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

BETWEEN:

WAYNE J. JUSTINEN and  
DEREK NEILSON,

grievors,

AND:

TREASURY BOARD  
(Transport Canada),

employer.

Before: Roger Young, Board Member.

For the Grievors: Catherine MacLean, counsel, Canadian  
Air Traffic Control Association.

For the Employer: Larry M. Huculak, counsel.

Decided without a hearing.

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JUSTINEN  
NEILSON  
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## DECISION

On 14 March 1986 I rendered a decision with respect to the instant grievances which were heard together in Calgary on 6 February. Subsequently my award became the subject on an application for review made by the employer under section 28 of the Federal Court Act. The application was heard on 23 September 1986 and judgment was rendered on 23 October. Writing for the Court, Mr. Justice Mahoney allowed the application, set aside my original decision and referred the matter back for reconsideration and decision on a basis not inconsistent with the reasons given by the Court: Her Majesty the Queen in right of Canada as represented by the Treasury Board and Justinen and Neilson et al: Court File No. A-171-86. Having noted the Court's reasons and reflected thereupon in light of the evidence and argument as presented before me at the hearing I do now render the following decision.

As the whole of the original decision was set aside and thus no longer exists in law it seems necessary that I should briefly restate the evidence and argument as it was first presented. Secondly, it seems to me that the net effect of the Court's judgment is to leave unchanged much of the result of my earlier decision but to necessitate some amendment with particular respect to the matter of compensation owing to Neilson in relation to a statutory holiday and the issue of whether or not he had earned a lieu day in respect thereof. The Court also expressed its concern with respect to the reasons which form the basis for this award. Part of the error in my original decision appears to have been that while, in part, I reached a correct result it was achieved by following the wrong logical path. This will all

be dealt with later; for the purposes, though, of recording a complete decision as required by the Public Service Staff Relations Act and the Regulations made pursuant thereto I will first restate the basis of the grievance and a summary of the positions of the parties.

The grievors are Air Traffic Controllers employed at the Calgary Terminal Control Unit. Their shift cycle, as mutually agreed upon by the bargaining agent and the employer, was a nine-day cycle on a 36 day rotation consisting of three periods of five days of work and four days of rest followed by a further period of six days of work and three days of rest. Various shifts are worked within this cycle. The relevant parts of clauses 13.02 and 13.03 of the applicable collective agreement between the Canadian Air Traffic Control Association and Treasury Board, Code 402/85, read as follows:

13.02      Unit      Shift      Cycle -  
Operating Employees

(a) At those air traffic control facilities or portions thereof where through local consultation between management and the Association, a mutually agreed upon shift cycle is now in effect:

(i) such cycle will remain in effect for the term of this Agreement unless through local consultation between management and the Association, a different shift cycle is agreed to,

or

- (ii) a party who desires a shift cycle change shall notify the other in writing and shall include the reasons for the change. The parties shall consult on any request. A party shall not withhold its consent unreasonably. A party who refuses to consent shall deliver in a timely fashion its reasons in writing for withholding its consent.

13.03 Changes in Shift Cycle -  
Operating Employees.

- (a) On a temporary basis an employee and unit management may mutually agree in writing to amend the shift cycle applicable to the employee. Such agreement may be terminated in writing by either the employee or unit management with at least thirty (30) calendar days' notice.

The employer required the grievors to attend a simulation exercise at its Simulation Centre in Hull, Quebec. This centre operates on a regular basis from 8:00 a.m. to 4:00 p.m. Mondays to Fridays, holidays excepted. The grievors were asked to agree to an amendment to their shift cycles pursuant to paragraph 13.03(a) to accommodate their work schedules in Hull as well as the necessary travelling time to Hull and

back. The grievors refused. Nevertheless the employer assigned them to the exercise and in so doing it advised the grievors that they would be compensated at overtime rates for work actually performed on what would otherwise have been a day of rest while at the same time pay would be recovered for work which was not performed on what normally would have been a day of work.

The employer relied upon its rights as a manager to follow this practice. The relevant clause of the collective agreement reads:

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

- (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
- (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

The definition of "shift cycle" and "shift schedule" are also pertinent and it is of some importance to note the distinction between the two.

- (7) "Shift cycle" means the recurring sequence of an employee's days of work and days of rest.
- (8) "Shift schedule" means the Employer's advance posting of shifts to be worked by employees within their shift cycle.

According to the original shift cycle in effect at Calgary, Justinen was scheduled to work on the two Saturdays 18 and 25 May 1985 but, because he was at the Simulation Centre, he did not work on those days. He was also originally expected to work on Sunday 26 May but was directed to perform work for only three hours on this day while he was at the Centre.

According to the original shift cycle Neilson was scheduled to work on 18, 19 and 20 May as well as on 26 May. He did not work on any of the first three days, and did so for only three hours on 26 May similar to Justinen. Neilson's situation differs from that

of Justinen only in that 20 May was a statutory holiday. Clause 16.04 of the collective agreement states:

16.04 Where an operating employee works on a holiday he shall:

(a) be paid at one and one-half (1½) times his straight-time hourly rate for all hours worked by him on the holiday,

and

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

Justinen claimed payment at straight time rates for the two days he was scheduled to work but did not and for the balance of 5 1/4 hours for the part day 26 May 1985.

Neilson claimed payment at straight time rates for 18 and 19 May and the balance of 5 1/4 hours on 26 May. Additionally, he sought compensation for loss of pay and a lieu day on the statutory holiday 20 May. The employer, as I understand matters, compensated Neilson for this day at straight-time rates while advising him he was to take the day off as his statutory holiday. It also deducted a lieu day from his bank of lieu day credits.

#### REASONS FOR DECISION

As stated above I have been directed by the judgment of the Federal Court of Appeal to give

reconsideration to these grievances and to render a decision not inconsistent with the reasons expressed by that Court in its judgment. At page 9 thereof Mr. Justice Mahoney states as follows:

In my opinion, the adjudicator did not err in concluding that the employer here was not entitled to recover the salaries paid the Respondents for their scheduled days and hours of work they were not required to work and did not work at Hull. That said, I do not agree that it makes no difference how the entitlement to salary is characterized. In my view, it is based entirely on the Respondents' contractual rights to their annual salaries in the absence of provision for abatement in the circumstances.

It follows, therefore, that Justinen must be compensated by the employer for 8 1/4 hours at straight time for each of Saturday 18 May 1985 and Saturday 25 May 1985, and for 5 1/4 hours at straight time for the balance of the day not worked on Sunday 26 May 1985. This represents compensation forming part of the annual salary to which the grievor was otherwise entitled and as against the receipt of which he would otherwise have been expected to perform work had it not been for the employer's decision to withhold work.

Neilson must be compensated by the employer for 8 1/4 hours at straight time for each of Saturday



and Sunday, 18 and 19 May 1985 as well as for 5 1/4 hours at straight time for the balance of Sunday 26 May 1985. The reasons for so doing are the same as for the treatment of Justinen.

With respect to Neilson there was an additional question as to how he ought to be treated with respect to the statutory holiday Monday 20 May 1985. It is my understanding that he received his normal straight time pay for this day and, in addition, he had the day off; in other words he was given a paid holiday much like any non-operating employee. The employer further deducted a lieu day from Neilson's "bank" of lieu day credits which was established pursuant to paragraph 16.05(a):

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.

While the actions of the employer have the effect of equating Neilson, an operating employee, with a non-operating employee as regards the holiday, this is what must prevail based on the directions of the Federal Court of Appeal. Neilson is unable to earn his lieu day by working on 20 May 1985 because work has been denied him; however, he has been credited at the beginning of the fiscal year with just such a lieu day in anticipation that such would be earned. To the extent that I have properly understood the manner in

which the employer dealt with Neilson in this regard I make the finding that it did so in a manner in keeping with the decision of the Federal Court of Appeal. Mr. Justice Mahoney has stated at page 9 thereof:

The entitlement to be paid at an overtime rate and to a lieu day of holiday arises under that provision only if the employee actually works on a holiday. Neilson had no vested right to work on the scheduled statutory holiday. The employer was entitled to change the schedule for operational reasons.

Accordingly Justinen's grievance is allowed and Neilson's grievance is allowed in part. I remain seized of these matters should the parties encounter difficulties in implementing these awards.

Roger Young,  
Board Member.

OTTAWA, November 27, 1986.