

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

BETWEEN:

TONY LASTORIA,

Grievor,

- and -

TREASURY BOARD  
(Transport Canada),

Employer.

CODE 402/85  
ART 16

Before: Thomas W. Brown, Board Member.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: Raymond Piché, Counsel.

Heard at Montreal, Quebec, October 30, 1986.

LIEU DAYS ACCUMULATED PRIOR  
TO JUN 21, 1988



## DECISION

The grievor, an air traffic controller, classified at the AI-02 level, was employed by the Ministry of Transport in the control tower at Mirabel International Airport and was covered by the collective agreement between the Canadian Air Traffic Control Association and Treasury Board, Code 402/85.

He grieves against management's decision to force him to liquidate "lieu days" on October 9, 10, 22 and 26 and November 12,13,14,15 and 16 of 1985, in violation of clause 16.05 of the collective agreement and requests that these liquidated days in his bank of lieu days be reinstated as such.

Under the collective agreement, for operating employees, such as the grievor, the 11 designated holidays in a fiscal year are anticipated to the end of the year and "lieu day" credits established. Such lieu days may be scheduled as an extension to vacation leave or as occasional days and are charged against the lieu day credits on the basis of one shift for one day. However, clause 16.05 at paragraphs (d), (e), (f), (g) and (h) provides that:

16.05 For operating employees,

...

- (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.

Letter of Understanding No. 10-85, reproduced in and forming part of the collective agreement, addressed by the employer to the bargaining agent, reads:

This is to clarify the intent with respect to lieu days accumulated prior to June 1, 1982 as referred to in clause 16.05(h) of the collective agreement expiring December 31, 1986.

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

The grievor had over the years accumulated a fair number of lieu days which he had not used and as at April 1, 1985, he had 30 "pre-June 1, 1982" lieu days and carried over a further 8½ lieu days credited to him for the fiscal year 1984-85. In keeping with clause 16.05 of his collective agreement, he banked an additional 11 lieu days for the fiscal year 1985-86. Accordingly, he had 49½ lieu day credits in his "bank" when on July 30, 1985, he was advised by his unit chief, Mr. Roger Plouffe, that the latter would assign him "... a minimum of 5 lieu days effective September and thereafter every month in order to eliminate these lieu days". He was asked to advise the employer of the dates he wished to take each month. Upon enquiry, the grievor was advised by Mr. Plouffe by memo as follows:

As far as lieu days are concerned there are no limit (sic) as to the number of lieu days that you can carry over. The policy, however, is for management to give lieu days in the year it is earned. As an example everybody begins the fiscal year with 11 statutory holidays. Management should ensure that they have a policy so that everybody will take their lieu days in that year. Due to the overstaff at Mirabel the undersigned does not have a choice but to schedule all lieu days for everybody rather than give paiement (sic).

The grievor had already, in February of 1984, requested 10 lieu days to be taken in December of 1985 (plus one isolated day) but had not specified the exact dates. This, he had indicated, would liquidate the lieu day credits he would earn during the current fiscal year. Later he specified that he would like to take these days during the last week of December and the first week of January, 1986. Mr. Plouffe left the unit in August or September and lieu days were not in fact scheduled for the grievor in September. When the work schedule for October was posted, the grievor was indicated on it as having to take four lieu days on specific days in that month, although he had not wished to take any that month. He advised Mr. Michel Boucher, the new unit chief, that he had not requested any lieu days for October and, because of the request he had made for leave in December and January, he requested that the assigned leave for October be removed from the schedule. Later

he repeated his request and added that he wished to have the four days scheduled for October changed to five days' leave from November 13 to 17. Mr. Boucher advised the grievor that he could not rescind his decision to schedule four days in October, as he was following a plan to eliminate accumulated lieu days by scheduling some each month until the end of the fiscal year.

The grievor wrote to Mr. Boucher on November 6, 1985, as follows:

As you know, I have eleven (11) lieu days for this fiscal year and eight and one half (8½) lieu days from the last fiscal year. You're (sic) office was advised last April that I was requesting ten (10) lieu days at the end of December and first week of January. On my initial eleven (11) credits from this year, I will have one (1) lieu day remaining after Christmas leave. Since in October 85 I was scheduled four (4) unrequested lieu days (9-10-22-26). I will have eliminated all of my lieu days for this year and have taken three (3) lieu days from last fiscal year. The remaining five and one half (5½) lieu days from last fiscal year is requested to be taken at the end of February (86). So as per article 16.05(d) of our contract, I am requesting that you to cancel (sic) those lieu days scheduled by you from Nov. 12 to Nov. 16.

It was only on December 3, 1985, that Mr. Boucher answered the grievor's memo of November 6, 1985, and by that time the grievor had taken the five lieu days scheduled during November. His request to take lieu days over the last week in December and the first week in January was granted. Mr. Boucher's memo of December 3, 1985, reads:

As it was discussed with you and your representative in October, my intentions are to start eliminating some of your lieu days at a rate of 5 per month starting in October. As it was pointed out to you I was ready to consider other dates than those that were scheduled as long as you provided me with other preferred dates which you did not do. As it stands now you have eliminated 4 days in October and 5 days in November. Your request for 5 days in Dec. and 5 days in Jan. has been approved. I maintain my intentions to eliminate another 10 lieu days on top of that. Would you please let me know the dates you would prefer. As we discussed, on 21 Nov. I am also ready to consider dates in the next fiscal year as long as I obtain from you a global plan to reduce the number of your lieu days accumulated.

On the same day, December 3, the grievor brought to Mr. Boucher's attention the decision by Vice-Chairman



J. Maurice Cantin in Bourne (Board Files 166-2-15136 and 166-2-15188) in which it was held that, because of the meaning to be given to paragraph 16.05(h) of the collective agreement and Letter of Understanding 10-85, the employer was precluded from unilaterally scheduling lieu days which had been accumulated prior to June 1, 1982. Mr. Boucher, after making enquiries, advised the grievor that he did not plan for the time being to schedule any of his lieu days accumulated prior to June 1, 1982. No further unilateral scheduling of lieu days was made before the end of the fiscal year and the practice of unilaterally scheduling lieu days accumulated prior to June 1, 1982, was first suspended by the employer, pending an appeal of the Bourne (supra) decision, and later discontinued following a decision by the Federal Court of Appeal confirming the decision: Court file no. A-936-85.

ARGUMENT FOR THE GRIEVOR

Counsel for the grievor reviewed the scheme of things regarding lieu days as provided for under clause 16.05 of the collective agreement and emphasized paragraph 16.05(d) and its requirement that, in the scheduling of lieu days, the employer must make every reasonable effort to schedule lieu days at times desired by the employee. Counsel brought me through the existing jurisprudence dealing with this area of the collective agreement, starting with the decision in Anderson et al (Board Files 166-2-9005 to 9008) in which adjudicator R.D. Abbott held that the employer could not unilaterally schedule lieu days. She acknowledged that this decision was short-

lived, having been reversed by the Federal Court of Appeal [1982], 1 F.C. 714. The Court held, however, at page 717 of the decision that:

The sole limitation that article 16.05 places upon the right of the employer to determine when lieu days will be used is contained in paragraph (d) which obliges the employer to make every reasonable effort to grant lieu days "at times desired by the employee".

Counsel argued, however, that the instant case differed factually from that in Anderson et al (supra) in that here the grievor was agreeable to using up his current and carried-over lieu days in his bank but not those accumulated prior to June 1, 1982. The employer, however, ignored his desire and commenced scheduling the "elimination" of all his lieu day credits at the rate of five per month, including the pre-June 1, 1982, credits. It was only with the decision in Bourne (supra) that it ceased unilaterally scheduling lieu days for the grievor but the damage had already been done. The employer had mistakenly decided that it need schedule for the grievor five days in each month starting with September - later changed to October - in order to realize its goal to eliminate all his lieu-day credits by the end of the fiscal year. It could only have scheduled some 18½ days - not 48½, because it could not touch the 30 pre-June 1, 1982, credits - and so did not act reasonably in unilaterally scheduling four days in October

and five days in November. The effect of this was that when the grievor had already voluntarily taken one day in November and requested and was granted five days in each of December and January, his bank was depleted to such an extent that it ate into his pre-June 1, 1982, credits to the extent of 2½ days, although the grievor had been specific in advising the employer that he did not want to use up any of those days. Because of the employer's unreasonable decision in unilaterally scheduling lieu days in October and November, it must be held to have violated paragraph 16.05(d), it was argued.

Counsel pointed out that, prior to taking the five lieu days unilaterally scheduled for November, the grievor had indicated (Exhibit 10) that he did not want to take such days in November but rather in February, next, instead. The employer did not act reasonably when it refused his request, based on the mistaken belief that it had to schedule five days per month to average out the elimination of all of the grievor's lieu days. There were no "operational requirements" preventing the granting of the grievor's request, as there was "overstaffing" at the time (Exhibit 3). This emphasizes the fact that the employer did not make "every reasonable effort to schedule lieu days at times desired by the employee" when it unilaterally scheduled nine days in October and November. Counsel referred to the decision in Derrien et al (Board Files 166-2-13805 to 13807) in support of her position.

Counsel for the grievor concluded that there were two possible positions to be taken in this case,

the first being that, because the employer did not make every reasonable effort to schedule lieu days at times desired by the grievor, all nine days unilaterally scheduled for him in October and November of 1985 should be reinstated in his lieu day bank. This is so because of the violation of paragraph 16.05(d). The alternative position, it was suggested, was that, should I find that the employer was entitled to do what it did, I should, nevertheless, find that the grievor was entitled to have his pre-June 1, 1982, credits fully reinstated, in keeping with the decision in Bourne (supra). They had been 30 in number and had been reduced to 27½ days when the grievor took 2½ such days because he needed them. This voluntary use of 2½ days of pre-June 1, 1982, lieu days resulted from the fact that the involuntary and improper liquidation of nine lieu days in October and November and the voluntary use of 10 days in December and January provided no other alternative for the grievor.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer considered that counsel for the grievor presented an accurate description of the existing jurisprudence in the area of paragraph 16.05(d) of the collective agreement. He stated, however, that he was not intending to rely on the decision in Bourne (supra), as he contended that pre-June 1, 1982, lieu days were not in play here. What was in play only was the employer's decision to unilaterally schedule lieu days for the grievor in October and November, 1985, in the absence of any indication by the grievor when in those months he wished to take lieu days, the whole

in keeping with the employer's legitimate right to embark on a program to eliminate the grievor's accumulated lieu days by scheduling five per month. The grievor had agreed to take only one such day in October, so the employer unilaterally scheduled four others. He had been asked to indicate his preferences as to dates but refused to advance any. The employer's right to unilaterally schedule lieu days in October, in the circumstances, was exercised after every reasonable effort was made to have the grievor indicate, unsuccessfully, the time during October when he wished to take them. The grievor had indicated that he wished instead to take these five days in November, on specific dates, but later informed management that he no longer wished to take any lieu days in November. The employer thus acted within its rights in unilaterally scheduling five days in November for the grievor.

With the rendering of the decision in Bourne (supra), counsel stated, a halt was put to the plan to continue unilaterally scheduling lieu days for the grievor during the remainder of the fiscal year. When the grievor voluntarily requested and was scheduled to take 10 further lieu days for the last week in December and the first week in January, the employer cannot be held to have thereby forced the grievor to dip into any of his pre-June 1, 1982, accumulated lieu day credits, if that was the effect of voluntarily liquidating some of his banked lieu days. He traced the number of lieu days the grievor had to his credit on April 1, 1985, namely 51½, through the number remaining to his credit after he was forced to take four days in October and five in November. This showed that the grievor, over and above

the 30 days he had prior to June 1, 1982, still had 8½ days left because he had voluntarily taken two days in April and one on the 8th of November. The grievor then voluntarily took five days during the last week of December and five days during the first week of January, as well as one day on March 30. He remained with 27½ pre-June 1, 1982, credits as a result of his voluntary use of lieu days, counsel argued.

#### REASONS FOR DECISION

The facts of this case are set out in detail above. There remains only a slight difference of opinion as to whether the grievor's pre-June 1, 1982, bank of 30 lieu days had been depleted to 28½ or 27½ lieu days. For the reasons I shall set out below, nothing turns on this difference of opinion.

The jurisprudence, the parties agree, allows the employer the right to unilaterally schedule lieu days off for an employee, for other than the pre-June 1, 1982, banked lieu days, in the absence of the employee taking advantage of paragraph 16.05(c). This right is subject to the sole limitations that clause 16.05 places upon the employer in determining when lieu days will be used and that is that it must make every reasonable effort to grant lieu days "at times desired by the employee". In Anderson et al (supra) the Federal Court of Appeal, in addressing the employer's right to unilaterally decide when lieu days will be granted, stated at page 717:

Is this right modified or limited by other provisions of the agreement? ... The sole limitation that article 16.05 places upon the right of the employer to determine when lieu days will be used is contained in paragraph (d) which obliges the employer to make every reasonable effort to grant lieu days "at times desired by the employee." Does that paragraph impose on the employer the duty to make every reasonable effort to accede to an employee's request that his lieu days be carried over to a subsequent year? In my view, it does not because it merely refers to the granting of lieu days on precise dates requested by employees within the current fiscal year. I would add that insofar as article 16.05 gives employees the right to exchange lieu days for cash, this right is clearly limited to lieu days "which cannot be liquidated by the end of the fiscal year". It would be an abuse of language, in my view, to say that lieu days cannot be liquidated for the sole reason that the employee would prefer not to use them.

Adjudicator Williams in the Derrien et al (supra) decision stated at page 31:

Inasmuch as the word "grant" in article 16.05(d) does not imply any request by the employee and embraces a unilateral decision to schedule on the part of the employer, as I believe

the court held, I conclude that the limitation to "...make every reasonable effort to grant lieu days at times desired by the employee" has application to lieu days scheduled unilaterally by the employer. The Question thus becomes: In the facts of these cases, and given that the employer acted unilaterally to schedule and debit each grievor's lieu day credits, did the employer "...make every reasonable effort to grant lieu days at times desired by the employee."

The employer in the instant case exercised its right to unilaterally schedule lieu days off for the grievor during October and November of 1985. It had in August, 1985, notified the grievor (and others) of its plan to eliminate, by the end of the fiscal year, the large number of lieu days which he had accumulated (48½) and would do so over the ensuing seven months, at the rate of five each month, beginning in September. The employer requested the grievor to indicate his preferences as to dates in each of the months to come, beginning with September. But the grievor did not want to liquidate his pre-June 1, 1982, accumulated lieu days and indicated his wish to take the current year's entitlement of 11 lieu days at the end of December and the beginning of January. He was ultimately allowed to take off the desired days in December and January but refused to take any off in October, after the opportunity to assign days to him in September had been missed. The employer came within the findings of the Federal Court of Appeal in



Anderson et al (supra) and the decision in Derrien et al (supra) when it, in the circumstances, unilaterally scheduled lieu days off for the grievor in October 1985. The same is true for the scheduling of lieu days off in November, 1985. For November, however, the scheduling was done after the grievor had indicated preferred dates and then later informed the employer that he did not wish to take any lieu days off in November. Can it be said in those circumstances that the employer did not make every reasonable effort to grant lieu days at times desired by the employee. I think not for the reasons set out by the Court of Appeal in Anderson et al (supra). The employer, although mistakenly heading towards scheduling off pre-June 1, 1982, accumulated lieu days, which the Federal Court of Appeal in Bourne (supra) held that it could not do, stopped in time to avoid this result. Nor can it be said that by coming so close to the brink and as a result possibly causing the grievor to voluntarily use up some of his pre-June 1, 1982, accumulated lieu days, it violated paragraph 16.05(h) of the collective agreement or Letter of Understanding No. 10-85.

In the circumstances, this grievance cannot succeed and is dismissed.

Thomas W. Brown,  
Board Member.

OTTAWA, February 10, 1987.