File No.: 166-2-16080

No. 27.

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

BETWEEN:

ANTHONY S. NICHOLSON,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

ART 17

CODE 402/85

Before: Thomas W. Brown, Board Member.

For the Grievor: Michael T. Dooling, Canadian Air Traffic Control Association.

For the Employer: Luc Leduc, Counsel.

Heard at Vancouver, B.C., October 1, 1986.

DENIAL OF VACATION LEAVE

DECISION

The grievor, an air traffic controller employed by the Ministry of Transport at the Vancouver International Airport control tower, was covered by the collective agreement between the Canadian Air Traffic Control Association and Treasury Board (Code 402/85). His grievance and the corrective action requested read as follows:

> On Jan. 6/86 I applied for one day of leave on Saturday Jan. 25/86. The staff scheduled for Jan. 25 was four on day shift, one on swing shift, four on evening shift. The minimum staff required as per staff memorandum 85.08 is 4 on day shift, 4 on evening shift. The leave was denied. On Jan. 10/86 I was informed the leave would be approved subject to me being available for recall 30 minutes after commencement of the shift. This contravenes CATCA Treasury Board agreement 402/85, Article 17. This unit has been chronically under-staffed for some time and this restriction on ad hoc leave is unreasonable as it does not allow staff to make concrete plans for the leave period.

Corrective action requested:

> Management return to past practice of authorizing ad hoc leave down to levels outlined in staff memorandum 85-08 without restrictions.

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Only the grievor testified at the hearing before me and he established that on January 6, 1986, he verbally requested one day of vacation leave for Saturday, January 25th, for the purpose of attending a wedding ceremony and reception. His request was refused. He was told that it was being refused because a new policy governing the granting of unscheduled leave, dubbed "ad hoc" vacation leave by the parties, was about to become effective. This new policy would vary the existing policy in that it would condition the granting of such leave to there being "minimum" staff plus one employee available for work. However, ad hoc leave would still be granted to "minimum" staff, as in the past, provided the requesting employee agreed to recall. The onus was placed upon the controller to call the unit 30 minutes prior to commencement of the regularly scheduled shift or agree to be available for recall up to 30 minutes after commencement of the shift. Previously, such leave was granted when only minimum staff was available to work, without any recall provisions governing.

The grievor was able to take leave in spite of this refusal when he arranged to have another employee exchange shifts with him, as was permitted by the collective agreement. The grievor's subsequent written request for leave was later answered in writing as follows:

> Your request for one day annual leave can be approved, subject to unit policy (see attached).

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> The provision for recall is a temporary measure to ensure there is adequate staff available to meet the unit's anticipated operational requirements without incurring overtime costs.
>
> Our conversations have indicated that the recall provision does not satisfy your needs, however, in this and other similar instances, the unit's operational requirements must take priority.
>
> If you do agree to the recall provision, please indicate in the space for 'reasons' on the Leave Form and return for formal approval.

The grievor explained that he was scheduled to work on the day in question, Saturday, January 25, 1986, on the early evening shift, being from 2:00 p.m. to 10:00 p.m. On the same day, there were four controllers scheduled to work on the day shift, 7:00 a.m. to 3:00 p.m., four scheduled to work on the evening shift, 3:00 p.m. to 11:00 p.m. (including the grievor who was scheduled to work on the early evening shift) and one (1) employee scheduled to work on the swing shift, 10:00 a.m. to 6:00 p.m. Air traffic on weekends was lighter than traffic on weekdays. The grievor considered that management would cover off his absence on leave by having the controller scheduled on the swing shift cover for him.

ARGUMENT FOR THE GRIEVOR

The grievor's representative identified the issue in this case as being whether the employer had acted

within its rights in denying the grievor the leave which he requested when he was unwilling to accept the recall conditions imposed upon him to obtain approval of the leave. He referred to the terms of clause 17.06 of the collective agreement which state, inter alia, at paragraph (b) that:

> ... Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

He emphasized that the key conditions in clause 17.06 were "efficient operating requirements ... shall make every reasonable effort" and not that an employee could have exchanged his shift with another employee or make himself available for recall. There is no reference whatsoever in clause 17.06 to "recall" nor is there mention of denying vacation leave based on anticipated sick leave. The grievor's representative referred to the decision of adjudicator Frankel in Savage (Board File 166-2-9734) in which it was held that because of a persistent staff shortage, the employer must be seen as not having made "every reasonable effort" to grant vacation leave by relying on a general policy not to cover vacation leave with overtime when denying the grievor his request for vacation leave.

He argued that the employer could not base its refusal or tentative agreement to grant vacation leave based on "what if's". It could not grant such leave conditional on there not being any absences at the last

minute, such as sick leave. He attempted to draw an analogy between clause 13.04, in which the employer had a right to change scheduled shifts, and clause 17.06 where it must be deemed that the scheduling of vacation leave may be made on a day to day or "ad hoc" basis. He did not believe that the employer's policy concerning ad hoc vacation leave in place prior to January 9, 1986, varied or added to the collective agreement at clause 17.06. Such policy was permitted by the collective agreement.

The grievor's representative pointed out that operational requirements had remained constant throughout the period in question yet the employer added a "swing man" to its staffing. Past practice would have allowed this "extra" employee to cover for ad hoc vacation leave. But the employer changed its practice with its new policy by having the extra employee available to cover in the event of unscheduled leave occurring, such as absences for sickness, for the sole purpose of avoiding the payment of overtime. This constituted an administrative requirement and not an operational requirement. In his view, the employer had violated clause 17.06 by basing its denial of vacation leave not on operational requirements but on overtime reasons, due to a shortage of overtime dollars.

The employer, additionally, had an obligation under clause 17.06 to make "every reasonable effort" to grant the leave requested by the grievor, which it did not fulfill in the instant case. It had overstaffed

and had done so not for operational requirements but simply to avoid the payment of overtime. It could not legitimately do so. The grievor's representative referred me to the decision in Pinard (Board File 166-2-15381) in support of his position that the employer had not made "every reasonable effort" to grant the grievor's request for leave. The employer's new policy governing the granting of ad hoc leave was not related to operational requirements and was applied in a blanket way, without regard to the grievor's individual request. "Recall" was not a condition available to the employer under the collective agreement. As regards the possibility of exchanging shifts with another employee, this possibility is irrelevant to the present grievance and, in any event, by past practice, was necessary only when staffing was at a minimum. In the present case, there was excess staffing. Although it is up to the employer to determine staffing requirements, operational requirements determined the granting of leave. When it changed its past practice of granting ad hoc leave to "minimum plus one", for strictly budgetary reasons, the employer did so to the detriment of the employees. He sought a declaratory decision holding that the employer by changing its policy had violated the collective agreement by imposing "recall" or "standby" provisions.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer referred to the employer's new policy, Exhibit U-4, creating an obligation to phone in or remain on standby, as a condition to being granted

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"ad hoc" vacation leave and posed the question whether the terms of such a policy contravened the collective agreement. He made three submissions, the first of which was to the effect that the new policy did not breach clause 17.06(b), which addresses annual leave scheduling and in no way "ad hoc" leave. Management, he argued, retains the right to grant "ad hoc" leave, upon any conditions it wishes, in the absence of any provisions in the collective agreement dealing with that subject. In the circumstances, I cannot be called upon to determine whether the imposition of "recall" or "standby" was reasonable. Counsel's second submission was with regard to overtime considerations. The employer, he asserted, in granting or not granting ad hoc leave is not barred from taking into account overtime considerations. The earlier policy, which the bargaining agent admits was proper and not in contravention of the collective agreement, took into account the need to avoid the incurring of overtime when granting ad hoc leave. So also did the new policy. The jurisprudence is also supportive of this position. Thirdly, it was argued, it was reasonable, for the efficient operation of the control tower, to grant ad hoc leave on the basis of the new policy: there would not be an immediate decision taken to grant or not grant ad hoc leave. The requesting employee would have to call in or remain on standby for 30 minutes. These were entirely reasonable conditions.

During the term of the policy in place at the beginning of January, 1986, when ad hoc leave was granted

it was done conditional on there being no overtime payments incurred, except, of course, when there was a last-minute absence due to sickness and the like. Overtime funds had become exhausted: it was deemed necessary to put in place, for the remainder of the fiscal year, a new policy which would all but eliminate the possibility of having to resort to overtime when granting ad hoc leave. Clause 17.06 of the collective agreement was silent in the area of ad hoc leave. It dealt only with scheduled leave. The employer was free, therefore, to develop a possibility of ad hoc leave in favour of its employees and to attach to the granting of such leave such conditions as it deemed reasonable, including that of calling in 30 minutes before the employee's scheduled shift or remaining available for recall up to 30 minutes into the shift. By doing so, it was not only acting reasonably but was not in any way contravening any provisions of the collective agreement. It had every right to issue the new policy regarding ad hoc leave, which only reinforced its earlier policy to avoid the payment of overtime and with which policy the bargaining agent was in agreement. He dismissed the decision in Savage (supra), in which there was a staff shortage involved, as having no application to the instant case and referred instead to the decision in Hill (Board File 166-2-14425 and 14426) where adjudicator Williams, at page 12 of his decision, cited the following passage from pages 11 and 12 of the decision in Savage (supra):

> The question, then, is whether in refusing to allow the grievor vacation leave on September 26 and 27 on the grounds of its general policy not to cover such leave with overtime, the employer failed to discharge its obligation. I would not rule out the appropriateness, under normal conditions, of a general policy not to cover vacation leave with overtime. This could be a legitimate consideration of efficient operating requirements by the employer.

Following this citation, adjudicator Williams concluded that:

> While I do not wish to express it as broadly as adjudicator Frankel, I accept the view, in the light of the facts of this case, that the refusal to pay overtime is appropriate in the light of the words "Consistent with efficient operating requirements...". Further, I do not conclude that, on the facts of this case, a refusal by the employer to pay overtime is a breach of its duty to make every reasonable effort.

He referred also, in support of his position that the obligation to make "every reasonable effort" to grant annual leave does not require the employer to resort to the use of overtime, to the decisions in <u>Yurick</u> (Board File 166-2-14585); <u>Tremblay</u> (Board File 166-2-9742) and

Milette and Landry (Board Files 166-2-15368 and 15369). Thus, when the employer stipulated that ad hoc leave would be granted only if overtime is not incurred, it was stipulating a valid and recognized reason for controlling the granting of such leave.

Lastly, counsel for the employer referred to the reasonableness of the condition that an employee seeking ad hoc vacation leave phone in 30 minutes before the shift to be worked or remain available for recall for 30 minutes into the shift. The employer, it has been recognized, did not have to resort to overtime in granting such leave. But in the event of a last minute absence, overtime would be the likely result. To protect itself against the use of overtime and to maintain staff sufficient to meet operational requirements, it had to have in place a policy which was both reasonable to itself and to its employees. Such was the case before me, it was suggested. He referred, in support of the employer's right to anticipate staffing needs, to the decision in Dufresne (Board File 166-2-14582). Counsel dismissed the application to this case of the decision in Pinard (supra), which dealt with "lieu" days, which was another matter altogether.

REASONS FOR DECISION

The grievor requested vacation leave for Saturday, January 25, 1986, to attend a wedding in the afternoon of that day. He made his request verbally on January 6 and, when he did not get an affirmative response from

his immediate supervisor, he submitted a written application. On January 10, he was informed in writing that his leave request would be granted subject to his calling in 30 minutes prior to his shift, which was to commence at 2:00 p.m., or remaining available on "standby" for 30 minutes into his shift, to ensure that he was not needed due to other scheduled employees calling in sick or otherwise not being available to work. These "calling in" of "standby" provisions had newly been put in place by memorandum to staff in the Vancouver control tower because the tower's overtime funds had been depleted and it was necessary to avoid further overtime to the extent possible.

Prior to January 9, 1986, when new conditions for granting unscheduled vacation leave, dubbed "ad hoc" by the parties, were brought into effect, such leave was granted when "normal", that is "minimum" staff was scheduled to work on a given shift. Last minute absences due to sickness and like reasons for not reporting for work were not taken into account when granting "ad hoc" leave even though such an absence combined with "ad hoc" leave generally resulted in another employee being called in on overtime to make up the necessary minimum staff. This would be minimized or averted to the extent that there were excess employees scheduled to work for the air traffic which was anticipated, such as an employee scheduled to work the swing shift, which straddled the day and the evening shifts. Air traffic on weekends during the winter months was much lighter than traffic during the weekdays. During the month of January, 1986,

it was determined, nevertheless, that a controller would be scheduled on the swing shift on weekends in order to better provide for the avoidance of overtime due to unscheduled absences. This is the very reason why the grievor considers that there was a change from the previous basis on which "ad hoc" vacation leave was granted: In the past, an "extra" or surplus employee on the swing shift would be used to cover for an employee who requested "ad hoc" leave, thus bringing staffing to "normal" or "minimum". The new policy would allow "ad hoc" leave only when "normal" staffing was augmented by one controller, being the swing shift employee. This was a staffing decision taken to avoid overtime to the extent possible.

The question becomes one of determining whether the employer in changing its staffing patterns and thus the basis for granting "ad hoc" annual leave, thereby violated the collective agreement at article 17. The employer's obligation under that article is to accommodate an employee's request to schedule vacation leave and make every reasonable effort to do so "consistent with efficient operating requirements". The employer must, accordingly, determine its staffing requirements to meet anticipated air traffic and in doing so, it has been recognized in various arbitral decisions, it can staff in such a way as to avoid the need to resort to overtime. Ad hoc vacation leave requests were always permitted in the past, if there were employees scheduled to work who were deemed surplus to requirements. Considerations developed during the time surrounding the grievor's request

for ad hoc leave which precluded the use of overtime to the extent possible and to ensure this result an employee was scheduled to work the swing shift. Depending upon absences which occurred at the last minute, the presence of this swing shift employee might or might not have resulted in there being an employee who was surplus to requirements. For instance, if an employee reported sick, then this "extra" employee would cover for the absent employee and no longer would he be "extra". Otherwise, in the absence of such an extra employee, another employee would have to be called in on overtime. But, as has been held generally by adjudicators in the past, the requirement to schedule vacations "consistent with efficient operating requirements" did not include for the employer the obligation to resort to overtime. The employer, in the instant case, was faced with a request for ad hoc vacation leave at a time when it legitimately could staff to avoid the need to resort to overtime and the grievor could not rightfully complain that it had so staffed and had not used the "extra" controller to cover for him in order that he be granted the leave. Had he been granted the leave, overtime would have resulted if another scheduled employee had called in sick at the last minute. But the employer did not want to shut the door on the grievor's request or on similar requests and so adopted a new basis for granting ad hoc vacation leave: the employee requesting the leave could call in 30 minutes before the start of his shift for confirmation of the leave or be on "standby" for 30 minutes into the shift, during which time he could be called in to work if a need developed because of unforeseen absences of other employees.

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The grievor had the right to exchange his shift with another willing employee, which he was fortunate enough in arranging, and attended the wedding on time. His grievance that the employer, in so conditioning its approval of his request for ad hoc vacation leave, violated clause 17.06 of the collective agreement has not been established before me and for that reason is denied.

Thomas W. Brown,
Board Member.

OTTAWA, February 6, 1987.