PARTIESofDECISION

No. 88

File: 166-2-2411

Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MARTIN SITTIG

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Marguerite-Marie Galipeau, Board Member

For the Grievor: Sean McGee, counsel, Canadian Air Traffic Control Association

For the Employer: Roger Lafreniere, counsel

Heard at Montreal, Quebec,
May 19, 1994

TEXTofDECISION

DECISION

This decision follows the reference to adjudication of a grievance filed by Mr. Martin Sittig who is employed at the Department of Transport as an air traffic controller (AI-2) at the Mirabel Control Tower. The grievor's claim relates to the interpretation or application of clause 15.04 of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Exhibit A-2), Code 402/91.

This clause reads as follows:

> 15.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

The parties agreed to the following facts which were enunciated by counsel for the grievor. They are set out as expressed by counsel.

EVIDENCE

. Mr. Sittig is an air traffic controller who has worked since 1973 in various locations including St-Honore, Mirabel and Montreal.

2. The period at issue is the month of March 1992.

3. During that time, the grievor worked at the Mirabel Tower.

4. The grievor's schedule is set out in exhibit A-1; the initials XM on the schedule (exhibit A-1) refer to the grievor.

5. The parties are agreed that the grievor worked for nine consecutive days beginning March 12, 1992.

6. On the tenth day, that is, March 21, the grievor did not work although as indicated in the third column of the schedule (Exhibit A-1) he was scheduled to work.

7. The issue is whether pursuant to the collective agreement, the grievor was entitled to be paid notwithstanding the fact that he did not work.

8. The clause at issue is 15.04.

9. It is admitted that, on the tenth day, there was no emergency.

10. There was an issue at the beginning as to whether the employer could force an employee to take sick leave on that day.

11. The parties have worked out an understanding on that issue and have agreed not to argue it before the undersigned adjudicator.

12. The remaining issue is, if a person has worked nine consecutive days and is scheduled to work a tenth day, is there an obligation on the employer to pay the employee notwithstanding the fact that he does not work on that day. At this point, counsel for the employer stated that the parties did not necessarily agree on the characterization of the issue.

Those are the facts agreed to by both counsel.

Counsel for the grievor added the following. Clause 15.04 does not say what is to happen if an employee cannot work a shift which he was supposed to work because of the fact that he has worked nine consecutive days prior to that shift.

For a variety of reasons, the grievor worked nine days between March 12th and March 20th. On March 21st, he would have been able to work. The collective agreement prevented him from working on that day since he had worked nine consecutive days previously. What was to happen to the tenth scheduled day of work?

Counsel for the grievor announced that there would be evidence of a clear, longstanding unambiguous practice between the parties that on the tenth day, if an employee was scheduled to work, he was permitted not to show up for this shift but he would be paid nonetheless. The terms EDO (Earned Day Off) and DNA (Do Not Assign) were commonly understood by employees and management to cover this situation. According to counsel for the grievor, disputes such as the present one have come up in the past and have been settled by payment of salary for the day in question. Counsel stated that settlements have not been "without prejudice" settlements. Whether or not those facts are used as past practice for the purpose of interpreting the collective agreement or creating an estoppel, the evidence would be that the parties had relied on this practice and thus, the employer should not be allowed to change its practice which occurred prior to and subsequent to Mr. Sittig's grievance.

Counsel for the grievor added that since the employee works in a civil law jurisdiction, he was relying not only on estoppel but also on preclusion or fin de non-recevoir.

Counsel for the employer remarked that the employer had raised the issue of timeliness and that he was putting counsel for the grievor on notice that the issue still existed. In regard to past practice, concerning EDO (Earned Day Off), the employer was putting the bargaining agent to strict proof of this practice. On the matter of preclusion, fin de non-recevoir or estoppel, counsel stated that they could only be used as a shield and not as a sword and that the grievor was attempting to create a right where no such right existed.

The additional evidence can be summarized as follows.

The grievor testified that he worked nine days between March 12, 1992 and March 20, 1992. On the 21st of March, he was sick. He did not lose any pay. On a previous occasion, he worked nine days, had a regularly scheduled shift on the tenth day, stayed home on that tenth day and did not lose any pay.

Between March 21st and June 30th, the grievor discussed with Mr. Labonte, the supervisor, the one-day sick leave debit effected by Mr. Labonte. The grievor was sick on March 21 and a day of sick leave was deducted from his sick leave credits. The parties informed me that they had agreed that the issue of restoring this day did not have to be resolved; rather, the issue to be resolved was whether the grievor was entitled to a regular day's pay as an EDO.

The grievor testified that in the past he had been reprimanded by Mr. Labonte who reproached him for having called in a Mr. Tony Campione on overtime because it had caused Mr. Campione to work more than nine days in a row. In the end, Mr. Campione got an EDO.

In cross-examination, the grievor stated that it was on March 22, when he filled out a status report and was about to enter one day of sick leave that he noticed that March 21, the day on which he was sick, had been scheduled as a day of work. The grievor acknowledged that the employer had not made him work on the tenth day.

On the issue of timeliness the grievor testified that, although there had been conversations between himself and Mr. Labonte on the status of Ma 21st, it is only on June 30th, when he received a filled-out leave application (Exhibit A-3) that he found out with certainty that March 21st would be a "lost" day.

Mr. Guy Ruel, air traffic controller and regional director in Quebec for the bargaining agent, Canadian Air Traffic Control Association (C.A.T.C.A.) testified that as a matter of practice since 1987-88, an EDO is paid to operational controllers in the Montreal Control Centre who have worked nine consecutive days and are scheduled to work a tenth day but that the giving of an EDO is a rare occurrence. If a person works for nine days and is scheduled to work on the tenth day, this person receives an EDO. According to Mr. Ruel, the practice affects 8 to 10% of the employees in Quebec as in most units there is a sufficient number of employees. Mr. Ruel testified that if the bargaining agent had been informed that this practice would be set aside, the bargaining agent would have tried to negotiate its inclusion in the collective agreement. Mr. Ruel

added that clause 15.04 of the collective agreement was included in the collective agreement with a view to avoiding a situation where employees would be forced to work more than nine consecutive days.

Mr. Fazal Bhimji, National Vice-President, Labour Relations, Canadian Air Traffic Control Association (C.A.T.C.A.) testified that as part of his previous duties as regional director for the central region, he has travelled in Saskatchewan, Manitoba, North Western Ontario and has also done limited travel coast to coast. He has been aware since 1986 of the practice of giving an EDO (Earned Day Off) to controllers who have worked nine days and are scheduled to work on the tenth day.

ARGUMENTS

The argument presented by counsel for the grievor can be summarized as follows.

There is an uncontroverted practice existing since 1986 that when an employee works nine days in a row and is scheduled to work for the tenth day, the employee will receive pay notwithstanding the fact that he is not required to report for work. The employer's evidence does not contradict the existence of this practice. The grievor should have been paid in accordance with this practice regardless of the fact that he was sick and stayed home. As for the timeliness of the grievance, it should be noted that it is only when the employer took action (Exhibit A-3) on June 30 that the grievor had cause to grieve.

There was an inducement by act and reliance on this act to the detriment of the bargaining agent and the employees. The detriment is that if there had been an indication that the employer was stepping back from this established practice, the bargaining agent would have attempted to negotiate and obtain the practice as a provision in the collective agreement.

The ambiguity and the silence of clause 15.04 must be resolved in favour of the clear practice.

It should be noted that clause 15.04 is part of the overtime provisions. If an employee is called in to work nine consecutive days in compliance with a directive of the employer, the employer should know that there are financial consequences.

The following cases were quoted: Suchma and Treasury Board (Board file: 166-2-19518), Pyke and Treasury Board (Board file: 166-2-15645), Grandy and others and Treasury Board (Board files: 166-2-16321 to 16323), Phillips and Treasury Board (Board file: 166-2-20099), Menard v Canada, [1992] 3 F.C. 521.

Counsel for the employer argued that the effect of clause 15.04 is to prohibit the employer from forcing an employee to work overtime after nine consecutive days of work. In the instant case, the situation was created by the employee. On March 22, he became aware that he would have been required to work a tenth day. Discussions ensued (Exhibit E-1 and E-2). The fact remains that the employer at no time agreed to pay the employee an EDO but maintained a consistent position: either it was going to be a sick leave day or a leave day without pay. The EDO practice is not a matter recognized by the collective agreement, nor can it be the object of interpretation or application by an adjudicator. This is not a situation where an adjudicator applies a past practice in the course of an interpretation of rights exist under the collective agreement.

Counsel for the grievor added that clause 15.04 does not state what happens if an employee's shift cycle requires him to work on a tenth day.

DECISION

This is a case of interpretation and application of the collective agreement. The burden of proof rests with the grievor. Having considered the evidence and the arguments, I have concluded that this burden has not been met.

The grievor relies on clause 15.04 of the collective agreement and the existence of a practice.

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The evidence does not support the conclusion that the employee worked more than nine consecutive days. In fact, the evidence is that the employee worked nine days. Had the employee worked more than nine days, the outcome might be different and a violation of clause 15.04 might be found but such is not the case.

As for the practice to grant an employee an Earned Day Off (EDO) when an employee has worked for nine consecutive days, although its existence has not been seriously disputed by the employer, I am of the view that I am without jurisdiction to apply it for the following reasons. Firstly it has not been established that clause 15.04 is ambiguous or that it has been violated to start with. Moreover, the link between this practice and clause 15.04 is tenuous at best. The practice seems to have evolved on its own irrespective of any article in the collective agreement. The jurisdiction granted to an adjudicator is to interpret the collective agreement. I have done so and I have found that clause 15.04 has not been violated. In addition, the practice has not evolved as a deviation from the terms of clause 15.04. As I have said, it has simply acquired an existence of its own and on the basis of the evidence before me, its relationship to the collective agreement and to a specific clause in the collective agreement cannot be clearly ascertained.

Although as was pointed out by Mr. Justice Hugessen in Menard v Canada (supra) at page 532, "the Quebec Court of Appeal and the arbitration tribunals sitting pursuant to the Quebec Labour Code have often adopted and applied the principle of estoppel under the guise of a fin de non-recevoir", the grievor has not put forward any argument to explain the applicability of this civil law concept in the instant case.

In view of my conclusion that clause 15.04 has not been violated and hence that I am without jurisdiction to apply the practice at issue, I need not decide on the timeliness of the grievance.

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For all these reasons, the grievance is denied.

Marguerite-Marie Gailpeau
Board Member

OTTAWA, June 27,1994

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