

File no.: 166-2-16212

No. 79

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

BETWEEN:

PETER M. HUDGIN,

grievor,

- and -

TREASURY BOARD
(Transport Canada),

employer.

Before: J. Galipeault, Board Member.

For the grievor: A.C. Fischer, Canadian Air Traffic
Control Association.

For the employer: S. Barry, counsel.

ART 13
CODE 402/85

Heart at Montreal, Quebec, January 7, 1987.

8 HOURS BETWEEN SHIFTS FOR OPERATING EMPLOYEES

DECISION

The grievor, Peter M. Hudgin, is an air traffic controller, AI-03, with Transport Canada, at the Dorval International Airport, in Dorval, Quebec. Mr. Hudgin's grievance and corrective action requested is as follows:

After having being involved in an operating irregularity, I was re-assigned to work non-operational 9 - 5 on Feb. 3. During this period, an administrative inquiry was held, at which I was present for five (5) hours. At about 16:45 local, I was informed, by 2-way memo, that I was reassigned to operational duties. After consideration, I elected, for safety reasons, to advise both my supervisor and unit chief that I was unable to work the 22:45 local shift that evening.

No effort was made by management to abide by clause 13.06 and 13.06(a) of our collective agreement. It was, and is, incumbent upon management to realize that scheduling such a short interval between shifts (4 hrs. - exclusive of travelling time), after a major incident inquiry, was a most unreasonable, indeed unsafe, demand.

Corrective action requested

1. That clause 13.06 of our collective agreement be adhered to in future cases.

2. That the pay-deduction notice, dated Feb. 20, 86, be cancelled for this shift in question.

The employer, in its response at the second level (not the final level) of the grievance procedure said the following:

The events leading to your grievance have been carefully reviewed and I have come to the following conclusions: If you felt that you were not able to perform your duties as an operating controller, you could have asked for sick leave as suggested by your supervisor. On the other hand, if you disagree with the employer's compliance with article 13.06 a) you may grieve his decision but not unilaterally take yourself off the schedule.

As far as the application of article 13.06 a) is concerned, I find that the unit Chief made the reasonable effort required by the collective agreement.

Article 13.06 a) of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association, January 1, 1985 - December 31, 1986, code: 402/86 says:

Every reasonable effort shall be made by the Employer not

to schedule the commencement of a shift within eight (8) hours of the completion of the employee's previous shift.

EVIDENCE

The grievor testified on his own behalf. He filed four exhibits. Mr. N. Salomon testified for the employer. One exhibit was filed by the employer.

Mr. Hudgin testified to the effect that on January 30, 1986 he was, while acting as a ground controller at the Dorval International Airport, involved in an operating irregularity. The acting unit chief, Mr. Cameron, advised him by memo dated January 30, 1986 that he was relieved from acting control duties until the completion of the preliminary investigation with regard to the above incident. The grievor was thus removed from operational duty to non-operational duty. Mr. Hudgin was off January 31, February 1 and 2. He was scheduled to be back at work on February 3, at 22:45 for the night shift ending at 06:45. The grievor found out, on January 31, that he was to be on duty February 3 as non-operational between 9 and 5. On February 3, the witness reported for work at 9 a.m. Mr. Hudgin was then summoned, around 10 a.m., to Mr. Salomon's office where, in presence of Mr. Cameron, the January 30 incident was discussed. The grievor was expected to testify the next day before a fact finding board at 13:00. Mr. Hudgin said that he would be ill at ease testifying before a fact-finding board at 13:00 after

having finished a previous shift at 7:00. Mr. Salomon replied that he could testify at 15:00 or 16:00. The grievor stated that he wanted eight hours sleep between shifts in order to give a decent testimony. He offered to appear the following day or during the evening. Mr. Cameron suggested that Mr. Hudgin, at the conclusion of his night shift, at 7:00, book a room at the Dorval Hilton at his own expense. The grievor refused for cost factor reasons and also because he would not necessarily get more sleep before he was to appear before the fact-finding board:

The grievor reported that the morning session of the February 3 preliminary investigation ended at 12:00. He was told that it would continue in the afternoon starting at 14:00. The afternoon session ended at 16:45. Eight minutes before the end of the afternoon session, that is at 16:37, Mr. Hudgin was given a memo by Mr. Salomon in which he was told that he was reassigned in his operational duties as of 16:00 that same day. The grievor was expected to report that same day for the 22:45 shift, that is six hours later. Mr. Hudgin left his workplace at 17:00 and arrived at his residence at 18:00 or 18:10. He explained that when he has to work on the 22:45 to 6:45 shift, he has to leave his home at 21:45. The grievor decided that he would not work the night shift because he could fall asleep. He was still agitated from the preliminary investigation held during the day. Mr. Hudgin called supervisor B. Bourgon and told him that he could not work the night shift. Mr. Bourgon asked Mr. Hudgin if he was sick.

The grievor said he was not. Mr. Hudgin stated it was inadvisable for him to work. Mr. Bourgon declared he was on leave without pay. Mr. Hudgin did not react. The grievor then called his unit chief N. Salomon at his home and repeated to him the same things he had said to Mr. Bourgon. Mr. Hudgin mentioned to Mr. Salomon the interval in hours he would have between shifts that same day. Mr. Salomon asked Mr. Hudgin to come for the night shift but the grievor declined. Mr. Salomon told Mr. Hudgin to report the next day at 13:00 for non-operational duties. The witness stated that Mr. Salomon told him to prepare a leave request for the shift he declined to work and that he would have a letter for him.

Mr. Hudgin explained that around 9:10 on February 4, Mr. Salomon called and informed him not to report for 13:00 that same day. The grievor was told that he was to be on unauthorized leave without pay for February 4. On February 5, Mr. Hudgin was removed from operational duties to non-operational duties. He was to be interviewed, that day, by the fact-finding board. The grievor reported on February 5 at 7:00. He presented his special leave request for the night shift he did not do on February 3. The witness explained to the employer in an attached memo why special leave should be granted to him. Mr. Hudgin appeared on February 5 at 15:00 before the fact-finding board. The grievor learned on February 5 that his special leave request was denied. He then filed the present grievance.

When cross-examined, Mr. Hudgin said that when the February schedule was posted fifteen days before, that is in January, he knew that he was scheduled for the 22:45 shift on February 3. He was, however, on January 30, changed from operational duties to non-operational duties. He was put back on operational duties at 16:00 on February 3. The grievor said that, when the preliminary investigation was held on February 3 until 16:45, a big discussion with regard to his January 30 operating irregularity went on. Mr. Hudgin reiterated that it was only at 16:37 that he received Mr. Salomon's memo in which he was told that he was now back on operational duties. The meeting ended at 16:45. The grievor explained that it was only on February 5 that it was suggested to him that he make a request for special leave for the February 3 night shift. Mr. Hudgin stated that, during the period of the preliminary investigation held on February 3, the delay and time between shifts was mentioned. The grievor explained that the state of agitation he was in after the end of the preliminary investigation on February 3, "did not permit him for sick leave". Mr. Hudgin declared that when he phoned Mr. Salomon after 18:00 on February 3 to tell him that he would not work the 22:45 shift that same night, he told him that he was scheduled to report for that shift only a few hours after the end of his 9 to 5 shift.

Mr. N. Salomon, the air traffic controllers unit chief at the material time at the Dorval International Airport, testified for the employer. The grievor was

one of his controllers. Mr. Salomon said that when an air traffic controller is removed from operational duties after an operating irregularity has occurred, it is until the end of the inquiry held by the internal administration. There is also going on, at the time of the preliminary investigation, a fact-finding board organized by management in Ottawa. The witness stated that he made his own inquiry regarding the January 30, 1986 operating irregularity involving Mr. Hudgin. Mr. Salomon said that when the grievor was told, at the beginning of the February 3 afternoon meeting, that he would be reprimanded for the January 30 incident, he was upset. Mr. Hudgin tried to convince Mr. Salomon not to reprimand him but he did not succeed. The witness declared that he told the grievor verbally at that time that he wanted him on the 22:45 shift that same day. Mr. Salomon said that he wrote his exhibit G-3 memo in front of Mr. Hudgin and gave it to him as soon as it was completed.

The employer's witness stated that during the February 3 afternoon session, Mr. Hudgin, after he had been asked to work the night shift, never said he was refusing to do it. He went home, then called Mr. Bourgon and the witness. Mr. Salomon reported that when Mr. Hudgin called him at his home, he told him that he had left the office and that, if he had to report for the 22:45 shift, he did not have the eight hour interval envisaged by the collective agreement. The grievor said that he was thus entitled not to work. He added that he should be on leave without pay for

that shift. The witness stated that he told Mr. Hudgin that he could not grant him special leave. If he would not work, he would be on leave without authorization. Mr. Hudgin said to Mr. Salomon that he was not taking sick leave, and he was not getting the eight hours between shifts of the collective agreement. Mr. Bourgon was told by the witness to find a replacement for Mr. Hudgin for the 22:45 shift.

Mr. Salomon stated, during his cross-examination, that he was sure when Mr. Hudgin called him at his home on February 3 that the grievor would not show up for the 22:45 shift. The witness thus told Mr. Bourgon to make sure that somebody could replace Mr. Hudgin. Mr. Salomon agreed that exhibit G-1 shows that the grievor was replaced by DD.

ARGUMENTS

The grievor's representative argued that although the February 1986 schedule showed that Mr. Hudgin was to report for the 22:45 shift on February 3, he was told on January 31 that he was to report on that day for a 9 to 5 non-operational shift. The grievor remained non-operational until 16:37 on February 3. Mr. Hudgin participated, on February 3, along with Messrs. Salomon and Cameron, in an administration inquiry which ended at 16:45. Mr. Salomon, the unit chief, knew that the grievor needed eight hours between shifts, under the conditions of article 14.03 of the relevant collective agreement, yet asked him to report for the 22:45 shift

that same night. The evidence adduced showed that Mr. Hudgin got home after 18:00 on February 3 but nevertheless would have had to leave at 21:45, that is three hours and forty-five minutes later, to arrive in time at the airport for his 22:45 shift. The employer contravened article 14.03 of the collective agreement when it asked the grievor^{13.06} to report back for work in a period much less than the eight hours permitted. Reference was made to the Pinard (Board file 166-2-15381) decision.

Mr. Fischer submitted that the employer never made, in the present instance, the every reasonable effort mentioned by article 14.03 of the relevant collective agreement. It is in^{13.06} uncontradicted evidence that when the grievor got home on February 3 he phoned both his supervisor and the unit chief to tell them that, since he was tired from the events of the same day, he could not report that same night for the 22:45 shift. Since Mr. Hudgin was not sick he could not ask for sick leave. He could only ask for special leave which he did later. The special leave request was unjustly denied by the employer. Mr. Fischer argued that the grievor was, under the conditions of article 10.06 of the relevant collective agreement, entitled to be granted special leave with pay for the February 3 night shift he could not do because circumstances not directly attributable to him prevented his reporting for duty. The grievor's representative stated that when Mr. Hudgin came to the conclusion, after he had arrived at his home on February 3, that, because of the state of agitation and fatigue he was in, it was better for him not to

report for work that same night in less than five hours, he acted as a very responsible air traffic controller and he should be so commended.

Counsel for the employer, mentioning that Mr. Hudgin in his grievance never referred to a request for special leave being denied to him, argued that the grievor cannot be paid for services he did not render on the night of February 3. Mr. Barry submitted that if I so conclude, I can only make a declaration, in the present instance, that the employer has contravened article 14.03 of the relevant collective agreement. What Mr. Hudgin should have done would have been to call in sick and grieve later if the employer had refused to grant him sick leave with pay. Counsel for the employer stated that the evidence adduced showed that the employer made the every reasonable effort envisaged by article 14.03 of the relevant collective agreement. Mr. Hudgin was advised very early in the afternoon of February 3 that he had to show up that night at 22:45 but it was only around 18:30, when he decided to phone Messrs. Bourgon and Salomon, that he said something about it. It was too late. Mr. Hudgin should have made known his refusal when he signed, at 16:37, the memo given to him by Mr. Salomon. The grievor did not prove that the employer did not make the every reasonable effort envisaged by article 14.03 of the collective agreement.

REASONS FOR DECISION

Counsel for the employer argued that I can only make a declaration, in the present instance, if I come to that conclusion, that the employer has contravened article ~~14.03~~^{13.06} of the relevant collective agreement. Article ~~14.03~~^{13.06} says that "Every reasonable effort shall be made by ^{13.06} the Employer not to schedule the commencement of a shift within eight (8) hours of the completion of the employee's previous shift." I agree with Mr. Barry's above submission.

The grievor did not work the night shift of February 3, 1986 and should thus not be paid for services not rendered. It is in uncontradicted evidence that Mr. Hudgin's request for special leave with pay was given to the employer on February 5, that is two days after the February 3 incident. Furthermore, Mr. Hudgin's grievance and corrective action requested do not mention at all the denial by the employer of a special leave with pay request made under the conditions of article 10.06 of the relevant collective agreement.

Did the employee contravene, in the present instance, the conditions of article ~~14.03~~^{13.06} of the relevant collective agreement? I think it did. When Mr. Salomon gave, at 16:37 of February 3, a memo to the grievor in which Mr. Hudgin was told that, as of 16:00 that same day, he was reintegrated into its operational duty, the employer, even if it had asked him verbally in the afternoon to report for the 22:45 shift, did surely not make every reasonable effort not to schedule the

commencement of Mr. Hudgin's next shift within eight (8) hours of the completion of his previous shift. The grievor finished his last shift on February 3 at 16:45 and, if he were to have reported later for the 22:45 shift, it would have been in only six hours time, not including the time for him to go to his home for supper and to come back.

Noting also that Mr. Salomon's memo given to the grievor at 16:37 on February 3 does not specifically mention that Mr. Hudgin must report for the 22:45 shift that same day, I have come to the conclusion that when the employer, knowing that it had previously asked Mr. Hudgin to attend a preliminary investigation that lasted the whole day of February 3, asked the grievor verbally, on the afternoon of February 3, to report for the 22:45 shift, it did it too late.

Mr. Hudgin is an air traffic controller. He came to the conclusion after he got home on February 3, after 18:00, that he could not go back to work for the 22:45 shift because he could fall asleep and also because he was still agitated from the preliminary investigation held during the day. He told both Messrs. Bourgon and Salomon about it but they, instead of understanding the situation, told him that he was on leave without pay. The grievor was asked if he was sick but he could not say he was since he believed he was not. Mr. Hudgin was fatigued and agitated and was surely not in the best condition to report, in less than six hours time, for the duties of an air traffic controller.

The evidence adduced before me also showed that as soon as Mr. Bourgon was told by his supervisor, Mr. Salomon, around 18:30 on February 3, to find a replacement for Mr. Hudgin for the 22:45 shift, he did. An air traffic controller with the initials of D.D. effectively replaced the grievor.

For all the above reasons, I conclude that Mr. Hudgin's grievance is maintained in part and I declare that the employer has contravened, in the present instance, article ~~14.03~~ of the relevant collective agreement..

13.06

Jean Galipeault,
Board Member.

OTTAWA, March 17, 1987