

File No.: 166-2-14888

No. 234.

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

BETWEEN:

JOHN H. HILL,

grievor,

- and -

TREASURY BOARD
(Transport Canada),

employer.

Before: J. Galipeault, Board Member.

For the grievor: Ms. C. MacLean, counsel.

For the employer: L. Leduc, counsel.

ART 13
CODIE 402/82

CHANGE IN
STATUS

Heard at Moncton, New-Brunswick, July 12, 1985.

DECISION

The grievor, John H. Hill, is an air traffic controller, AI-4, for Transport Canada, at the Moncton Tower. On May 29, 1984, he submitted the following grievance and corrective action requested:

I was unilaterally changed from operational to non-operational status for the period from May 3, 1984 to June 6, 1984 inclusive. As the requirement for this change was for less than 30 consecutive calendar days (a training course at TCTI from May 7 to 25 inclusive) this change is in violation of the CATCA/TB Collective agreement Article 13.08.

1. That I be credited with operational time for the period May 3 to June 6, 1984.
2. That I be paid at the appropriate overtime rate for those days that would have been my normally scheduled days of rest and any appropriate premiums.

Article 13.08 of the Collective agreement between the Treasury Board and the Canadian Air Traffic Control Association, January 1, 1981 - December 31, 1982, code 402/82, reads as follows:

Change in Employee Status

It is understood that certain employees, because of the nature of their duties, may be required to change from an operating employee to a non-operating employee for varying periods of time. No change in such an employee's status will be made unless the requirement to change is consistent

for thirty (30) consecutive calendar days or more. Advance notice of such requirement which will involve a change in the employee's status should be given at the earliest possible date but in any case no less than fifteen (15) calendar days prior to the earliest date that the changed circumstances may commence. If notice of the change is less than fifteen (15) calendar days, the employee shall be paid a premium of four (4) hours' pay at the straight time hourly rate for each shift or day worked during the period of the change for which he had not received fifteen (15) calendar days' notice. Such notice shall not be required nor is the premium payable when the employee concerned is promoted, is acting in a higher level position or the change is in response to the employee's request.

This clause does not apply to an Air Traffic Controller-in-Training prior to the completion of his ab initio training at TCTI.

The employer's response at the final level of the grievance procedure was as follows:

Your grievance of May 29, 1984 has been carefully reviewed and the matter was discussed with a representative of your Association.

I find that the change of status from operating employee to non-operating employee was consistent with the provisions of the TB/CATCA collective agreement.

It would appear that in the first part of the corrective action requested, you express concerns

regarding your operational service under the Superannuation Act. I would like to assure you that for the purpose of calculating operational service under the Superannuation Act, a period of less than six months away from active control duties does not affect your entitlements associated with the special ATC pension benefits.

EVIDENCE

The grievor testified with respect to his grievance. He filed seven exhibits. Mr. J. Navaux was heard for the employer. One exhibit was filed by the employer.

Mr. Hill said that, in the summer of 1984, he completed his training to become a Data System Coordinator (DSC). The training lasted one year and a half and the grievor was on courses for 22 weeks. Mr. Hill stated that when he was not on courses, he worked on projects for DS managers, to whom he reported, and he also worked with the DS coordinator on job training. The grievor was on a 5 days on, 4 days off, 5 days on, 3 days off schedule. He worked 8½ hours on day, evening or night shifts. The day shift was from 7.30 a.m. to 4.00 p.m., the evening shift was from 3.30 p.m. to 12.00 p.m. and the night shift was from 11.30 p.m. to 8.00 a.m. Mr. Hill declared that, prior to May 1984, he was, for one period, non-operational. The grievor reported that, for six weeks, he followed two courses and his status changed from operational to non-operational. The grievor said that he was working on a 5 days on, 2 days off shift, which was the shift of the school he attended. Mr. Hill declared that in May 1984, he was in the final phase of his training.

The grievor said that on April 22, 1984, he received a memorandum, dated April 18, 1984 and filed as Exhibit G-1, from Mr. J. Navaux, the shift manager at the time, which memorandum had to do with his future scheduling. It was stated that Mr. Hill was changed from operational to non-operational status for the period of May 3 to June 6 inclusive. The grievor went to see Mr. Navaux a few days after April 22 and told him that he was not happy that he had been changed from operational to non-operational because of a course he was following. Mr. Navaux said to Mr. Hill that he had not much choice. The grievor had to be scheduled that way because a grievance with respect to shift cycles had been upheld. Mr. Hill declared that he followed his new schedule. Mr. Hill filed, as Exhibit G-2, the operational schedule he was following while on training. He said that he took leave on the days he was supposed to work in the "office", more particularly at the DSC library. The grievor stated that the employer did not tell him what to do when he would not be working in the office. He was not advised of any project. Mr. Hill said that his hours of work, when he was non-operational, were from 8.00 a.m. to 4.30 p.m., Monday to Friday inclusive. It was a 37½ hour week.

Mr. Hill stated, during his cross-examination, that he decided to become a DSC during the fall of 1983. He added that during his training to become a DSC, he remained an air traffic controller. The grievor's training started in January 1983 with a five-week introductory course which lasted until February. From February to the end of March, there was a five-week advance course. The OIDS course was from November 1

to November 7 while the JETS course went on from November 8 to December 9. Mr. Hill could not take the ICSS course during the fall of 1983 because of death in the family. He took it later, in 1984. The grievor revealed that when he met Mr. Navaux, a few days after April 22, 1984, he did not tell him that he would later submit the present grievance. Mr. Hill's grievance was submitted May 29. He was at the office for two hours on May 29, just for the submission of his grievance.

Ms. MacLean asked the grievor to file the following documents: Exhibit G-3: Automation Documentation Project; Exhibit G-4: memorandum from J. Linkletter, DSC, to W.B. Clory, dated June 6, 1984, relevant to Documentation Research Automation Section, Toronto ACC; Exhibit G-5: memorandum from W.B. Clory to J. Linkletter, dated July 4, 1984 relevant to Terms of Reference - Project Manager - Site Automation system documentation; Exhibit G-6: memorandum from D.J. MacKeigan, A/chief, Moncton ACC, to DSM, Moncton ACC, dated July 30, 1984 relevant to Documentation Project - DSC's; and Exhibit G-7: Update documentation project.

Mr. J. Navaux testified that he was, between March 1983 and January 1985, shift manager at Moncton. He is now regional supervisor of training and career development. The witness said that, when he was shift manager at Moncton, Mr. Hill reported to him with respect to scheduling and leave. The grievor reported, for functional purposes, to the Data Manager. Mr. Navaux reported that Mr. Hill had indicated since 1976 that he wanted to become a DSC and he was thus given the opportunity to follow the appropriate

courses. The witness explained that Mr. Hill was selected from a group of applicants and then started his training. When Mr. Hill left to go on courses, he ceased to be operational after thirty days on said courses. Mr. Navaux declared that when the grievor received the round trip memorandum, filed as Exhibit G-1, he had already taken all courses except the ICSS one. The ICSS course, which Mr. Hill could not take in the fall of 1983 because of death, at that time, in his family, had to be taken in May 1984.

Mr. Navaux declared that Mr. Hill had spent more days on job training than normal. The grievor was not required to perform shifts. His schedule was designed to permit him to accommodate the courses he was following. The witness affirmed that Mr. Hill was not asked to perform what is reported in documents filed as Exhibits G-3 to G-6 inclusively. The grievor was to update documentation for the library. Mr. Hill became a DSC on July 6, 1984. Mr. Navaux declared that if Mr. Hill had told him that he would grieve, when he met with him after April 22, he would not have been sent on course.

During his cross-examination, Mr. Navaux said that while Mr. Hill was on training, he remained in his position at Moncton operation control until July 6, 1984 when he became a DSC. The witness declared that there was an understanding that the employer could not amend the schedule of an employee on training. Rather, the employer would be obliged to pay overtime.

Mr. Navaux stated, in re-examination, that when Mr. Hill was on training he did not perform the duties of an air traffic controller.

Before she argued, Ms. MacLean submitted to me a "monetary document" for possible later use. I was asked to remain seized for application of the present decision if the grievance was to be upheld. I decided I would do so.

ARGUMENTS

Ms. MacLean argued that at all times until he became a DSC, the grievor held the position of an air traffic controller in Moncton Control Center. Mr. Hill was treated by the employer, from January 1983 until May 2, 1984, as an operational controller. He worked the work week of an operating employee. The grievor worked the schedule mentioned in article 13.02(a) of his collective agreement. The grievor's counsel said that although Mr. Hill was training for another position, article 13.02(c), he remained an operating employee within the definitions of his own collective agreement. The grievor followed 22 courses in a year and one half in order to become a DSC and it is only when he had the ICCS course, a three-week course only, left that the employer decided that he should go from operational to non-operational. Ms. MacLean wondered why Mr. Navaux decided to change the grievor's status, shift cycle and schedule. The reviewed evidence showed that Mr. Navaux had said to Mr. Hill that he had not much choice because of a grievance recently upheld by the Federal Court of Appeal. There was no real need for Mr. Hill to become non-operational for a period of only three weeks.

Counsel for the grievor submitted that the Richard decision was the only reason why Mr. Hill was changed

from operational to non-operational. The employer had to find something and it found that. The employer, when it changed Mr. Hill's status from operational to non-operational, saved more than \$2,500. Ms. MacLean commented on the text of article 13.08 and said that the requirement for change of status must be linked to duties that had to be done and also that the requirement to change had to be consistent for thirty consecutive calendar days or more. The employer only said to Mr. Hill that it wanted him to become non-operational. Since the employer did not want to pay the grievor overtime, it had to find something for Mr. Hill to do that would be for more than 30 days and it did. Ms. MacLean contended that this is not permitted. What the employer really did in the present matter was only a paper exercise because it did not want to abide by the decision of the Federal Court of Appeal in Her Majesty the Queen in right of Canada as represented by the Treasury Board and Regis Richard, as represented by the Canadian Air Traffic Control Association Court file no. A-866-83, and thus keep the \$2,500 it would have had to pay the grievor in overtime. It was a sham. If the employer had not breached article 13.08 of the relevant collective agreement, Mr. Hill would have retained his operational status and would have thus been able to earn what was rightfully due to him. Counsel for the grievor asked again that I remain seized for application of the present decision in case Mr. Hill's grievance was to be upheld.

Counsel for the employer argued that the employer's position is simple. Article 13.08 of the relevant collective agreement gave the employer the right to change the grievor's

status from operational to non-operational. Article 1 of the collective agreement gives the definition of an operating employee. While Mr. Hill was a DSC in training, he was not performing the duties of an air traffic controller, although he was still an operating controller. The evidence is to the effect that when the grievor attended from May 2 to May 25 the ICCS course, he was attending a course of a non-operational nature. Mr. Hill was asked to perform, for a period of over 30 days, non-operational duties. The grievor had to perform those duties as asked by the employer under rights granted to the employer by article 3.01 of the collective agreement and Section 7 of the Public Service Staff Relations Act.

Mr. Leduc submitted that at the beginning of article 13.08, it is said "because of the nature of their duties", and not "by the nature of their duties", certain employees may be required to change from an operating employee to a non-operating employee for varying periods of time. Mr. Hill was asked to do in May, June and July non-operational duties. The employer can ask an employee to perform many duties, not just one. Article 13.08 does not limit the duties to be performed. The grievor was asked, during his "office" days, Exhibit G-1, to organize/amend the DSC library but he chose to take leave instead on those days. That work had to be done. When the employer assigned different duties to the grievor, it fulfilled the conditions of article 13.08. The change from operational to non-operational is to be for thirty days or more and it was.

Ms. MacLean replied that the change which was made by the employer in the present matter was not a real change. The employer did not sit down with the employee and did not show him that the proposed change was appropriate and legitimate. What Exhibit G-1 shows is not real duties to be performed but a set of supposed duties put there just to fill the thirty days required by article 13.08. Exhibit G-1 says that Mr. Hill was to go to the office, on "office" days, and work in the library. This is not a duty meant by article 13.08.

REASONS FOR DECISION

As we know, the grievor stated, in his grievance, that he was "unilaterally changed from operational to non-operational status for a period from May 3, 1984 to June 6, 1984 inclusive. As the requirement for this change was less than 30 consecutive calendar days (a training course at TCTI from May 7 to 25 inclusive) this change is in violation of the CATCA/TB Collective agreement Article 13.08".

Article 13.08 of the relevant collective agreement is really to the effect that no change in an employee's status from operating to non-operating will be made unless the requirement to change is consistent for thirty (30) consecutive calendar days or more.

When the grievor testified, he said that after he received Mr. Navaux's round trip memorandum, Exhibit G-1 he went to see the latter to express his displeasure with respect to the announced change from operational to non-operational status and Mr. Navaux told him that he had not much

choice. Mr. Hill had to be scheduled that way because a grievance with respect to alteration of shift cycles had been upheld. When his turn to testify came, Mr. Navaux did not contradict Mr. Hill's above allegation. As we can see right away, the grievor was not really required to change from an operating employee to a non-operating employee because of the nature of his duties. It was only because a decision upholding a grievance with respect to alteration of shift cycles had recently been rendered by the Federal Court of Appeal against the employer.

When Mr. Hill testified, we also learned that said Mr. Hill could not take the ICSS course during the fall of 1983 because of death in the family. The ICSS course was taken from May 7 to May 25, 1984. When the grievor could not take, during the fall of 1983, the ICSS course, it was agreed by the employer that said course could be taken later by Mr. Hill. At the time, as at all times when Mr. Hill took the other 21 courses, the grievor was considered to be an operating employee. The employer, when it was learned that the ICSS course had to be postponed to 1984, never told the grievor that, at that time, he would then become non-operational. Mr. Hill was operational during 21 courses and I do not see why he did not remain operational during the last one. In fact, Mr. Navaux, during his cross-examination, said that while Mr. Hill was on training, he remained in his position at Moncton operation control until July 6, 1984 when he became a DSC. Mr. Navaux added that there was an understanding that the employer could not amend the schedule of an employee on training. The employer would be obliged to pay overtime. I submit that if there was an understanding that the employer could not amend the schedule of an employee

on training, there was also implicitly an understanding that he could not change his status from operational to non-operational unless the nature of the duties of the concerned employee really required it, which was not the case here.

Exhibit G-1 says that its subject is ICCS Course May 7-25. It does not say that it really concerns duties to be performed by Mr. Hill from May 3 to June 6. The real period, in Exhibit G-1, concerned is the period of May 7 to May 25 and this period encompasses less than three weeks and less, of course, than the thirty consecutive calendar days or more mentioned in article 13.08 of the relevant collective agreement. With respect to the days, other than those relevant to the ICSS course, we see, in Exhibit G-1, office days, off days and travel days. Many of those days, if not all of them, are surely not days where the grievor would have had to perform the duties really meant by article 13.08. Exhibit G-1 says that Mr. Hill, an air traffic controller, was to go to the office, on "office" days, and work in the library. I tend to agree with counsel for the grievor MacLean that this is not a duty meant by article 13.08.

When Ms. MacLean argued before me, she stated that there was no real need for Mr. Hill to become non-operational for a period of only three weeks. I agree with her. The above evidence adduced clearly showed it. Counsel for the grievor affirmed that what Exhibit G-1 shows is not real duties to be performed but a set of supposed duties put there just to fill the thirty days required by article 13.08. I agree.

For all the above reasons, I maintain Mr. John H. Hill's grievance and order that he be credited by his employer with operational time for the period from May 3, 1984 to June 6, 1984 inclusive. I remain seized for the application of the present decision in case of disagreement relevant to its implementation.

Jean Galipeault,
Board Member.

OTTAWA, October 8, 1985