APR 0 5 1991

File No. 166-2-21070

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

RICHARD B. RICE,

Grievor,

- and -

TREASURY BOARD
(Transport Canada),

Employer.

Before: Donald MacLean, Board Member.

For the Grievor: Peter M. Ripley, Canadian Air Traffic Control Association.

For the Employer: Roger Lafrenière, Counsel.

Heard at Moncton, New Brunswick, February 15, 1991.

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DECISION

The grievor, Richard Rice, is an Air Traffic Controller, classification AI-4, at the Moncton Air Traffic Control Centre in Riverview, New Brunswick. On May 20, 1990 he applied for vacation leave for the midnight, 0000 to 0800, shift on May 30, 1990. His supervisor told him that he could have the leave provided that he check in one hour prior to the commencement of the shift to make sure that there were enough controllers at work to meet the manning requirements for that particular shift. The grievor filed a grievance and referred it to adjudication because he said that the employer's response was contrary to article 17 of the collective agreement between Treasury Board and the Canadian Air Traffic Controllers Association, Code 402/89, which expired December 31, 1990. The specific article in the agreement that is brought into question is 17.06(b):

> Local representatives of the Association shall be given the authority 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 is the second sentence of the article which the grievor contends has been violated by the employer in this case.

The employees at the centre are formed into crews of controllers who work the specialities for which the centre is responsible. There are 2 specialities at the centre: the high speciality, who are controllers responsible for directing airplanes in the region controlled from the Moncton centre at altitudes of 29,000 feet and higher, i.e. the transatlantic flights; and, the low speciality, who are responsible for flights below 29,000. All controllers are rotated through the shifts that are scheduled in the centre. The shifts are assigned so as to maintain the service continuously on a 24-hour per day basis, 7 days a week throughout the year. The normal rotation is on a cycle of 5 days on, 4 days off; 5 on, 4 off; 5 on, 3 off; and 6 on, 4 off. The shifts vary from 00:00 (midnight) to 08:00 (a.m.), (the midnight shift); 08:00 to 16:00 (day shift); 10:00 to 18:00 (day shift); 16:00 to 24:00 (evening shift); and 18:00 to 02:30 (evening shift). The shifts and scheduling is such that the controllers average 34 hours per week over the long run. Controllers in each of the crews are assigned as a group to specific shifts. For the high specialty crews there are 6 or 7 controllers in a crew. The low specialty crews usually have only 4 or 5 employees. While a crew of controllers may be scheduled to a particular shift, when they are on an evening or midnight shift, it is not uncommon that one or more may be temporarily scheduled (stuffed) to one of the day shifts. When both employees give their consent, they are permitted to exchange shifts with one another as long as there are no extra expenses to the employer in making the exchange. The employee who initiates the exchange, repays his fellow employee by a shift exchange at the convenience of the latter.

The grievor, as well as the other members of his crew, was scheduled to work the midnight shift on May 30,

1990. He wanted to take the shift as vacation leave. He therefore requested the leave. He did not try to exchange the shift with one of his compatriots. It was said that the controllers do not want to exchange onto the midnight shift. It is less desirable. They normally want to be paid overtime if they work the midnight shift.

When his request was, in effect, turned down by his supervisor, the grievor questioned the reasons for it. He knew that of the 6 controllers in his crew one was scheduled to be on annual leave (part of a 2-week leave period), another was "sluffed" to days, and, therefore, there were 4 controllers available to occupy the 3 positions that would be the staffing requirements for the midnight shift. However, the employer had instituted a policy whereby they would approve requests for short (ad hoc) vacation leave only conditionally on the employer meeting the staffing requirements. They would allow employees on a crew to schedule ad hoc leaves in advance down to one above the staffing requirements. When another employee requests leave, his request is granted but only conditionally. He has to check in 1 hour before work begins in order to make sure that there are sufficient controllers on hand. The grievor considered that this was an unreasonable restraint on his taking leave. He just could not really plan to do anything, given that constraint.

The reason for the implementation of the policy by the employer was the fact that they had been experiencing high overtime costs through the previous winter months. In part this was due to having to replace absent employees who were on sick leave. To grant annual leave which could result in short staffing would result in high overtime

costs to pay the controller who would be assigned to replace the absent employee, i.e at time and one-half or double time. The evidence is that the controllers on the midnight shift as a group use sick leave at a rate over 3 times the average for day or evening shifts, i.e at 15% versus 5 to 6%. The policy allows the employer to use the schedule to keep an extra employee available to cover for unforeseen sicknesses. If a controller calls in sick during the last hour before the start of the shift (i.e. after the fourth employee has called in prior to going on an ad hoc vacation leave) his position is covered by extending an employee who is ending the evening shift at 02:30. However that sort of extension of the work hours was not viewed positively by the union nor by the employer. They both wanted to keep overtime to a minimum.

For the union a solution that would substantially restrict the overtime in instances such as the one which is the subject of this case would be to make the leave conditional up to 8 hours before the start of the shift. If 4 controllers would still be available at the 8-hour limit, then the ad hoc leave could then be granted. This suggested solution was unacceptable to the employer. It was noted that when an employee requests a week or 2 of vacation leave at a time the employer is usually able to meet those requests. It is only when the request is for shorter ad hoc leave that the policy becomes operational.

Summary of the Representations on behalf of the Parties

-For the Grievor

The representative of the grievor said that the corrective action requested was only for a declaration that the employer had not made every reasonable effort to accommodate the grievor when he requested the vacation leave. He also wanted the policy of the employer to be removed as being unreasonable in the circumstances. He questioned whether the amount of sick leave taken in a month was excessive in comparison to the shifts actually used.

Mr. Ripley acknowledged that the employees could more readily accept 1-hour notices in regard to day or evening shifts. It would be easier to exchange shifts with someone for those shifts. But it was practically impossible to exchange shifts with another controller to take a midnight shift.

The representative submitted that leave is earned. It should be permitted when requested. Every reasonable effort should be made to provide it when requested. It is certainly not reasonable when the employees have to wait until one hour before the night shift before they know if they will be taking the shift off. Indeed the employer's use of the policy constituted an excess of caution. In fact to require the controller to come into work after having attended to a meeting or other activity in the evening would mean that he would be working in less than the desirable condition that the service requires. He would not be rested. On the other hand if the leave request related to an activity in the morning, denial of

the leave at 23:00 would mean that he would be awake anyway. He may as well go to work.

The policy does not take account of the shift work aspects of the job. The controllers deserve special effort from the employer to accord the leave requests, because the circumstances of the job put them in conflict with any sort of normal life.

The policy is unreasonable. It should be removed.

Reference was made to the following Board decisions: Lauzon (166-2-15728), Milne (166-2-18376), Whyte (166-2-17992), Nicholson (166-2-16080), and Hancock & Best (166-2-18617 & 18642).

-For the Employer

Counsel for the employer submitted that, although there is a requirement on the employer to schedule vacations in a manner acceptable to employees under article 17.06(b), there still remained the factor that before the employer was obligated to make reasonable efforts, they had to consider the efficient operating requirements of the employer. This meant more than just operational requirements. Because of the reference to efficiency, the employer was allowed to look at budgetary implications of staffing solutions. In the instant case we are looking at a high probability of sick leave occurrence, and not the low probability that was evident in Lauzon (supra).

There is no obligation on the employer to use overtime to make up for absences. The employer had a right to look at costs and efficiencies when considering requests under 17.06(b).

Mr. Lafrenière questioned whether in fact 17.06(b) deals with ad hoc requests for leave. Rather he suggested it deals with scheduled requests for vacation leave. A schedule had been drawn up in accord with employee requests. Now what the grievor wants to do is to amend the schedule that is already in place.

Counsel noted that there is no real problem in scheduling vacation leave. It was not a systematic refusal impacting on the employees. The employer response to excess overtime has been to implement a policy to ensure adequate staffing with one employee over their needs to account for contingencies. Nothing in the collective agreement prevents the employer from doing what it has done.

Counsel requested that the grievance be rejected.

Reference was made to **Milne**, **Whyte**, **Nicholson**, **Lauzon**, and, **Hancock and Best**, (supra).

Conclusion and Reasons for the Decision

It seems to me that it is the whole of the second sentence of article 17.06(b) that must be interpreted in this case. I agree with counsel for the employer that the employer is entitled to look at the efficient use of employees to meet its staffing requirements before it is required to make every reasonable effort to accede to the employees' wishes to schedule vacation leave.

In Lauzon, supra, it was said that (at page 10):

> ...the employer can cite an obligation to pay overtime as grounds for denying a request for vacation leave only if it reasonably anticipates that it is certain or almost certain that it will have to pay overtime if it grants the leave requested...
>
> ...the line must be drawn at the employer's expectation at the time of the request...

It was, accordingly, decided that the employer was obliged to do all in its power to schedule the vacation leave as requested. Despite the fact that the wording in the collective agreement was the same as that in the instant case, no reference was made to the impact of the words "consistent with efficient operating requirements" (my emphasis). It appears that because there is no mention of "efficient" in the French text of article 17.06(b) of the collective agreement, the adjudicator was not requested to consider its implications. Because the

employer has raised the issue in the instant case I am obliged to consider the impact of the use of "efficient" within the article.

In **Nicholson**, supra, it was noted (at page 13) that:

> But, as has been held generally by adjudicators in the past, the requirement to schedule vacations "consistent with efficient operating requirements" did not include for the employer the obligation to resort to overtime. The employer, in the instant case, was faced with a request for ad hoc vacation leave at a time when it legitimately could staff to avoid the need to resort to overtime and the grievor could not rightfully complain that it had so staffed and had not used the "extra" controller to cover for him in order that he be granted the leave.

In **Nicholson** the employer wanted to keep the extra controller in reserve to cover the contigencies of sick leave, or other absences, that would be unforeseen as of the date of a request for vacation leave. The grievance was denied.

In **Milne**, supra, the actions of the employer were found wanting because the employer had not been able to maintain the normal complement of controllers at the tower facility in Saskatoon, that the employer had calculated was the minimum required to staff the facility. One of the 11 controllers who made up the normal complement at Saskatoon had been transferred to Winnipeg. The employer, therefore, was not able to respond to absences within the very limits that they had set for themselves. It was found that the absence of a controller could have been covered by an overtime shift, while at the same time the employer would

remain within the constraints of its own efficient operations.

In the instant case there was no allegation that there was not enough staff to meet the operational requirements of the service. It was simply a situation where the grievor was not given unconditional permission to take the requested leave. He did not want to have to wait until 1-hour before the commencement of the shift so as to ascertain for sure that he could go on the leave.

The union suggests that they can accept such a restriction when the day or evening shifts are concerned. Rather, they object when it comes to the midnight shift. But it is 3 times more likely that the extra controller scheduled for a night shift will be required to fill in for a controller who is sick or on some other unforeseen absence (i.e., 15% absence rate for the night shift versus 5 to 6% absences for days and evenings). A rate of absence of 15% may seem to some to be a minor factor in this day and age. Although such a rate does not conjure up the degree of certainty spoken of in **Lauzon**, it does begin to bring in questions of efficiency, at least to the degree that it would be at least prudent for the employer to maintain staffing schedules at least one above the minimum in order to respond to unforeseen and unusual circumstances. In such a case it is not in my view unreasonable for the employer to institue its policy. It is important to remember that there was no suggestion from the union or the grievor that vacation leaves of longer duration than the ad hoc 1 or 2 days had suffered because of the implementation of the policy at the centre. The union did not contradict the allegation by the employer

that longer term vacation requests had been met by the employer for those dates when the employee wanted specific dates.

I think it is now in order to respond to the union's suggestion that they do not object to the employer's standard (to have the employee call in 1-hour before the shift is scheduled to start in order to get final approval) for the day or evening shifts. What the union questions is the setting of the standard for the midnight shift. Employees are not able to plan for their requested absence. Further, it was almost impossible to get replacements to exchange to the midnight shift. They did not like the disruption of the midnight shift. However, there is also a restriction in article 15.03 which requires the employer to keep overtime to a minimum. Taking all these points into consideration, they do not, in my view, amount to sufficient cause to conclude that the employer was in breach of the collective agreement when it implemented the policy at the Moncton Centre.

The employer was not in violation of article 17.06(b) when they told the grievor that his request for vacation leave was granted only conditionally.

The end result is that for the above-noted reasons this grievance and reference to adjudication must be and is hereby denied.

Donald MacLean,
Board Member

Moncton, New Brunswick, April 1, 1991.