File: 166-2-527

OCT - 4 1972

PUBLIC SERVICE STAFF RELATIONS ACT

DECISION

BETWEEN:

J.L. RACH,

Grievor,

AND:

TREASURY BOARD
(Ministry of Transport),

Employer.

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

For the Grievor: W. Burrows, Counsel,
J.R. Campbell of The Canadian Air Traffic Control Association.

For the Employer: G. Terkel, Counsel,
R. Paulin.

Heard November 23, 1971, at Ottawa.

The only issue in this case is whether the aggrieved employee was entitled to be paid at time and one-half or at double time for working on June 8, 1971, which had been scheduled as a "day of rest" for him.

The facts are not in dispute. By a written agreement of counsel, they were stated to be as follows:

> "The Grievor is an operating employee, classified A I 5, employed by the Ministry of Transport, Civil Aviation Division at Calgary Terminal Control.
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> "His shift cycle, which was posted at least 15 days in advance of the 30th of May, 1971, is as follows for the period relevant to this grievance: May 30, 31 and June 1, 1971, days of rest; June 2 to 7 both inclusive regularly scheduled days of work, June 8, 9 and 10 days of rest.
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> "The Grievor was required to work as overtime on the 1st day of June and on the 8th day of June, 1971. He worked his regularly scheduled days from June 2nd to 7th inclusive. He was paid at the rate of one and one-half times his straight time hourly rate for the work performed on the 8th of June, 1971."

In Support of the claim, Mr. Burrows relied on three clauses in the agreement signed on December 22, 1969, between The Treasury Board and The Canadian Air Traffic Control Association, articles 13.04, 15.01 and 15.04(b). They read as follows:

> 13.04 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.
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> 15.01 Time worked by an employee in excess or ourside of his scheduled hours of work shall be considered as overtime.

15.04

(a) . . . . . .

(b) Operating Employees. An operating employee shall be paid for overtime worked by him at one and one-half ($1\frac{1}{2}$) 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, the employee shall be paid at two (2) times his straight-time hourly rate. An employee is entitled to overtime compensation for each completed fifteen (15) minute period of overtime worked by him.

Mr. Burrows also relied heavily on the Holliday case (166-2-297) in which the meaning of the word "consecutive" was considered. He argued that the reasoning in Holliday is clearly applicable here, and that the Pollack decision (166-2-295) referred to by the employer in its final-level reply, is distinguishable. He described the employer's second-level reply as "frivolous", because it misquoted the language of 15.04(b).

For the employer, Mr. Terkel filed and read a written argument, which may be summarized as follows.

The employer concedes that Mr. Rach was required to work on June 1 and June 8, 1971, both of which had been scheduled as days of rest. They were not consecutive calendar days and the grievor had worked the intervening days as scheduled, June 2 to 7 inclusive.

The Holliday case, Mr. Terkel argued, was not relevant. It had been decided under Article 22.10 of the Radio Operations agreement. Although the wording of 22.10 in that agreement was similar to the wording of 15.04(b) of the Air Traffic Control agreement, the latter also contained language in 13.02(d) providing that "an employee's days of rest

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shall be consecutive and not less than two." No such language could be found in the Radio Operations agreement, and therefore the Holliday case was decided in a different context.

Mr. Terkel said further:

> ". . . . . The Employer is of the view that clause 15.04(b) of the Air Traffic Control Agreement must be read together with clause 13.02(d) of the said agreement. The aforementioned clause has to have a meaning which qualifies the term consecutive as used in clause 15.04(b) of the Agreement, If every second or subsequent day of rest is necessarily consecutive to the preceding day of rest then surely the term consecutive in clause 13.02(d) would be redundant and meaningless. The Employer's position is that the aforementioned clause makes it inter alia a condition precedent that a day off immediately follow in calendar days another day off for it to be considered a day of rest. The Employer's position is supported by the Pollack adjudication case, File 166-2-295 where, inter alia, the interpretation of clause 13.02(d) of the Air Traffic Control Agreement was in issue before you. In Pollack, the Grievor had three days of rest, (February 5, 6, and 7), worked two days of his regular shift (February 8 and 9) and then because of an emergency which was completely unrelated to him, had his shift schedule changed. He was given a day off (February 10) and he reported in on his new shift the following day. You agree with the Grievor that clause 13.02(d) of the Air Traffic Control Agreement had been violated because February 10 could not be regarded as a day of rest within the meaning of the said clause as it was not consecutive to February 7. Thus, it appears from your decision in Pollack that under clause 13.02(d) of the Agreement, days of rest must, inter alia, be consecutive in the sense of consecutive calendar days.
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> "In the present case, June 8, within the meaning of clause 13.02(d) and therefore, within the meaning of clause 15.04(b) of the Agreement, cannot be regarded as a day of rest as there intervened between June 1 and June 8 six regularly scheduled working days."

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In reply, Mr. Burrows said that 13.02(d), emphasized by Mr. Terkel, fell within Article 13, which was headed "HOURS OF WORK" and was related to the scheduling of days and hours of work, while on the other hand Article 15 related to the calculation of premiums to be paid for overtime and such non-scheduled work as that done on days of rest. The proper application of the word "consecutive," he submitted,"depends on the context," and the context here was that of Holliday rather than Pollack.

Before stating reasons for my decision in this case, it seems necessary to clarify the distinction between Pollack, decided February 4, 1971, and Holliday, decided March 10 of the same year.

It has sometimes been suggested (although not expressly in the argument before me in this case) that Holliday is inconsistent with Pollack. The suggestion is specious for two simple reasons. The first is that the two cases were decided under two different agreements, and part of the applicable language was not the same. The second is that the circumstances in which Holliday arose were entirely different from those of Pollack. In other words, as would be apparent on careful reading of both decisions, the too cases were distinct as to both law and fact.

In Pollack a dispute developed because it became necessary (due to reasons unrelated to him) to transfer the employee from one crew to another, which involved a different schedule. He claimed double time for one day and time and one-half for all hours worked during the next 14 days, basing that claim on the requirement in 13.04 of the Air Traffic Control agreement that "except in an emergency,

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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 circumstances were held to constitute an emergency, one of the reasons for which that branch of his claim did not succeed.

There remained, however, another problem in Pollack's case. With Crew "A" he was scheduled to work February 8 to 13 inclusive, he was to enjoy days of rest February 14 to 16 inclusive, and he was to work again February 17 to 22 inclusive. In fact he worked with Crew "A" February 8 and 9 as scheduled, but on February 9 he was told to take the next day off and then start work with Crew "B" on February 11 for a six-day stint in accordance with Crew B's existing schedule. I held that his entitlement to days of rest had to be computed under either one schedule or the other, and in either case he should be paid half-time for one day and straight time for a second day in addition to straight time already paid for two of the days worked. The two alternatives (which produce the same result) were explained at pages 12 and 13 of the decision:

> "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 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

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> 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."

A subordinate issue in Pollack was that he had actually been told the day before to take February 10 as a "day off" or a "day of rest." It happened to be the third day of rest for Crew "B", his new crew, so that there was no need for his services that day. For him it had been scheduled as his third working day with Crew "A", his old crew. The question arose whether it should be considered as a "day of rest." It had never been scheduled as one of his days of rest. Even if it had been so scheduled, I could not regard it as a day of rest in the correct sense. I said at page 10 of the Pollack decision:

> "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.'"

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The reference to the word "consecutive" in the paragraph quoted may have been understood or misunderstood to mean that "consecutive" invariably and necessarily implies an unbroken or uninterrupted sequence. Of course it sometimes does . . . having regard to the context . . . and sometimes does not, again having regard to the context. As I said at page 10 of the decision in Holliday: "The notion of continuity associated with the word 'consecutive' can be understood only in relation to the context. Absolute continuity is not relevant unless the nature of the sequence requires it." This was rather fully explained, with examples, in Holliday, but I shall explain it again, with particular reference to the three cases in which the application of the word "consecutive" has been discussed.

Category No. 1: The context requires absolute continuity from period to period without any interruption between them, e.g.: "He worked for X throughout four consecutive years."

Category No. 2: The context precludes absolute continuity and makes interruptions inevitable, as any informed person would understand, e.g.: "His visits to Europe were in four consecutive leap years."

Category No. 3: The context may admit the possibility of absolute continuity and also the possibility of broken continuity,

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e.g.: "He fought for his country in four consecutive wars." Here the word "consecutive" is used correctly but in such a context that we do not know whether the wars occurred in unbroken succession, which is of course possible, or were interrupted by one or more periods of peace, which is also possible. It is necessary to know more; here the word "consecutive" fails to disclose the whole story.

The examples suggest that the principal clue (but not necessarily the only clue) in establishing the sense in which the word has been used is the nature of the word or term modified by the adjective "consecutive." Its significance is quite different when that term is "leap year" rather than "year". Similarly, the significance may be different when the term modified is "day of rest" rather than "day". It is often necessary, however, to seek a wider context, as in the example given for Category No. 3, when the term modified and the adjective read together admit both the possibility of unbroken continuity and the possibility of one or more interruptions.

In Holliday, having regard to the wider context, it was my opinion that the expression "provided the days of rest are consecutive" fell into Category No. 3. I concluded that when the employee was required to work on a day of rest and again required to work on his next succeeding scheduled day of rest, he was entitled to double time for that second encroachment on his rest time. I rejected the argument that because six regularly scheduled work days intervened he

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somehow became so recuperated or rejuvenated that the parties did not intend him to receive a double-time premium when he had to work on his next day of rest. Indeed, Holliday actually worked nine days in succession without a break. The curious effect of the employer's argument was that he should be paid double time for the first day worked (because the previous day had also been a scheduled day of rest); straight time for each of the next six days; time and one-half for the eighth day and double time for the ninth. I held that in the circumstances of the case and in the context of the applicable language, the eighth day (January 26) was the "second or subsequent day of rest" after the first day worked (January 19) and that they were consecutive scheduled days of rest on which he was required to work. In the result, he became entitled to double time rather than time and one-half for his work on January 26.

In Pollack, I had to consider a clause which received no attention in Holliday because it did not appear in the Radio Operations agreement. It does appear however, in the Air Traffic Control agreement, so that it is relevant in this case as well as in Pollack.

The decision in Pollack, as already explained, was based on my conclusion that whether the employee was considered as being under his old schedule or his new schedule, he had in either case lost two of his scheduled days of rest and was entitled to be paid at time

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and one-half for one and at double time for the other. Incidental to that conclusion, I had decided that the "day off" he was given on February 10 (between his transfer from one crew to the other) was not a "day of rest" within the meaning of the agreement. It had been scheduled as a day of rest, not for him, but for other members of the crew to which he was being transferred, and of course that crew did enjoy two other days of rest contiguous thereto at a time when Pollack was not a member of their crew. In that context, I did not think the "day off" on February 10 met any of the requirements of the agreement so far as he was concerned, although it did with respect to certain other employees. It was a "day off" in isolation from any other, preceded by scheduled days of work for himself and his old crew and followed immediately by scheduled days of work for himself and members of his new crew. As such it was irreconcilable with the requirement in 13.02(d) that "an employee's days of rest shall be consecutive and not less than two." One day off in isolation is obviously less than two. In that context it could not be said that the word "consecutive" linked the single day off with any other day or days separated from the day off by scheduled working days. Further, February 10 had never been scheduled as a day of rest for him. He was merely told on February 9 to take the day off.

Of itself, the provision in 13.02(d) that "an employee's days of rest shall be consecutive" falls into what I have called Category No. 3.

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I place it in Category 3 because, if they be considered alone, days of rest may or may not be separated from other days of rest by a sequence of scheduled work days; in a 6-3 cycle obviously some of them are so separated and some of them are not, just as some wars are separated from other wars by periods of peace and some are not. However, in 13.02(d), all doubt is resolved by the words which follow immediately: "and not less than two (2)." This language provides the context and makes the meaning clear: the parties intended that days of rest should be scheduled so that there would be at least two at a time, one following immediately after the other.

It should be noted that Article 13, headed "HOURS OF WORK", relates to the manner in which regular and foreseeable work is to be scheduled; it is not concerned with overtime or the rates to be paid in the event that it becomes necessary for an employee to serve "in excess or outside of his scheduled hours of work." In my view the case before me now, the grievance of Mr. Rach, must be decided, not by reference to Article 13, but by reference to Article 15.04(b), which expressly provides for the result when "the overtime is worked by the employee on his second or subsequent day of rest where days of rest are consecutive."

Mr. Terkel has conceded that the language of 15.04(b) in the Air Traffic Control agreement applicable here is similar (not identical) to the language in 21.10 of the Radio Operations agreement,

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which was applicable in the Holliday case. He contended, however, that the effect of 15.04(b) is governed by the language of 13.02(d), which appears in the Air Traffic Control agreement, and which I held in Pollack used "consecutive" in the sense of absolute continuity. The weakness of the argument is that 13.02(d) and 15.04(b) deal with different subjects and in different contexts. The former is concerned with the manner in which hours of work and days of work and days of rest are to be scheduled; the latter deals with the results when there must be a departure from what has been scheduled. As I have taken pains to explain, the word "consecutive" does not have a fixed or unvarying significance; its meaning has to be determined in each instance by reference to the context. That was done in Pollack; it was done again, with a fuller explanation, in Holliday. I am doing it again in this case. The point at issue here is not whether Mr. Rach's days of rest were correctly scheduled under 13.02(d); there is no dispute whatever about that. The issue is whether Mr. Rach should be paid for June 8 at time and one-half or at double-time under 15.04(b), which closely resembles 21.10 in the Radio Operations agreement and indeed is the same in principle.

Mr. Terkel's final argument, already quoted, was that "June 8, within the meaning of clause 13.02(d) and therefore, within the meaning of clause 15.04(b) of the Agreement, cannot be regarded as a day of rest as there intervened between June 1 and June 8 six regularly scheduled working days."

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I cannot accept that argument for reasons which must be already apparent. It equates the significance of "consecutive" in 13.02(d) with its significance in 15.04(b), although the differences in context and subject-matter give the word, in my opinion, a different significance. Moreover, the argument reflects the confusion about the term "day of rest" to which I referred in Holliday. In scheduling, the term denotes a day scheduled to be not worked. Then the requirements of 13.02(d) come into play: there must be at least two of them scheduled together. When claims for overtime payment arise, the term "day of rest" is also used - - - referring this time to a day actually worked. When this occurs, the relevant clause is not 13.02(d) but 15.04(b). A scheduled day of rest not worked is obviously a very different animal from a "day of rest" which is in fact worked, and the two should not be confused, particularly since they are governed by different clauses in different articles of the agreement.

In this case the aggrieved employee had been duly scheduled to enjoy a day of rest on June 1 and another on June 8. He was also scheduled to work June 2 to 7 inclusive, six days. There is no complaint about his schedule; it can be assumed that it complied with the requirements of 13.02(d). He was paid at double time for his work on June 1 (which had been scheduled as his second or subsequent day of rest) and he was paid at time and one-half for June 8, which the employer regarded as a scheduled first day of rest, not consecutive

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to June 1. The case is indistinguishable in principle from that of Holliday, and for the reasons given in that decision I must uphold Mr. Rach's claim for double-time with respect to June 8.

I have noted that in his original grievance Mr. Rach expressly drew attention to Holliday, identifying the decision by file number and date. In the reply at the first level the citation was ignored. It was also ignored at the second level where the Western Regional Director gave the following reason for rejecting the grievance:

> "Clause 15.04(b) of the Air Traffic Control Group Collective Agreement makes provision for compensation at double time only for work performed on the 'second or subsequent day of rest' in an unbroken series of consecutive and contiguous calendar days of rest."

The expression embodied in the last 12 words of the reply quoted does not appear anywhere in the agreement. I suggest that when a representative of either party relies on language foreign to an agreement, his colleagues and superiors should be at once alerted to the weakness inherent in his reasoning.

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Mr. Rach has already been paid at time and one-half for work performed on June 8, 1971. For the reasons heretofore given he was entitled to double time. He should now be paid the difference between what he ought to have received and what he did receive, or one-half his straight-time rate for one day.

Edward B. Jolliffe,
Chief Adjudicator.

Ottawa,
August 8, 1972.