DEC 24 1985

File Nos: 166-2-15195
166-2-15197 No. 31

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

GINETTE J.M. RONCALI,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: Thomas W. Brown, Board Member.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: Rosslyn Levine, Counsel.

Heard at Waterloo, Ontario, November 13, 1985.

RETROACTIVE
REMUNERATION

CODE [redacted]
402/82

DECISION

The grievor, Ginette J.M. Roncali, is an air traffic controller employed by Transport Canada at its airport control tower in Kitchener, Ontario. At all relevant times she was covered by the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (code 402/82). The corrective action requested in the two grievances before me, which were heard concurrently and in which common evidence was advanced because they cover the same periods of the grievor's employment, that is, from September 20, 1983 to March 19, 1984, are as follows: (1) that the statutory holidays falling during the period in question be considered "lieu days" for the grievor and be credited to her as such together with all the benefits which flow therefrom under article 16 as an operating employee and (2) that she be paid the applicable operational facility premium under article 31 during the same period.

Article 16 of the collective agreement, titled "Holidays", designates at clause 16.01 some eleven holidays for the employees in the bargaining unit. Clauses 16.02, 16.04 and 16.05 (a), (c), (d) and (g) provide as follows:

> 16.02 When a day designated as a holiday under 16.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first working day following his day of rest.
>
> 16.04 Where an operating employee works on a holiday he shall:
>
> (a) be paid at one and one-half (1 1/2) times his straight-time hourly rate for all hours worked by him on the holiday,

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and

(b) be granted a day of leave with pay at a later date in lieu of the holiday.

16.05 For operating employees,

(a) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu days" credits established.

...

(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.

(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.

...

(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.

...

Article 31 of the collective agreement, titled "Operational Facility Premium" reads, at clause 31.01, as follows:

31.01 Effective January 1, 1981 in addition to all other entitlements he may be eligible to receive, each operating employee employed in an Area Control Centre, the Airspace Reservation Unit, a Control Tower, or a Terminal Control Unit, shall be paid a premium for each calendar month in which the employee has earned at least ten (10) days' pay while subject to this clause, based on the formula

> Annual Operational Facility Premium as specified in Appendix B to this agreement for the facility in which the employee is employed, divided by twelve (12).

Such premium shall not constitute a part of rates of pay for the purposes of this agreement and the Public Service Superannuation Act.

The facts in this case are not in dispute and show that the grievor was first employed as an air traffic controller, VFR (that is, Visual Flight Regulations) in 1973. In the intervening years to 1983 she worked out of airport towers in various cities, after having "checked-out", meaning "qualified", for air traffic control in the case of each such tower. In May of 1983, however, upon her return to duty at Kitchener Tower following Maternity leave, she failed to check-out, as was required, and so was found not qualified to continue to function as an air traffic controller. Management decided, in the circumstances, to attempt to find other employment for her and for that purpose transferred her to

the Toronto ATS Facility, where she commenced training as an Operations Support Specialist, "a sort of clerical job". The grievor was not happy in doing this type of work and so refused an offer of employment as a CR-3 in the Hamilton Control Tower. Because of this refusal and the fact that she was no longer qualified to work as an air traffic controller, it was decided to recommend her release from the Public Service on the grounds of incompetency and this under the authority of Section 31 of the Public Service Employment Act. At the same time, the grievor was "sent home" to await the decision of her appeal against the recommendation to release her under section 31. On January 23, 1984, the Appeal Board constituted under the Public Service Employment Act rendered its decision denying the recommendation for release and allowing the appeal, with the result that the grievor, as of right, was entitled to continue to occupy the position from which she was recommended to be released, namely the position of an air traffic controller at the Kitchener Tower. It must be mentioned that during her sojourn in Toronto ATS Facility the employer continued to treat the grievor as an operating employee and accorded her, as such, the Operational Facility Premium provided for by Article 31 of the agreement. As regards clauses 16.02 and 16.04, the grievor testified that during that particular period of time she did not on any occasion which occurred, work on a designated holiday. However, during all of the preceding period of employment as an air traffic controller she generally did work on designated holidays as they occurred.

The principal issue before me, it was argued by the parties, was the determination by me of the employee status of the grievor from the moment she was "sent home" on September 19, 1983, to the date of the decision by the Appeal Board under the Public Service Employment Act refusing the employer's recommendation to release the grievor from the Public Service and allowing the grievor's appeal. Reference was made, for their own purposes, by the representatives of the parties to clause 13.08 of the collective agreement, which allows the employer to change the status of an employee. Counsel for the grievor argued that no such change had been made when the grievor was "sent home" and so, the grievor remained an "operating employee", a status which the employer agrees she had right up to the moment of being "sent home". The employer's representative stated that the notice required by clause 13.08 was not imperative and its absence resulted only in a penalty having to be paid for subsequent shifts worked, which was not applicable in the instant case, but, in any event, there was contained in the memorandum sent to the grievor by management on May 12, 1983, filed as Exhibit E-2, an implicit notice of change of status - obviously, since the grievor was no longer being required to work, although continuing to be paid her salary while remaining at home, she could not be assumed to be continuing her status as an "operating employee" during that period.

I find that the employer was, perhaps, too generous in its financial treatment of the grievor while she was assigned to the Toronto ATS Facility to undergo training for what was considered a quasi-clerical position. It continued to pay her the Operational Facility Premium and

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allowed her to take advantage, if she wished, of the provisions of clause 16.04, relating to work on a holiday. Rightly or wrongly, and I did not have before me the issue nor the evidence to determine whether the employer was correct in its attitude, it admittedly considered the grievor an "operating employee" during that period and this as though she were still working at the Kitchener Tower! Its subsequent decision to seek her release from the Public Service was surrounded again by some questionable practice in that the grievor continued to be paid her full salary, although she had been relieved of her duties. The pay of public servants is tied to services rendered and, in this particular case, is authorized by the collective agreement and is to be paid for services rendered (Article 14). There is little doubt that had the grievor been kept at work pending the outcome of the recommendation for release she would have continued to have been employed at the Toronto ATS Facility and would not have been returned to her position as an air traffic controller at the Kitchener Tower, where she had earlier failed to qualify. In addition, her recognized status as an "operating employee" would have continued, unless changed by the employer, which did not happen. In the circumstances, I find that the grievor was at all relevant times an "operating employee" and thus entitled to all of the benefits which flow from such a status.

Counsel for the employer argued alternatively, that in the event that I should find that the grievor was an "operating employee" during the period in question, she should not be considered entitled to the Operating Facility Premium because she had not "earned" at least ten

(10) days' pay during each of the calendar months during which she remained at home without performing any duties pending her appeal of the employer's recommendation to release her. She had not, therefore, met the condition precedent for being paid such a premium under clause 31.01 of the collective agreement. Basing herself on The Shorter Oxford Englisn Dictionary, where the word "earn" is defined, inter alia: "To render an equivalent in labour for; hence to obtain or deserve as the reward of labour", counsel argued that, since the grievor had not laboured or worked during the time she was at home and not at work, she could not be said to have "earned" pay during that period. Counsel saw support for her argument in the fact that at clause 9.01, dealing with sick leave, the word used to qualify an employee for sick leave was "received" and not "earned". There was thus a distinction to be made between receiving pay unconnected to services rendered and "earning" pay, which is only when services are rendered. The simple answer to this position, I find, is, as I have mentioned above, pay in the public service and, particularly under the collective agreement covering the grievor, is always and only for services rendered. The word "earned" is translated as "touché" in the French text of clause 21.01. The verb "toucher" from which "touché" derives, is defined in Harrap's New Standard French and English dictionary as including "to draw, receive, one's salary; to be paid" and in Collins Robert French-English dictionary "(recevoir) pension, traitement to draw, get; prime to get, receive..." In Le Robert dictionary "toucher" is given the meaning, inter alia, of "recevoir", that is "receive". There is, thus, no real distinction to be made, in the context of the collective agreement, between "earned" and "received".

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In the circumstances, the grievor, having been paid for each and every day during the period she was placed "on off duty status", the expression used by the employer in its memo of March 30, 1984 (Exhibit E-5), was entitled to the Operational Facility Premium for Kitchener Tower, which she continued to receive while at the Toronto ATS Facility immediately prior to her being "sent home" pending her appeal of the employer's recommendation to release her.

As regards the grievor's claim that she should also have been granted a "lieu day" for each of the designated holidays falling during the period September 1983 to March 1984 because she would have worked on those holidays, I am greatly influenced by the grievor's admission before me that she did not work any of the designated holidays which occurred during her stay at the Toronto ATS Facility and, since she would no doubt have continued to work at that location during the period in question, as I have earlier found, she likely again would not have worked on any of those holidays. Her past practice of generally working on such holidays while working at Kitchener Tower and in other towers when functioning as an air traffic controller can have no bearing in the present case.

Accordingly, the grievance the subject matter of Board File No. 166-2-15197 is allowed in full and the grievance in Board File No. 166-2-15195 is denied.

Thomas W. Brown,
Board Member.

OTTAWA, December 20, 1985.