 2nd, 1983. The grievor refused to do so and sought the advice of his CATCA representative concerning his obligations under Letter of Understanding 3-82.

11. By memo dated April 2nd, 1984, Mr. Dewar asked the grievor to sign "Application for Sick Leave" forms for the period from April 1st, 1983 to February 5th, 1984. In the memo, the grievor was advised that failure to sign the forms would be considered to be a breach of Letter of Understanding 3-82 and that pay action deduction would be taken if he failed to sign them. See Annex "B".

12. In view of the position taken by the employer, on April 5th, 1984 the grievor signed sick leave request forms for the period from April 2nd, 1983 to February 1st, 1984. Each form was signed with the following waiver: "I sign this without prejudice, subject to future corrective action".

13. The employer charged 210 days sick leave from the employee's accumulated bank of sick leave for the "maintenance

of salary period" February 8th,  
1983 to February 7th, 1984.

This Agreement is signed without prejudice of either party to adduce further evidence at the hearing of the reference to adjudication of this grievance.

Dated at Ottawa this 19th day of April, 1985.

Attached to the Agreed Statement of Fact and referred to in it are Annex "A" and Annex "B". Annex "A" is a Memorandum dated February 28, 1983 addressed to the grievor by Mr. N.R. Addaway, Acting Regional Manager, Air Traffic Services, Winnipeg. It reads as follows:

Information has been received from the Regional Supt., Air Regulations, that the privileges of your Air Traffic Controller Licence were suspended on February 8, 1983 for medical reasons.

As a result of your medical endorsement being revoked you are hereby placed on maintenance of salary as described in Letter of Understanding 3-82 of the Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association.

This maintenance of salary takes effect on the date your medical endorsement was revoked, February 8, 1983, and will conclude on February 7, 1984.

Your status will remain as operational and during this period your salary will be maintained and all leave debits

will be calculated on an operational basis.

If you should return to operational duties, the period of maintenance of salary will be recorded and will be deducted from the one year period if it should become necessary for you to return to a lengthy period of sick leave.

Please feel free to contact us at any time if you have any questions.

Annex "B" is a memorandum dated April 2, 1984 sent to the grievor by his immediate supervisor, Mr. S.L. Dewar. It reads as follows:

APPLICATION FOR LEAVE

In conjunction with the Treasury Board/CATCA Agreement, Letter of Understanding No. 3-82, please sign the Application for Leave forms for the period April 1, 1983 to February 5, 1984, during which time you were on Maintenance of Salary and as such will be considered on "Sick Leave".

Your failure to sign the forms will be considered to be a breach of the Agreement and as such pay action deduction will be taken.

3. Counsel for the grievor stated that the issue raised by the grievance for my determination involves the interpretation of Letter of Understanding #3-82, dated May 28, 1982, attached to and forming part of the collective agreement mentioned in paragraph 2 of the Agreed Statement of Fact. That letter states as follows:

This is to confirm an understanding reached during the current negotiations in respect of removal from active control duties for medical reasons.

Provided a controller has performed active control duties for a period of five (5) years and is no longer able to perform active control duties for medical reasons, it was agreed that the individual involved would suffer no loss of his normal pay for a minimum of one year. This one-year period will commence on the date on which the medical endorsement of his air traffic controller licence is revoked or sixty (60) days following the first day that he ceased to exercise active control duties as a result of being on sick leave, whichever is earlier. This maintenance of salary would be conditional upon the employee first performing other duties related to his technical background and/or experience as assigned by the Employer for which he is medically qualified. If the employee is unable to perform such duties because of medical reasons, then he must utilize all earned leave credits during the maintenance of salary period referred to above.

4. Counsel for the grievor stated that by placing the grievor on salary maintenance commencing February 8, 1983, the employer complied with Letter of Understanding #3-82. However, counsel also stated that the maintenance of the grievor's salary was conditional upon him first performing other duties related to his technical background and/or experience as assigned by the Employer for which he was

medically qualified as set out in the second last sentence of the second paragraph of the Letter of Understanding. Because the employer did not assign other duties to the grievor, he had to use sick leave for the purpose of maintaining his pay while he was not performing his duties. She argued that by not assigning duties to the grievor and by requiring him to use sick leave, it violated the last two sentences of the Letter of Understanding. She submitted that it is only if an employee is unable to perform other duties related to his technical background and/or experience for medical reasons that he must use sick leave. If the employer could require the use of sick leave by merely refusing or failing to assign such duties regardless of the ability of the employee to perform them there would have been no need for the bargaining parties to have exchanged the Letter of Understanding. She submitted that it is a necessary implication arising out of that letter that the employer must assign the "other duties" contemplated in it.

5. Counsel for the grievor referred to Letter of Understanding #4-82 dated May 28, 1982, annexed to and forming part of the collective agreement mentioned in the Agreed Statement of Fact. The thrust of that letter is that functions which are now performed by members of other bargaining units would not normally be assigned to members of the Air Traffic Control Group bargaining unit, nor would functions which are presently only performed by members of the Air Traffic Control Group bargaining unit be assigned to members of other bargaining units. Counsel stated that this letter meant that the employer



could only assign duties to the grievor that were related to his technical background.

6. Counsel for the grievor argued that if an employee is too ill to perform the "other duties", he must use sick leave, a sensible result to be expected by any employee too ill to perform his duties. However, the grievor was well enough to perform other work but was not permitted by the employer to do so. Counsel submitted that the grievor cannot be required to use sick leave simply because the employer failed to assign "other duties" to him. She requested reinstatement of the grievor's sick leave taken after March 3, 1983.

7. Counsel for the employer referred to paragraph 8 of the Agreed Statement of Fact and pointed out that the determination that no duties were available for the grievor at Regina was a genuine determination made in good faith.

8. Counsel submitted that Letter of Understanding #3-82 establishes what amounts to a guaranteed bank of sick leave for one year in addition to any further sick leave that may be available as a result of accumulated credits. The employer is protected because it does not have to grant sick leave if "other duties" can be performed. It is simply not reasonable or fair to expect the employer to maintain the salary of an employee who does not work when alternate work is available. The letter of understanding provides that an employee must first perform duties assigned by the employer if he is medically able to

do so, but the duties must be related to the employee's technical background. They cannot be insignificant. However, any "other duties" related to the employee's technical background must be performed if the employee is medically able to perform them even if the duties are of less value than those assigned to his operational classification. Counsel submitted that the loss by the grievor of his licence endorsement raises for him an entitlement to sick leave, i.e., maintenance of his normal salary. It is only if work is performed by him that sick leave is not used. His salary level is maintained regardless of the nature of any alternate duties he may be assigned. The implication raised by the letter of understanding is that, if an employee is unable to perform his duties he is entitled to sick leave (clause 9.02 of the collective agreement). Sick leave ends when accumulated credits are exhausted. The Letter of Understanding guarantees sick leave for one year regardless of the existence of sick leave credits. The letter explicitly sets out the circumstances in which sick leave will have to be used during the salary maintenance period. If the employer fails to assign "other duties", the employee's lack of performance of such duties, of necessity, places him in the position of requiring sick leave and he can only be paid his salary if he takes sick leave. An employee must perform the "other duties" assigned by the employer and cannot opt to take sick leave instead. The question that arises is whether or not the employer has a corresponding obligation to assign "other duties" in order to prevent the use of sick leave? Counsel answers in the negative. The employer has no such obligation and if no "other duties"

are assigned, the employee is "on leave" for the salary maintenance period and must use sick leave to the extent available to him.

9. Counsel submitted that the employer has the following options:

1. It may do nothing and maintain the employee's salary for the one year minimum period. (If the maintenance period extends beyond one year the employee must take sick leave if his salary is to be maintained).

2. Assign "other duties", in which event no sick leave is taken.

10. Counsel submitted that it is the employer's prerogative to assign or refuse to assign duties. The only condition that requires an employee to use sick leave is if he is medically unable to perform "other duties". There is nothing in the letter of understanding setting out the effect of the failure of the employer to assign "other duties" on the use of sick leave. If the employee is able to perform those "other duties" but the employer fails to assign them, then what justification is there for using sick leave? Counsel submitted that that situation cannot properly be characterized as one involving sick leave, i.e., the employee's lack of performance of duties is for a reason not related to his medical condition.

11. Counsel argued that the grievor is entitled to be absent from his operational position because of illness.

Ordinarily this absence would have to be covered by the use of sick leave. If no "other duties" are assigned by the employer he is still absent from his operational position because of illness. For that reason he is entitled to sick leave and such leave must be used to cover his absence from work regardless of the reason for his not performing "other duties".

12. Counsel submitted that the grievor will receive his normal pay one way or the other during the salary maintenance period for him, regardless of the existence of sick leave credits. The letter of understanding does not say that the employer must assign "other duties" or make any reasonable effort to do so. An employee remains on sick leave if no "other duties" are assigned and after the expiry of the one year minimum period, the employee can continue to be absent with pay only if sick leave credits are available to him.

13. Counsel for the grievor, in reply, submitted that if the argument advanced by counsel for the employer were correct there would be no need for the last sentence to be included in the letter of understanding. If an employee must use sick leave for any absence from duty caused by the loss of his medical endorsement, then he must be regarded as being on sick leave during his salary maintenance period and regardless of whether or not he performs "other duties".

14. Counsel argued that the argument advanced by counsel for the employer would require the use of words to

qualify the application of article 9 of the collective agreement which are absent. Counsel argued that it is not fair that an air traffic controller be required to use sick leave when he is well enough to work.

15. There is no reference to sick leave in the Letter of Understanding. The maintenance of salary for one year provided by the letter is an added benefit. If an employee refused to perform "other duties" assigned by the employer he would be able to use sick leave but would not qualify for one year of salary maintenance. During the salary maintenance period an employee must perform work he wouldn't normally perform. That is not a situation that could give rise to an entitlement to sick leave. The letter provides solely for the maintenance of salary.

#### REASONS FOR DECISION

16. The only issue before me in this case is whether or not the grievor is entitled to the restoration of 210 days of sick leave the grievor was required by the employer to take during the period from February 8, 1983 to February 7, 1984. The parties are agreed that the grievor was properly placed on salary maintenance pursuant to the Letter of Understanding 3-82. The employer contends that, because the grievor did not perform duties other than those he had been performing as an operational air traffic controller related to his technical background and experience he had not met the condition expressed in the Letter of Understanding for the maintenance of his salary. The parties are agreed that the reason the grievor

did not perform such duties was because none were assigned to him by the employer. The grievor had advised his supervisor that he was ready, willing and able to perform other duties related to his technical background in accordance with the Letter of Understanding.

17. In these circumstances, I have little difficulty in determining that the grievor is entitled to the restoration of the 210 days of sick leave he was required to use during his salary maintenance period. The grievor had performed active control duties for a period of five years prior to the commencement of his salary maintenance, for medical reasons. Accordingly, he was protected against any loss of his normal pay for a minimum of one year. He was entitled to be so protected whether or not he was entitled to sick leave during that period. The only reason the grievor would have been required to take sick leave during his salary maintenance period would have been his inability for medical reasons to perform the other duties related to his technical background assigned to him by the employer. No other circumstance could have given rise to such a requirement. The fact that the employer did not assign to the grievor other duties related to his technical background is not a reason for requiring the grievor to take sick leave. The employer's prerogative to assign duties, or to refrain from doing so, is not affected by the Letter of Understanding. However, that letter obliges the employer to maintain the grievor's salary for a period of one year where his medical endorsement on his licence is revoked. If it chooses not to assign to him other duties related to his technical

background during his salary maintenance period, it cannot be heard to say that the grievor was unable to perform such duties for medical reasons.

18. Accordingly, the grievance is allowed and the employer is ordered to restore the sick leave taken by the grievor during his salary maintenance period.

Walter L. Nisbet, Q.C.,  
Deputy Chairman.

OTTAWA, June 17, 1985.