

File: 166-2-17530  
166-2-17529

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

BETWEEN:

KEITH W. STEEVES,  
GARY R. LEE,

grievors,

AND:

TREASURY BOARD  
(Transport Canada),

employer.

Before: Thomas Omer Lowden, Board Member.

For the grievors: Catherine H. MacLean, Counsel.

For the employer: Linda Gobeil, Counsel.

ART 16  
CODE 402/85  
ARRB. AWARD  
PSSRB  
FILE  
NO.  
185-2-312  
FIRST SKED  
WORKING DAY

Heard at Moncton, New Brunswick, August 11, 1988.



## DECISION

These references to adjudication are in connection with two individual grievances, which are similar in nature, presented by Messrs. G.R. Lee and Keith W. Steeves, Air Traffic Controllers (AI-2), Moncton Control Tower, Moncton, N.B. The grievances involve the interpretation of clause 16.02, Appendix II, page 28 of the Air Traffic Control Group Arbitral Award, Board File 185-2-312 dated 27 July 1987. This Award is effective until 31 December 1988.

The clause in question reads as follows:

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 scheduled working day following his day of rest.

The particulars of the grievances are as follows:

Lee: August 3, 1987, a designated holiday as prescribed by clause 16.01, fell on Mr. Lee's day of rest. Management moved the designated holiday to 6 August, as 4 and 5 August were also days of rest. However, Mr. Lee had been granted annual leave for 6 August. Notwithstanding, management considered his first scheduled working day as 6 August whereas Mr. Lee stated the designated holiday should be moved to 7 August, the first day he worked following his days of rest and annual leave subsequent to the holiday. He would therefore be entitled to premium pay for working on August 7.

Steeves: August 3, 1987, a designated holiday as prescribed by clause 16.01, fell on Mr. Steeves' day of rest. Management moved the designated holiday to 4 August. Mr. Steeves maintains the designated holiday should have been moved to 13 August 1987, observing he was on approved lieu days from, 4 to 8 August and days of rest from 9 to 12 August. Mr. Steeves worked on 13 August and therefore considered he is entitled to premium pay for that day.

Thus, the issue to be determined in this instance is when did the grievors' first scheduled working day occur following the holiday which fell on their day of rest.

#### EVIDENCE

In her opening statement, counsel for the grievors stated the grievors were operating employees who were subject to a shift cycle. They worked on their first scheduled working day following a holiday which fell on their day of rest and were thus entitled to premium pay as outlined in clause 16.04 (a) of the Air Traffic Control collective agreement (Code 402/85), (Exhibit G-1). The Arbitral Award (supra) was submitted as Exhibit G-2.

Counsel for the employer stated the employees did not work on their first scheduled working day, and

therefore were not entitled to premium pay as per clause 16.04 (a) which reads:

16.04 Where an operating employee works on a holiday he shall:

(a) be paid at one and one-half ( $\frac{1}{2}$ ) times his straight-time hourly rate for all hours worked by him on the holiday

. . .

Messrs. Lee and Steeves both testified they were subject to a shift cycle and such schedules are posted at least one month in advance. For ease of reference a 1987 calendar was submitted, (Exhibit G-3). A memorandum dated 22 April 1987 signed by Mr. Louis E. LeBlanc, Manager, Moncton Control Tower indicated controllers were to submit requests for leave and once these requests for leave were received the proposed shift schedule to 30 September 1987 would be re-published (Exhibit G-4).

A shift schedule (Exhibit G-5) for August 1987 posted before 15 May 1987 indicates Mr. Lee, identified as GL was on a day of rest on 3, 4 and 5 August 1987 and on annual leave 6 August 1987. Annual leave for 6 August 1987 was requested by Mr. Lee on 24 July 1987 and approved on 6 August 1987 (Exhibit G-6).

Exhibit G-5 also indicates Mr. Steeves identified as KS was on a day of rest on 3 August 1987 and lieu

days from 4 August to 8 August inclusive followed by four days of rest from 9 to 12 August 1987. Exhibit G-7 confirms such leave was formally requested on 24 August 1987 and approved on 25 August 1987.

In cross-examination the grievors stated they did not work on the designated holiday, nor on the day which the employer alleged was their first scheduled working day, i.e. 6 August 1987 for Mr. Lee and 4 August 1987 for Mr. Steeves. Mr. Steeves did state the change from annual leave to lieu days as shown on Exhibit G-7 was effected at his request but still approved by management. They also stated that if leave had not been approved they would have reported for work. Also, they were not aware of the Arbitral Award prior to 4 August 1987.

The request for Mr. Joe Potter to give evidence on behalf of the employer resulted in a strong objection from counsel for the grievors. She stated she had been previously informed of the nature of the evidence and it could only be considered as "extrinsic evidence". Mr. Potter, a negotiator for the employer, had presented the employer's case to the Board during the proceedings which resulted in the rendering of the Arbitral Award, and it was proposed to have him explain the rationale for the wording in clause 16.02 of the Award. Counsel for the grievors stated clause 16.02 was not ambiguous and therefore such evidence was not admissible. I decided to hear the evidence and reserve my decision on the objection as to its admissibility. Having heard the

testimony of Mr. Potter, I have no alternative but to be in agreement with Ms. MacLean as to its nature. It can only be characterized as extrinsic evidence. As there is no ambiguity in clause 16.02, extrinsic evidence is clearly inadmissible and I shall not consider Mr. Potter's testimony in rendering my decision. This decision will be based solely on the interpretation of the clause in question in light of the remaining evidence adduced by the parties and their respective submissions.

#### ARGUMENT FOR THE GRIEVORS

Counsel for the grievors argued this was a simple case involving the first scheduled working day following days of rest and annual leave where a holiday fell on a day of rest for the grievors. She observed leave had been approved for the grievors by the employer and could not be retroactively cancelled. Counsel cited the cases of Stamnes (Board File 166-2-2056), Mills (Board File 166-2-3461) and Pearce et al (Board Files 166-2-13760, 13766, 13767, 13771 and 13772) in support of the grievors' position.

#### ARGUMENT FOR THE EMPLOYER

Reference was made to the definition of shift cycle on page 2, paragraph 7 of the Air Traffic Control collective agreement (Code 402/85) which reads:

"Shift cycle" means the recurring sequence of an employee's days of work and days of rest.

Annual leave must be taken on a scheduled working day because on a continuous shift cycle, which the grievors were subject to, all days with the exception of days of rest are scheduled working days. Counsel also cited the decision of the Federal Court of Appeal in Doheny (Court File A-613-86). In this decision, the grievor did not work on the holiday for which he was scheduled; therefore he was not entitled to the benefits of clause 16.04 of his collective agreement.

It was emphasized that such cycles must be maintained and any leave does not affect scheduled working days. For employees in the grievors' situation to assume that they could work at the premium rate would only result in an unfair situation as other employees do not have this opportunity.

#### REASON FOR THE DECISION

I have reviewed all of the evidence brought before me, including the various decisions that have been cited, but excluding the extrinsic evidence and I have come to the conclusion that the grievances of Messrs Lee and Steeves must be allowed for the following reasons.

In Exhibit G-4 management invited requests for annual leave and stated a shift schedule would be re-published. One can only assume this was intended to amend the previous posted shift schedule. Days of annual leave for Messrs. Lee and Steeves were approved



and a revised shift schedule was issued as per Exhibit G-5. The period of annual leave for Mr. Steeves was subsequently changed to reflect lieu days at his request but it was still approved by management. The granting of such leave automatically changes the shift schedule and the period of leave cannot be considered as scheduled working days.

Of significance is the difference between the term "Shift Cycle" and "Shift Schedule" as stated on page 2, paragraph 8 of the Air Traffic Control collective agreement (Code 402/85) Exhibit G-1 which reads:

(7) "Shift Cycle" means the recurring sequence of an employee's days of work and days of rest.

(8) "Shift schedule" means the Employer's advance posting of shifts to be worked by employees within their shift cycle.

It is obvious therefore that where a day of work (shift) is not scheduled it can not be considered as one.

In the case of Mr. Lee he was not scheduled to work within his shift cycle on 4, 5 and 6 August 1987 as indicated in Exhibit G-5. Therefore his first scheduled working day following his day of rest can only be 7 August 1987.

With Mr. Steeves he was not scheduled to work within his shift cycle from 4 August to 12 August. His first scheduled working day following his day of rest can only be 13 August 1987.

The designated holiday for Messrs. Lee and Steeves is to be moved to 7 August 1987 and 13 August 1987 respectively and, as they worked on those days, they are to be compensated in accordance with clause 16.04 of their collective agreement.

This decision is not inconsistent with the Doheny decision (supra). In that situation, the grievor was scheduled to work, but was unable due to illness. The Court ruled an employee must actually work on a holiday to be entitled to the benefits of clause 16.04.

However, in this instant, the holiday fell on the grievors' day of rest and as required by clause 16.02 the holiday was moved to their first scheduled working day following their day of rest. Therefore, the first scheduled working day that can be considered for Mr. Lee is 7 August 1987 and 13 August 1987 for Mr. Steeves. These dates are recognized by the shift schedule (Exhibit G-5) as days on which the grievors actually worked.

I remain seized in case of difficulties in implementing this decision.

T.O. Lowden,  
Board Member.

OTTAWA, September 20, 1988.