

Files: 166-2-16474
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W-362

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

BETWEEN:

BARRY JOHN GREEN,
JACK A. HEITZNER,
PETER SULLIVAN,

grievors,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: David Kwavnick, Board Member.

For the grievors: Wayne Barry, Canadian Air Traffic
Control Association.

For the employer: Linda Gobeil, counsel.

CODE
402/85
ART 13

Heard at Sudbury, Ontario, December 1, 1987.

MEAL & RELIEF BREAKS

DECISION

The present references to adjudication concern grievances by Messrs Barry John Green, Jack A. Heitzner and Peter Sullivan, air traffic controllers employed by Transport Canada at the Sudbury Control Tower. They grieve the employer's interpretation and application in respect of them of Article 13.01 (b) of a collective agreement between the Treasury Board of Canada and the Canadian Air Traffic Control Association (Code 402/85).

Article 13.01 (b) reads:

Where operational requirements permit, the Employer will provide operating employees with meal and relief breaks.

The grievors contend that on a number of days in 1986, as specified in their grievances, the employer failed to meet its obligations under this provision.

It was agreed between the parties that the relevant circumstances on all of the days in question were similar and that a decision in respect of one of those days would be dispositive of all the grievances. It was also agreed that on the days in question all of the grievors were operating employees.

Mr. Barry John Green testified in his own behalf, Mr. Barry Cubitt testified on behalf of the employer.

At the start of proceedings Ms. Gobeil noted that the grievors seek two remedies. They seek, first, a declaration that the employer failed to discharge its obligations under the collective agreement. They seek, second "an order that in the future the employer ensure that sufficient staff is available to permit that I be granted relief breaks in accordance with the collective agreement".

Referring to the second remedy sought she said that an adjudication decision can deal only with the shifts complained of in the grievance which was referred to adjudication. She said that a prospective declaration cannot be made because operational requirements are a question of fact in each case.

The evidence shows that air traffic controllers at the Sudbury tower work three shifts. There is a morning shift from 0645 hours to 1500 hours, a swing shift from 1045 hours to 1900 hours and an evening shift from 1445 hours to 2300 hours. There is normally only one controller assigned to each shift on any day. Thus, in the normal course of events, the controller who works the morning shift will be on duty alone from 0645 hours to 1045 hours, a period of four hours. The controller who works the evening shift will be on duty alone from 1900 hours to 2300 hours, a period of four hours.

The evidence shows that when a controller is on duty alone it is possible to take short breaks of a few minutes duration for urgent reasons, but it is

not possible to take breaks for such purposes as rest or meals.

Mr. Green identified a memorandum dated 1 August 1985, from Mr. Cubitt entitled "Temporary Absences from the Tower Cab - Minimum Staffing" (Exhibit G-1). He said that this document was in force throughout the period covered by the grievances and is still in force. He noted the concluding sentence of the first paragraph: "These absences are only permitted for urgent personal needs and should be taken during periods of no traffic". He said that the term "urgent personal needs" refers to use of the washroom. Aside from short breaks for such purposes, no breaks are permitted when a controller is on duty alone.

In cross-examination he said that the control tower cab is approximately 20 feet in diameter and is equipped with fridge, stove, sink, microwave oven, coffee maker and toaster. These conveniences are available for the use of an employee in the cab if traffic is not too heavy.

He admitted that he received meal and relief breaks when the second controller was on duty; that is, between 1045 hours and 1500 hours when he was working the morning shift and between 1445 hours and 1900 hours when he was working the evening shift.

In re-examination he said that on the days covered by his grievances he had not asked for meal or relief

breaks during the first half of the morning shift or the second half of the evening shift. He said it would have been useless to have asked because there was no qualified person at the airport who could have relieved him.

Mr. Barry Cubitt testified that he is manager of the Sudbury control tower and that he held this position throughout the period covered by the present grievances. He described the staffing arrangement at the Sudbury control tower and the shift cycle worked by the controllers. He said that the staffing of the tower includes provision for additional manpower to cover off such matters as vacation leave and sick leave. At times, it is possible to assign a second controller to the morning shift or the evening shift. On such occasions it is possible to permit meal and relief breaks throughout the shift.

He said that a controller who is on duty alone may use the kitchen appliances in the tower to prepare a meal when traffic is not too heavy. Relief breaks can be taken in such circumstances, but the controller cannot leave the tower except in accordance with the memorandum of 1 August 1985 (Exhibit G-1).

ARGUMENT FOR THE GRIEVORS

Mr. Barry, on behalf of the grievors, said that the evidence establishes that meal and relief breaks are not normally available on the morning shift between

0645 hours and 1045 hours and on the evening shift between 1900 hours and 2300 hours. During those periods, the only breaks permitted are very short ones to deal with "urgent personal needs", i.e., washroom visits.

The evidence also shows that the unavailability of breaks is due to the fact that management has assigned only one controller to tower duty on the morning and evening shifts. He said that the employer's staffing policy should be such as would enable employees to receive the meal and relief breaks to which they are entitled.

Mr. Barry said that the employer has staffed the Sudbury Tower in such a way that there is only one controller on duty for 50% of the time. Thus, it is entirely due to the employer's staffing policy that employees are unable to receive the meal and relief breaks to which they are entitled. The employer's staffing policy, he said, places it in contravention of Article 13.01 (b) of the collective agreement.

With respect to the prospective order, he said that in the absence of a penalty clause some means must be found to ensure that the employer will meet its obligations. He said that an order of the sort requested here is the correct means of ensuring compliance and cited the case of Lawes (Board file 166-2-6437).

ARGUMENT FOR THE EMPLOYER

On behalf of the employer, Ms. Gobeil cited Article 3.01 of the collective agreement:

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

- (a) to plant, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
- (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

and noted, in particular, the provision in 3.01 (b) giving to the employer the right to determine the number of employees.

With respect to the dates complained of in the grievances, she said that the grievors received meal and relief breaks on those days and this is admitted. The problem is the timing of those breaks - during the last half of the morning shift or the first half of the evening shift. However, there is nothing in the collective agreement which requires the employer to schedule such breaks at certain times during a shift. In any case, the employees' right to breaks is always subject to operational requirements.

Moreover, there is nothing in the collective agreement which requires the employer to grant meal and relief breaks to be taken outside the control tower. A controller could be given a break but be required to take it inside the control tower cab. In the present case, the controllers have a whole range of food preparation appliances available to them in the tower. They can, therefore, take short breaks while remaining available for duty in the control tower.

She said that the jurisprudence is unanimous on the point that if the employer grants adequate meal and relief breaks, regardless of when during the shift those breaks are granted, then the employer has met its obligations under the collective agreement. She cited the cases of Baker (Board file 166-2-16090); Shield

(Board file 166-2-16410); Dooling (Board file 166-2-16387).

Counsel reiterated her earlier points on the subject of a prospective declaration.

REPLY FOR THE GRIEVOR

Mr. Barry said that Article 3 of the collective agreement, the management rights clause, gives the employer a certain latitude. However, the latitude given by Article 3 is subject to the specific provisions of the collective agreement such as Article 13.01 (b).

REASONS FOR THE DECISION

The meal and relief break provisions of Article 13.01 (b) have been the subject of a considerable amount of litigation. Yet the meaning of that provision appears to remain obscure.

Article 13.01 (b) does not mean that the employer is obliged to provide meal and relief breaks. Still less does it mean that the employer is obliged to arrange matters in such a way as to enable employees to have such breaks. It most certainly does not oblige the employer to grant any definite number of breaks of any particular duration at particular times during a shift. Finally, there is no obligation on the employer to increase manning levels beyond what is required to do the assigned work solely in order that employees may have the opportunity to enjoy meal or relief breaks.

Article 13.01 (b) reads: Where operational requirements permit, the Employer will provide operating employees with meal and relief breaks. What do these words mean and under what circumstances do they come into force?

By virtue of Article 3.01 (b) of the collective agreement the employer retains "the right to decide on the number of employees, to organize and assign work". Even in the absence of such a provision in the collective agreement, the employer would have that power by virtue of the provisions of section 7 of the Public Service Staff Relations Act and section 7 of the Financial Administration Act.

Thus, the employer assigns duties and determines manning levels. After the employer has done these things, it is possible that there will be opportunities for operating employees to take meal and relief breaks without disrupting, or interfering with, the work that is to be done. Where such opportunities exist, and only where such opportunities exist, the employer cannot refuse to give operating employees meal and relief breaks which are consistent with the proper discharge of their duties. This, in my view, is the plain meaning of the words of Article 13.01 (b) of the collective agreement.

I turn now to the present reference to adjudication. Leaving aside the question of whether a grievance alleging under-manning may be referred to adjudication, the evidence before me does not indicate

that the employer has under-manned the Sudbury control tower. The work to be done at certain times justifies the presence of only one controller. Furthermore, with the exception of certain very brief absences, the safe discharge of the duties of that controller require that he be continuously present in the control tower. These are the operational requirements. By the words of Article 13.01 (b), meal and relief breaks are subject to them.

It is my finding that operational requirements at the Sudbury control tower - the fact that only one controller is needed on duty during certain times of the day and the fact that the tower must be manned at all times when it is open - have the effect of precluding meal and relief breaks away from the tower during the first four hours of the morning shift and the last four hours of the evening shift. That being the case, the present grievances must be dismissed.

David Kwavnick,
Board Member.

Ottawa, December 11, 1987.