File No.: 166-2-18833

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

BETWEEN:

VERN A. WARKENTIN,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Roger Young, Board Member.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Barbara Shields, counsel, Dept. of Justice.

Heard in Winnipeg, Manitoba, September 13, 1989.

DECISION

Vern Warkentin was an Air Traffic Controller, A1-04, at the Winnipeg Area Control Centre (ACC) of the Air Traffic Services Branch of Transport Canada, when this grievance arose. He has grieved 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 (CATCA), Code 402/85, as amended by an Arbitral Award (see Board file 185-2-312) dated July 27, 1987.

This grievance has to do with a request by the grievor to take a day of either lieu or annual leave on 28 December 1988. Mr. Warkentin's request was denied and the instant dispute arose. The case is not quite as simple and straightforward as that, however, as the facts will soon bear out. It also involves the matter of a holiday falling on a day of rest which is then required to be moved forward to the employee's first scheduled working day following the holiday. It very specifically concerns the question of whether, by taking a day of leave on what would otherwise be his first day back at work, an employee can cause this "moveable feast" to be bumped along his work cycle. At stake is really the basic issue of whether an employee, who has an opportunity to earn a substantial premium for working either on the holiday or the first day of work to which it has been moved, has the ability to determine, through the exercise of leave, just which day in his work cycle will earn him his premium pay or, on the contrary, whether the employer may deem the employee to have "observed" his holiday by not coming in to work and thereby save itself the premium pay and the lieu day.

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Explanations being best commenced at the beginning, some background information is in order. Air Traffic Controllers at Winnipeg, such as Warkentin, work a set "shift cycle" which, subject to certain narrowly defined conditions, remains unchanged. In this case, the shift cycle is a "triple 5,4 - 6,3" meaning five days "on", four "off", five "on", four "off", five "on", four "off", six "on", three "off", repeated every 36 days. The term "shift schedule" is used exclusively to denote the shift hours which a controller is scheduled to work during those days on which his cycle ordinarily calls for him to be "on". It is not necessary to list here the individual shifts in use at the Winnipeg ACC; suffice it to say that there were six of them, of eight hours' duration each, covering various portions of the full 24 hour day that the airport was in operation.

Warkentin applied on 22 November 1988 to take a day of leave on 28 December. His shift cycle already had him scheduled "off" for the three days 25, 26 and 27 December (Exhibit 2). That is to say, the nationally observed Christmas Day holiday fell on a day which was for the grievor already a day "off" and would, pursuant to the collective agreement, ordinarily be moved to his first scheduled working day, or 28 December. By taking a day of leave on 28 December, Warkentin wanted to move his "holiday" to 29 December and, by reporting to work on that day, earn his premium pay and his lieu day by working on the 29th rather than the 28th.

The matter of the premium pay is all important. Those controllers who work on the actual holiday earn

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time and one-half plus a lieu day of leave to be taken at another time. Those controllers who are already "off" on the day that the holiday is observed by most of the remainder of the nation still get the opportunity to earn the same premium (time and one-half plus a lieu day) when they work on their first scheduled working day to which the holiday has been moved. The nomenclature "moveable feast" has been used by more than one adjudicator to describe this "prize" of the relevant collective agreement.

Now this is not the first grievance which has been fought over the interpretation or application of this and other similar contractual provisions. There is a long line of jurisprudence which has been established by this Board. Two of the latest of these decisions are the case of Lee and Steeves (Board files 166-2-17529 and 17530) and that of MacArthur (Board file 166-2-18414).

To return to the facts of the instant case (concerning which there was no dispute) Warkentin's application of 22 November 1988 for leave on 28 December was originally granted on 23 November, the day after he applied. He made his plans accordingly. Then, on 21 December, the leave was abruptly cancelled. Warkentin was told by management that he could still have the day off but that he could not take a day of leave; management told the grievor that he would be granted, instead, an "authorized absence" allowing him to "observe his holiday". His regular day's pay would be protected; however, he would not be credited with the extra half-day of premium pay nor would he earn a lieu day credit if he took the day off (Exhibit 6).

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Warkentin refused management's offer and once again requested a day of lieu or annual leave. Management again refused this request (Exhibit 7). Therefore, in order to protect his opportunity to earn the premium pay as well as his lieu day credit, Warkentin reported for work on 28 December 1988 and gave up on his vacation plans for that day. He also submitted the instant grievance with respect to the denial of his request for leave. Management's only reason for denying the grievor's request for leave was that this was the new policy as set down by Transport Canada headquarters in a memorandum dated 20 December 1988, the day before Warkentin's leave request was denied (Exhibit 4).

This memorandum, Exhibit 4, actually consisted of two parts, the first of one page and the second of four pages. It was sent to the various air traffic control regions across the country on the authority of G.M. Allan, Director General, Staff Relations and Compensation. It is set out here in its entirety as this is the simplest and best means of explaining the thought processes behind these managerial maneuverings.

> [Part 1]
>
> Subject: AI Collective Agreement - Clause 16.02 Movement of Designated Holiday
>
> The attached procedure is self-explanatory and is being distributed for immediate implementation. There may be instances where employees have requested leave for the day to which Christmas, Boxing

Day or New Year's Day has been moved and leave has been approved. In such cases, employees are to be informed that the leave is cancelled and the leave form is to be returned to the employees with a notation that the leave is cancelled. Employees are also to be provided with the information outlined in point #2 of the attached procedure.

[Part 2]

Subject: AI Collective Agreement - Clause 16.02 Movement of Designated Holiday

Further to the Doheny decision (reference memo attached), during the last round of collective bargaining, clause 16.02 of the AI collective agreement was amended to state:

"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 change in this clause was the addition of the word "scheduled". Prior to this change, the practice in applying clause 16.02 was to move the holiday to the first day actually worked by the employee, thus resulting in the designated holiday "floating" and the employee always receiving the premium pay for working on a designated holiday. With the insertion of the word

"scheduled" in clause 16.02, the Employer took the position that the holiday is moved to the first scheduled working day following the days of rest and is either worked or observed. If worked, the employee is entitled to premium compensation in accordance with clause 16.04. If observed, there is no requirement to utilize leave although the employee's lieu day credits are reduced since the employee did not "earn" a lieu day.

This position was challenged by CATCA in the Lee and Steeves case (166-2-17529 and 17530) and on September 20, 1988, Adjudicator T.O. Lowden rendered his decision; a copy of the decision has already been forwarded to you.

The case of Messrs. Lee and Steeves dealt with a situation where a designated holiday fell on the employees' day of rest. The employees were scheduled to be on annual and lieu leave on their first scheduled working day following their days of rest. The employees requested premium compensation in accordance with clause 16.04 for the first shift worked upon returning for duty. Premium compensation (½ time) was denied on the basis that the designated holiday had been moved to the first scheduled day of work and since they did not work on that day, they had observed the holiday. It was the employer's position that, in spite of the authorized leave, the day remained a scheduled

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working day and, therefore, no annual leave credit had to be used.

The adjudicator's ruling is that the designated holiday cannot be moved to a day scheduled as annual or lieu leave.

In order to give effect to this decision, the following procedure should be followed:

1. In preparing shift schedules and in considering requests for ad hoc leave, management must take into consideration designated holidays and ensure that no leave (including lieu leave and sick leave) is scheduled for the first scheduled working day for controllers for whom the designated holiday(s) fall(s) on their days of rest. This is in line with our position that the holiday is either worked or observed. If a controller is authorized to be absent on the first scheduled working day following a designated holiday which occurred on his/her day or rest, the shift schedule should continue to reflect that the employee is scheduled to work. A notation may be made on the schedule indicating his/her absence.

2. If an employee requests leave (either lieu or annual) on the first scheduled day of work following a designated holiday which coincided with a day of rest, management

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should inform the employee by two-way memo, that the day is considered a holiday and all that is required from the employee is a request to be on authorized absence from work for the day. Management should also inform the employee that he will receive his/her normal pay for the day and that there is no entitlement to the ½ time premium for the first day actually worked following the designated holiday.

3. For administrative purposes, the manager shall notify the pay clerk to reduce the employee's lieu day credits. In accordance with clause 17.07, if the employee has already taken his full entitlement of lieu leave, the manager shall notify the pay clerk to reduce the employee's annual leave credits.

Please ensure that the above information is applied as soon as possible...

Testimony was given by the grievor that, prior to the cancelling of his leave request, management had been able to make adequate arrangements to cover Warkentin's intended absence on leave. Another employee was available as well as sufficient overtime allotments, if necessary. In fact, at the end of December 1988, three of the additional overtime shifts supplied by management to make up for leave coverage owing to the staffing shortage were still available and unused.

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Testimony on behalf of the employer was provided by Glen Shewfelt, Shift Manager at the Winnipeg ACC. Mr. Shewfelt acknowledged that he was the person locally responsible for approving, denying and cancelling leave requests. In the instant case, he had acted according to Mr. Allan's directive; there was no reason other than the new policy for cancelling the leave for which Warkentin had already received approval. Mr. Shewfelt acknowledged in cross-examination that there was a "banking" provision in the collective agreement in respect of the lieu days to be earned by controllers, that controllers were permitted to draw in advance upon their bank of lieu day credits and that there was a presumption in the operation of the collective agreement that controllers would always work their holidays (or the days to which the holidays had been moved) and thereby always earn their lieu day credits. Mr. Shewfelt stated that there were between 80 and 100 air traffic controllers on staff at Winnipeg and that approximately 45 controllers would be at work on any given day.

In argument on behalf of the grievor, Ms. MacLean stated that this issue had only come about because the employer was attempting to circumvent the decision in Lee and Steeves (supra). This was abundantly clear from the memo prepared by the Director General of Staff Relations (Exhibit 4). Prior to the decision of the Federal Court of Appeal in The Queen (Treasury Board) v. Doheny (1987), 72 N.R. 312, which decision was based upon an earlier decision of that same court in Canada v. Justinen and Neilson (1986), 70 N.R. 151, holidays

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for air traffic controllers had been a "floating" or "moveable" feast. It was presumed that controllers would always work their holidays, whether moved or not, and that they would always earn their premium pay and their lieu day credits. Both parties had acted for years according to this understanding.

However, following the decision in Doheny, the employer thought it saw an opening whereby, if it could get a change in the wording of the collective agreement, it might save money. Thus it pushed for the amendment calling for a holiday falling on a controller's day off to be moved to his first scheduled working day rather than simply to his first working day. The decision in Lee and Steeves (supra), held that the holiday could not be moved to a day of leave. In order to get around this, and to try to save premium pay and a lieu day, the employer was simply now refusing to grant leave hoping that employees would elect to stay away from work on an "authorized absence", whatever that was. It was only a short step away, Ms. MacLean suggested, from ordering an employee home on his holiday and thereby avoiding the premium costs set out in the collective agreement.

The employer's new policy stated that an employee must request and may be granted an "authorized absence". However, no such category of leave could be found in the collective agreement. The employer had denied the grievor the use of leave to which he was entitled. The only grounds for denial were "operational requirements and inadequate notice" in the case of a request for lieu

leave or "efficient operating requirements" in the case of a request for vacation leave. No such grounds had been proved.

Counsel referred to the previous decisions of Empson (Board file 166-2-319); Stamnes (Board file 166-2-2056) and Gravel (Board files 166-2-9373 and 9374) in tracing the development of the Board's jurisprudence. Ms. MacLean pointed out how comments in earlier decisions concerning whether or not employees had a "right" to work a holiday in order to earn premium pay had been taken out of context or misapplied in subsequent decisions. She argued that the wording of many of these earlier collective agreements was significantly different than that concerned in the instant grievance. The obligations with respect to the treatment of holidays and the premiums involved were much different in the air traffic controller's agreement than in any of these earlier cases.

Ms. MacLean argued that the instant grievance was being contested solely on the narrow grounds of whether or not the grievor was entitled to a day of leave on 28 December 1988. This was the basic question to be answered and the employer had failed to demonstrate that it had made every reasonable effort to comply with the grievor's request. Clearly the grievor must succeed on this issue of his right to take leave even if the resultant impact of that decision had a bearing on the determination of the day to which his holiday must be moved. The employer ought not to be allowed to deny Warkentin's request simply because it thought it had

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found a means to run its operation more economically. It ought not to be allowed to base its denial on an "economy" or budgetary expense lesser than that which it could ordinarily have been expected to pay through the basic operation of the collective agreement. That is, it should not be allowed to deny leave simply to economize on premium pay and lieu days which it would otherwise be liable to pay for had no request for leave been made.

Ms. MacLean concluded by seeking a declaration of the grievor's right to take vacation or lieu leave in the manner requested and an order that, in future, the employer adhere to its obligations under the collective agreement. She acknowledged that, by working on 28 December 1988, the grievor had received his premium pay and was considered to have earned his lieu day credit for the Christmas Day holiday.

On behalf of the employer, Ms. Shields argued that the real issue here was not whether the grievor was entitled to take a day of vacation leave but whether, by doing so, he was able to determine whether and on which day he would work his holiday and thereby ensure that he would earn the premium pay. Ms. Shields suggested that it was important that the employer be able to plan when and where holidays would fall when scheduling coverage by its employees. Counsel argued that in deciding whether it was the employer or the employee who had the final say in determining when and where the holiday would fall, this adjudicator should look at the purpose behind the granting of premium pay. This ought to be restricted

to compensating an employee for the inconvenience of having to work on a holiday. It should not be used for anything more than this. If a holiday was not really lost, then a premium should not have to be paid.

Ms. Shields referred to a number of earlier decisions: Doheny (supra); Justinen and Neilson (supra); Noel (Board file 166-2-17885); Savage (Board file 166-2-9734) Hill (Board files 166-2-14425 and 14426) and Stoykewich (Board file 166-2-14983). Ms. Shields argued that, as in Justinen and Neilson, the employer, here, had authority under its overall management's rights powers to impose scheduling restrictions or make changes that it deemed necessary. Similarly, as in Doheny, the employer did not have to protect the employee's right to a moveable holiday through the granting of sick leave which would have had the effect of bumping the holiday further along.

Ms. Shields argued that the decision in Noel stood for the proposition that the employer ought to be permitted to offer another form of leave to an employee at a lesser cost to itself. This "authorized absence" could then be regarded as an alternate way of allowing the employee to "observe" his holiday. The issue raised here was not a matter of disallowing the employee his opportunity to earn a lieu day credit. This was simply a question of returning to the true purpose for granting premium pay in lieu of holidays in the first place; the premium was really meant for those who truly lost their holidays through having to work. No employee had a vested right

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to work on a holiday. As a corollary, an employee did not have a right to take leave (and then enjoy the holiday) while at the same time preserving and bumping along to some future date his opportunity to earn premium pay when he finally felt like working (the "holiday").

Ms. Shields conceded that no factual evidence had been presented by the employer which would establish that the grievor's request for leave had been denied on the basis of "operational requirements". Nor, indeed, had any evidence been presented that "operational requirements" had dictated the formulation of the employer's policy as set out in Exhibit 4, Mr. Allan's memorandum on the movement of designated holidays. The reasons behind the employer's actions were outlined in the memorandum. Further to that, it was argued that the right to try to economize on its operations should be viewed as authority enough to deny further movement of the holiday.

REASONS FOR DECISION

The basic issue at the heart of this grievance is the claim by the grievor that the employer improperly denied his request for leave on 28 December 1988. The grievor requested that he be granted either lieu or vacation leave for a planned absence on that day. The employer originally granted this request on 23 November 1988, but then revoked its approval on 21 December 1988. Repeated requests by the grievor for re-approval of his leave were met with repeated denials by the employer.

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The obligation upon the employer with respect to the granting of lieu leave is found in paragraph 16.05(d) of the collective agreement which states:

> 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.

The obligation upon the employer with respect to the granting of vacation leave is found in paragraph 17.06(b) of the collective agreement which states:

> 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.

It was conceded by counsel for the employer that no evidence had been submitted by management with respect to establishing that the leave request had been denied on the basis of the "operational" or "operating requirements" of the "Winnipeg Specialty" section of the employer's operations, where the grievor was employed. The only reason for the denial of the leave request was

the policy enunciated in the memorandum issued by the Director General of Staff Relations, G.M. Allan, on 20 December 1988.

On the basis of the evidence that the employer was, at one point, prepared to grant the grievor's leave request, and the employer's admission that it had no evidence to present that "operating" or "operational requirements" dictated the decision to deny the leave request it would not be incorrect for me to conclude that the employer failed to make every reasonable effort either to "... schedule a lieu day at a time desired by the employee..." or to "... schedule [his] vacation [leave] in a manner acceptable to the employee...". On either of those counts, therefore, this grievance would succeed. The employer, however, argues that such a result ought not to prevail because the granting of such leave also involves the matter of a first scheduled working day following a day of rest to which a holiday has been moved. It wishes the employee either to work on that specific day or, if he does not, to be considered to have "observed" his holiday and to lose his right to earn any premium associated with working on the holiday. This is, essentially, the same line of argument used by the employer in the Lee and Steeves (supra) and MacArthur (supra) cases.

The question really becomes one of whether by taking a day's leave the grievor is able to delay or postpone his opportunity to earn the benefits associated with working on a holiday or a day to which his holiday

has been moved. For ease of reference the clause in the agreement covering this situation is repeated here. It reads:

> 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 scheduled working day following his day of rest.

According to the grievor's shift cycle, 28 December 1988, was first and foremost a day upon which he could ordinarily be expected to be scheduled to perform work unless other circumstances intervened. It was to be, if unaffected by circumstances, his first day back at work following three days of leave in the grievor's cyclical rotational pattern of 5-4, 5-4, 5-4, 6-3 (days "on" and "off"). The grievor having been scheduled "off" for 25 December, his Christmas holiday was being moved to his first scheduled day of work. The grievor in asking for leave on 28 December was, in effect, seeking to delay or postpone this repositioning of his holiday by one day, to 29 December, something which automatically would have occurred had Christmas Day (i.e. 25 December 1988) fallen on the first of four days "off" in the 5-4 portion of his cycle rather than as it did on the first of three days "off" in the 6-3 part.

There is, therefore, no particular "magic" to the fact that we are dealing with 28 December as opposed to 29 December. In some other year, the case will be

that Christmas Day falls on the last day of an employee's three or four days of rest in his shift cycle. The holiday will then have to be moved to 26 December, but this is already the Boxing Day holiday. It is my understanding that in such cases the Boxing Day holiday gets treated as if it is bumped along one more day thus maintaining the possibility of working back-to-back holidays. The thing that I wish to point out is that without anything else happening these moveable holidays will move as little as one day ahead or as many as four depending upon where they occur in an employee's shift cycle. One is tempted to ask, if they are certain to move at least one or as many as four days, whether there is any real hardship if, for other reasons such as leave requests, they are caused to move five, six or more days along the calendar? One of the ways in which such further movement might take place is through the operation of lieu leave, paragraph 16.05(d), or annual leave, paragraph 17.06(b).

Neither paragraph 16.05(d) nor paragraph 17.06(b) make any mention of a different obligation on the part of the employer when an employee seeks to take leave on a day which, were it not for his request, would otherwise be his first scheduled working day following a holiday which falls on his day of rest, as opposed to a request for leave made at any other time. These paragraphs, and the obligations contained within them must, therefore, be construed in a manner which causes them to operate with the same effect at <u>all</u> times. An adjudicator's job is to apply the clear language of the collective agreement; it is not his job to make purposive interpretations of those clauses. See in this regard

the comments of the Federal Court of Appeal in the case of Bourbonnais and Werenka v. Public Service Staff Relations Board (Court file A-743-84).

Since the collective agreement itself does not distinguish or differentiate the obligation to grant leave on a working day which immediately follows a holiday which fell on a day of rest from the obligation to grant leave sought on any other occasion, for me to read such a feature into the collective agreement - as the employer would have me do - would be both improper and tantamount to amending the collective agreement, something forbidden by subsection 96(2) of the Public Service Staff Relations Act.

The employer argues that there is a clash between its obligation to grant leave as requested by the grievor and the need for it to run an efficient operation and to be able to plan when and where moveable holidays will fall for various employees on its scheduled shift coverage. The employer argues that I should find in its favour and, in so doing, return the operation of the holiday premium provision to "something more in keeping with its originally intended purpose". I believe that this is equivalent to asking me to make a purposive interpretation of article 16, something which their Lordships on the Federal Court of Appeal have already warned adjudicators against doing.

When I look at the clear and unambiguous language of the article, I am unable to find any such clash as

suggested by the employer. What is clear is that the bargaining agent has won for its members quite a distinct "prize" in relation to the treatment of holiday. Commencing with the premise that controllers are either "on" or "off" duty according to their shift cycle, it is clear that holidays will fall either on a day on which a controller is scheduled to work or on a day on which he is at rest. If he is scheduled to work, the controller becomes eligible to earn his premium pay (i.e. time and one-half) plus a lieu day to be taken at another time by reporting for duty. If the controller is at rest, the holiday (and thereby his opportunity to earn his premium pay and lieu day) are moved to his first scheduled working day following the day of rest.

Prior to the Arbitral Award (Board file 185-2-312) the collective agreement called for the holiday to be moved to the controller's first working day. The award revised the agreement to state that the holiday was to be moved to the first scheduled working day following the day of rest. The employer felt that it had found a way to limit the moveability of the "moveable feast" and, possibly, to cut down on its operational costs. Two decisions of the Federal Court of Appeal, Justinen and Neilson (supra) and Doheny (supra), the latter of which was based upon the decision in the former, were not altogether unconnected to the employer's thinking.

The employer, it is quite clear from a reading of Exhibit 4, has been interested for some time in economizing upon its operations and in cutting back on

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the cost of providing premium holiday pay. It simply does not believe that it should have to pay a premium to all of the controllers for all of their holidays all of the time. The employer is of the opinion that those who work on a holiday ought to receive premium pay and a lieu day but that those who "enjoy" their holiday by not having to work on a day to which it has been moved ought to get nothing more than a day off with normal pay. It is as simple as that. This is a straight, bottom-line, dollars and cents issue, nothing more.

The employer, it seems to me, is attempting to do two somewhat contrary things at the same time. Firstly, it seeks to concentrate upon the point of the first scheduled working day. Once this date becomes fixed in the employer's mind it cannot be amended or changed. In this case, it is 28 December 1988 and none other. Then it says the employee must work that day in order to earn his premium pay and his lieu day or else stay home, forego these benefits and be considered to have "enjoyed" or "observed" his holiday.

However, the employee is not entitled to observe this holiday as of right as are most other employees. He cannot simply not show up for work. First he must ask for and then must be granted an "authorized absence". Some holiday! Only if the employer agrees can the employee actually enjoy or observe his holiday; otherwise he is expected to be at work on his first scheduled day of work following a holiday which fell on a day of rest. The employer's stance here is remarkably rather Dickensian. Christmas? Bah, humbug!

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The point I wish to make is that the day in question, if otherwise unaffected, is first and foremost a working day in the mind of both employer and employee. If the employee is not going to work the employer wants to know about it. While the employer is prepared (and is contractually bound) to pay for the employee's labour at holiday premium rates including the granting of a lieu day, it is also prepared to allow the employee, provided he obtains permission, to observe a holiday. This rather seriously distorts the concept or understanding of statutory holiday which most of us have.

Employees are obligated to report for work on working days. They are not normally obligated to report for work on what are termed "holidays" or on days for which they have been granted leave. Vacation leave and lieu leave are earned credits of which an employee is entitled to make use upon application to and approval by an employer. The grievor here was entitled as of right to the use of such leave subject only to the rights of the employer set out earlier (i.e. adequate notice, operating or operational requirements).

The right to exercise such leave applies to and may, with approval, be substituted for the obligation to show up for work on any scheduled working day. The grievor had a right to apply for such leave for 28 December 1988, a working day to which his holiday which fell on a day of rest would otherwise have been moved. Had such leave been granted, 28 December would no longer have been the grievor's first scheduled working day. This

was the result in Lee and Steeves (supra) and in MacArthur (supra) both of which decisions I believe to have been correct and neither of which appears to have been challenged or appealed by the employer.

It is my opinion that the decisions in Justinen and Neilson (supra) and Doheny (supra) do not apply here. They deal with what happens on a holiday per se and not to a first scheduled working day to which a holiday which falls on a day of rest has been moved. In this instance, what I have to deal with first is the concept that, before anything else takes place, 28 December was a working day. As such, the grievor was entitled to ask for leave on that day and the employer had only limited grounds upon which it could deny such leave. It has failed to do so. In fact, the employer conceded that it had provided no proof that operating or operational requirements prevented it from granting such leave.

That is the narrow question which I am called upon to decide. For all of the above reasons this grievance is allowed; the grievor was entitled to take either a day of lieu or annual leave on 28 December 1988. The employer was in breach of its obligations under the collective agreement in not granting the employee's request. That is the extent of this decision. That the grievor's first scheduled working day (had the employer observed its obligation) would then have become 29 December flows not from this decision but from those of Lee and Steeves (supra) and MacArthur (supra). As each grievance must be determined on its own facts, it would be

inappropriate for me to make the prospective declaration requested by counsel for the grievor.

I cannot help but note that the statement by the employer in Exhibit 4 that it has followed the procedures of denying such leave requests, which practice led to this grievance, "... in order to give effect to [adjudicator Lowden's] decision..." is one of the most facetious passages of bureaucratese that I have ever come across. Such a suggestion is totally false; the procedure followed by the employer was one not meant to give effect to the adjudicator's decision at all but to circumvent it.

For all these reasons, this grievance is allowed to the extent indicated.

Roger Young,
Board Member.

OTTAWA, December 5, 1989.