AUG 2 1 1989

File No.: 166-2-18376

No. 226

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

21/08/89
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BETWEEN:

RICHARD BRUCE MILNE,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Roger Young, Board Member.

For the Grievor: Catherine H. MacLean.

For the Employer: Mark R. Kindrachuk, counsel.

Heard at Saskatoon, Saskatchewan, July 25, 1989.

DENIAL OF LEAVE

DECISION

Pursuant to paragraph 92(1)(a) of the Public Service Staff Relations Act, Richard Bruce Milne has referred to adjudication his grievance concerning the interpretation or application in respect of him of a provision in the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association, Code 402/85, expiring 31 December 1986 as extended by an arbitral award (Board file 185-2-312). The specific provision of the agreement with which we are concerned here states:

> 17.06(b) Local representatives of the Association shall be given the opportunity to consult with representatives of the Employer on vacation schedules. Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.
> (underlining added)

It is the proper interpretation or application of this second sentence upon which this grievance turns.

The grievor, Milne, is an Air Traffic Controller, AI-02, at the tower facility in Saskatoon, Sask. From 1 March to 31 October 1988, the tower was in operation from 7:00 AM to 11:00 PM, daily, local time. In order to staff this operation, five controllers were assigned each day. Two of these persons commenced work at 6:45 AM and stayed until 3:00 PM; two others commenced at 2:45 PM

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and stayed until 11:00 PM. In addition, a "swing" controller worked from 9:45 AM until 6:00 PM to cover relief breaks. It will quickly be noted that these shifts were eight hours and fifteen minutes in duration; the extra quarter-hour was to allow for briefing time.

Air Traffic Controllers at the Saskatoon tower work a "shift cycle" known as the "5, 4, 5, 3, repeat"; that is, five days "on", four "off", five "on", three "off", repeated. The "shift schedule", on the other hand, is represented by the monthly sheet (posted by the 15th of the preceding month) showing which controllers have been assigned to each of the three daily shifts, or are on leave, training or other assignments.

The regular, or normal, complement of staff required to operate the Saskatoon tower facility has been determined by the employer to be 11 controllers. An "operational staffing multiplier" of 2.12 Airport controllers is multiplied by the number of watches per day required to be staffed to obtain a product of 10.60 controllers. This number of controllers will satisfy the needs of this operation as well as meet the requirements of the collective agreement for such purposes as days off, annual leave, lieu days, sick leave, training, etc., (Exhibit 9). This fractional requirement is "rounded up" to 11, and has been agreed upon by the parties to be the basic number of airport controllers needed to meet normal requirements. However, from approximately September 1987 until January 1989, only ten airport controllers were assigned to the Saskatoon tower operations. The shortage occurred

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as a result of one of the controllers, Gibson Kostiuk, being transferred to Winnipeg while a replacement could not immediately be found.

During the period of this staff shortage the grievor, Milne, sought to take some of his annual vacation. He applied for annual leave from 10 to 14 June 1988, inclusive. This was to cover five days on which he ordinarily would have been working, following the previous three days "off" and to be followed, in turn, by a further four days "off", for a total of 12 days break away from work. The employer granted Milne annual leave from 10 to 13 June, inclusive, but withheld its approval for leave on 14 June due to "operational requirements". Milne, however, was able to have a day "off" on 14 June 1988 by reason of a shift exchange arranged by him with another controller, Marty Davidson. This exchange required Milne to work for Davidson on 18 June 1988. The result was that Milne was only able to get 11 consecutive days away from work for his vacation. Additionally, he was not able to find a convenient day on which to use up the day of annual leave which still remained to his credit so that he was forced to carry over this day plus one other unexpended leave credit into the following fiscal year.

It is the grievor's contention that this denial by the employer of his request for annual leave on 14 June 1988 is in breach of paragraph 17.06(b) of the collective agreement. As a remedy the grievor seeks a declaration to this effect along with compensation for the 8.25 hours of leave which he claims to have been denied.

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The employer denied that it was in breach of its obligation under the collective agreement. Furthermore, counsel for the employer argued, by way of a preliminary objection, that since the employer had carried forward, to the grievor's credit in the following fiscal year, his entitlement to a day's annual leave, the grievor had lost nothing. Since there was nothing to remedy, there was no case to put before this adjudicator. It was, argued counsel, inappropriate for me to simply render a declaratory decision concerning the proper administration of the collective agreement.

I overruled the employer's preliminary objection and stated that the grievor was properly entitled to bring this grievance before me for disposition since a declaratory remedy could exist which would involve a finding as to the proper interpretation or application of the contract. A witness for the employer provided evidence explaining that party's side of this matter and its reasons for acting as it did in denying the one day of annual leave to the grievor.

Emil Bryksa is the Unit Manager of the Saskatoon Terminal Control Unit and has been in that position since mid-July 1986. He confirmed that the normal complement of airport controllers was 11 although this number had been depleted by one following Kostiuk's transfer. Bryksa had not expected the deficiency to continue as long as it did. However, he had done his best to cope with the situation.

According to Bryksa, had Kostiuk not been transferred and had he, thus, remained on strength at Saskatoon, there would have been 44 "spare" shifts during the month of June 1988, for which an extra controller was available to cover leave requests, sickness, etc., over and above the requirement to cover the five regular watches each day. Because the tower crew was short one controller, only 28 "spares" were actually available after normal staffing needs were met. That is, 16 less "spares" were available to cover leave requests, illness, training, etc., during June.

In order to cover the on-going needs of the remaining controllers, Bryksa worked out a system of allocating "spares" on what he felt was a reasonable and equitable basis. First, because he no longer needed to cover any leave requirements for the missing controller, he reduced the number of "spares" normally considered to be required: e.g. 10/11 X 44 = 40 spares (Exhibit 9). That is, Bryksa premised his calculation on the basis that there were really only 40 "spares" required for the remaining controllers, not 44. Since he had 28 in actual fact, the shortfall was only 12, not 16.

Bryksa would then add as many overtime credits to the shift schedule as were necessary each month. That is, in addition to the 28 available "spares", the employer would make 12 additional overtime shifts available to cover leave requests. This was the employer's way of making up for the missing controller. It was, in its mind, doing its best to absorb the cost and the hardship caused by the staffing shortfall while making

it possible for the remaining controllers to continue to be able to take annual leave, etc.

For the several months between October 1987 and May 1988, this is how the system operated at Saskatoon. In April 1988, for instance, Bryksa made an additional 12 overtime shifts available for the purpose of covering leave. In May 1988, the number of additional overtime shifts made available was 15. In June, however, the number was seven.

There was a reason for the sudden drop. During the previous months it occurred to Bryksa that he had been paying too much in additional overtime in his efforts to make up for the missing controller. He, therefore, amended his formula for calculating the amount of extra overtime shifts required. He incorporated a fourth step (Exhibit 9) to determine the number of days not being utilized by his unit according to the staffing formula (i.e. the staffing multiplier).

Whereas the national multiplier suggested that airport controllers required an average of 17 days annual leave, Bryksa knew that his requirements at Saskatoon actually averaged 21 days. In other words the staffing multiplier had an in-built, four day shortfall. Bryksa looked further at the multiplier formula and decided that he did not need to include in the credit three days for sick leave, three days for special requirements, one day for familiarization flights or three of the seven days set aside for training. All of these would simply

be paid for out of overtime. As viewed in this manner by Bryksa, the staffing multiplier was also seen as giving him ten days more coverage, per employee, per year, than was needed. Putting these two conclusions together Bryksa then decided that the staffing multiplier had given him six days per controller, per year, more coverage (i.e. "spares") than he actually required. Multiplying by the ten controllers on hand meant that he had 60 shifts each year or five shifts each month that would no longer be required because he had opted to pay overtime to cover these elements, if indeed they were used at all.

The net result of all this was that Bryksa concluded that he could further reduce the number of additional overtime shifts which he had been granting to the airport controllers to cover their leave requests each month by five shifts. That is to say the 44 "spares" which might have been available in June 1988 with 11 controllers on staff became reduced by 1/11 or four shifts to 40. Since 28 "spares" remained available with ten controllers the shortfall was considered by Bryksa to be 12. This was further reduced to seven as a result of Bryksa's determination that he no longer needed to have "spares" to cover items such as sick leave, training, familiarization flights, etc. This accounts for the reduction to seven, in June 1988, of additional overtime shifts made available by the employer to cover annual leave requests.

In addition to all this, leave requests were covered on a priority basis. At the time Milne made his request

for five days of annual leave from 10 to 14 June, inclusive, only four extra overtime shifts were still available according to Bryksa. Thus, Milne was granted annual leave for only the first four of the five days that he had requested and was refused leave for the fifth day on the basis of "operational requirements". In effect, the employer was saying to him..."we are prepared to pay overtime to have someone else cover for you for up to four days but not for a fifth..."

This, then, is the factual background against which this grievance was lodged. Several additional points require noting. Although Exhibit 9 is a written "Memo to file" dated 11 July 1989, it was accepted in evidence by both parties as an accurate summary of earlier notes used by Bryksa for the purposes explained above. The employer's methods and calculations, while never provided to the employees in written form, were, on at least two occasions, orally explained to them one at a time, including the amended formula for June 1988. Bryksa stated that he twice explained the matter to Milne.

Although Bryksa testified that to the best of his knowledge the rotational order in which the airport controllers moved through the shift schedules remained the same both before and after Kostiuk left (with Kostiuk's departure being the only change) it also appeared from the evidence presented that this was not necessarily so. The shift schedules on which Bryksa made his calculations had, in fact, been made up by Brent Sadoway, the Unit Operations Specialist (U.O.S.). It was possible

that some controllers might have changed position vis-à-vis one another. The import of this concession was that it was possible that as many as 47 "spares" might have been available in June 1988 had Kostiuk remained in his original place in the schedule.

Another point requiring mention was that, during August 1988, and in order to cover enhanced requests for annual leave, the employer moved Sadoway from his position as U.O.S. (where he normally worked basically a day shift) into the airport controller rotation in place of the missing Kostiuk. This had the effect of immediately increasing the number of spares available to cover leave requests for that month by 16. It also meant that the employer no longer needed to rely on the system devised by the Unit Manager, Bryksa, to cover leave requests by paying for overtime shifts. In other words, the system operated as if it had been fully staffed by 11 regular airport controllers. There was no evidence that this arrangement could not also have been made in June 1988.

Counsel for the grievor argued that the employer had failed to make every reasonable effort to accommodate Milne's wishes as to the use of his annual leave. Ordinarily, the employer was not required to pay overtime in order to accede to an employee's wishes but, in this type of situation, where the employer was not able to meet the basic staffing requirements which would enable it to fulfil its contractual obligations under the collective agreement, it had been held in previous Board decisions that the employer could be required to bear some extra costs.

Ms. MacLean referred to the previous decisions in Pinard (Board file 166-2-15381); Sumanik (Board file 166-2-395); Lawes (Board file 166-2-6437); Savage (Board file 166-2-9734) and Noakes (Board file 166-2-9688). These cases discussed the meaning of "operational requirements" as well as the impact of "staffing levels" upon contractual obligations. Ms. MacLean noted the similarity between the present case and Savage (supra). She also conceded that manager Bryksa was attempting to act in good faith when he tried to avoid the pitfalls of Savage. However, he had made a critical error in the formula which he had adopted as his guide in allowing overtime shifts in order to cover requests for annual leave. This could be demonstrated in several ways.

Firstly, Ms. MacLean argued, the number of "spares" which ought to have been ordinarily available in June 1988 was 47, not 44 as determined by Bryksa. At the very least, and assuming for the moment that Bryksa's formula could be valid, there ought to have been three more "spares" still available when Milne's request to take annual leave on 14 June was denied. However, she continued, the Bryksa formula was wrong; it was incorrect for him to have deducted four "spares" on the basis that the eleventh controller really was not there and thus would not need them. Secondly, Bryksa had gone astray in treating the "staffing multiplier" as an exact accounting of what he required at Saskatoon; that is, its purpose had been distorted. Adding the three "spares" that she suggested Bryksa had originally overlooked (i.e. 47 rather than 44) to the four "spares" that ought

not to have been deducted meant that at least seven more "spares" should have been available than had been allowed by Bryksa. This meant that the number of overtime shifts which the employer ought to have provided as a minimum in order to meet requests for annual leave during June 1988 was 14, and not seven.

Alternatively, Ms. MacLean argued, the most sensible thing to have done would have been to simply ask "what is the number of "spares" that would have been available with 11 controllers?" and, then, "what is the number that are available with only ten controllers?" The answers, respectively, to these questions are 44 (if you accept Bryksa's June count) and 28. Therefore the employer should have been prepared to pay up to 16 overtime shifts to accommodate requests for annual leave. The logic of accepting this very basic and simple calculation was confirmed by the fact that this was exactly what took place when Sadoway was inserted in the rotation, in place of Kostiuk who had left, to correct the shortfall.

Ms. MacLean looked at the problem from yet a third perspective. The available evidence showed that during the month of June 1988, the ten airport controllers who worked performed an average of 13.3 days of labour each. It was not just coincidence that one could have expected that an eleventh controller, had he been available, would have worked 13, or possibly 14, days as well. This meant that some 13 or 14 "spares" would have been available over and above the 28 which Bryksa had supplemented, with but seven overtime shifts.

Thus, according to Ms. MacLean, the employer had failed in its obligation to make every reasonable effort to accommodate Milne's request to take a day's annual leave on 14 June 1988. It had shortchanged him in calculating the number of overtime shifts, the costs of which it reasonably could have been expected to bear, in order to make up for the missing controller. At the very least, the employer should have made up for 13, possibly 14, missing "spares" and not just seven. More appropriately, the number of overtime shifts it ought to have provided in June 1988 was closer to 16. This was borne out by the fact that Sadoway's inclusion in the rotation in August accomplished just that. It was conceivable that the number of "spares" which ought to have been made up by the employer was as high as 19, if indeed 47 "spares" would have been available (as calculated by Ms. MacLean) had Kostiuk not left.

The bottom line of Ms. MacLean's argument on behalf of the grievor, therefore, was that the employer had failed to make every reasonable effort to schedule Milne's vacation in a manner acceptable to him. Milne ought to have been allowed to take leave on 14 June 1988, but was refused. He had had to arrange a shift exchange and, as a result, could only take 11 straight days away from work and not 12 as he had wished. Ms. MacLean also referred to the decision in Lauzon (Board file 166-2-15728) with respect to declaratory decisions. She asked, in addition, that Milne be compensated by way of damages or the award of another day's leave for having lost the opportunity to be away from work at a time desired by and acceptable to him.

On behalf of the employer, Mr. Kindrachuk referred to the general proposition that the requirement to make "every reasonable effort" did not ordinarily require the employer to resort to overtime to cover requests for annual leave where a full complement of staff was available. Mr. Kindrachuk sought to distinguish the case of Savage (supra) wherein it was held that staffing shortages could have the effect of overturning the general rule.

Counsel argued that manager Bryksa had acted in good faith. He believed that the correct number of "spares" which ordinarily would have been available in June 1988 was, indeed, 44. Furthermore, Bryksa had gone to great lengths to develop a formula which he believed accurately reflected what the employer believed was reasonable to do, and would meet its obligations under the collective agreement. Bryksa, Mr. Kindrachuk argued, had employed reason as well as an attempt to be reasonable. That was all that was required of him. It simply was not reasonably possible to meet Milne's request. Whether the formula or the mathematics involved was entirely accurate was not the issue; the employer's attempt to find a reasonable solution was.

Mr. Kindrachuk argued that Bryksa had simply attempted to estimate how he could best resolve the shortfall of "spares" caused by the missing controller. He employed the "staffing multiplier" as part of his solution. This was no arbitrary solution but one which management felt related to the situation. Both parties

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were interested in arriving at a fair solution. The shortage of available controllers was as much a problem for management as for the employees.

Mr. Kindrachuk concluded by arguing that, if the employer was in breach of its obligation under the contract, a declaration to that effect was the most that should be considered in remedying the situation. There was no bad faith here. The employer ought not to be penalized. Furthermore, the grievor had eventually been granted his full entitlement to annual leave. He had not lost anything. Therefore, to grant him an additional 8.25 hours leave would be to award him something which he did not deserve and had not earned. It would be tantamount to an award of damages.

REASONS FOR DECISION

The sole issue to be decided here is whether, consistent with efficient operating requirements, the employer made every reasonable effort to schedule the grievor's vacation in a manner acceptable to him. That is the obligation which the employer undertook to meet when it signed the collective agreement. Staffing problems impacted upon the normal ability of the employer to meet employees' leave requests and it made adjustments in an attempt to compensate. The question is, having done so, whether the employer still continued to meet the contractual obligation incumbent upon it.

This case is very similar to that of Savage (supra) and, I believe, must end with the same result. Ordinarily, the employer need not go to the extra expense of paying for overtime shifts in order to cover leave requests. The reason for this is that adequate staffing of any particular operation incorporates within it sufficient personnel resources to cover contractual leave provisions. That this is so is evident in this case from the "staffing multiplier" (Exhibit 9).

The Director of Air Traffic Services made the determination that 2.12 airport controllers were needed in order to fill each watch of an airport operation such as at Saskatoon. Because five watches were required to meet operational requirements, this meant that a total of 10.6 airport controllers would provide sufficient personnel to meet both operational needs as well as contractual obligations pursuant to the collective agreement. In the case of fractional totals instructions were given to "... correct to whole numbers, rounding off as follows: if total requirement is less than 10, round up, between 10 and 50, correct to nearest whole number, greater than 50, round down..." Thus, it was determined (from the national average) that 11 airport controllers would adequately fill the staffing needs of the Saskatoon operation.

It is interesting to note that the "staffing multiplier", which was developed from national statistics, was based, in part, on the assumption that an average of 17 days annual leave was required to meet the needs

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of each airport controller. In fact, at Saskatoon, according to manager Bryksa, his employees were entitled to an average of 21 days of annual leave. It can fairly be said, therefore, that a "staffing multiplier" of 2.12 controllers per watch, when applied to Saskatoon, was insufficient to meet the actual needs of this operation. (A multiplier of 2.18 would have been more appropriate). Rounding off from 10.6 to 11 controllers helped, but really provided Bryksa with just enough staff to meet operational and contractual needs (2.18 X 5 = 10.9).

However, all of this changed when controller Kostiuk transferred to Winnipeg. No longer was adequate staff available to meet either operational or contractual requirements on a normal scheduling basis. Controllers worked overtime to make up for the operational shortfall and management assumed the cost of these overtime shifts in order to fulfil its obligation to cover leave requests. At first, approximately 12 additional overtime shifts were made available each month to cover vacation leave requests. In June 1988, this was reduced to seven.

It is my conclusion that Bryksa's formula for assessing how many overtime shifts would be allotted each month in order to cover vacation leave, while a well-intentioned effort to cope and to be fair, did not meet the requirements of the collective agreement. In fact, it distorted the mathematics of staffing the operation at Saskatoon and left the employees bearing the cost (in terms of inability to take vacations when they wished) of the staffing shortfall created by Kostiuk's departure.

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What is clear from the evidence is that, had Kostiuk not left Saskatoon (or had he been replaced), there would have been at least 44 "spares", and possibly as many as 47, available to cover vacations, sick leave, training, etc., in June 1988. In truth, only 28 "spares" were available leaving a shortfall somewhere between 16 and 19.

It would not have been unreasonable to expect the employer to bring the complement of staff back up to the number required as quickly as possible. Training requirements and lack of readily available replacements meant that a lengthy delay occurred. When it could not find an actual warm body, management attempted to factor in a "phantom controller" for the purposes of calculating "spares". It is true that the "phantom controller" did not actually need to take leave himself. Therefore, having counted him "in" for purposes of having sufficient "spares", management ought also to be able to count off or deduct the number of days of leave, etc., to which the "phantom" was entitled.

Bryksa did something like this when he subtracted 1/11 or four days from the number of "spares" which he otherwise had available each month. Where things went wrong, it seems to me, is when Bryksa went beyond this. He also "re-jigged" the "staffing multiplier" when he decided that he could reassess the number of sick days, training days, familiarization flights and special requirements that he needed to account for.

I conclude that it would have been more accurate and appropriate to have reduced the number of "spares" that the employer was prepared to make up each month through factoring in the phantom by no more than four days. In other words, something in the order of 12 to 15 overtime shifts ought to have been made available in June 1988, to cover leave requests. This, of course, is based on the assumption that factoring a "phantom" back into the schedule was a "reasonable effort" on the part of the employer to continue to schedule vacations in a manner acceptable to employees. The employer's method was not contested by the grievor, only the amount of the its contribution.

I have arrived at a conclusion within the range suggested by counsel for the grievor. Indeed, when Sadoway was inserted into the controller's rotational schedule in August 1988, this immediately brought the staff back to a normal level and increased the number of "spares" generally available by 16. Of course, Sadoway's leave entitlements would have reduced this so that the net increase was probably closer to 12.

Why did the employer simply not insert Sadoway into the line-up earlier? It seems to me that if this was possible in August 1988, it ought to have been possible earlier as well. This was the closest the employer came to making every reasonable effort to return the staffing level at Saskatoon to a normal complement. It is what could have been done much sooner, although the position of Unit Operations Specialist then would have been

unfilled. "Factoring in" the "phantom" was really only a second-best attempt because, although this was an attempt to maintain the same number of "spares", it really called upon the remaining controllers to put in extra work.

Vacations are provided so that employees can gain a rest from the demands of the workplace; so that they can join in recreation and refresh themselves. All of us need periodic breaks to do this. Some occupations are more demanding than others and it is essential that employees involved therein avail themselves of their vacations. There is reason to believe that the work of air traffic controllers can be, at times, highly stressful. Therefore, there is also reason to believe that such employees should take adequate vacation breaks.

In the situation here, controllers at Saskatoon airport had been working additional overtime shifts in order to cover leave requests for one another and to make up for their missing colleague. It could be expected that they would want to take vacation breaks which, when coupled with their usual days "off", would give them at least 12 straight days away from work. The ordinary office worker, not confronted with the added stress of irregular hours gets nine days break for the cost of five days leave, or 14 days break by taking ten days leave. Milne's request to take leave from 10 to 14 June, inclusive, so that he might have had 12 days vacation, was understandable and, given the circumstances, it is my conclusion that the employer failed to make every reasonable effort to accommodate the grievor's vacation wishes.

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I have reached this conclusion on the basis of the factual situation just described as well as on my belief that the missing controller could have been replaced by Sadoway earlier or, alternatively, that the employer should have been prepared to pay for some 12 or more overtime shifts to make up for the "spares" lost owing to Kostiuk's departure. In either case, there would have been, according to my findings, sufficient "spares" to allow Milne to take a day's annual leave on 14 June 1988 without unduly impacting on efficient operational requirements beyond the degree which the employer was contractually bound to bear.

I am not prepared to go further than making a declaration to this effect. The employer acted in good faith even if it did so wrongly. Manager Bryksa was simply trying to do his best with an insufficient supply of resources. His attempt to be fair was admirable but insufficient. In the end, Milne got a day's leave at a later time; therefore, he suffered only an inconvenience. To my mind it would be improper to award him a further 8.25 hours of leave. It is apparent from a reading of the Arbitration Award under which this grievance is brought that just this sort of penalty provision was proposed by the bargaining agent and turned down by the Board. To grant this same sort of relief as now requested by the grievor would be tantamount to amending the Arbitral Award.

This grievance will, therefore, be allowed to the extent that a declaration, only, is made that the employer failed to make every reasonable effort to schedule the grievor's vacation in a manner acceptable to him and that the need to meet this obligation was not absolved by efficient operating requirements.

This grievance is allowed in part.

Roger Young,
Board Member.

OTTAWA, August 17, 1989.