Scheduling

File: 166-2-295

PUBLIC SERVICE STAFF RELATIONS ACT

DECISION

BETWEEN:

KLAUS G.S. POLLACK,

Grievor,

AND:

TREASURY BOARD
(Ministry of Transport),

Employer.

Before:

Edward B. Jolliffe, Q.C., Chief Adjudicator.

For the Grievor:

W. Burrows

ART 13

CODR 402/70

For the Employer:

W.L. Nisbet

Date and Place of Hearing: September 17, 1970, Ottawa.

PAYMENT WHEN EMPLOYEE [redacted]
IS NOT SCHEDULED TWO CONSECUTIVE
DAYS OFF

The aggrieved employee, Mr. Klaus G.S. Pollack, was at material times an air traffic controller, classified A13, at Toronto International Airport. He complains that in February, 1970, his shift was suddenly changed, contrary to a requirement in Article 13.04 of the applicable collective agreement that shift schedules be posted at least 15 days in advance "except in an emergency." He further complains that the change deprived him of his second consecutive day of rest, contrary to Article 13.02 (d). By way of relief he claims compensation at overtime rates for all hours worked between February 12 and 25 inclusive and double time for February 11.

As counsel stated, the employee's case is that an "emergency" did not exist on February 9, when he was informed of a change in his schedule, to be effective the next day. Supervision had known for at least three weeks of the problem which gave rise to the change.

Counsel for the employer also said the issue is whether there was an emergency on February 9. If not an emergency, then another issue emerges relating to the appropriate corrective action.

Before summarizing the facts, it would be well to quote two clauses of the agreement between The Treasury Board and The Canadian Air Traffic Control Association.

Article 13.04, one of many clauses relating to hours of work, provides as follows:

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"Except in an emergency, shift schedules shall be posted at least fifteen (15) calendar days in advance in order to provide an employee with reasonable notice as to the shift he will be covering. The shift as indicated in this schedule shall be the employee's scheduled hours of work."

Article 13.02 (d) provides:

"An employee's days of rest shall be consecutive and not less than two (2)."

The aggrieved employee, Mr. Pollack, had been an air traffic controller since July, 1967. After some experience at North Bay and the Toronto Island Airport, he was moved to Toronto International in 1969, where he completed his "checking-out" period on August 26. The significance of "checking-out" is that even a fully-qualified and experienced controller, on being posted to an airport such as Toronto International, must be monitored by another controller for some weeks until he becomes so familiar with his new work that he can be found competent to rotate on each shift through all the positions filled by controllers of his crew at the Toronto Tower, and his licence is then endorsed accordingly.

At some point in January, Mr. Pollack's schedule showed that he was to work on February 8 to 13 inclusive (six consecutive days) and on February 17 to 22 inclusive (six consecutive days) and

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on February 26 to March 3 inclusive (six consecutive days). He was to enjoy as days off February 14 to 16 inclusive, February 23 to 25 inclusive and March 4 to 6 inclusive. This was consistent with the practice of working six consecutive days, followed by three consecutive days off. Thus, in a cycle of 27 days, a controller like Mr. Pollack would be rotated through three different shifts, working a total of 18 days and having a total of nine days off. The pattern was also reasonably consistent with the requirement of Article 13.02 (a) in the agreement that operating employees scheduled on a rotating or irregular basis should work 37½ hours per week averaged over a period of time not exceeding 70 days. Over a 63-day period the weekly average hours worked would appear to be 37.333.

In accordance with his schedule, Mr. Pollack had three days off, February 5, 6 and 7, and then commenced a 6-day stint on the morning of February 8. However, on February 9 he was told by his crew supervisor, Mr. Trevor Moore, and later by the Unit Chief, Mr. W.E. Brooks, that he was being transferred to a different crew, that he must take off the next day (February 10) and that on February 11 he would commence a new 6-day stint ending February 16. The change in schedule was the inevitable result of being transferred to a different crew.

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For several reasons, Mr. Pollack was displeased and disturbed by the change. He regarded it --- mistakenly --- as a reflection on his own competence. He had become accustomed over some months to working with the men of Mr. Moore's crew and disliked the adapting or adjustments necessary to fit in as a new member of another crew. If a transfer had to be made, he thought the junior man, Mr. Felix Smith, should be the one to go. He knew schedules were supposed to be fixed at least 15 days in advance and he did not believe there was any "emergency." He was unaware of the problem confronting the Unit Chief, and Mr. Brooks appears to have had no success in explaining it. Perhaps Mr. Brooks was reluctant to discuss a problem of conflicting personalities. Mr. Pollack's own testimony is that he did not listen closely to the Chief's explanation; his mind was on other things.

Mr. Brooks' problem must now be described and it will then be necessary to find whether, having regard to all the circumstances, such a problem constituted an "emergency" within the meaning of Article 13.04.

It should first be made clear that Mr. Pollack was in no way responsible for the alleged emergency and indeed knew nothing about it until after supervision had decided to transfer him from one crew to another.

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With respect to the facts which created difficulty for Mr. Brooks and his staff, I heard evidence in detail from Mr. Brooks himself and from Mr. John Thomassen. I think, however, that they may be shortly summarized.

Mr. Thomassen, an air traffic controller, was posted to Toronto International in December, 1969, after experence at London and Toronto Island. The monitor assigned to him was Mr. W.J. Robertson, who is described by both Mr. Thomassen and Mr. Brooks as a "perfect-ionist." From the outset Mr. Thomassen did not get along well with his monitor. They had known each other at Toronto Island. No one has questioned the competence of either man. Suffice it to say that they were incompatible.

All witnesses agree that the work of air traffic controllers is carried on under strain and tension. Their responsibility is heavy, decisions must be made quickly and an error can be disastrous. It is clearly essential that the co-ordinator, airport controller and ground controller work together as a team in harmony and with a high degree of mutual understanding. When all runways at Toronto International are in use, there may be landings and take-offs only 30 seconds apart and the aircraft may have very low speed or they may be high-speed jet airliners. All these and all surface traffic must move under constant surveillance and control from the Tower.

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On January 5, about two weeks after his arrival, Mr. Thomassen went to the Unit Chief, Mr. Brooks, and asked for a transfer, giving a number of reasons, including his unhappy relations with the monitor. Mr. Brooks referred to a staff shortage and said a transfer was impossible. Mr. Thomassen says he was asked to "try another week." According to Mr. Brooks, he offered a transfer to a different crew, but Mr. Thomassen declined: "he didn't want to change horses in mid-stream."

During the two weeks which followed, the "Green" crew, where Mr. Thomassen was being "checked-out," lost two experienced men, who left to take an I.F.R. Course, and the supervisor went on sick leave. Mr. Brooks assigned an experienced supervisor, Mr. Harmon, and planned to transfer another man from Mr. Moore's crew to the "Green" crew.

Mr. Brooks says he heard no further complaints until February 6. On that day Mr. Thomassen came to him and said that the situation was "intolerable," that he was too nervous, and was subject to "harassment" by his monitor, who was too much of a "perfectionist."

On this occasion Mr. Brooks decided he had to take action. There is no doubt he now recognized an emergency. On January 5

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it had been easy to persuade Mr. Thomassen to continue where he was. This time the complaint was made more forcefully. Mr. Brooks knew the "Green" crew had been weakened by the loss of two men --- and it had a new supervisor. It would be much weaker if two remaining controllers were incompatible, even though he regarded both as competent.

Mr. Thomassen had also made his complaint to the new supervisor, Mr. Harmon, but was advised to see the Unit Chief, Mr. Brooks.

Mr. Brooks made a decision quickly, although it was not fully implemented for several days. He told Mr. Thomassen to take the next two days off and then transfer to Mr. Moore's crew. Later he asked Mr. Moore to choose a controller for transfer from his crew to Mr. Harmon's crew. Mr. Moore named the aggrieved employee, Mr. Pollack, but the latter was not informed of the decision until February 9.

It has been argued on behalf of the employee that the situation on February 6 or 9 did not constitute an emergency because Mr. Brooks had known about it ever since January 5. An emergency, it was urged, connotes a "sudden, generally unexpected occurrence or set of circumstances demanding immediate action," according to the

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American definition, or a "sudden juncture demanding immediate action," as the Oxford English Dictionary puts it. Since the "Green" crew was under-manned from about January 18, and since Mr. Moore's crew had at least one surplus controller, Mr. Brooks, it was suggested, could easily have rectified the situation at any time between January 5 and February 6, but for some reason had failed to do so.

Counsel for the Employer argued that Mr. Brooks and only Mr. Brooks was capable of judging whether in all the circumstances an emergency did in fact exist. He knew the airport, he knew his men and their responsibilities, his long experience made him familiar with the requirements of the work, and above all he was charged with the duty of maintaining the safety and efficiency of the operation.

Reference was also made to my decision in the Bergenham case (166-2-125), where a controller was recalled from vacation because of what was thought to be an emergency. The result in that case, however, did not turn on the meaning of the word "emergency."

In my opinion, Mr. Brooks had proper grounds for concluding on February 6 that an emergency existed. Whether he was right or wrong in concluding otherwise on January 5 and whether he was right or wrong in leaving Mr. Thomassen where he was for more than a month, the fact remains that Mr. Thomassen --- for the first time ---

described his situation as "intolerable" when he came to see Mr. Brooks on February 6. This announcement, at a time when Mr. Brooks knew the "Green" crew had been weakened by the loss of several experienced men, gave him a substantial reason to believe that there was a real emergency necessitating a departure from the posted schedule.

That, however, is not the end of the matter. What follows from my finding that there was in fact an emergency? The only result is that the Employer is relieved of the obligation to post a schedule, so far as it relates to Mr. Pollack, at least 15 days in advance. I do not think the Employer is relieved of any other obligation. Such is the plain meaning of Article 13.04.

There were other obligations under the agreement. An employee's days of rest shall be consecutive and not less than two, according to Article 13.02(d). As to that requirement, no exception is made in the event of an emergency.

The Employer takes the position that Mr. Pollack was granted an additional day of rest, over and above those he received in the ordinary course. The argument is based on the fact that he received his three regular days off on February 5, 6 and 7, worked

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on February 8 and 9 and was granted a day off February 10 before joining the "Green" crew for a 6-day stint starting February 11.

I do not think the day off on February 10 can be regarded as a day of rest within the meaning of the agreement. The agreement makes clear that days of rest must be consecutive and not less than two. Any period which fails to meet those requirements fails to qualify as a "day of rest."

I appreciate Mr. Brooks' explanation that he did not want to work Mr. Pollack for nine consecutive days without a day of rest. There is also another explanation. Mr. Thomassen had already started work with Mr. Moore's crew and the "Green" crew was not scheduled to start work until February 11. In the circumstances it made sense to tell Mr. Pollack he could stay away on February 10. There was really nothing for him to do on that day.

The arrangement, however, had a curious result which was probably not anticipated by the Employer. It actually meant that Mr. Pollack was certain to be deprived of a "day of rest" rather than receiving an additional day. The reasons are as follows.

Mr. Pollack worked under his posted schedule until and including February 9. On that day Mr. Moore showed him a new

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"schedule" --- which was really an amendment of the existing schedule --- and Mr. Brooks also informed him of the change, which was to become effective immediately. Thus the new time-table became his as of the next day, February 10. There could be no hiatus; like other members of his new crew, he was not to work on February 10.

Upon examining the record for the 18 days commencing February 10 and ending February 27, it becomes clear that Mr. Pollack worked 12 days and did not work six days. One of those six days, however, did not qualify as a day of rest within the meaning of the agreement because it was a single day, not consecutive to any other day off. In effect, Mr. Pollack had three days of rest, ending February 7, and did not receive another day of rest (in the correct sense) until February 17.

There is nothing in the agreement to prevent the Employer from requiring an employee to work nine consecutive days. Indeed, Article 15.06 provides that "except in an emergency, no operating employee shall work more than .... nine consecutive days." In this case, there was no need to invoke that clause: the crew to which Mr. Pollack had been transferred was scheduled to work only six consecutive days --- from February 11 to 16 inclusive.

That crew, however, had enjoyed three days off, February 8, 9 and 10. If, when the emergency arose on February 6, Mr. Brooks

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had acted promptly and made the change at once, he could have given Mr. Pollack at least two consecutive days off instead of only one. Indeed, Mr. Thomassen started work with Mr. Moore's crew on February 9, while Mr. Pollack was still there.

Accepting the fact that there was a real emergency, I think the appropriate action ought to have been taken at once and not three days later. The evidence makes clear that this could have been done, Mr. Moore's crew being fully manned. Mr. Pollack ought to have been given two consecutive days of rest, February 9 and 10. It was inequitable to deprive him of a "day of rest" merely because the exigencies of the service required his transfer from one crew to another, a change which he was not responsible for causing.

"Overtime" is defined by Article 15.01 of the agreement as "time worked by an employee in excess or outside of his scheduled hours of work."

There are two possible views of the time worked by Mr. Pollack on February 11 and the subsequent days. One view is that he should be considered as working at straight-time (under his previously posted schedule) on February 11, 12 and 13. In that event the work performed by him with his new crew on February 14, 15 and 16 was "in excess or outside of his scheduled hours of work." Had he remained

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with Mr. Moore's crew he would have been off on those three days. On the other hand, if he is considered as working under a new schedule (not posted 15 days in advance) as and from February 10, then the time he worked on and after February 11 was not "in excess or outside of his scheduled hours of work." But if he is so considered, then it follows that he was entitled to the same three days of rest which had been enjoyed by the other members of his new crew, namely February 8, 9 and 10, or the equivalent thereof. He was under either one schedule or the other and his time-table cannot be juggled in such a way as to deprive him of his rights or certain of his rights under the applicable schedule, whichever it was.

What occurred was unusual. However, the change which became necessary had been known to Mr. Brooks on February 6. He knew on that date that he would have to transfer Mr. Thomassen from the "Green" crew to Mr. Moore's crew and also that he would have to transfer a controller from Mr. Moore's crew to the "Green" crew in exchange. He knew also that the latter were enjoying their days of rest on February 8, 9 and 10. At that point he ought to have taken steps to make certain that the transfer would not result in Mr. Pollack being deprived of two consecutive days of rest being enjoyed by other members of the "Green" crew. Instead, he let matters stand and did not inform Mr. Pollack of the change until February 9.

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For these reasons, I have come to the conclusion that Mr. Pollack was obliged to work outside or in excess of his scheduled hours, either on February 8 and 9 or on February 14 and 15. He thus became entitled to a premium with respect to two days. Under Article 15.04 (b) it is provided that if overtime is worked by the employee he shall be paid at one and one-half times his straight-time hourly rate, except that if the overtime is worked by the employee on his second or subsequent day of rest where days of rest are consecutive, he shall be paid at two times his straight-time hourly rate. Mr. Pollack has already been compensated at straight-time for the two days in question. He is thus entitled in addition to be paid half-time for one day and straight-time for the second day, totalling one and one-half days' pay.

In the original grievance, Mr. Pollack claimed overtime at the time-and-one-half rate for the work done on February 12, 13, 14, 15, 16, 20, 21, 22, 23, 24 and 25. He arrived at this claim on the basis that the new schedule did not become effective until 15 days after he was informed of it on February 9. I do not think this branch of the claim can succeed. It is true that Mr. Pollack's new schedule had not been posted 15 days in advance, but I have held that the employer was relieved of that obligation by the existence of a real emergency. The agreement does not provide that overtime rates become applicable for a 15-day period when an emergency arises and it is

necessary to amend the schedule. The change became effective when Mr. Pollack was transferred from Mr. Moore's crew to the "Green" crew. Mr. Pollack thereupon became subject to the "Green" crew schedule, with all the rights and obligations connected therewith. On being compensated for the loss of two consecutive days of rest, he is in no worse position than any other member of either crew.

This grievance must be upheld in part. For the reasons given, my decision is that Mr. Pollack should be compensated for the loss of two consecutive days of rest made necessary by the amendment of his schedule in February, 1970, and his compensation should be the equivalent of one and one-half days' pay at straight-time rates.

Ottawa,
February 4, 1971.

"Edward B. Jolliffe"
Chief Adjudicator.