

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

BETWEEN:

DAVID F. DOHENY,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: David Kwavnick, Board Member.

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

For the Employer: Luc Leduc, counsel.

ARTICLES
3/16
CODE 402/85

Heard at Ottawa, September 18, 1986.

GRIEVOR DENIED A SICK DAY WHEN SICK ON
WEDNESDAY HE WAS SCHEDULED TO WORK. GRIEVANCE
UPHELD

DECISION

The present reference to adjudication concerns a grievance by David F. Doheny, an air traffic controller (AI-4), employed by Transport Canada at the Vancouver Area Control Centre. Mr. Doheny grieves the employer's interpretation and application in respect of him of the terms of a collective agreement between the Treasury Board of Canada and the Canadian Air Traffic Control Association (Code 402/85). Mr. Doheny's grievance concerns Articles 9 and 16 of that collective agreement. Those articles read:

ARTICLE 9

SICK LEAVE

9.01 An employee shall earn sick leave credits at the rate of one and one-quarter (1 1/4) days for each calendar month for which he received pay for at least ten (10) days.

9.02 An employee is eligible for sick leave with pay when he is unable to perform his duties because of illness or injury provided that:

(a) he has the necessary sick leave credits,

and

(b) he satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

9.03 Unless otherwise informed by the Employer before or during the period of illness or injury that a certificate from a qualified medical practitioner, licensed chiropractor, dentist, dental surgeon or orthodontist, will be required, a statement signed by the employee stating that because of this illness or injury he was unable to perform his duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 9.02 (b):

(a) if the period of leave requested does not exceed three (3) days, (effective April 1, 1986 five (5) days),

and

(b) if in the current fiscal year, the employee has not been granted more than seven (7) days' sick leave wholly on the basis of statements signed by him, (effective April 1, 1986 ten (10) days).

9.04 An employee is not eligible for sick leave with pay during any period in which he is on leave of absence without pay or under suspension.

9.05 Where an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of 9.02, sick leave with pay may, at the discretion of the Employer, be granted for a period of up to fifteen (15) days subject to the deduction of such advanced

leave from any sick leave credits subsequently earned.

9.06 The amount of sick leave with pay already credited to an employee by the Employer at the time this Agreement is signed shall be retained by the employee.

9.07 The Employer agrees that an employee released from employment under Section 31 of the Public Service Employment Act for incapacity by reason of ill health may exhaust his accumulated sick leave credits prior to his release.

ARTICLE 16

HOLIDAYS

16.01 Subject to 16.02 the following days shall be designated holidays for employees:

- (a) New Year's Day;
- (b) Good Friday;
- (c) Easter Monday;
- (d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;
- (e) Canada Day;
- (f) Labour Day;
- (g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;

- (h) Remembrance Day;
- (i) Christmas Day;
- (j) Boxing Day;
- (k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August;
- (l) Any other day that is proclaimed by law as a national holiday.

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.

16.03 When a non-operating employee works on a holiday he shall be paid, in addition to the pay he would have received had he not worked on the holiday, one and one-half (1½) times his straight-time hourly rate for all hours worked by him on the holiday.

An employee at his request, shall be granted time off in lieu of cash payment at that rate. The employee and his supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated.

Where an employee requests time off in lieu of cash payment he must indicate this to his supervisor prior to the end of the month in which he worked on the holiday.

Where an employee has not utilized this accumulated time off by the end of the fiscal year, the unused portion will be paid off at the appropriate rate.

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

(a) be paid at one and one-half ($1\frac{1}{2}$) 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.

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 scheduled 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 schedule 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, he may elect to carry forward into the next fiscal year the unused portion of his lieu days.
- (f) Lieu days earned in the fiscal year will be utilized before lieu days carried forward from the previous fiscal year.
- (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 13.09 shall be subject to recovery of pay.

16.06

- (a) An employee who is absent without pay on both the working day immediately preceding and the working day following the holiday shall not be paid for the holiday.
- (b) An employee who is absent without permission and who is not on sick or special leave on a designated holiday, or the day to which the holiday is moved by reason of clause 16.02 on which he is scheduled to work, shall not be entitled to be paid for the holiday.

At the start of proceedings, the parties submitted an agreed statement of facts which reads as follows (attachments not included):

AGREED STATEMENT OF FACTS

1. The Grievor was an operating air traffic controller classified at the Al 4 level, employed at the Vancouver Area Control Centre of the Department of Transport at all material times.

2. Mr. Doheny has been employed with the Department of Transport as an air traffic controller since January 20th, 1975.

3. The collective agreement applicable to this grievance is the Treasury Board/CATCA Collective Agreement Code: 402/85.

4. The shift cycle at the Vancouver Area Control Centre for operating air traffic controllers consists of a pattern of five days of work followed by four days of rest repeated three times and followed by six days of work and three days of rest (5-4, 5-4, 5-4, 6-3).

5. On April 1st, 1985 Mr. Doheny was credited with 11 lieu days representing the 11 designated holidays specified in Clause 16.01 of his collective agreement, for the 1985/86 fiscal year. Since Mr. Doheny did not carry over any lieu days from his previous fiscal year, his total balance of lieu days on April 1st, 1985 was 11.

6. According to the attached August 1985 shift schedule for Vancouver ACC and the 1985/86 Attendance and Leave Record, Mr. Doheny (shown as CA on the

shift schedule) was scheduled to be absent from duty on August 22nd, 23rd, 24th, 25th and 26th inclusive. For each of these days, Mr. Doheny received his normal pay and five lieu days credits were deducted from his bank of lieu days. Lieu days on the Attendance and Leave Record form are shown as "L".

7. According to Mr. Doheny's shift cycle, August 22nd, 23rd, 24th, 25th and 26th, 1985 were days of work.

8. From August 31st, 1985 to September 14th, 1985, Mr. Doheny was absent from work due to illness for a total of 10 1/2 days. During this period of time he was scheduled to work on August 31st, and September 1st, 2nd, 3rd, 4th, 9th, 11th, 12th, 13th and 14th. He worked 1/2-day on August 31st but did not work any other days on which he was scheduled to work. September 5th, 6th, 7th and 8th were his scheduled days of rest.

9. In 1985, the Labour Day holiday fell on September 2nd, 1985.

10. Mr. Doheny submitted a medical certificate stating that he was unable to perform his duties during the period August 31st to September 14th due to illness.

11. Mr. Doheny had more than 10 1/2 days accumulated sick leave credits.

12. On his return to work, Mr. Doheny requested 10 1/2 days sick leave. He was told by the Unit Chief that he was entitled to 9 1/2 days sick leave with pay.

13. On September 30th, 1985, Mr. Doheny submitted at the Employer's request an application for leave form requesting 9 1/2 days of certified sick leave with pay for the period from August 31st to September 14th, 1985. On October 11th, 1985 another leave application was completed at the Employer's request indicating that Mr. Doheny was deducted a lieu day credit for September 2nd, 1985. The relevant leave application forms are attached.

The corrective action sought by the grievor is the restoration of his lieu day and the substitution for it, in respect of September 2, 1985, of a day of sick leave. Thus, the point at issue in the present reference to adjudication is whether, under the terms of the applicable collective agreement, an operating employee who is sick on a holiday on which he was scheduled to work shall forfeit a lieu day or a day of sick leave.

ARGUMENT FOR THE GRIEVOR

Counsel for the grievor said that sick leave had been claimed by the grievor in respect of the Labour Day holiday in 1985. The employer had chosen, instead, to reduce his lieu day credits. As evidenced by the replies during the grievance process, the employer has

chosen to base itself upon Article 16 of the collective agreement while ignoring completely Article 9, the very provision under which the grievor submitted his application. The point at issue, she said, is the relationship between Articles 9 and 16. In particular, the issue is whether an employee may claim sick leave in respect of a holiday on which he was scheduled to work but was prevented from doing so by reason of illness.

Counsel said that this very point had been decided by Chief Adjudicator Jolliffe in the case of Wood (Board File: 166-2-257). She said that the circumstances there were exactly the same as in the present case: an air traffic controller was prevented by illness from working on a holiday on which she had been scheduled to work. She had sought to cover the day by means of sick leave while the employer wished to cover it by means of a lieu day. Counsel said that the same parties are involved in both cases; namely, Treasury Board and the Canadian Air Traffic Control Association. Finally, the relevant provisions of the collective agreement have not changed. Thus, the matter ought to be regarded as res judicata. In this respect, she referred me to the discussion in the case of Johnson (Board File: 166-2-10027) and said that unless I find that the decision in the case of Wood (supra) is manifestly wrong, I ought to find that the principle of res judicata is applicable here.

Counsel then turned to Article 9 of the collective agreement. She said that this article deals specifically with sick leave. By the provisions of Article 9.01,

an employee earns sick leave which can be claimed if certain conditions are met. It is common ground that the specified conditions have been met here. Therefore, the grievor is entitled to draw upon his sick leave credits to cover his absence from work on 2 September 1985.

She said that Article 16.05 of the collective agreement does not make it a condition of receiving lieu days that an employee actually works on a holiday. Each employee is given 11 lieu days on 1 April and thereafter there are only certain ways in which the number of lieu days may be reduced.

She cited the case of Derrien (Board File: 166-2-13805) with special reference to paragraphs 5 and 7 on page 28. It was found, she said, that the substantive benefit is conferred by Article 16.01; the other parts of Article 16 which are applicable to an operating employee all relate to the administration of the benefit.

Counsel said that the present case is on all fours with that of Wood (supra). As was found there by Chief Adjudicator Jolliffe, the employer here has, in effect, unilaterally scheduled a lieu day. The decision in the case of Wood (supra) is supported by the decision of the Federal Court of Appeal in the case of Attorney General of Canada v. Anderson et al [1982] 1 F.C. 714.

In summary, she said that the only way in which an employee's entitlement to lieu days may be reduced, other than by severing the employment relationship, is by scheduling a lieu day under the provisions of Article 16.05(c). The employer cannot do this unilaterally. Furthermore, Article 9 gives the employee an unrestricted right to sick leave when he is unable to work due to illness. The employer has no right to refuse sick leave if the conditions set out in Article 9 have been met. It is common ground in the present case that those conditions have been met.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer said that since the case of Anderson (supra) the employer has taken the position that an employee who has not worked on a holiday is not entitled to a lieu day. This, he said, is in accord with the plain words of Article 16.04 of the collective agreement:

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

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

Counsel said that the clear meaning of Article 16.04 is that an employee must work on a holiday in order to earn a lieu day. In the present case, the

employer did not "schedule" the grievor's lieu day; it deducted a lieu day from his entitlement because he failed to earn it.

Counsel referred to the decision of the Federal Court of Appeal in the case of Anderson (supra). He noted in particular the second paragraph on page 715:

Those two [Articles 16.04 and 16.05] provisions regulate the rights of operating employees who work on a holiday. Article 16.04 provides that those employees must be paid at one and a half (1½) times their normal hourly rate for all hours worked by them on the holiday and shall, in addition, "be granted a day of leave with pay at a later date in lieu of the holiday."

(stress added).

He said that the meaning of these words is that the grant of a lieu day is restricted to "those employees . . . who work on a holiday". He referred also to the first two sentences on page 717:

The decision [of the adjudicator] is, in my view, based on a misinterpretation of the collective agreement. Under article 16.04, the employee who has worked on a holiday is given the right to "be granted a day of leave with pay at a later date".

In the present case, the grievor did not work on the holiday in question; therefore he failed to earn a lieu day and his credits were reduced accordingly. The credit of lieu days which the grievor had did not constitute a grant to him; they were not his. As provided in Article 16.05(a), those credits merely anticipated the holidays for the current fiscal year and are based upon the assumption that the employee will work on holidays.

Finally, counsel referred to the fact that an employee who takes annual leave during a period in which there is a holiday merely receives his regular pay. He said that a similar principle should prevail here.

REPLY FOR THE GRIEVOR

Counsel for the grievor said that the decision in the case of Anderson (supra) is of no relevance here. That case was concerned with an entirely different matter and the court did not turn its mind to the question of the relationship of Articles 16.04 and 16.05.

Counsel said that the difference between vacation leave and the present case is that in the present case the grievor was sick. She said that the purpose of sick leave and the clear intent of Article 9 of the collective agreement, is to make an employee whole, to put him in the same position he would have been in had he worked. She said that in the circumstances of the present case the grievor ought also, if he had asked

for it, to receive the premium pay for work on a holiday as provided by Article 16.04(a) of the collective agreement.

REASONS FOR THE DECISION

It would be useful to begin by stating certain facts. Collective agreements are fashioned through bargaining by the parties or arbitral awards made in relation to various well-defined issues. It is, therefore, not necessarily the case that all of the provisions of a collective agreement will relate to each other in an entirely logical manner. Indeed, there is no assurance of consistency among the various provisions of a single article. It should not, therefore, be surprising if a collective agreement contains anomalies or provisions which cannot all be brought within a single theoretical framework.

The collective agreement reflects the intentions of the parties. However, between the intentions of the bargaining agent and the intentions of the employer there lies a middle ground which does not reflect the intentions of either. It is in this middle ground that the provisions of a collective agreement are often found. Stated differently, each of the parties takes a bargaining position which is based, whether they know it or not, upon certain principles. What emerges from the bargaining process need not accord with either set of principles or, indeed, with any consistent set of principles.

In the present reference to adjudication, the principle underlying the argument made by counsel for

the grievor in respect of sick leave is based upon the principle, which she stated, that the purpose of such leave is to restore an employee to the position he would have been in had he not been sick. She went so far as to say that, had the grievor asked for it, he would have been eligible to claim the premium pay which he would have earned had he not been sick. However, a claim for premium pay, even if it could be sustained, would still not restore the grievor to the position he would have been in had he not been sick. To make him whole would require that he be compensated for missed overtime opportunities as well.

The argument made by counsel for the employer, on the other hand, is apparently based upon the principle that sick leave is an income maintenance plan intended to ensure that an employee who is unable to work due to illness receives his basic pay for the period of that illness.

There are, as well, a number of anomalies in Article 16 of the present collective agreement. The arguments made before me have not served to clarify them. For example, whether she is aware of the fact or not, the argument made by counsel for the grievor amounts to this: That for the grievor, 2 September 1985, was not a holiday but an ordinary working day; his holiday is the lieu day. It should be noted that this is the only form of argument that would enable her to get around the plain meaning of the opening words of Article 16.04.

However, if the lieu day is the holiday while the actual holiday is an ordinary working day, what is the basis for the premium pay provided for in Article 16.04(a)? It may be argued that this premium is akin to the shift premium provided for in Article 27 of the present collective agreement. That is, it is compensation for the inconvenience of having to be at work when most other employees are on holiday and thus being deprived of the opportunity to celebrate in the company of family and friends.

This explanation stands up only until we consider the effects of Article 16.02. If a holiday coincides with an employee's day of rest, and he is thus spared the inconvenience of having to work when family and friends have a day off work, his holiday is moved to his first following working day and he is paid the premium for that day. At this point, it would be well to give up the search for logical consistency.

Counsel for the grievor argued that the grievor was scheduled to work; he was unable to work due to illness, he has met all of the requirements for sick leave under the terms of Article 9 of the collective agreement and, therefore, he is entitled to claim sick leave for the day in question. She is right. Counsel for the employer argued that Article 16.04 of the collective agreement applies "where an operating employee works on a holiday"; the grievor did not work on the holiday in question; therefore he is ineligible for the benefit provided by Article 16.04(b). He is right. In other words, it is my finding that the circumstances

of the present reference to adjudication have revealed a latent conflict in the terms of the collective agreement.

There is a conflict between Articles 9 and 16 of the collective agreement. I propose to resolve this conflict by reference to first principles. For an operating employee such as the grievor, every day other than a day of rest must be either an ordinary working day or a holiday. What is a holiday? It is a day on which the employee is not required to work but is paid nonetheless. Was 2 September 1985 a holiday for the grievor? The evidence before me indicates that on that day the grievor was scheduled to work as he would on any ordinary working day. I conclude, therefore, that for the grievor, 2 September 1985, was an ordinary working day.

If 2 September 1985 was an ordinary working day for the grievor, where is the holiday to which he is entitled under the provisions of Article 16.01 of his collective agreement? The obvious answer is that for the grievor the holiday -- that is, his day off work with pay -- is the lieu day which he received in exchange for giving up his holiday. In other words, I find that for certain purposes the effect of Article 16.05(a) is that operating employees give up their right to the holidays listed in Article 16.01 and accept, instead, the lieu days provided for in Article 16.05(a). For these employees, the lieu days are their designated holidays. Accordingly, when the grievor was unable to work on 2 September 1985 due to

illness, he was unable to work on what was, for him, an ordinary working day. It is precisely to cover such absences that the collective agreement makes provision for sick leave. I am unable to see that being unable, by reason of illness, to report for work on an ordinary working day should have any consequences for the grievor's entitlement to holidays under Article 16.

A similar conclusion may be reached, starting from first principles, by a different route. An employee who works a standard week and is sick on a designated holiday has no recourse to the employer. Such an employee cannot claim sick leave for the lost holiday and a day off work with pay at some later date. Thus, on eleven days of the year the employee himself bears the risk of loss due to illness. On all other days (apart from days of rest or weekends and other forms of authorized leave) the risk is borne by the employer. In the case of the present grievor a question arises: On which days is he at risk? Does he risk losing a day of holiday if he is sick on the actual day of the holiday or does he run that risk if he is sick on his scheduled lieu day?

It is obvious that he cannot be obliged to run that risk on both, for that would have the effect of transferring to the employee 11 days of risk which ought to be borne by the employer. Stated differently, the grievor cannot be put at risk 22 times in respect of only 11 designated holidays. For 11 of those 22 days, the risk belongs on the shoulders of the employer. The question is: which eleven days?

The employer has itself provided an answer to this question in the case of Pottinger (Board File: 166-2-9004). There, the grievor was sick on the days scheduled as his lieu days. He asked to have those days covered by sick leave and to have his lieu days rescheduled. The employer refused his request and the refusal was upheld upon reference to adjudication. If the employee must bear the risk of losing his scheduled lieu days due to illness on those days, he should not also be required to bear the risk of losing those days through illness on the actual holidays.

It may be objected that my decision in the present reference to adjudication flies in the face of the opening words of Article 16.04. The problem is that the grievor did, after all, meet all of the requirements for sick leave under the provisions of Article 9. Adherence to the opening words of Article 16.04 would have meant flying in the face of the words of Article 9. This is the conflict which I found. I have chosen to find a way around this conflict by relying, primarily, upon the commonly accepted meaning of the word "holiday" and, secondarily, upon the position taken by the employer in the case of Pottinger (supra).

In summary, the present grievance is sustained. The employer is to reduce the grievor's sick leave credits by one day and increase his lieu day credits by one day.

David Kwavnick,
Board Member.

OTTAWA, October 3, 1986.



Federal Court of Appeal

Ottawa, Tuesday, February 24, 1987

A-613-86

CORAM: URIE J.
STONE J.
MacGUIGAN J.

IN THE MATTER OF an application to review and set aside, pursuant to Section 28 of the Federal Court Act, S.C. 1970, Chapter 1;

AND IN THE MATTER OF a Decision of the Public Service Staff Relations Board rendered by David Kwavnick, Board Member, on the 3rd day of October, 1986 respecting a grievance referred to adjudication under Section 91 of the Public Service Staff Relations Act, (P.S.S.R.B. File No. 166-2-15796)

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by Treasury Board

Applicant

A N D :

DAVID F. DOHENY

Respondent



J U D G M E N T

The section 28 application is allowed, the decision of the Public Service Staff Relations Board is set aside and the matter is referred back to the Board for reconsideration and decision on a basis consistent with the Reasons for Judgment herein, filed on this day.

*D. DOHENY
copy BOPs
VAPORIZER CHAMBER
3 COPIES ACF
6/3/97
ACF*

"John J. Urie"

J.F.C.C.

I HEREBY CERTIFY that the above document is true copy of the original as it appears in the Register

of The Federal Court of Appeal on 24th

of February A.D. 1987

Dated this 24th day of Feb 1987

Diana C. Bradley *Kana C. Brien*
Registrar



Federal Court of Appeal

CORAM: URIE J.
STONE J.
MacGUIGAN J.

IN THE FEDERAL COURT OF APPEAL

IN THE MATTER OF an application to review
and set aside, pursuant to Section 28 of
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166-2-15796)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by TREASURY BOARD

Applicant

and

DAVID F. DOHENY

Respondent

Heard at Ottawa on Wednesday, February 18, 1987.

Judgment rendered at Ottawa on Tuesday, February 24,
1987.

REASONS FOR JUDGMENT BY: MacGUIGAN J.

CONCURRED IN BY: URIE J.

STONE J.



Federal Court of Appeal

CORAM: URIE J.
STONE J.
MacGUIGAN J.

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BETWEEN:

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as represented by TREASURY BOARD

Applicant

and

DAVID F. DOHENY

Respondent

REASONS FOR JUDGMENT

MacGUIGAN J.

The respondent is an operating air traffic controller employed at the Vancouver Area Control Centre of the Department of Transport. His grievance before the Public Service Staff Relations Board ("the Board") related to his treatment by the applicant with respect to September 2, 1985 (Labour Day). The issue before the Board and this Court revolves entirely around the interpretation of a collective agreement between the

applicant and the Canadian Air Traffic Control Association, Code: 402/85. The relevant parts of that collective agreement are as follows:

ARTICLE 9

SICK LEAVE

9.01 An employee shall earn sick leave credits at the rate of one and one-quarter (1¼) days for each calendar month for which he receives pay for at least ten (10) days.

9.02 An employee is eligible for sick leave with pay when he is unable to perform his duties because of illness or injury provided that:

(a) he has the necessary sick leave credits,

and

(b) he satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

9.04 An employee is not eligible for sick leave with pay during any period in which he is on leave of absence without pay or under suspension.

ARTICLE 16

HOLIDAYS

16.01 Subject to 16.02 the following days shall be designated holidays for employees:

(a) New Year's Day;

(b) Good Friday;

(c) Easter Monday;

(d) the day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;

(e) Canada Day;

(f) Labour Day;

- (g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;
- (h) Remembrance Day;
- (i) Christmas Day;
- (J) Boxing Day;
- (k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August;
- (l) Any other day that is proclaimed by law as a national holiday.

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 (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.

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 scheduled 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 schedule 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, he may elect to carry forward into the next fiscal year the unused portion of his lieu days.
- (f) Lieu days earned in the fiscal year will be utilized before lieu days carried forward from the previous fiscal year.
- (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 13.09 shall be subject to recovery of pay.

16.06

- (a) An employee who is absent without pay on both the working day immediately preceding and the working day following the holiday shall not be paid for the holiday.
- (b) An employee who is absent without permission and who is not on sick

or special leave on a designated holiday, or the day to which the holiday is moved by reason of clause 16.02 on which he is scheduled to work, shall not be entitled to be paid for the holiday.

At the beginning of the 1985 fiscal year (April 1, 1985) the respondent was credited with 11 lieu days representing the 11 designated holidays specified in clause 16.01 of the collective agreement. He was scheduled to work on August 31 and on September 1-4, September 9, and September 11-14. However, after working ½ day on August 31, he was absent from work for the rest of this period (10½). He submitted a proper medical certificate and had more than 10½ days accumulated sick leave credits. However, he was refused sick leave for September 2 and was deducted a lieu day for that day. His grievance sought the restoration of his lieu day and the substitution for it of a day of sick leave. The point at issue before the Board was therefore whether an operating employee who is sick on a holiday on which he was scheduled to work forfeits a lieu day or a day of sick leave.

The nub of the Board's decision was as follows:

Counsel for the grievor argued that the grievor was scheduled to work; he was unable to work due to illness, he has met all of the requirements for sick leave under the terms of Article 9 of the collective agreement and, therefore, he is entitled to claim sick leave for the day in question. She is right. Counsel for the employer argued that Article 16.04 of the collective agreement applies "where an operating employee works on a holiday"; the grievor did not work on the holiday in question; therefore he is ineligible for the benefit provided by Article 16.04(b). He is right. In other words, it is my

finding that the circumstances of the present reference to adjudication have revealed a latent conflict in the terms of the collective agreement.

There is a conflict between Articles 9 and 16 of the collective agreement. I propose to resolve this conflict by reference to first principles. For an operating employee such as the grievor, every day other than a day of rest must be either an ordinary working day or a holiday. What is a holiday? It is a day on which the employee is not required to work but is paid nonetheless. Was 2 September 1985 a holiday for the grievor? The evidence before me indicates that on that day the grievor was scheduled to work as he would on any ordinary working day. I conclude, therefore, that for the grievor, 2 September 1985, was an ordinary working day.

If 2 September 1985 was an ordinary working day for the grievor, where is the holiday to which he is entitled under the provisions of Article 16.01 of his collective agreement? The obvious answer is that for the grievor the holiday -- that is, his day off work with pay -- is the lieu day which he received in exchange for giving up his holiday. In other words, I find that for certain purposes the effect of Article 16.05(a) is that operating employees give up their right to the holidays listed in Article 16.01 and accept, instead, the lieu days provided for in Article 16.05 (a). For these employees, the lieu days are their designated holidays. Accordingly, when the grievor was unable to work on 2 September 1985 due to illness, he was unable to work on what was, for him, an ordinary working day. It is precisely to cover such absences that the collective agreement makes provision for sick leave. I am unable to see that being unable, by reason of illness, to report for work on an ordinary working day should have any consequences for the grievor's entitlement to holidays under Article 16.

A similar conclusion may be reached, starting from first principles, by a different route. An employee who works a standard week and is sick on a designated holiday has no recourse to the employer. Such an employee cannot claim sick leave for the lost holiday and a day off work with pay at some later date. Thus, on eleven days of the year the employee himself bears the risk of loss due to

illness. On all other days (apart from days of rest or weekends and other forms of authorized leave) the risk is borne by the employer. In the case of the present grievor a question arises: On which days is he at risk? Does he risk losing a day of holiday if he is sick on the actual day of the holiday or does he run that risk if he is sick on his scheduled lieu day?

It is obvious that he cannot be obliged to run that risk on both, for that would have the effect of transferring to the employee 11 days of risk which ought to be borne by the employer. Stated differently, the grievor cannot be put at risk 22 times in respect of only 11 designated holidays. For 11 of those 22 days, the risk belongs on the shoulders of the employer. The question is: which eleven days?

The employer has itself provided an answer to this question in the case of Pottinger (Board File: 166-2-9004). There, the grievor was sick on the days scheduled as his lieu days. He asked to have those days covered by sick leave and to have his lieu days rescheduled. The employer refused his request and the refusal was upheld upon reference to adjudication. If the employee must bear the risk of losing his scheduled lieu days due to illness on those days, he should not also be required to bear the risk of losing those days through illness on the actual holidays.

It may be objected that my decision in the present reference to adjudication flies in the face of the opening words of Article 16.04. The problem is that the grievor did, after all, meet all of the requirements for sick leave under the provisions of Article 9. Adherence to the opening words of Article 16.04 would have meant flying in the face of the words of Article 9. This is the conflict which I found. I have chosen to find a way around this conflict by relying, primarily, upon the commonly accepted meaning of the word "holiday" and, secondarily, upon the position taken by the employer in the case of Pottinger (supra).

In summary, the present grievance is sustained. The employer is to reduce the grievor's sick leave credits by one day and increase his lieu day credits by one day.

Since the Board's decision, this Court has decided the case of Her Majesty the Queen in Right of Canada as represented by the Treasury Board v. Justinen and Neilson et al., no. A-171-86, decided October 23, 1986. That case arose out of a grievance filed pursuant to the same collective agreement at issue in this case, and, in particular, out of a unilateral change in the shift cycles by the employer, and the adjudicator held that the employees were entitled to their pay for the days they were scheduled to work but did not. The Court upheld the adjudicator with respect to the straight-time aspect of the award, but not in relation to the premium pay awarded to the respondent Neilson for a statutory holiday not worked. On this point Mahoney J. wrote for the Court, at pp. 9-10:

However, in my opinion, the adjudicator did err in his award to the Respondent Neilson under Article 16.04. 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.

In the case at bar the respondent did not claim entitlement to overtime rates, but based his claim for a lieu day on the distinction established in that respect by the long-standing decision of then Chief Adjudicator Jolliffe in Wood et al. v. Treasury Board, P.S.S.R.B. no. 166-2-257, decided November 5, 1970. In that case the grievor had been scheduled to work 32 days during the period between November 20, 1969, and January 4, 1970. Instead of the 32 days of sick leave she claimed, she was allowed 29, but the other three days were treated as statutory holidays not worked, for which she

was paid at straight-time rates. The Chief Adjudicator stated, at pp. 4-13:

It was suggested that since Miss Wood had been scheduled to work on all three holidays and presumably would have done so had she not been absent on sick leave, she should be deemed to have worked on such holidays and would be eligible for payment at overtime rates. Such an interpretation is unrealistic. The language clearly applies to an operating employee who actually works on a designated statutory holiday. It has no application to an employee who does not work on a holiday, whatever the reason for not working may be.... The lieu-day system is related to but distinct from the provision for overtime rates on a holiday actually worked, and wholly separate and distinct from the provision for payment at straight time when an employee with sufficient credits is absent on sick leave....

I do not accept the assumption that Miss Wood's status on December 25, 26 and January 1 was that of an employee enjoying a holiday at home. Her status was that of an employee who had been scheduled to work on each of those days but was in fact excused from work by reason of illness and in accordance with her rights under Article 9. Her entitlement to payment at straight time rates arose out of Article 9, not Article 16. It would be unrealistic to pretend that she was not at work as one of those lucky enough to be scheduled "off" on the holiday. The reality is that she was not at work because she was ill.

The final question to be decided is what Miss Wood's rights were under Article 16.05. In other words, were her lieu-day credits affected?

Lieu days are neither "earned" nor "unearned." A bank of 11 lieu-day credits is established in advance or "anticipated" under 16.05(a). These may be drawn upon or liquidated in one of several different ways....

My conclusion on this branch of the case therefore is that Miss Wood's lieu-day credits were not affected by her absence on December 25, December 26 and January 1 - - - while she was on sick leave. Her lieu-day credits were neither increased

nor reduced. Her status rested upon Article 9 rather than Article 16.

In my view, it is a fallacy to regard the claim as one for "double compensation." Miss Wood's sick leave credits were reduced by 32 days - - not 29. Her right to be paid for each of those 32 days had been "earned" under Article 9.01. As for lieu-day credits, they were unaffected. She did not on December 25, or 26 or on January 1 receive a day "off" in lieu of a lost holiday; what she received and what she was entitled to receive was leave with pay, because she was ill and because she had earned it.

With due respect to the late Chief Adjudicator an employee's rights under the collective agreement (which is in all material respects the same as in 1970) to lieu-day credits cannot rest upon article 9, which does not deal with them at all. Article 9.02 provides for "sick leave with pay." The adjudicator himself has ruled that pay is not holiday overtime, but straight time. Why should lieu days which are not mentioned at all be read into article 9.02 when premium pay is being read out? For my part I am able to base entitlement to lieu days only upon article 16.04, which is the only part of the collective agreement that creates entitlement to them.

In this respect I believe the Chief Adjudicator was also in error in his view that lieu days are "neither earned nor unearned," a position that he based upon article 16.05. It is true that article 16.05 provides for the anticipation of lieu days and the consequent establishment of a "bank" of 11 credits for each operating employee for the year. But these credits are not yet earned. They are in truth potential rather

than actual credits, and will become actual only when "earned," as the use of that verb in article 16.05 (f) and (g) should serve to remind us. What gives them the appearance of actuality is only the device of anticipation.

Despite the ingenious alternative arguments of the counsel for the respondent, I must find that article 9 is at most ambiguous on the question of lieu days and that with respect to holidays it is limited by article 16.04. Moreover, the anticipating scheme of article 16.05 establishes no entitlement. Entitlement falls to be determined under article 16.04, and on that provision this Court has already spoken. In the words of Mahoney J., "the entitlement ... to a lieu day of holiday arises under [article 16.04] only if the employee actually works on a holiday." The Board's contrary view constitutes an error of law.

The section 28 application must therefore be allowed, the decision of the Board set aside, and the matter referred back to the Board for reconsideration and decision on a basis not inconsistent with these reasons.

(Mark R. MacGuigan)

J.F.C.C.

I agree
John J. Urie J.
I agree
Arthur J. Stone J.

MAR 19 1987

File: 166-2-15796

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

BETWEEN:

DAVID F. DOHENY,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: David Kwávníck, Board Member.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Luc Leduc, counsel.

Heard at Ottawa, September 18, 1986.

DECISION

On 3 October 1986, I rendered a decision in the present reference to adjudication. That decision was reviewed by the Federal Court of Appeal and set aside in a decision dated 24 February 1987: Her Majesty the Queen in Right of Canada v. Doheny (Court File: A-613-86).

The Court found that "the entitlement ... to a lieu day of holiday arises under [article 16.04] only if the employee actually works on a holiday". The Court also found that a contrary view constitutes an error of law.

The decision of 3 October 1986, was set aside and the matter was referred back to me for reconsideration and decision on a basis not inconsistent with the above noted findings of the Court.

After reconsideration, I have concluded that if my determination in the present proceedings must be based upon the principle that the entitlement to a lieu day of holiday arises only if the employee actually works on a holiday, then the present grievance must be dismissed. Accordingly, the grievance is dismissed.

David Kwavnick,
Board Member.

OTTAWA, March 17, 1987.