

File: 166-2-16211

No. 55.

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

BETWEEN:

JOHN KROEKER,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: Roger Young, Board Member.

For the Grievor: Terry Bartley, Canadian Air Traffic
Control Association.

For the Employer: Ted Tax, counsel.

ART 17
CODE 402/85-

DENIAL OF
LEAVE

Heard at Winnipeg, January 13, 1987.

DECISION

The grievor, John Kroeker, is an Air Traffic Controller, AI-04, at the Winnipeg, Manitoba, Terminal Control Unit, TCU. He has been employed in the Air Traffic Services Branch of Transport Canada for nearly 17 years, always with an average or above average performance rating. On 13 November 1985 he worked the day shift from 0800 to 1600 hours. Shortly after reporting in at 0740 hours, he asked his immediate superior, David Tustin, the Terminal Team Supervisor, if it would be possible for him to take four hours leave that afternoon. Two spare controllers were available to cover any absences from the regular day shift crew.

Kroeker testified that the normal procedure in obtaining such leave was to first ask the Team Supervisor who would then relay the request to the Shift Manager provided that there were no preliminary reasons for denying it. In this particular instance, Kroeker was advised by Tustin that, subject to Mr. Shewfelt's approval, there would seem to be no problem in his leaving early. On this basis Kroeker attempted to arrange an appointment for that afternoon in order to meet with the architect involved in the construction of new curling facilities for the club of which he was then President. The meeting could not be arranged to take place before 2:00 p.m. (1400 hours) that day. Kroeker, therefore, revised his request and sought only two hours leave instead. This revised request was made at approximately 1100 hours; the two spare controllers were still available.

Kroeker testified that, shortly after noon, he was informed that Ralph Frith, a controller scheduled to work the evening shift from 1600 to 2400 hours, had called in sick. Tustin then asked Kroeker as well as the other available controllers whether anyone wished to work an overtime shift as a replacement for Frith. No one was willing to stay; Kroeker, himself, refused because he had other commitments that evening. A short while later, Tustin advised Kroeker that his request for leave had been denied and, further, that Kroeker had mandatorily been assigned four hours of contiguous overtime that evening.

It is against the denial of leave, which the grievor alleges was unreasonably withheld, that Kroeker has grieved. Also at issue is the assignment of mandatory overtime which the grievor claims inconvenienced him. The grievor agreed that he was compensated according to the collective agreement in relation to the contiguous overtime performed by him. The corrective action requested, however, is that six hours leave be added to his leave credits -- two hours for the leave which he was denied and four hours for the time during which he was forced to remain at work against his will. He further requested a written apology from the Shift Manager for having denied him the leave request.

On cross-examination, Kroeker agreed that a system of "book leave" was in use at Winnipeg with the acknowledgment and consent of both management and

employees. This system was established to allow leave of brief duration to be taken by an employee without the necessity of either party having to complete an inordinate amount of paperwork each time. A ledger was kept into which which an employee could transfer a number of hours of leave time up to the equivalent of one day. The leave credit might originally have been earned as vacation leave or compensatory leave; it would be transferred from that account to the "book leave" ledger. As the "book leave" was used up, the balance outstanding on this ledger would simply be reduced accordingly. In this way, for example, one day's worth of vacation leave could be transferred to a controller's credit in the "book" and only one leave application would have to be made out. It might then later be used up in the form of "book leave", only in bits and pieces of an hour or two at a time spread over several occasions. A controller's credit balance could be replenished from time to time, again requiring the completion of but a single leave request form.

Kroeker stated that, at the time his leave request was made, he did not specify whether this request was for annual leave, a lieu day of leave or for "book leave". In fact, he said he had not, at that point, decided in just which form he intended to take the leave if, indeed, it were granted. Aside from Tustin's comment that there would seem to be no problem with his request, Kroeker conceded that management had not expressed any formal agreement to it or that there was anything to indicate the request had been approved.

Kroeker also stated that it had not been possible to plan in advance to meet with the architect. The need had arisen owing to problems with building construction. The leave request was one which he had made when the opportunity appeared to present itself. The meeting likely would have lasted for one hour, from 2:15 p.m. to 3:15 p.m. The intended meeting place was about five minutes drive from the airport. Kroeker felt that he could have gone to his meeting and returned to the airport before the end of the day shift.

Kroeker also testified that he learned he was being assigned to work overtime that evening before he was told that his leave request was being denied. The denial of leave took place around 1300 hours and he cancelled his appointment with the architect as a result. He later discussed the leave request and contiguous overtime assignment with the Shift Manager, Glen Shewfelt, complaining, in particular, that he felt victimized by the policy in the work place of assigning mandatory overtime to the controller with the fewest overtime hours to his credit. The system at Winnipeg operated such that a controller who refused an offer of overtime was then credited with the same number of overtime hours, for distribution purposes, as one who actually worked the overtime. Kroeker maintained that the controller with the lowest number of hours on the roster would wind up being assigned the actual overtime work whereas another controller might have achieved a higher total and thus avoid performing overtime simply because he had refused more offers.

Kroeker stated that he did not explain to Shewfelt, at the time, that it would have been possible for him to return to the TCU before 1600 hours had he been permitted to go to his appointment with the architect. He contended that such brief leave for an hour or two could have been deducted either from his compensatory leave credits, which are kept on yet another ledger, or from his "book leave" credits. He conceded that during the fall of 1985 management was having difficulty in finding controllers who would voluntarily work call-in overtime.

David Tustin, the Terminal Team Supervisor testified that, during the day shift on 13 November 1985, the required three AI-04 controllers in the TCU had been present along with himself, an AI-05. In addition, a spare controller, AI-04, and a spare Team Supervisor, AI-05, were available. A Team Supervisor can fill in for a controller, if necessary. Tustin also stated that, on the basis of his own previous experience as a Control Centre Supervisor for some eight years (a position equivalent to today's Shift Manager) he would have approved Kroeker's leave and would have assigned the mandatory overtime to the next available controller with the lowest overtime hours.

Tustin agreed that short notice "book leave" was handled on a first come, first serve basis. It was normal to give an employee making such a request a preliminary indication of whether such leave might be possible; however, the actual approval of leave was subject always to circumstances as they developed during

any particular day. A final decision was normally only made just prior to the time the employee actually wished to depart.

Tustin stated that once Shewfelt became aware of Frith's illness in relation to the evening shift, Shewfelt would have begun searching for a replacement. Not finding any volunteers amongst those who were already off duty, Tustin would then have been asked to check amongst those who were on duty. Whereas Tustin was primarily responsible for matters pertaining to his own shift, Shewfelt, as Shift Manager, had a responsibility for the continuing welfare of the whole operation. Tustin agreed that a controller would not be released from the completion of his day shift until it was certain that the position was covered by a relief controller on the evening shift.

Tustin stated that the overtime records of the various controllers are kept by the Shift Managers and that the accounts pertaining to controllers were kept separate from those pertaining to Team Supervisors. However, since coverage of an open position was paramount an offer of available overtime would be made through both lists in order to exhaust all possible volunteers before mandatory assignments were made. Tustin agreed that there were problems filling overtime assignments because management was no longer paying controllers for a full shift. It had recently become the practice to send home controllers who were working overtime before they had put in a full eight hours if conditions permitted. Fewer volunteers were available as a result

and contiguous overtime assignments were on the increase, adding to some discontent amongst controllers at management's attempts to cut costs.

Tustin testified that, on the basis of the available overtime records for the Winnipeg TCU, Blake Doerksen had the lowest number of overtime hours as of 13 November 1985. However, Doerksen was already scheduled to work the midnight shift 0000 to 0800 on 14 November so he was ruled out as a possibility. Garth Nosworthy was the next lowest; however, Nosworthy was a Team Supervisor and the unfilled position was a controller function. Although Nosworthy was offered an opportunity to work the overtime and to fill in on a volunteer basis he would not be assigned, mandatorily, to fill it. Then came Kroeker with the next lowest total of overtime.

Glen Shewfelt has been a Shift Manager for the Winnipeg Area Control Centre since June 1983. Prior to that he was a Shift Supervisor for two years. He testified that, when Frith called in sick around 1130 hours on 13 November 1985, he, Shewfelt, exhausted all possibilities in contacting and offering overtime to off-duty controllers in order to find a replacement. By 1300 hours no one had been located who was available. Shewfelt then instructed Tustin to ascertain which on-duty controllers were available for contiguous overtime. He also instructed Tustin not to approve any "book leave". It was at this point that he learned such a request had been made by Kroeker.

Shewfelt testified that, in conformity with clause 15.03 of the collective agreement, it was the policy of the unit to assign overtime to the controller with the least number of hours to his credit unless another volunteer was available. Shewfelt determined that Kroeker was the controller with the lowest overtime account. He instructed Tustin to advise Kroeker to be prepared to stay unless someone else volunteered. No one did. Kroeker was therefore advised shortly after 1300 hours that he was being assigned contiguous overtime from 1600 to 2000 hours that day.

Shewfelt testified that Kroeker objected on the basis that he had already asked for leave that afternoon. However, this leave had not been finally approved and, in the meantime, operational requirements had changed. The leave request was then denied. Kroeker later wrote Shewfelt a memo complaining about his treatment to which Shewfelt responded similar to the reasons expressed above. Shewfelt corroborated Tustin's account that it had become increasingly difficult to find controllers willing to work voluntary overtime. He also corroborated statements previously made describing the operation of the "book leave" system. He testified that management had the prerogative to assign mandatory overtime.

Shewfelt testified that as of 13 November 1985, Kroeker had two hours and 15 minutes standing to his credit on the "book leave" ledger and some 66 hours and 41 minutes to his credit on the compensatory time ledger. He stated that short notice leave is normally

taken as "book leave" though it could be drawn directly from compensatory time but this was unusual. He also stated that the operational requirements which forced him to deny Kroeker's leave request centered upon the shortage of controllers to cover the evening shift.

Shewfelt conceded on cross-examination that Kroeker could have signed for annual leave or lieu leave as well as for either "book leave" or compensatory time to cover his request for time off on 13 November 1985. Kroeker, though, never did specify what his intentions were. The collective agreement described the scheduling of vacation leave in clauses 17.04 and 17.06(b) and the scheduling of lieu days in clause 16.05(d). Shewfelt agreed that these clauses obliged the employer to make every reasonable effort to accommodate an employee's wishes consistent with and subject to efficient operating requirements.

Shewfelt pointed out that 13 November 1985 was a regularly scheduled day of work for Kroeker not one of annual leave or a lieu day or compensatory time off. Shewfelt also agreed that, at the time Kroeker's request was originally made, and for the balance of that shift, the normal operating requirements of the service were sufficiently met. He agreed that more than enough staff were available had Kroeker been allowed to leave for two hours and return at 1600 hours. However, Kroeker had never made known any intention to return if allowed to leave. In any event, the relief controller or person assigned to contiguous overtime would have had to have been determined and available at 1540, i.e. 20 minutes

prior to the shift commencing for the necessary briefing period.

Shewfelt was asked why controller Greenwood was not asked to report in for the overtime assignment since the records suggested that Greenwood was not even contacted but had fewer overtime hours than Kroeker. Shewfelt pointed out that Greenwood had just finished working a midnight shift and would have been home, likely in bed asleep, for only some three hours when the 'phoning was done. Controller Dobson, similarly, was not ordered in, though he was offered but declined the opportunity to work, because, while he had less accumulated overtime than Kroeker it would also have meant that Dobson had less than eight hours between work assignments. The employer could not mandatorily impose such a schedule.

On behalf of the grievor, Mr. Bartley argued that leave had been unreasonably denied to Kroeker; the collective agreement required the employer to make every reasonable effort to allow an employee to take his leave at a time convenient to the employee. The operational requirements of the service were more than adequately met both at the time when Kroeker first made his request and during the time in which Kroeker wished to be away. Kroeker had followed the normal procedure in seeking leave. He had been led to believe there would be no problem. The leave request had not been denied because of operational requirements but because of the imposition of contiguous overtime.

Mr. Bartley suggested that Kroeker should have been given his leave and that Nosworthy should have been forced to stay. He suggested that no distinction should be made between Team Supervisors and Controllers. Both were offered available overtime without distinguishing between the groups; likewise both should be assigned overtime without distinguishing between them. Furthermore, Shewfelt failed to contact all possible available controllers. Someone else might have been ordered in. The decision to hold back Kroeker for contiguous overtime did not need to be made at 1400 hours; it could have been delayed until 1600 hours when four controllers still would have been on the premises.

Mr. Bartley referred to the previous decisions in Lauzon (Board File 166-2-15728) and Pinard (Board File 166-2-15381). In the former, a controller had sought a day's leave one week prior to the planned event. The employer had demurred, telling him to check again about four hours prior to the shift on which he wished to book off. The adjudicator held that the employer had been wrong in withholding its consent. It had not made every reasonable effort. In the latter case another controller also had asked for leave somewhat in advance of the event but had been refused and told he could check again on the day in question. He was subsequently allowed to take three hours leave at the end of his shift that day. The adjudicator had held that the employer was obligated to make every reasonable effort to accommodate a controller's request for a lieu day.

Mr. Bartley argued that Kroeker's case was identical to these others; in all cases sufficient staff had been available to allow for the leave to be taken. It was not open to the employer to now say that Kroeker had only sought compensatory leave or book leave. Kroeker had asked for leave; this could have been either annual or lieu leave. It was up to Kroeker to decide. In asking for a remedy, Kroeker sought to be made whole. In return for his inconvenience and lost opportunity to take leave he was asking to be awarded six hours leave. Also, he wished to be given a written apology by the Shift Manager.

On behalf of the employer, Mr. Tax first argued that whereas the grievor had based his argument on the employer's obligation to schedule annual leave or lieu leave according to the terms of the collective agreement, the grievor had never before suggested exactly what kind of leave it was that he was claiming. In the absence of knowing just what Kroeker was claiming it was impossible to know just how to approach this adjudication hearing. Only after the grievor first had specified which article of the collective agreement was being grieved could it then be determined what obligations were involved. It was up to the grievor to make out his case. In the absence of being able to show there had been a clear claim for annual leave or lieu leave, the grievance did not even come within the collective agreement for there was no provision covering ad hoc or "book leave". This was merely something which fell within management's discretion.

Alternatively, Mr. Tax argued that, even if the claim for leave could be said to fall within the collective agreement, the operational requirements of maintaining a continuous operation were such that the effects of the shortage on the evening shift spilled over onto the day shift. The inability to find a volunteer for an overtime assignment had caused management to mandatorily assign contiguous overtime to Kroeker. Since Kroeker was already at work and management needed to be certain of his availability, it decided to deny his request for leave. It was not realistic to expect Shewfelt to wait until the end of the shift to decide, nor could Shewfelt have simply left the problem to the incoming Shift Manager to solve. Management had fulfilled its obligations concerning the distribution of overtime according to clause 15.03 of the collective agreement and in conformity with the agreed system in place at the Winnipeg TCU.

Mr. Tax agreed that spare controllers were available when Kroeker's leave request was first made. The normal procedure for dealing with "book leave" was then followed by both parties. An initial indication of the possibility of leave had been given, but no formal approval. Kroeker thus had acquiesced to the standard procedure for obtaining short notice or "book leave" and this was what management believed he had requested. Subsequently, his request was simply superseded by the events of the day. Kroeker was compensated for the four hours of contiguous overtime he then worked. The employer was not obliged to compensate him any further with an additional four hours leave. As for his regular

shift, Kroeker was also compensated. He was owed nothing further even though he might have been inconvenienced by not being able to take his leave just when he wanted. He had lost nothing however.

As to the suggestion that Kroeker could have and should have been allowed to go to his appointment with the architect and then return to the airport, this was entirely hypothetical and only suggested by Kroeker after the fact. Nothing in this vein had been mentioned by Kroeker at the time, nor had he said anything about the appointment being absolutely necessary. If Kroeker's leave request really had been for compensatory time then clause 15.02 of the collective agreement would apply. It was obvious that the parties had simply been unable to reach agreement as to the appropriate time for scheduling such leave.

Mr. Tax distinguished Lauzon (supra) and Pinard (supra) on the basis that those cases involved leave requests made somewhat in advance of the day in question. Here the employer had acted reasonably and in good faith. It had exercised its discretion carefully and after making every attempt to accommodate the grievor. It had done nothing which could be classed as discriminatory.

REASONS FOR DECISION

I am unable to see how this grievance can be sustained or that there is any basis on which to award the corrective action requested even if it could. In the first place, it is up to the grievor, here, to

establish the basis of his grievance, i.e. the wrongful application in respect of him of a provision of the collective agreement. If that is done, it is then necessary that there be established some relationship between the loss alleged to have been suffered and the remedy sought.

The suggestion that the grievor could have been asking for either annual leave or lieu leave when he asked to be allowed to depart from work two hours early on 13 November 1985 seems to have been raised for the first time at the adjudication hearing before me. Prior to this point, the parties seem to have approached the issue in terms of whether the grievor had been fairly treated according to the informal procedures adopted by the parties for administering what has come to be known at Winnipeg as "book leave". The problem which arises is that the collective agreement recognizes no such item as "book leave". The grievor's request, seemingly, would only have substance under the collective agreement if made as a request for either annual or lieu leave. The grievor still has not specified which of these he relied upon though he does seek redress of his grievance under the guise of the collective agreement.

Even if a claim for annual or lieu leave was involved here I would have been of the opinion that the operational requirements of the service and the lack of adequate notice were sufficient to excuse the employer from acceding to the grievor's request. Both grounds are found in the collective agreement. The

employer is entitled to adequate notice when being asked to schedule a lieu day of leave. Likewise, operational requirements would have been sufficient to excuse the employer from being required to schedule, as annual leave, the grievor's request that two hours off be granted that very day.

I am unable to find anything else in the collective agreement which would have compelled the employer to accede to the grievor's request for two hours leave between 1400 and 1600 hours on 13 November 1985. I would have to say that I am not convinced that management acted unreasonably. Spare controllers may have been available to more than adequately cover the day shift. Ordinarily, this would have permitted Kroeker to get away. Other events intervened and, even though they pertained more to the subsequent evening shift, Kroeker did nothing to assist his cause when he failed to advise management that he was prepared to return to work, if necessary, before 1600 hours. Management had been given nothing to suggest other than that Kroeker was planning to leave and would not be returning before his next daily shift.

It was incumbent upon Shewfelt to ensure that sufficient air control staff were available to cover the evening shift. Volunteers were unavailable. Mandatory contiguous overtime had to be assigned to Kroeker. The obligation upon the employer pursuant to the collective agreement states:

15.03 The employer will endeavor to keep overtime work to a minimum and shall assign overtime equitably among employees who are qualified to perform the work that is required at the location concerned.

I find that the system in use for the distribution of overtime at the Winnipeg TCU satisfied the requirements of the collective agreement and, further, that the employer went to extensive efforts not only to make an equitable assignment in the instant case but to assign it, mandatorily, to the grievor only as a last resort. Once management had ascertained that Kroeker was the controller to whom it was required to assign the necessary overtime, it was equally entitled to be able to count on Kroeker's co-operation. Since Kroeker was already present at the TCU this was best achieved by asking him to remain present. That Kroeker now says he only needed to be away for an hour or so and would have been no more than five minutes travel from the airport is of little consequence. Management had no way of knowing this at the time since Kroeker said nothing; however, this would not necessarily, in my view, have been compelling in any event.

I find it unrealistic that it be suggested that management could have waited until 1600 hours before selecting a controller to perform overtime. In the first place, the assured, continuous operation of the air traffic control function is too important to be left in the balance until the last moment. That would not only be a poor management practice but it would

increase the inconvenience of the controllers themselves. Instead of one controller being certain that he would be working overtime, four controllers would have had to put their plans for the evening on hold. No one would be certain until the end of the day of the results of the overtime lottery. I have great doubts that this would be of much lasting satisfaction to the controllers.

It is unfortunate that a colleague's illness coupled with Kroeker's obligation to accept an overtime assignment because he had the lowest number of overtime hours caused Kroeker to be inconvenienced. There is nothing in the collective agreement which requires the employer to compensate Kroeker for this inconvenience. He has already been compensated for performing the overtime; there is nothing which requires him to be given an additional four hours leave. Likewise, there is nothing on which he can base a claim that two hours leave be given to him for the two hours he was unable to take off during his regular shift on 13 November 1985. No apology on the part of management is required for the actions it took.

For all of the above reasons this grievance must be and is hereby dismissed.

Roger Young,
Board Member.

OTTAWA, March 9, 1987.