

JUL 17 1995

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

WAYNE BARRY

Grievor

and

**TREASURY BOARD
(Transport Canada)**

Employer

Before: J. Barry Turner, Board Member.

For the Grievor: Catherine MacLean, Counsel,
Canadian Air Traffic Control Association

For the Employer: Lindsay Jeanes, Student-at-Law

Heard at Toronto, Ontario,
May 16 and 17, 1995.

DECISION

Mr. Wayne Barry, an Air Traffic Controller, AI-05 classification, Air Traffic Services, Transport Canada, Toronto Area Control Centre, Toronto, Ontario, is grieving a leave denial for September 2, 1993 under sub-clause 16.04(c) of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (CATCA), January 1, 1991 - December 31, 1993, Code: 402/91.

Sub-clause 16.04(c) reads:

16.04 For operating employees,

. . .

. . .

(c) 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.

Mr. Barry's grievance reads:

On Aug. 13, 1993 I was advised that my request for leave on Sept. 2, 1993, was denied even though there was a spare controller on the posted schedule and my request was timely. This is contrary to Article 16 and 17 of the CATCA-Treasury Board Agreement.

The number of available leave slots on the schedule have been unilaterally imposed by local management without consultive agreement with local CATCA representatives. This is contrary to Article 17 of the CATCA-Treasury Board Agreement.

The grievor's representative clarified that the original grievance should not have referred to Article 17 of the collective agreement, and that any reference to Article 17 should not be before me. Both parties agreed to this.

The grievor's requested corrective action reads:

1. That I be granted leave as requested on Sept. 2, 1993.

2. *That if #1 is not granted, that I be granted 5 (five) additional days leave to be taken at my choice, since a full cycle leave was ruined by denying leave on Sept. 2.*
3. *That the employer be instructed to attempt to reach an agreement with local CATCA representatives on a unit leave policy.*
4. *That failing an agreement being reached between the employer and local CATCA representatives on a unit leave policy, employees will be entitled to take leave whenever staff is available to replace those requesting leave.*
5. *That I be awarded such financial compensation as deemed appropriate.*

I am being asked to determine whether or not the employer's actions contravened the collective agreement.

The hearing lasted through two half days with two witnesses testifying and eight exhibits being submitted into evidence.

Summary of Evidence

1. Wayne Barry has worked with Transport Canada for twenty-seven years. He has been at Toronto's Lester B. Pearson International Airport for the last twenty-one years in the Toronto Area Control Centre (T.A.C.C.). He lives in Mount Forest, Ontario, about an hour to an hour and a half drive to his workplace.

He described the four shifts that apply to him: day shift, 0625 to 1520 hours; afternoon or evening shift, 1505 to 0000 hours; swing shift 1305 to 2200 hours; midnight shift, 0000 to 0620 hours. He said controllers and supervisors all work and rotate in the operational positions. His working speciality is the East en route, that is aircraft coming in primarily from throughout Eastern Ontario. He explained that staffing levels go up and down in the T.A.C.C. depending on season and budget restraints. He identified two Staff Memoranda to this effect based on adjusted lack of overtime resources and projected expenditures (Exhibits G-1 and G-2).

He said when more controllers are scheduled for a shift than what is actually required, the extra(s) is called a spare(s).

Ms. MacLean referred to two definitions in the collective agreement:

(7) "Shift cycle" means the recurring sequence of an employee's days of work and days of rest.

and

(8) "Shift schedule" means the Employer's advance posting of shifts to be worked by employees within their shift cycle.

Mr. Barry explained that his shift cycle is five days on, followed by four days off, for a total of about thirty four hours per week. A shift schedule is posted around the fifteenth of each month and shows the days and times when a controller is scheduled to work for the following month. He also explained that in February of each year, controllers apply for up to five priority leave slot choices for the upcoming fiscal year. The summer is "prime time". He made no distinction between annual leave and lieu days. He said that it takes about two to three weeks to learn what the master leave planner had approved for each controller based on seniority. He explained that a "leave slot" applies to leave for an approved number of controllers on any given day. It was normally five leave slots for the East en route but went to four in the winter. He also explained that there was a standby leave book (more properly referred to, I believe, as the leave request book) and that those on the list are "bumped-up" accordingly to their requested priority. He said "some controllers submit a Christmas wish list for leave in February and go from there".

Mr. Barry identified another Staff Memorandum regarding Leave Policy dated February 16, 1993 (Exhibit G-3). He said the ten Comp. days on page 1 in Exhibit G-3 were reduced to five after the 1993 budget. The grievor also identified an extract from the leave policy that was in place in August 1993 (Exhibit G-4) and referred to sections 10.1.5 Compensatory Leave. He noted that section 10.1.6, also speaks of Compensatory time or Comp. time as it is called.

Section 10.1.5 reads:

Compensatory Leave

Each staff member will be allowed to bank five (5) compensatory days which may be taken as a cycle in the leave bidding process or as adhoc days. Backfill overtime will be paid for five (5) compensatory days provided a leave slot is available, whether the leave is scheduled or adhoc - subject to operational requirements.

Time off in lieu (additional comp. leave) as per the Collective Agreements may be taken after all annual leave credits and the five (5) compensatory day credits have been exhausted, subject to operational requirements and spares available - NO BACKFILL OVERTIME.

Compensatory leave though it may be planned in advance, may not be taken unless the appropriate number of compensatory hours are banked.

He also referred to section 10.1.4(e) of Exhibit G-4 that reads:

**10.1.4 (e) If all leave and compensatory credits are booked during the scheduling process, then adhoc leave (annual or compensatory) must be deducted from a scheduled block and the leave slots cancelled.*

Mr. Barry said ad hoc leave is not defined in the collective agreement, but he thought it was leave that a controller did not include in the February leave planning cycle. He said it is allocated on a first come first served basis.

It was then pointed out that section 10.3.1 of Exhibit G-4 does define ad hoc leave as:

10.3.1 Ad hoc Leave is defined as all leave requested after the master leave planner has been completed for each year. Requests for ad-hoc Leave must be entered in the leave request book which is located at the Shift Manager's desk.

Mr. Barry testified that he put in for the Tuesday, August 31, to Saturday, September 4, 1993 leave cycle not as his first priority when he put in his original leave request in February 1993. He knew in February what his shift cycle would be for September, but not what his shift schedule would be. This five day period would be preceded by four days off and followed by four days off. His original vacation plan was to go camping, but in July his family was invited to a cottage in the Muskoka, Ontario region. He found out in February 1993 that he was not given the August 31 to September 4 cycle for vacation, but that he was on a priority standby list for this cycle. He said he found out for sure on August 13, 1993 when the September schedule was posted that he would have to work September 2 and would therefore not be able to take the August 31 to September 4 cycle as vacation. He wrote a memorandum that day to Supervisor Fernie who works with the posted schedule (Exhibit G-5).

Mr. Barry said he wrote the word 'lieu' on Exhibit G-5 after he sent it, because he was not sure what leave he had left so he wanted his request to come under sub-clause 16.04(c) of his collective agreement. He said there was a spare posted on the schedule and that he was first on the standby list. Mr. Fernie's response to his memorandum quoted paragraph one, page 2 of Exhibit G-1. Mr. Fernie wrote:

As per Staff Memo 040-93 dated 16-04-93. I quote:

"any spares that may exist after all leave slots have been utilized will not be eligible for adhoc leave until immediately prior to the shift. Requests for adhoc leave on day shift must be directed to the Shift Manager after 6 A.M. Similarly, evening shift requests will not be considered until after 1 P.M. of the day in question.

Ms. MacLean said here that it appears the employer treated the grievor's request for September 2 as ad hoc leave instead of lieu leave.

The grievor said that if he was to follow the policy referred to by Mr. Fernie that he would have had to call in on his way to work from Mount Forest sometime just after 0600 hours to find out if his request had been approved or not for that day.

Mr. Barry identified the most up to date copy of the roster plan for September 2, 1993 with some handwritten changes on it (Exhibit G-6). He said the bracketed numbers on the roster plan represent the staffing level required, and the other numbers beside the bracketed ones represent the number scheduled to work. For example, for the evening shift (6) were required, 7 were scheduled, so the +1 below indicates there was a spare. This fact was undisputed. He said that generally the controllers refer to anything after 1200 hours as the period when a spare would be accounted for. He testified that he could have switched to the evening shift from the swing shift for September 2, where there was a spare, and that this would have accommodated his leave request. He did not discuss this option with his employer.

He also said that the employer can move people around if it wants to since the roster plan changes a lot.

Mr. Barry said that he could not have come in to work from his friend's cottage on September 2 in time to see if he could be accommodated that day or not, so he and his family stayed at home during the period in question and did house painting. He in fact worked September 2, 1993, as he said, "for a break from painting I guess".

He said that shift changes are done as a gentleman's agreement but are hard to get.

After Ms. MacLean reviewed the requested corrective action with the grievor, Ms. Jeanes expressed concern regarding what the hearing was really all about.

Ms. MacLean said that the gist of the grievance is that there was a spare on duty, but Mr. Barry was denied leave for September 2 and that the employer therefore, under sub-clause 16.04(c), did not make every reasonable effort to accommodate him. She said that this breach of the collective agreement ruined a holiday for the grievor and he now wants some compensation for it.

During cross-examination, Mr. Barry said that he knew there was a good possibility he would get the leave slot he requested in February 1993 for August 31 to September 4,

even though he knew there were others ahead of him. He did not get it but he was granted the majority of what he had initially requested. He said that he did not put his name in the leave request book. He agreed that on August 13, 1993 his leave request was reaffirmed as denied. He did not call in on September 2 before his swing shift began, nor did he change his shift or his holidays during the August 31 to September 4 period.

Mr. Barry identified his detailed leave record report (Exhibit E-1) and said that in general, leave worked well for him. He agreed that he had used all vacation, compensatory, and lieu leave available to him in 1993. He also identified a leave application form that he signed on August 24, 1993 requesting leave for September 1, 3, 4, 11 and 12, 1993 (Exhibit E-2).

The grievor testified that he believed the spare on September 2, 1993 could have helped him, but that the employer's decision was imposed on him because of financial constraints that made getting leave harder.

During re-examination Mr. Barry agreed that prior to the leave policy outlined in Exhibit G-4, if a spare was available and someone requested leave, it would be granted.

2. Arlene Yakeley was the Manager, T.A.C.C. Operations in 1993. She said that she helped create the leave policy (Exhibit G-4) and therefore understood the nature of Mr. Barry's grievance. The witness said that ad hoc leave is approved after the initial master leave planning is done in February. She testified that Mr. Fernie correctly referred to ad hoc leave in his memorandum reply to Mr. Barry (Exhibit G-5) since it was leave requested after the initial leave planning process was completed, and since leave slots for September 2, 1993 were exhausted. She said the ad hoc leave policy was reviewed with CATCA in 1991. Ms. Yakeley said that for the East Specialty, that is the area the grievor worked in, there were a total of 1540 leave slots to chose from (see Exhibit G-4, page 20). She said there was a reduction of 70 leave slots as a result of the 1993 federal budget and that Mr. Barry cannot now argue what leave slots used to be like before the spring 1993 budget. She said he is correct regarding a request for ad hoc leave if there was a slot available on September 2, 1993. Ms. Yakeley said that prior to January 1992, if a spare was available, one would probably have had a leave request like Mr. Barry's approved.

The witness said that with less leave slots available due to expenditure reductions, it is less likely that a request for ad hoc leave would be approved. The witness said that if there had been a spare available on September 2, 1993 for the swing shift, Mr. Barry would probably have had his leave approved. She said that there was one for the evening shift as shown on Exhibit G-6. She testified that if Mr. Barry had called in that day the shift manager on September 2 would have made the decision to grant or not to grant leave, based on staff levels, weather conditions and other special conditions. She said that Mr. Barry did not call in on September 2, that she did not know if he tried to change his shift and that the employer has never had trouble accommodating the grievor before.

Ms. Yakeley said that the code 851 on Exhibit E-2 refers to lieu time for statutory time. She felt that the leave policy (Exhibit G-4) was fair and reasonable and that employees are allowed to use all of their leave credits.

During cross-examination, witness Yakeley testified that the grievor could only have been accommodated for September 2 after the entire leave plan had been done. She said that the shift manager would also look at the standby ad hoc leave request book to do this. She said that in the face of cost restraints, the employer had already met the requirements of the overall leave policy for controllers.

Argument for the Grievor

Ms. MacLean asked me to only consider sub-clause 16.04(c) of the collective agreement and not Article 17. She reminded me that reference in the grievance to Article 17 is improperly before me.

She said that there was "adequate notice" in the first place since the original leave request was from February 1993 and therefore the leave request was not really ad hoc. She argued that Mr. Barry did not put in his request for September 2 in the leave request book since September 2 was a day in the middle of a cycle that he had originally requested. She argued that the real issue is whether the employer made "every reasonable effort to schedule lieu days" for Mr. Barry. She concluded that the grievor did not get his leave request for September 2 because of a policy of protecting a spare in case

there was a need for an overtime shift if another controller did not show up for the shift on September 2.

She said there was a spare on the evening shift for September 2, and that according to the grievor under an earlier policy and previous practice, this spare would have been sufficient to cover him on the swing shift. She argued that Mr. Fernie's memorandum (Exhibit G-5) did not say that Mr. Barry was the only person on the swing shift for September 2 but quoted the new policy that the grievor had to check in on the day of his request for leave to see if he could be accommodated. She argued that this would suit someone who only wanted a day off, but not for a whole week to go to someone's cottage. Ms. MacLean concluded that, with the staffing level memorandum in place for the TACC (Exhibit G-1), every reasonable effort was not made for Mr. Barry.

Ms. MacLean argued that the employer cannot have a policy of protecting spares that ends up preventing a controller from taking a longer vacation period, for the sake of protecting the employer from the possibility of paying overtime.

Ms. MacLean said there is no evidence before me about the likelihood of the need to use the spare on September 2, or of a high incidence of absenteeism on the swing shifts at the T.A.C.C.

Counsel argued that the collective agreement has been breached and a declaration by me would not be sufficient, but that as a more proper remedy, an additional cycle of five days leave should be awarded to the grievor, or some other financial compensation at my discretion.

Counsel referred me to: Pinard (Board file 166-2-15381), Lauzon (Board file 166-2-15728); Nicholson (Board file 166-2-16080); Rice (Board file 166-2-21070).

Argument for the Employer

Ms. Jeanes reminded me that the issue is whether or not the employer made "every reasonable effort" to schedule lieu leave for Mr. Barry under Sub-clause 16.04(c) of the

collective agreement. She argued that I should also consider Sub-clause 3.01(b) as it relates to "efficiency" within the overall context of the employer's leave policy.

Sub-clause 3.01(b) reads:

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to the following:

. . .

(b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge.

Counsel reminded me that as far as she could tell from Exhibit E-1, the grievor's detailed leave record report, he had applied for and used all of his allowable time off and was therefore not hard done by. She said that the "Christmas wish list" reference for leave was accommodated for him in May, June and July but not for September.

She referred me to section 10.1.6 of the leave policy (Exhibit G-4) and argued that since the grievor received three periods of thirteen days off in prime summer time that the policy worked well for Mr. Barry.

Section 10.1.6 reads:

**10.1.6 Controller Bidding Procedure
First Round*

- 1. A maximum of two (2) cycles may be bid for by staff on a 5-4 cycle while those on a 4-3 can bid for two (2) during the prime periods or three (3) during non-prime periods.*
- 2. Leave cycles need not necessarily be consecutive, e.g. one (1) cycle during August, one (1) during the spring break.*

3. *Each person has a maximum of two (2) choices up to and including two (2) full cycles and all days in each choice must be contiguous.*

Second Round and Subsequent Rounds

- 1.a *One (1) cycle or not less than four (4) days may be bid during the prime period and one (1) cycle and not less than four (4) days in any non-prime period;
or*
- b. *Two (2) cycles, not necessarily consecutive, during the non-prime period.*
2. *Each person has a maximum of two (2) choices up to and including two (2) full cycles and all days in each choice must be contiguous.*

Remainder of Leave

Personnel will be given an opportunity, in order of seniority, to request all remaining annual leave and up to five (5) days Comp. time in either cycles or individual days.

After leave assignments are complete, the ad hoc leave policy takes effect. (see Policy Manual 12.7)

Ms. Jeanes argued that Mr. Barry could not really have expected to get all the leave as he asked for it, especially the Labour Day weekend in September since this was a period highly sought after by other controllers. She argued that his initial request was denied in February 1993 and that according to the leave policy (Exhibit G-4) under section 10.3.1, any request thereafter turns into an ad hoc leave. Mr. Barry applied for September 2 again on August 13, 1993 and was told to call in on the morning of September 2.

Section 10.3.1 reads:

*10.3 *Ad-Hoc Leave*

- 10.3.1 *Ad hoc Leave is defined as all leave requested after the master leave planner has been completed for each year. Requests for ad-hoc Leave must be entered in the leave request book which is located at the Shift Manager's desk.*

Counsel reminded me that Mr. Barry did not indicate in his memorandum (Exhibit G-5) that he was on the 1300 hours swing shift for September 2, so Mr. Fernie responded in a general way. She said Mr. Fernie had no assurance in his August 13 response that there was a spare for September 2.

Ms. Jeanes referred to the Daily Roster (Exhibit G-6) and reminded me that it was uncontradicted evidence that there was one person scheduled for 1300 hours, one person available (Mr. Barry), and no spare; therefore, the grievor can not be granted his grievance and the matter should end here. There was a spare on for the 1500 hours shift however, but that person also works during that shift.

Counsel argued that in the jurisprudence provided by Ms. MacLean, there was a spare available at all times and concluded therefore that these cases were not on point with the situation before me. Counsel also argued that Mr. Barry took all vacation leave and lieu leave available to him as shown in Exhibit E-1, and concluded that the employer took every reasonable effort to accommodate him. She argued that the purpose of the planned leave process in February is to plan well in advance.

Counsel also argued that the grievor did not try to switch his swing shift on September 2 but chose to come in to work.

Ms. Jeanes also argued that the Lauzon (supra) and Pinard (supra) cases were decided many years ago during a very different fiscal period, and that in the Nicholson (supra) case, calling in thirty minutes before the start of his shift was found to be reasonable.

Counsel referred me to Grégoire (Board file 166-2-20961) as a case on point since there was no spare, the leave slots were all full, and his leave was denied.

Ms. Jeanes concluded that there will always be some controllers who can not always be accommodated for their wish list of leave slots, but in this case, the employer made every reasonable effort to accommodate Mr. Barry.

Counsel also referred me to: Arsenault and Filiatrault (Board files 166-2-17282 and 17283); Langlois (Board file 166-2-21415) and Earle (Board file 166-2-21407).

Argument in Reply for the Grievor

In her rebuttal argument, Ms. MacLean reminded me that this is not a case that deals with the spares issue, and that since Mr. Fernie was responsible for the daily roster, he would have known that there was a spare on at 1500 hours on September 2. She agreed that there was no spare scheduled for the swing shift on September 2, but that there was one on the day and evening shifts. She said that Mr. Barry could not have exchanged his shift on September 2, because based on the policy, he had to call in on September 2 to see if there was a spare. Since there were two scheduled, she argued there was no point in Mr. Barry worrying about switching his shift. She concluded that his leave denial was simply a case of not letting him take advantage of a spare.

Ms. MacLean argued that Article 3 of the collective agreement is an overall acknowledgement of the rights of the employer, and the word "efficient" can not be read into every subsequent article in the agreement.

She agreed that the overall application of the leave policy is not in issue, but rather its application on the particular day in question. It was incumbent on the employer to make every reasonable effort to accommodate the grievor on that day.

Ms. MacLean argued that since there has not been much collective bargaining lately that reference to older cases decided many years ago is an unfounded comment by Ms. Jeanes. She also pointed out that the wording in clause 15.07 referred to in the Grégoire case (supra) reads "a reasonable effort" and not "every reasonable effort" as is the case before me. She also dismissed as irrelevant the Arsenault and Filiatrault, Langlois, and Earle cases (supra) since none of them had spares available.

Decision

I have been asked to decide if sub-clause 16.04 (c) of the collective agreement has been breached, and if so, to grant the appropriate portions of the grievor's requested corrective action.

Sub-clause 16.04 (c) reproduced here for ease of reference reads:

16.04 For operating employees,

. . .

. . .

(c) 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 burden of proof in this case rests with the grievor, and after considering all of the evidence, I do not feel that it has met this burden.

Ms. MacLean agreed that there was initially "adequate notice" in denying the requested leave, but she does not agree under the circumstances, that the employer made "every reasonable effort to schedule lieu days at times desired by the employee". I disagree.

Quite simply, Mr. Barry applied for leave slots in February 1993 for the next fiscal year starting April 1, 1993, and was granted the majority of what he requested since he had leave in May, June and July of 1993. He was denied, by the master leave planner in February 1993, the cycle August 31 to September 4, 1993, a cycle that would have included the busy Labour Day weekend. He did not then enter his name in the leave request book for reconsideration under ad hoc leave as described in section 10.3.1 of Exhibit G-4. Section 10.3.1 reads:

*10.3 Ad-Hoc Leave

10.3.1 *Ad hoc Leave is defined as all leave requested after the master leave planner has been completed for each year. Requests for ad-hoc Leave must be entered in the leave request book which is located at the Shift Manager's desk.*

The issue is whether or not the grievor could have somehow been accommodated for September 2, 1993.

It is clear to me from the Daily Master Plan for September 2, 1993 (Exhibit G-6) and based on the testimony that explained the number scheduled to work and the staffing level required, that there was no spare scheduled for the swing shift starting at 1300 hours. Mr. Barry's memorandum (Exhibit G-5) states that "there is a spare on duty". That is true for the day and evening shifts only. What his memorandum does not say, is that the grievor was scheduled to work the swing shift.

There is also no evidence that the grievor tried to exchange his shift with another controller. Such an initiative was his responsibility and not his employer's. If getting September 2 off was so important to Mr. Barry, I do not understand why he did not pursue his options more actively. I conclude that Mr. Fernie's response to Mr. Barry in Exhibit G-5 was the correct one based on the definition of ad hoc leave and the Staff Memorandum dated April 16, 1993 (Exhibit G-1) that was quoted in part by Mr. Fernie:

... any spares that may exist after all leave slots have been utilized will not be eligible for ad hoc leave until immediately prior to the shift.

There was no spare for the September 2 swing shift. All leave slots were filled by the master leave planner in February 1993. The grievor's request for September 2 was not entered in the leave request book as ad hoc leave defined by section 10.3.1 of the leave policy. He simply ran out of options for September 2.

It is also worth noting that the lack of overtime resources due to fiscal restraints has made the obligation for early and thorough vacation planning even more important for the employer.

I have not been persuaded that Mr. Barry's employer did not make every reasonable effort to accommodate him for September 2, 1993.

I therefore deny his grievance.

**J. Barry Turner,
Board Member.**

OTTAWA, July 10, 1995.