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PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

L. ELLIS, D. KLOTZ, W. JUSTINEN,
and D. DICKSON

Grievors,

AND:

TREASURY BOARD
(Transport Canada),

Employer.

Before: P. Chodos, Deputy Chairman.

For the Grievors: C. MacLean, Counsel.

For the Employer: L. Huculak, Counsel.

Heard at Calgary, Alberta, February 6, 1990.

UNILATERAL SCHEDULING OF LIEU DAYS — DENIED

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DECISION

The grievors are all Air Traffic Controllers employed at the Calgary Control Unit. Two of the grievors, Mr. Ellis and Mr. Klotz, are Air Traffic Control Supervisors at the Terminal. Essentially all the grievances raised the same issue and accordingly the parties agreed to consolidate the hearing of the grievances. It was also agreed that the evidence of Mr. Ellis and Mr. Justinen is representative of the other two grievances, and the disposition of the Ellis and Justinen grievances would apply to Messrs. Klotz and Dickson.

There is no dispute as to the facts. The Air Traffic Control operations at the Calgary Unit operate on a continuous basis. There are a number of different shifts applicable to the operational controllers and different sets of shifts and shift cycles for the supervisors. In addition, the manning requirements, as provided by management, vary depending on the time of day and the day of the week. The supervisors work either the 6:30 a.m. to 3:15 p.m. shift or the 3:00 p.m. to 11:45 p.m. shift. The minimum staffing requirements for supervisors at the Calgary Terminal Control Unit is one supervisor for each of the previously noted shifts (see Exhibits E-1, E-2). It was noted by Mr. Ellis that on occasion, perhaps 10 to 20 times during the year, there would be two supervisors per shift. Along with overseeing the work of the operational controllers, the supervisors would perform several other functions from time to time including the preparation of training material, and providing input into performance reviews and other personnel functions.

At the beginning of each calendar year, Air Traffic Control staff are requested to submit their plans respecting leave for that year. In accordance with this practice a memorandum dated January 31, 1989 was issued to all Air Traffic Control staff by the Manager of the Calgary Terminal Control unit, Mr. F.G. Lowe requesting that controllers submit their "vacation/lieu leave plans for 1989/90 in writing to Mr. Mike Brandon (Tower) or Gord Sorochan (IFR Room) by 3 March 1989. To the extent possible the full year's entitlement should be considered. Planning schedules have been placed in the Tower and IFR Room to assist." (Exhibit G-2). In response to this memo the grievors filled out a form known as an Annual Leave Request form (Exhibits G-3, G-8). Specifically Mr. Ellis indicated on the form that he wished to take lieu day leave from August 6 to August 19, 1989. The period of leave which he requested represented the full 10 days of lieu leave which constituted his bank of lieu days at the start of the fiscal year. Mr. Ellis testified that the controllers only know when leave is granted when the schedule is posted for the particular month for which the leave was requested.

The Supervisor Shift Schedule for the month of May, 1989 was issued and posted on April 14, 1989. That schedule showed Mr. Ellis as being on days of rest from May 22 to and including May 25; that period took in the day designated as Victoria Day (that is May 22). It is not in dispute that, in accordance with clause 16.02 of the relevant collective agreement the designated holiday is moved to "the employee's first scheduled working day following the employee's day of rest" and that for

Mr. Ellis the designated holiday in effect fell on May 26, 1989; Mr. Ellis anticipated that he would in fact be working on that day in accordance with the posted schedule. However, he received a memorandum dated May 17, 1989 from Mr. John Marsden, the Terminal Operations Manager, which stated the following:

> On May 26, your day to which the May 22 holiday is moved, has a surplus of supervisors. That being the case you are now granted an "H" day on May 26, 1989.

The designation of an "H" day was explained in a memo dated May 1st, 1989 from Mr. Lowe, (Exhibit G-4). That memorandum stated the following:

> AI operational employees scheduled for leave on a designated holiday or the day to which the holiday is moved in accordance with Article 16 shall have the day identified as the holiday on their shift schedule by the letter "H". A leave application form is not required for the day(s) identified by the letter "H". Employees scheduled for an "H" day shall be deemed to have been granted the designated holiday and therefore not eligible for extra pay or benefits resulting from performing work on the holiday. Lieu day credits established in accordance with the TB/CATCA agreement and Letter of Understanding 13-89 will be reduced by the appropriate number of hours.

In accordance with the memorandum from Mr. Marsden, the shift shown on the computerized shift schedule for May 26 was crossed out and the letter "H" was written in.

Upon receiving Mr. Marsden's memo Mr. Ellis advised him that he did not want May 26 as a day off. However, management refused to change that decision and as a consequence, Mr. Ellis filed the grievance which is the subject matter of this reference to adjudication.

Mr. Ellis' leave record (Exhibit G-7) reflected the fact that according to the employer, Mr. Ellis' lieu day credits were reduced by one lieu day (that is 8.75 hours), as a result of having been granted a day off on May 26. Mr. Ellis testified that as a result of this reduction in his lieu day credits he did not have sufficient lieu days to cover his requested period of leave from August 6 to August 19. In addition, although Mr. Ellis received his regular pay for May 26, he did not receive premium pay which he would have been entitled to had he worked on the day to which the designated holiday had been moved.

A similar set of circumstances pertained to Mr. Justinen. Mr. Justinen also submitted an Annual Leave Request form dated January 27, 1989 in which he indicated his intention to seek leave for the period July 22 to 26 in order to celebrate his son's impending marriage. It was Mr. Justinen's intention to take this leave as lieu days. Mr. Justinen considered that he had an entitlement as of the beginning of the year to 90.75 hours as lieu day credits which represented over ten days of leave. In addition, Mr. Justinen had earlier in the year requested

and taken leave in the form of lieu days on April 8 and April 23 to April 27. According to Mr. Justinen's Leave Record form (Exhibit G-13) this would have left him with a 41.25 hours of lieu time to his credit; accordingly, Mr. Justinen had an expectation that there was sufficient lieu time to his credit to cover leave for the period of July 22 to July 26. Therefore, on June 17, 1989 Mr. Justinen had submitted a Leave Application form (Exhibit G-10) wherein he formally requested leave with pay for that period and had indicated that he wished to use his lieu day credits to cover this period of leave. His immediate superior had duly signed this form approving the leave as requested. However, when the computerized shift schedule was posted for the month of July, Mr. Justinen discovered that an "H" day had been noted in respect of him for July 4, 1989. Mr. Justinen had assumed that in accordance with his shift cycle he would be working on July 4; as that day was his first day back following his scheduled days of rest, one of which coincided with Canada day, July 4th was the day to which the designated holiday had been moved. Mr. Justinen anticipated that by working that day he would be entitled to premium pay and lieu leave credit. Although Mr. Justinen expressed his displeasure at not being scheduled to work that day, he continued to be scheduled off that day and in fact did not work on July 4th. The following day Mr. Justinen received a handwritten note (Exhibit G-11) from Leslie Leppky, the unit clerk who maintains the leave records. The memorandum stated as follows:

> Following reduction of your anticipated leave credit following

> 4 July 1989 you have insufficient leave credits to cover the period 22-26 July 1989.
>
> Our records indicate a balance of 33 hours of lieu credits remaining.
>
> Please submit a leave request for the combination of lieu/vacation leave required to cover the entire period of leave requested.

As a result of this memorandum, Mr. Justinen, in order to ensure that he would be granted the July 22 to 26 period as leave with pay, submitted a new leave application form which requested that he be given time off for July 26 in the form of vacation leave. That is, he used his vacation leave credits to make up for the deficiency in his lieu leave credits, which resulted from the deduction in lieu leave credits for July 4th.

Mr. Frederick Lowe, the Manager of the Calgary Terminal Control Unit, explained the employer's policy in respect of designating certain scheduled shifts as "H" days. Mr. Lowe testified that where there are more controllers and supervisors scheduled to work than are required pursuant to the employer's minimum staffing policy (reference, Exhibits E-1, E-2), then he would grant a day off for the designated holiday or for the day to which that designated holiday is moved. Mr. Lowe stated that this policy is invoked where the effect would be to extend the individual employees' days off beyond the scheduled period of days of rest. Mr. Lowe acknowledged that the controllers who are subject to this policy had not requested that additional day of rest and were in fact

not pleased with the "H" day designation. He also noted that this practice was a means of saving the employer additional labour costs. He admitted that although the imposed holiday would extend their period of days of rest, this would not necessarily allow the employee to celebrate the holiday on the day on which it falls; he noted that the holiday would have fallen in any event on a previous day of rest. Mr. Lowe also stated that there is a basic assumption underlining the collective agreement for the air traffic control group that lieu days would be earned eventually and consequently are banked in advance. He observed that employees who take their lieu days at the beginning of the year and then fall ill on a designated holiday can end up losing pay.

On behalf of the grievors, Ms. MacLean argued that from the grievors' perspective they received a day off when they did not want it and they did not receive lieu time off when they did want it and had actually requested it. She noted that Mr. Ellis had asked for ten lieu days in August back in February 1989 which represented all the lieu days that he would have been entitled to for that year. As a result of the employer assigning him an "H" day, he was forced to request that the time off be given to him in the form of annual leave in order to ensure that he would receive the time off when he needed it. Likewise, in the case of Mr. Justinen he advised management in February that he wished to have time off in July; he had formally requested that time off and it was duly approved. Nevertheless he was required to substitute a day of vacation leave as a result of being assigned an "H" day.

It should be noted that employees such as Mr. E. is were assigned a day off, not on May 22, which was the day that most people were given to celebrate Victoria Day, but rather May 26. Counsel for the grievor submitted that management at Calgary Terminal were attempting to engage in a cost-effective practice by scheduling employees so they would not be able to earn their lieu day credits and receive premium pay. She submitted that this constituted a breach of paragraph 16.05 (d) of the collective agreement. Ms. MacLean noted that the notion of "H" days is not found in the collective agreement for the air traffic control group. The agreement does recognize the notion of banking lieu days per paragraph 16.05 (a); paragraph 16.05 (d) recognizes that lieu days should be scheduled as desired by the employees; there is no correlation between the earning of lieu days and enjoying them after the holiday. Rather, employees are entitled to use the lieu days when they wish, and in advance of any designated holidays.

The grievors' counsel also contended that there is an overwhelming assumption pursuant to clause 16.05 that employees can anticipate and can use lieu days in advance. The new policy initiated by Mr. Lowe was designed to ensure that employees are not permitted to earn lieu days and this is contrary to the intent of that provision.

With respect to the meaning of "operational requirements" in paragraph 16.05 (d), counsel referred to the adjudication decisions in Sumanik (Board file 166-2-395), as well as Noakes (Board file 166-2-9688) and

Lawes et al (Board files 166-2-6437 to 6440, 6666, 6473, 6474 and 7026 to 7029). These decisions support the proposition that operational requirements must relate to the operations itself and not to questions of cost. Moreover, in the context of this case, it is impossible to find that the savings of lieu day cost could not have been anticipated and duly budgeted for. She noted the Warkentin decision (Board file 166-2-18833); that decision demonstrates that the employer had been attempting to narrow the scope of earlier decisions in respect of the scheduling of days off. In Warkentin the adjudicator rejected these attempts by the employer.

In respect of the judgement of the Federal Court of Appeal in Canada v. Justinen and Neilson (1986), 70 N.R. 151, the issue was whether the employer had breached the shift schedule and therefore should pay damages. The court rejected this contention; the court also stated as obiter that the entitlement to lieu day under article 16 arises only if the the employee actually works on the holiday. Ms. MacLean submitted that the context of that decision is entirely different from the subject-matter of the instant hearing; she noted that in the Justinen and Neilson case it could not be established that there was a breach of the collective agreement; in her submission in the instant case there was a clear breach of paragraph 16.05 (d).

In conclusion counsel for the grievors argued that the Union had successfully negotiated an "enormous benefit" in providing in the agreement that the operating controllers can chose when to utilize their lieu days.

The employer is attempting to deprive them of this benefit and is thereby in contravention of the collective agreement; finally she noted that this agreement is very different from other public service agreements in respect of the banking and utilization of lieu days and, therefore, the jurisprudence dealing with other bargaining units has very little relevance.

Counsel for the employer submitted that where an employee has no lieu days to his credit then paragraph 16.05 (d) does not apply. Consequently in the case of Mr. Justinen he did not have the lieu day credit and therefore was not entitled to leave under 16.05 (d). Mr. Huculuk contended that the Justinen and The Queen (Treasury Board) v. Doheny (1987) 72 N.R. 312 decisions established that lieu days are not automatic and there is no right to work holidays in order to earn the lieu days. He referred in particular to paragraph 14 of the Justinen decision in support of his contention. He also referred to paragraph 8 of the Doheny decision which he submitted states that an employee can bank lieu day credits; however they are not earned in advance, rather they are potential. Mr. Huculuk also submitted that the Warkentin decision (supra) is in error where it finds the Justinen and Doheny cases have no application to a designated holiday which is moved. Mr. Huculuk submitted that those cases do apply in that circumstance. In any event, he also submitted that the issue in this case is not the same as in Warkentin.

Mr. Huculuk concluded that management has the right to manage its resources. There was no intention or

attempt to harass the employees. The individual employees have no right to work a particular day; they did not so work and, therefore, are not entitled to the lieu day or to premium pay which they did not earn.

In reply Ms. MacLean maintained that there would be no purpose to having a banking system if employees where not allowed to earn the lieu days. The employer cannot, under the guise of general management rights, specifically ensure that they will not earn lieu days. Exhibit G-8 demonstrates that there has been a consistent practice of using up lieu days first which is also confirmed by the leave records (reference Exhibits G-7, G-13).

REASONS FOR THE DECISION

The pertinent facts of this case can be summarized briefly. The operating controllers and supervisors are requested to indicate their leave intentions at the beginning of the calendar year. The grievors duly advised the employer of their intentions to use the lieu time credits. However, management in Calgary invoked a policy of granting a holiday on the day to which the designated holiday is moved when, according to the employer's view of it, the controllers are surplus to minimum staffing requirements. This designation of an "H" day was contrary to the employees' wishes to work the days in question and thereby receive premium pay for those days, as well as ensuring that they received their lieu day credits which are banked at the beginning of the year. The lieu day credits for these employees were deducted as a consequence

of their being assigned a day off in respect of the designated holiday; in the result the grievors did not have sufficient lieu days credits to enable them to invoke lieu time to cover absences from work for periods of their choosing.

The issue in this case is whether the employer's actions described above are contrary to the collective agreement. It is clear that this question turns on the proper interpretation and application of Article 16 of the collective agreement for the air traffic control group (Code 402/89), which states as follows:

> ARTICLE 16
>
> HOLIDAYS
>
> 16.01 Subject to 16.02 the following days shall be designated holidays for employees:
>
> (a) New Year's Day;
>
> (b) Good Friday;
>
> (c) Easter Monday;
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> (d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;
>
> (e) Canada Day;
>
> (f) Labour Day;
>
> (g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;

(h) Remembrance Day;

(i) Christmas Day;

(j) Boxing Day;

(k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August;

(l) Any other day that is proclaimed by law as a national holiday.

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 the employee's day of rest.

16.03 When a non-operating employee works on a holiday the employee shall be paid, in addition to the pay he or she would have received had he or she not worked on the holiday, one and one-half (1 1/2) times his or her straight-time hourly rate for all hours worked by him or her on the holiday.

An employee at his or her request, shall be granted time off in lieu of cash payment at that rate. The employee and his or her supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated.

Where an employee requests time off in lieu of cash payment he or she must indicate this to his or her supervisor prior to the end of the month in which he or she worked on the holiday.

Where an employee has not utilized this accumulated time off by the end of the fiscal year, the unused portion will be paid off at the appropriate rate.

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

(a) be paid at one and one-half (1 1/2) times his or her straight-time hourly rate for all hours worked by the employee on the holiday,

and

(b) be scheduled a day of leave with pay at a later date in lieu of the holiday.

16.05 For operating employees,

(a) The designated holidays in a fiscal year shall be anticipated to the end of the year and lieu day credits established on the basis of seven decimal five (7.5) hours for each designated holiday.

(b) For the purpose of paragraph (a) above only, in those years wherein Good Friday and/or Easter Monday fall in the month of March they shall be deemed to fall in the month of April, except in any case where the application of this

paragraph would cause an employee to lose credit for the holiday(s).

(c) Lieu days may be scheduled as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on a hour-for-hour basis.

(d) 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.

(e) Where in any fiscal year an employee has not been granted all of the lieu days credited to him or her, the employee may elect to carry forward into the next fiscal year the unused portion of his or her lieu days.

(f) Lieu days earned in the fiscal year will be utilized before lieu days carried forward from the previous fiscal year.

(g) At the employee's option, any lieu days which cannot be liquidated by the end of the fiscal year in which they are earned will be paid off at the employee's straight-time rate of pay in effect at that time.

(h) In cases where lieu days from the previous fiscal year have not been fully utilized by the end of the current fiscal year, any outstanding carry-over lieu day credits

will be paid off at the employee's straight-time rate of pay in effect at that time. This provision does not apply to lieu days accumulated prior to June 1, 1982.

(i) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or commencement of retiring leave or after he or she becomes subject to clause 13.09 shall be subject to recovery of pay.

16.06

(a) An employee who is absent without pay on both the working day immediately preceding and the working day following the holiday shall not be paid for the holiday.

(b) An employee who is absent without permission and who is not on sick or special leave on a designated holiday, or the day to which the holiday is moved by reason of clause 16.02 on which he or she is scheduled to work, shall not be entitled to be paid for the holiday.

It is the grievors' contention that the employer was in violation of paragraph 16.05 (d) by in effect depriving the grievors of sufficient lieu time credits to permit them to utilize the lieu days bank to their credit at the start of the fiscal year for periods of absence of their choosing. However, this contention presupposes that

the lieu day credits which are banked at the outset of the fiscal year are an absolute entitlement, an acquired right to be utilized at the employees' convenience, subject only to the contingencies provided in paragraph 16.05 (d).

In my view, this contention fails to adequately consider clause 16.04 and paragraph 16.05 (a). I would suggest that those provisions contemplate that lieu day credits are in fact a contingent or inchoate right which may or may not blossom into an actual acquired right, depending on whether or not the employee works on a designated holiday or the day to which it is moved. I believe that this interpretation is the only one open to me in light of the Federal Court of Appeal's decisions in Justinen and Neilson and Doheny. In respect of the Doheny case, while the issue before the adjudicator and the court related to sick leave, it is readily apparent that the decision of the court has considerable relevance for the instant case. Thus, Mr. Justice MacGuigan concluded his judgement:

> (at page 317)
>
> Despite the ingenious alternative arguments of the counsel for the respondent, I must find that article 9 is at most ambiguous on the question of lieu days and that with respect to holidays it is limited by article 16.04. Moreover, the anticipating scheme of article 16.05 establishes no entitlement. Entitlement falls to be determined under article 16.04, and on that provision this court

> has already spoken. In the words of Mahoney, J., "the entitlement ... to a lieu day of holiday arises under [article 16.04] only if the employee actually works on a holiday". The Board's contrary view constitutes an error of law.

What then are the grievors' rights under paragraph 16.05 (d)? I do not believe that that provision can be said to provide some sort of guarantee that the controllers will be assigned work on a designated holiday or a day to which it is moved. Such an interpretation would fly in the face of clause 16.04 and the management rights provisions of Article 3. The actual effect of 16.05 (d) is to allow the controller to resort to lieu days when they wish to be off work, but with the proviso that the lieu days are in fact duly earned by virtue of the controllers working the statutory holidays which the lieu days are meant to replace. Accordingly, where the designated holiday or the day to which it is moved is not worked, there is, no entitlement to a day "in lieu of the holiday" (16.04 (b)).

It follows therefore that the employer was not in breach of the collective agreement where it did not grant the days off requested by the grievors as lieu days, when there were insufficient lieu day credits to cover this period of time. Accordingly, these grievances are dismissed.

P. Chodos,
Deputy Chairman.

OTTAWA, March 28, 1990.