File No.: 166-2-18414

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

BETWEEN:

DONALD A. MACARTHUR,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Philip Chodos, Deputy Chairman.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: Mylène Bouzigon, Counsel.

Heard at Ottawa, Ontario, June 22, 1989.

DECISION

The grievor, Mr. Donald A. MacArthur, is an Air Traffic Controller (AI-03) employed at the Calgary Terminal Control Unit.

He has referred to adjudication his grievance respecting the employer's decision to refuse to pay him at the premium rate for work performed on a designated holiday.

The parties agreed to proceed by way of a joint statement of facts, which provides as follows:

AGREED STATEMENT OF FACTS

1. The Grievor is an Air Traffic Controller, employed in the Calgary Terminal Control Unit (T.C.U.) as an AI-03.

2. At all material times, his terms and conditions of employment were governed, inter alia, by Collective Agreement 402/85, between the Treasury Board and the Canadian Air Traffic Control Association, as extended by Section 51 of the Public Service Staff Relations Act and Arbitral Award 185-2-312, dated July 27, 1987.

3. The shift cycle for employees employed within the Calgary T.C.U. is five days on, four days off, five days on, three days off, repetitive.

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4. In April 1987, the relevant shift schedule, attached as Annex "A", was circulated in accordance with the unit policy and, all Calgary Tower Air Traffic Controllers were requested to review the schedule and identify their preferences for leave. The Grievor was identified on this schedule as working the 3:00 p.m. shift on the 27th and 28th of December and the 7:00 a.m. shift for the 29th, 30th, 31st, 1987.

5. Prior to November 15, 1987, Mr. MacArthur was informed that he was authorized, as per his request, to be absent from December 27th to December 31st, 1987 on annual leave.

6. (deleted by agreement)

7. When the December shift schedule was posted in accordance with Article 13.04 of the Collective Agreement, the Grievor was scheduled to be on days of rest on December 25th, Christmas Day, and December 26th, Boxing Day, of 1987. He was scheduled to be on annual leave (AL) from December 27th, 1987 to December 31st, 1987, inclusive. A copy of the December shift schedule is attached as Annex "B".

8. When the January shift schedule was posted in accordance with Article 13.04 of the Collective Agreement,

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the Grievor was scheduled to be on days of rest on January 1st, New Year's Day, and January 2nd, 3rd and 4th, 1989. A copy of the January shift schedule is attached as Annex "C".

9. As of December 25th, 1987, the Grievor had used the eleven (11) lieu day credits that had been granted to him, pursuant to Article 16 of the Collective Agreement.

10. The Grievor was paid his straight time hourly rate for work performed on January 6th and 7th, 1988. He was paid time and one-half for work performed on January 5th, 1988. The Employer paid this premium pay with respect to the January 1st, 1988 holiday.

11. The Grievor is claiming that he is entitled to premium pay, in accordance with Article 16.04 for January 6th and 7th for the December 25th and 26th Designated Paid Holidays.

The parties hereby agree to the above-noted Statement of Facts.

Counsel for the grievor submitted that the issue in this case is the effect of Clause 16.02 of the Arbitral Award rendered by the Board in respect of the Air Traffic Control bargaining unit in 1987. In her submission the question to be answered in this reference to adjudication

is: when an employee has a period of days off which is immediately followed by approved annual leave and a designated holiday falls within this time-frame, to which day is an employee's designated holiday "moved" in accordance with Clause 16.02. The significance of this question is found in clause 16.04(a) of the collective agreement, which provides that where an operating employee works on a holiday, which is the grievor's contention here, he is entitled to be paid at the rate of one and one-half times his hourly rate.

Ms. MacLean referred to a number of definitions found in the relevant collective agreement, including clause 1(a) the definition of "operating" employees, which would include the grievor. She also noted the definitions of "shift cycles" and "shift schedules" which, she emphasized, referred to the employer's advance posting of shifts to be worked by employees.

For the Calgary Terminal Control Unit the relevant shift cycle was five days on, four days off and five days on, three days off. In April 1987, a shift schedule covering the entire year was circulated, and controllers were asked to review it and identify their preferences for leave. Mr. MacArthur at that time was shown as being scheduled for work on December 27th through to December 31st.

The grievor requested, prior to November 15th, 1987, that he be granted annual leave for December 27th to December 31st, which request was granted. In accordance

with clause 13.04 the shift schedule for December was duly posted at least 15 days in advance. Ms. MacLean noted that this provision states that: "The shift as indicated in the schedule shall be the employee's scheduled hours of work." On this schedule (i.e. Annex "B" of the Agreed Statement of Facts) Mr. MacArthur is shown, for period December 27th to December 31st as being on annual leave. The January 19, 1988 shift schedule (i.e. Annex "C") shows Mr. MacArthur as having January 1st to January 4th off, and starting work again on January 5th, 1988.

It is clear that pursuant to clause 16.01 of the collective agreement, December 25th and 26th, 1987, were holidays. It has been the employer's position that these days are in effect moved "to December 27th and 28th"; the employer accepts that the January 1st holiday moves to January 5th and accordingly Mr. MacArthur was paid premium pay for his work on that day, although not for January 6 and 7.

Ms. MacLean submitted that the Board has already determined this issue, in virtually the same circumstances, in the Steeves and Lee decision (Board file 166-2-17530, 17529). Ms. MacLean noted that the employer did not file an application pursuant to Section 28 of the Federal Court Act in respect of this decision. In the Steeves et al case, adjudicator Lowden characterized the issue as follows (page 2): "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." He concluded, at page 7 of his decision, that: "It is obvious therefore that where a day of work (shift) is not scheduled it can not be considered as one." He therefore found for the grievors. According to counsel for the grievor, this decision, which is consistent with several other past decisions of the Board, stands for the proposition that when a working day is scheduled as leave it can no longer be considered as a scheduled "working day" and accordingly holidays can not be moved to those days. The pertinent jurisprudence was well established when the 1987 Arbitral Award was rendered. For example, the Pearce et al. decision (Board files 166-2-13760, 13766, 13767, 13771, 13772) held that in respect of the term "normal working day", "normal" meant scheduled, rather than actual working day. In the earlier adjudication decision in Mills (Board file 166-2-3461), which in turn endorsed the adjudication decision in Stamnes (Board file 166-2-2056), the same approach was adopted.

There is a long line of jurisprudence which supports the grievor's position and it was submitted that unless the Steeves decision is manifestly wrong, it should be followed.

Counsel for the employer argued that stare decisis has no application to administrative tribunals. She noted that in the past adjudicators had departed from earlier adjudication decisions. Accordingly, the adjudicator is not bound, and should not be bound by the Steeves and Lee decision, whose effect would be to require that

a holiday be moved twice. She also submitted that in the earlier decisions cited by counsel for the grievors, the grievances did not involve Air Traffic Controllers, and there was no suggestion in the decisions that they were subject to shift cycles. Moreover, the language of clause 16.02 which refers to "scheduled working day" is not found in other collective agreements. In this instance the shift schedules were repetitive and were known well in advance. In the context of Annex "A", and given that pursuant to clause 16.01 the grievor was aware that Christmas and Boxing Day were paid holidays, it is logical that the first scheduled working days, in respect of those holidays, were December 27th and 28th. Annex "A" shows December 27th as a scheduled working day, for purposes of clause 16.02. If it were otherwise, the employee need not have asked for annual leave in respect of that day. Consequently, the Steeves et al. decision should be reconsidered since it did not respond to the issue of a holiday being moved twice. The collective agreement contemplates moving a designated holiday only once, and that was done when Annex "A" was issued. Moreover, this interpretation would be consistent with clause 17.07 of the Collective Agreement.

In respect of clause 17.07, and in the alternative to the submissions noted above, it was submitted that this provision allows for the coincidence of a designated holiday and vacation leave when the employee has no lieu days left to his credit; as stated in paragraph 9 of the Agreed Statement of Facts the grievor did not have

any lieu days left. It is a peculiarity of the Air Traffic Control Group collective agreement that operational controllers are allowed to anticipate holidays. It is clear from clause 17.07 that the employee is not permitted to "use" a holiday and claim the premium. If the grievor had any lieu days left to his credit and wanted to take holidays on December 27th and th he would be required to have his lieu days deducte in which case there would be no question of any premium. However, if the grievor's submission is upheld then employees who, like the grievor, "use up" their lieu days would be in a more advantageous position than those employees who have lieu days to their credit and consequently would have those lieu days deducted, rather than being entitled to a premium. In Ms. Bouzigon's submission, pursuant to clause 17.07 the Collective Agreement allows for the coincidence of designated holidays and vacation leave when an employee has no lieu days left to his credit. This is the precise situation which arises in this instance. Accordingly there is no requirement to "move" the holiday a second time from December 27th and 28th because of the coincidence with the grievor's annual leave.

In support of her submissions counsel for the employer cited Her Majesty the Queen in right of Canada v. Doheny F.C.A., (Court File A-613-86), Anderson v. Her Majesty the Queen as represented by Treasury Board (Court File A-1227-87), and Her Majesty the Queen as represented by Treasury Board v. Justinen and Neilson (Court File A-171-86).

In reply, Ms. MacLean argued that particularly in cases of collective agreement interpretations it is important to maintain stare decisis. Ms. MacLean also maintained that the holidays were not "moved" twice; rather, a proposed schedule was circulated in April which was subject to modification in response to requests for annual leave by employees. Ms. MacLean noted that in the Pearce decision (supra) the master shift schedule was posted, but having granted annual leave, the employer was required to "move" the designated paid holidays to the first day that the employee was actually scheduled to work following the period of leave.

Ms. MacLean also contented that clause 17.07 has no application to the instant grievance. The question at issue here is where the holiday is moved to, in accordance with clause 16.02. If, as the grievor contends, the designated holiday must be moved outside the period of vacation leave then clause 17.07 has no impact.

REASONS FOR DECISION

In my view, the resolution of this dispute turns on the application and interpretation of clause 16.02, as provided in the Canadian Air Traffic Control Association Arbitral Award of July 27, 1987 (Board file 185-2-312). This provision provides as follows:

> 16.02 When a day designated 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 facts are not in dispute. It is agreed that following the issuance and circulation of the employee's shift schedule in April, 1987, which inter alia covered the month of December,1987, the grievor requested annual leave for the period December 27th to December 31st, 1987. The December shift schedule which was duly posted noted the grievor was to be on annual leave during this period. That is, the employer's own shift schedule reflected the fact that the grievor was not scheduled to work from December 27th to December 31st, 1987. Therefore, it is simply not tenable to argue that in respect of the grievor the designated holidays in question were properly moved to his period of annual leave. Accordingly, the circumstances posited in clause 17.07 simply do not arise in this instance; that is, in these circumstances there is no coincidence between the designated holidays and a period of annual leave.

In my view, the facts respecting Mr. Lee were in all material circumstances, identical to those pertaining to the instant grievance. Moreover, I agree with Ms. MacLean that the Steeves and Lee decision is consistent with a long line of jurisprudence established by this Board. In addition to those cases cited by counsel for the grievor, I would also note the decision of adjudicator Young in the L'Hirondelle case (Board file 166-2-14733). In that case the relevant clause stated as follows:

> When a day designated as a holiday under Clause 21.01 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.

As is readily apparent, the clause is virtually identical to clause 16.02. In the L'Hirondelle case the grievor advised his employer that he would be absent on sick leave for a period of three weeks. During this period the designated paid holiday, Labour Day, coincided with the grievor's day of rest. In fact, the grievor was absent on sick leave until October 1st of that year, and having worked on that day he claimed compensation at the rate of time and a half for work on a holiday. The employer refused the request, taking the position that the holiday was moved to the day immediately following the grievor's days of rest, that is September 6th, notwithstanding that the grievor was on sick leave that day. The adjudicator upheld the grievance, relying, (as did adjudicator George Adams in the Mills decision (supra)) on the following conclusion in the Stamnes case (supra):

> Once a period of annual leave has been scheduled, the days within are no longer scheduled working days. The employer may not move a day designated as a holiday from a day of rest to a day of scheduled annual leave. Where a statutory holiday falls on a day of rest which is immediately followed

> by a period of annual vacation, the statutory holiday must be moved to the first day the employee is scheduled to work following the annual vacation...

I entirely agree with this conclusion. Moreover, I do not believe that the decisions of the Court of Appeal cited by Ms. Bouzigon have any bearing on this case. For example, in the Doheny judgment (i.e. Her Majesty v. David Doheny Court File A-613-86) the Federal Court of Appeal identified the issue in that case as follows: "The point at issue before the Board was therefore whether an operating employee who was sick on a holiday on which he was scheduled to work forfeits a lieu day or day of sick leave." This is clearly not the issue in the instant grievance.

Counsel for the employer submitted that adjudicators are not bound by the principle of stare decisis. While quasi-judicial tribunals may not be required to strictly follow their previous decisions, there are compelling reasons why, as a matter of policy, labour relations tribunals in particular should be reluctant to overturn their own precedents. In the R.K. Johnson decision, (Board File no. 166-2-10027) adjudicator Norman responded to similar submissions as follows:

> (at page 6)
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> "I am satisfied that there is every good reason for arbitrators and adjudicators to do what they can to discourage parties who

> have been unsuccessful before one arbitrator and who have chosen not to seek reversal of the award in the courts, from re-litigating the self same issue before another arbitrator. This is so when the same issue of interpretation is presented to the second arbitrator. It must be so, a fortiori, when a different finding is being sought on the basis of somewhat different facts being found, albeit on precisely the same set of circumstances".

Professor Norman then goes on to quote from former Deputy Chairman Jolliffe's decision Derbyshire (Board file 167-2-5) who focussed on the issue with characteristic clarity:

> (at page 7)
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> "Any other course is to invite caprice, inconsistency and perhaps chaos in the administration of collective agreements and the grievance processes within the public service...
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> In my opinion, it was not the intent of the Act to provide facilities for endless exercises of litigious habits or gambits by employers or employees; the purpose was to introduce some order, consistency and justice into employer-employee relations by way of collective agreements under which disputes were to be resolved in the grievance process and - as a last resort - by adjudication. In other words, a legislative effort has been made to establish what might

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> be termed the rule of law in place of unfettered administrative discretion on the one hand and irresponsible employee protests on the other."

The Federal Court of Appeal recognized the validity of those concerns in its judgement respecting an application to review and set aside Professor Norman's decision (ref. Her Majesty the Queen as represented by Treasury Board and Ralph Johnson, as represented by the Canadian Air Traffic Control Association File A-281-83):

> (at page 3)
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> "The applicant argues that this passage shows that the adjudicator, instead of interpreting and applying the Collective Agreement on his own, felt that he was bound to follow a previous interpretation given by somebody else unless he could be persuaded that such an interpretation was manifestly wrong. I do not think that is an altogether fair characterization of what this adjudicator did. In a previous passage of his award, he had carefully considered and rejected the applicability of the doctrines of stare decisis and res judicata to labour arbitrations. He then went on to adopt the wholly common sense view that different adjudicators should try to avoid giving different interpretations for the same clauses of a collective agreement if that can reasonably be done."

In summary, I find that the matter at issue here is the interpretation and application of clause 16.02. In my view, the position taken by the grievor is consistent with the earlier decisions of the Board in respect of that provision, which were decided on a proper interpretation of the language of that provision. Accordingly, the instant grievance is granted. I remain seized with this matter in the event the parties have any difficulty in implementing this decision.

P. Chodos,
Deputy Chairman.

OTTAWA, August 30, 1989.