

NOV 25 1985

Files Nos.: 166-2-15136
and 15188

No. 261

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

BETWEEN:

C.M. BOURNE,

grievor,

and

TREASURY BOARD
(Transport Canada),

employer.

Before: J. Maurice Cantin, Q.C., Vice-Chairman.

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

For the employer: Luc Leduc, counsel.

ART 16
CODE
402/82

LIEU DAYS
ACCUMULATED
PRIOR TO
JUNE 1, 1982

Heard at Kamloops, B.C., October 9, 1985.

DECISION

These are references to adjudication pursuant to paragraph 91(1)(a) of the Public Service Staff Relations Act of two grievances concerning the interpretation or application in respect of the grievor of the collective agreement, code 402/82, between the Treasury Board and the Canadian Air Traffic Control Association (CATCA) covering, amongst others, all traffic controllers.

The grievor was at all material times employed by Transport Canada as an Air Traffic Controller at the Kamloops, B.C., Control Tower.

The issue in the two instances is whether the employer is entitled to unilaterally schedule lieu days. The two grievances relating to the same issue, it was agreed that the cases would be joined and that only one decision would be rendered.

THE EVIDENCE

The facts are not disputed.

Mr. Bourne has held the same position since 1974 and he has accumulated lieu days ever since. On August 28, 1984, he had a balance of 44 lieu day credits earned prior to June 1, 1982, as evidenced by a memorandum prepared by D.W. Anderson, Chief, Kamloops Tower (Exhibit G-1). Mr. Bourne had liquidated at the time his 1984/85 lieu days and he was asked to reduce his balance and indicate in writing 22 days (or half of 44) between the dates of August 28, 1984 and March 31, 1985 which he wanted to take

as lieu days. Mr. Bourne elected "under protest and under pressure", as he so testified, to have 4 lieu days scheduled at the end of December 1984 and 5 at the beginning of January 1985.

Mr. Bourne testified that he could not recall if he ever saw the copy of Scheduling of Lieu Days Policy issued on February 23, 1984 by the Director, Staff Relations, and being part of Exhibit E-1.

It was admitted by counsel for the employer that the grievor had not agreed or consented to have his lieu days scheduled and that the employer had in effect scheduled the above 9 lieu days unilaterally.

Mr. Bourne filed in September 1984 a grievance protesting against the employer's intention to schedule 22 lieu days (see Exhibit E-2) but he withdrew the grievance subsequently and decided not to grieve until such time as the days would in fact be scheduled.

ARGUMENTS

Counsel for the grievor argued that I have to take into account not only article 16.05 of the collective agreement but also the letter of understanding of August 20, 1982. According to counsel, the wording of the collective agreement was altered as a result of the decision of September 18, 1981 by the Federal Court of Appeal in The Attorney General of Canada and David K. Anderson and others and the Public Service Staff Relations Board, /1982/ 1 F.C. 714. It was not permissible for the employer to unilaterally

schedule lieu days. Paragraphs e) to h) of article 16.05 are new. Under article 16.05 g), the employee has clearly two options, that is either to carry forward into the next fiscal year the unused portion of his lieu days, or to have his lieu days paid off. Article 16.05 h) has a special provision for lieu days accumulated prior to June 1, 1982. This special provision did not exist when the Federal Court of Appeal examined the above Anderson case. The key words were absent from the collective agreement bearing no. 402/79. The letter of understanding is clear and the employer cannot force the liquidation of lieu days accumulated prior to June 1, 1982, which is the case here.

Counsel for the employer replied that the decision in the above Anderson case still applies. The letter of understanding simply gives the employee the right to choose payment. The letter does not give the employee the right to carry over his lieu days. Paragraphs a) to d) of article 16.05 of the collective agreement clearly read that the employer has the unilateral right to schedule lieu days. Paragraphs a) to f) apply to the employee. The employer's right to schedule lieu days unilaterally has not been altered in any way by the new collective agreement. Counsel referred to the decision rendered by Deputy Chairman Guy D'Avignon in Minchin and Newell (Board files 166-2-14607 and 14608).

Counsel for the grievor stated that surely paragraph g) of article 16.05 would have not been changed and the above letter of understanding would not have been issued, if the intention of the parties were not to exclude in the new collective agreement lieu days accumulated before June 1982.

REASONS FOR DECISION

The purpose of the judgement of the Federal Court of Appeal in the above Anderson case was the interpretation of article 16.05 of the collective agreement between the Treasury Board and CATCA (code 402/79) expiring on December 31, 1980. The Court then ruled unanimously:

The only applicable provision is article 16.05. Paragraphs (a), (b) and (e) of that article make clear, in my view, that 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. 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.

(page 717)

The conclusion of the judgement is clear and it was relied upon by Deputy Chairman Guy D'Avignon in the above cited case of Minchin and Newell, notwithstanding the fact that the wording of article 16.05 of the collective agreement (code 402/82) expiring December 31, 1982 was different. One has to note however that in that case, the lieu days had been granted "during the time frame requested by the grievors". The situation in the present instance differs inasmuch as the grievor had not agreed or consented to have his lieu days scheduled.

It is necessary in my opinion to compare both articles 16.05, that is the one which the Federal Court of Appeal examined in the above Anderson case (collective agreement code 402/79) and the one under which the present grievance was filed (collective agreement code 402/82). They read as follows:

Agreement Code 402/79

- 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.

Agreement Code 402/82

- 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.

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| (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. | (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. | (e) | Where in any fiscal year an employee has not been granted all of the lieu days credited to him, he may elect to carry forward into the next fiscal year the unused portion of his lieu days. |
| | 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) | Lieu days earned in the fiscal year will be utilized before lieu days carried forward from the previous fiscal year. |
| (g) | 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. | (g) | At the employee's option, any lieu days which cannot be liquidated by the end of the fiscal year in which they are earned will be paid off at the employee's daily rate of pay in effect at that time. |
| | | (h) | In cases where lieu days from the previous fiscal year have not been fully utilized by the end of the current fiscal year, any outstanding carry-over lieu day credits will be paid off at the employee's daily rate of pay in effect at that time. This provision does not apply to lieu days accumulated prior to June 1, 1982. |
| | | (i) | 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. |

The changes, as one can see, are numerous:

- 1) In the agreement expiring on December 31, 1980 (code 402/79), all lieu days, irrespective of the dates when they were credited, are treated alike. In the next agreement (code 402/82), lieu days accumulated prior to June 1, 1982 are distinguished. Paragraph h) of the new agreement refers to the payment of any outstanding carry-over lieu day credits, but it reads that "this provision does not apply to lieu days accumulated prior to June 1, 1982".
- 2) The employee's "unused portion of...lieu days" is no longer automatically "carried over into the following

year". Paragraph e) now stipulates that the employee "may elect to carry forward into the next fiscal year the unused portion of his lieu days".

- 3) The new agreement reads that "lieu days earned in the fiscal year will be utilized before lieu days carried forward from the previous fiscal year" (paragraph f). This is an entirely new provision.

It is clear that the lieu days in the present instance have been accumulated prior to June 1, 1982 and as such, they do not have necessarily, in view of paragraph h), to be paid off. It is also clear that by distinguishing between the lieu days accumulated before June 1, 1982, as against the ones accumulated after, the parties wished to treat them differently. In the above Anderson case, the relevant agreement or I should say, the relevant article 16.05 which was examined and interpreted contained no special reference to the lieu days accumulated before June 1, 1982. Paragraph g) refers to an option on the part of the employee and it indicates that even lieu days which cannot be liquidated by the end of the fiscal year in which they are earned do not have necessarily to be paid off. My opinion is that concerning lieu days accumulated after June 1, 1982, the employee, in view of paragraph h) of the new agreement, has to accept that his lieu day credits be paid off and he will not by way of consequence continue to carry forward such lieu days. On the contrary, the employee who has accumulated lieu days prior to June 1, 1982 cannot be compelled to accept a payment and he may continue to carry forward his lieu days.

The letter of understanding dated August 20, 1982, which was handed to me by the parties and which is admittedly part of the collective agreement, is as follows:

Mr. W.J. Robertson,
President,
Canadian Air Traffic
Control Association,
Suite 604,
1 Nicholas Street,
Ottawa, Ontario
K1N 7B7

Dear Mr. Robertson:

This is to clarify the intent with respect to lieu days accumulated prior to June 1, 1982 as referred to in clause 16.05(h) of the collective agreement expiring December 31, 1982.

At the employee's option, any lieu days accumulated prior to June 1, 1982 will be paid off at the end of a fiscal year at the employee's daily rate of pay in effect at that time.

Yours sincerely,

R.A. Hunt,
Negotiator,
Staff Relations &
Compensation Division

Received and Accepted

W.J. Robertson

This letter indicates clearly that the employee has the option to have his days accumulated prior to June 1, 1982, paid off at the end of a fiscal year of his choice. This provision would have no purpose if, to avoid paying the employee at his leisure, the employer would be allowed to unilaterally schedule the lieu days. Because the letter is giving the employee the option to be paid off at the end of a fiscal year of his choice, it follows that if the employee does not exercise the option, his days are or would be carried over.

I am of the opinion for the above reasons that the employer cannot schedule unilaterally lieu days accumulated prior to June 1, 1982.

In his grievances, the grievor asks "a declaration that the employer contravened the CATCA collective agreement". I so declare. He also asks to "be reimbursed for the lieu days referred to above which he was forced to use". My opinion is that the grievor's lieu days which he took despite his wish must be restored to his credit. I realize that as a result the grievor will have received 9 additional days of vacation leave to which he otherwise would not have been entitled but the employer can only blame itself for this. I cannot grant the grievor's request for costs.

This grievance is therefore maintained in part.

J. Maurice Cantin, Q.C.,
Vice-Chairman.

OTTAWA, November 21, 1985