

File: 166-2-16440

No. 339

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

BETWEEN:

ROBERT ANDERSON,

grievor,

AND:

TREASURY BOARD,
(Transport Canada)

employer.

Before: Roger Young, Board Member.

For the grievor: Catherine MacLean, counsel.

For the employer: Harvey, Newman, counsel.

ART 16
CODE 402/85

Heard at Ottawa, September 15, 1987.

SICK ON STAT. NO LIEU DAYS

DECISION

This grievance concerns the interpretation or application in respect of Robert Anderson, of a provision of the collective agreement, Code 402/85, between the Treasury Board and the Canadian Air Traffic Control Association (Exhibit 2). The sum total of the evidence before me is contained in the following Agreed Statement of Facts (Exhibit 1).

1. At all material times the grievor was an operating air traffic controller classified at the AI-4 level, employed within the Department of Transport at the Vancouver Area Control centre ("the Vancouver ACC").

2. The Collective Agreement applicable to this grievance is the Treasury Board/CATCA Collective Agreement - Code 402/85.

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

4. On April 1, 1985 the grievor was credited with 11 lieu days pursuant to Article 16.05 of the Collective Agreement for 1985/1986 fiscal year which was to terminate on March 31, 1986. Since the grievor did

not carry over any lieu days from his previous fiscal year, his balance of lieu days on April 1, 1985 was 11.

5. As of December 31, 1985 the grievor had utilized all of the lieu day credits established for him for the 1985/86 fiscal year by taking 11 days off on days he would otherwise have been scheduled to report to work;

6. The grievor was scheduled to work on January 1, 1986, New Year's Day;

7. The grievor was unable to work on that day due to sickness.

8. The grievor submitted an application for sick leave for January 1, 1987 which was denied although the grievor had sufficient sick leave credits to cover the day's absence.

9. The grievor was denied sick leave and pay action was taken to recover pay for one day due to the grievor's failure to work on New Year's Day as scheduled. See attached memoranda dated January 17th, 1986.

The memorandum referred to reads as follows:

TO R.K. ANDERSON

FROM R.R. OVERTON

SUBJECT: SICK LEAVE - January 1, 1986

Although I initially approved your request for certified sick leave on January 1, 1986, that request cannot be processed based on the following rationale:

Article 16.05 allows designated holidays to be anticipated to the end of the year and "lieu day" credits established. However, in order to benefit from these anticipated lieu days, the terms of Article 16.04 must be completed, namely that the shift must have been worked. By being absent on the designated holiday you are not entitled to be credited with a day of leave with pay at a later date. In effect your lieu day entitlement must be reduced to cover that day.

As you have already used all lieu day credits to the end of the year, the only alternative is to recover the day as leave without pay.

ARGUMENT

Counsel for the bargaining agent argued, firstly, that the grievor sought the right to use sick leave pursuant to Article 9 of the collective agreement. This reads as follows:

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 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.

9.03 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.

Ms. MacLean stated that Anderson had been scheduled to work on 1 January 1986; he had become sick and unable to work; he had sufficient sick leave credits to entitle him to such leave on 1 January 1986. The employer had refused Anderson his right to sick leave. Furthermore, because Anderson had used up all his lieu day credits and had not worked on 1 January 1986 to earn his credit for that day, the employer took a pay recovery action to recoup one day's pay from the grievor. This, Ms. MacLean argued, it should not have done.

Ms. MacLean suggested that the instant case needed to be distinguished from that of Doheny (Board file 166-2-15796) which had eventually been decided by the Federal Court of Appeal (Court file A-613-86). In Doheny, while the facts were somewhat similar, the grievor still had lieu day credits left to him. Ms. MacLean suggested that the result of that Federal Court decision did not penalize the grievor therein by making a "deficit recovery" but simply removed the opportunity for a day off sometime in the future. Here, Anderson was being penalized with the loss of a day's pay because he had already exhausted his lieu day credits, which he was entitled to do.

Ms. MacLean referred also to Anderson et al (Board files 166-2-9005 to 9008) and to Gingras (Board file 166-2-16318). She conceded that the employer was within its rights to deduct a lieu day credit where work was not performed to earn such credit, but only where the credits were still in existence. If they had been used up, the employer had no right to deny sick leave and to enforce a pay recovery.

Ms. MacLean further referred to clause 16.06 of the collective agreement. This reads:

- (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.

Paragraph (b) could only be construed as meaning that an employee could be sick on a holiday. What was the value of having a provision for sick leave if the employer was now suggesting that sick leave could not apply on an employee's holiday? The value of the sick leave provision was that it protected the employee's pay for the day. In Anderson's case, 1 January 1986 involved not only an opportunity to earn a day's pay but also the opportunity to earn a lieu day credit. Both ought to be protected by his sick leave.

Ms. MacLean then raised a completely alternate ground on which she suggested the grievor must succeed. This was based upon the lieu day credits earned and established pursuant to clauses 16.04 and 16.05. For the sake of convenience, the whole of Article 16 is now reproduced here, save for clause 16.06 which appears above:

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.

16.02 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 ($1\frac{1}{2}$) 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 East 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.

Ms. MacLean argued that, by virtue of paragraph 16.05 (i), it was clear the parties had recognized that while lieu day credits should be anticipated, they would only be recovered, if not subsequently earned, when an employee became separated from his employment or he retired. Ms. MacLean suggested that if the parties had meant to permit a recovery in all instances, such as in Anderson's situation, they would have said so. In other words, the maxim "*expressio unius personae vel rei, est exclusio alterius*" ought to apply.

On behalf of the employer, Mr. Newman countered, briefly, that the situation had been fully decided by the Federal Court of Appeal in Doheny (supra). Anderson had been paid for 1 January 1986, because the day was a paid holiday. He had previously used up the lieu day credit he would have earned for working this day. In essence, this meant that at some previous occasion he had taken a day off that he later became not entitled to have taken off because he failed to work on 1 January 1986. Therefore, Anderson owed the employer one day's leave.

Mr. Newman also referred to the decision of the Federal Court of Appeal in Justinen and Neilson (Court file A-171-86) which had preceded the hearing of Doheny (supra) by a brief interval. The employee here, Anderson, ought not to be able to gain an extra benefit (which had been denied to Neilson and to Doheny) simply because he had previously exhausted all his lieu day credits. Anderson had been given a paid holiday much like any other employee. It was unfortunate that he had fallen ill on his holiday. However, no sick leave had been deducted. The only thing which had been recovered from him was the equivalent of a day's pay for the lieu day of leave he had used but later failed to earn.

Mr. Newman also argued that the legal maxim quoted by Ms. MacLean, and with which he himself was most familiar, had no application in the present circumstances. On 2 January 1986, the grievor was

indebted to the Crown for the value of one, unearned lieu day. The employer need not wait until a new fiscal year when the grievor would replenish his "bank". It was entitled to collect its debt promptly because Anderson did not fulfill his contractual obligation.

REASONS FOR DECISION

Both parties have raised very interesting interpretations of a complex and often contentious collective agreement. Variations of the present issue have been disputed previously as in Neilson (supra) and Doheny (supra) and decided eventually by the Federal Court of Appeal.

When one peruses Article 16 of the agreement it appears that the parties did not contemplate the recapture of lieu days when these clauses were originally negotiated. Only latterly it seems have they included a means of recapture where an employee exhausts his lieu day credits but fails to earn them due to separation, retirement or transfer to non-operating status-see paragraph 16.05(i). I believe there is a reason why this came about.

The collective agreement grants to all employees certain designated holidays (clause 16.01). When a holiday coincides with an employee's day of rest, it is moved to his next working day (clause 16.02). Thus far, all employees are treated similarly. But when it comes to paying employees for working on holidays,

important distinctions begin to occur (clauses 16.03 and 16.04). For operating employees only, the system of anticipated holidays and lieu day credits is created (paragraph 16.04(a). Why? The answer can only be that it is presumed that an operating employee will work on his holidays. Since he will normally work every holiday he will normally always earn his lieu days. That being the case, it was not necessary to contemplate recovery of lieu days taken but not later earned - except for the situations specified in paragraph 16.05(i).

One must also note, however, the consequences of clause 17.07; this reads as follows:

17.07 Where a day that is a designated holiday for an employee falls within a period of vacation leave with pay, the holiday shall not count as vacation leave unless the employee has already taken his full entitlement to lieu days.

This creates a situation where an operating employee may have a day off with pay on a statutory holiday much like any non-operating employee. That is, a paid holiday is taken, no vacation leave is deducted and no lieu day is earned. However, if the lieu day credit that would have been earned by working has already been exhausted the employee must give up a day of vacation leave to compensate.

With respect to the necessity of employees earning their lieu day credits, Mr. Justice Mahoney had the following to say at page 9 of the Federal Court of Appeal decision in Neilson (supra):

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.

I move now to give consideration to the fact that Anderson fell sick on 1 January 1986, and was unable to fulfill his scheduled commitment to work so as to earn his lieu day credit. Writing for the Federal Court of Appeal in Doheny (supra), Mr. Justice McGuigan said at page 5:

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.

It seems to me that it is precisely just such a question which is before me, now, in Anderson's case. Anderson has been awarded a paid, designated holiday; because he has not worked he has not earned a lieu day credit.

The problem which arises here is that Anderson previously exhausted his lieu day credits. He now owes the employer a day's work for the unearned lieu day already taken. However, unlike the case covered by clause 17.07, concerning vacations, the collective agreement does not appear to sanction the substitution of a day's sick leave in order to wipe out the debt. Clause 16.06(b) does not appear to provide for this.

It appears therefore that the decision of the Federal Court of Appeal in Doheny (supra), has indeed settled the instant matter. The Federal Court of Appeal reconfirmed the position taken in Neilson (supra). That being the case, I must uphold the argument put forward by Mr. Newman and conclude that Anderson's grievance herein must be denied.

Roger Young,
Board Member.

Ottawa, November 26, 1987.