Files: 166-2-1584 to 1597 inclusive, and
166-2-1599 and
166-2-1602

PUBLIC SERVICE STAFF RELATIONS ACT

DECISION

BETWEEN:

F.W. JODOZI, J.E. HAMMOND, S. LAVIOLETTE, L.J.L. BOULET, C.J. BLANDFORD, J.L. POITRAS, R.L. DOYLE, C.J. REASIN, J.G.D. LANCTOT, S.P. DOHERTY, J.M.S. GUILBAULT, J.G. GALLANT, J.A.R. LAUZON, P. BIBEAU, PIERRE G. BESSETTE AND SERGE L. PREVOST.

Grievors,

AND:

THE TREASURY BOARD
(Ministry of Transport)

Employer.

Before: R.D. Abbott, Adjudicator

For the Grievors: F. Ager, of the Canadian Air Traffic Control Association

For the Employer: Mrs. M.K. Saltman, counsel.

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Heard October 30 and November 27, 1974, at Ottawa, Canada.

ASSIGNMENT OF VACATION LEAVE

By direction of the Chief Adjudicator dated September 13, 1974, all these grievances were heard together at Ottawa. All the grievors are classified as Air Traffic Controllers and are employed with the Ministry of Transport at Montreal, Quebec. All sixteen grievances allege misinterpretation or misapplication of Article 17 of the Air Traffic Control Group (all employees) collective agreement. All the grievors allege that a portion of their earned vacation leave was unilaterally assigned to them at times which were not requested by them. They request as corrective action that such leave be reinstated to their credits.

At the time when these grievances arose, the grievors were the most junior of all the air traffic controllers at the Montreal Air Control Centre. They were each entitled to fifteen days of vacation leave. In addition, according to the admission of the employer's witness, they were entitled to eleven days of "holiday leave", that is to say, days off to be taken in lieu of statutory holidays. By memorandum from Mr. M. Daigle, the grievors' superior, dated January 25, 1974, the grievors were required to indicate on attached forms their "annual leave" requests for FY 1974-75. They were required to commit themselves to at least three cycles. A "cycle" in this context meant five consecutive days of leave. Fifteen of the grievors complied with the memorandum by specifying cycles of leave they wished to take. Mr. Hammond, the sixteenth grievor, did not. Subsequently each grievor was required to take five consecutive days of leave in April or May, 1974. No grievor requested the period of leave assigned to him in April or May. Each grievance was submitted at the first level before the commencement of that

grievor's leave.

It will be noted that Mr. Daigle's memorandum referred to "annual leave". That term does not appear in the collective agreement. Mr. Daigle testified that it was his practice to lump together vacation leave and holiday leave as "annual leave" in establishing his leave program. The employer's representative, Mrs. Saltman, pointed out that the grievors' grievance forms referred only to the unilateral assignment to them of "vacation leave". She submitted that if the evidence established that it was not vacation leave but holiday leave (or lieu days) which was assigned to them, they should not be permitted to amend their grievance forms accordingly. The employer, she said, had dealt with these grievances on the basis of their alleging wrongful assignment of vacation leave, and she had not come prepared to argue the question of assignment of holiday leave or lieu days.

The evidence before me was consistent with the assigned leave being vacation leave, holiday leave, or a mixture of the two. However, since it was the grievors' superior who chose to amalgamate the two types of leave and thereby render it impossible to identify which type it was which was assigned to the grievors, I am prepared to find that prima facie some or all of the assigned leave was vacation leave. It was for the employer to establish the contrary, that the assigned leave was wholly holiday leave. This it has failed to do. Thus, the evidence was in this respect consistent with the grievance form allegations, no amendment is required, and the employer's representative's objection is consequently unsuccessful.

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These grievances place in issue the interpretation of Clauses 17.04 and 17.06 of the pertinent collective agreement:

> 17.04 Subject to operational requirements the Employer shall make every reasonable effort to grant an employee his vacation leave during the fiscal year it is earned. Where in any fiscal year an employee has not been granted all of the vacation leave credited to him, the unused portion of his vacation leave shall be carried over into the following fiscal year.
>
> 17.06 The vacation year extends from April 1 to March 31 and vacation may be scheduled by the Employer at any time during this period.
>
> Local representatives of the Association shall be given the opportunity 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.

In essence, the case for the grievors is that the employer violated these provisions by unilaterally forcing the grievors to take leave, without making any "reasonable effort" to determine the acceptability to the grievors of the assigned leave periods. The response for the employer is that it has a power to assign leave periods as it sees fit, consistently with operational requirements; the duty established in the second paragraph of Clause 17.06 is only a duty to consult with the bargaining agent and such consultation did take place; even if the duty is one of attempting to meet the employees' wishes, this was done.

Most of the evidence submitted at the hearing of these grievances explored the constraints affecting the leave program of the Montreal Air Control Centre, and the nature of that program for FY 1974-75. This was the first year that a leave program

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had been adopted as a formal policy. Mr. Daigle, testifying for both the grievors and the employer, explained at length why his leave program required that in some months some employees would have to take leave, at times not desired by them. His staff complement is determined in part on the basis of certain assumptions as to foreseeable absences, e.g. for sickness and for various types of leave. Furthermore, his staff complement is set in part on the assumption that a policy against the carrying-over of leave from one year to the next will be applied. Absences due to vacation leave and holiday leave together average 28.5 days per employee; absences for refresher training average five days and for familiarization flights three days. It seems these types of absences, while predictable as to quantum, are capable of being spread out throughout the year.

As Mr. Daigle explained, the operation of the Montreal Air Control Centre is continuous. It requires that a minimum number of Air Traffic Controllers be on the job on each of the three daily shifts. A certain number of controllers can be absent, for leave, training and familiarization flights, so long as this minimum is not endangered. Due to the nature of the work done, it is impossible to shut down the operation for a period to permit everyone to go on leave.

Within these constraints, Mr. Daigle worked out a leave program for FY 1974-75. His approach was to require the "elimination" of a certain number of days of leave in each month. In other words, in each month some personnel would have to be using up their leave credits. The reasons for this were that, first,

it avoided an excessive number of absences during the "prime time" summer months, when nearly everyone would prefer to take leave. Secondly, it avoided the need to rely on overtime work to fill in for excess absences. Thirdly, it ensured that little or no leave would be carried over into the following fiscal year.

Mr. Daigle was closely questioned on these three reasons. He explained that, in order to increase the number of man-days available for leave during "prime time", he had allocated to that period the leave that would have been taken by the number of employees he was under strength. He was under superior orders to avoid excessive overtime, and the bargaining agent itself had agreed that it was unsafe for controllers to work excessive overtime individually. Finally, as to carry-over of leave, he was subject to a general policy against carry-over. Furthermore, he said, it would be taken by his superiors to be a demonstration of mismanagement, an indication of having requested too high a staff complement, if his operation was characterized by a heavy carry-over of leave.

The actual operation of the leave program involved a request by the January 25th memorandum for employees to indicate their preferences for leave periods, to the extent of at least three five-day blocks or "cycles". Requests would be met applying seniority among the controllers. But Mr. Daigle's experience was that employees preferred to hold on to a block of uncommitted leave for as long as they could, as insurance against unforeseen opportunities or needs. This would result in a heavy taking of leave at the end of the fiscal year and a disproportionate lack

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of leave-taking early in the year. Thus, he had felt it necessary to require some employees to take some of their leave early in the fiscal year, at a time when, as was generally known, few would want to take leave. He had endeavoured to allot other forms of absence such as familiarization flights to that period, April and May, but still ended up with some eighty man-days of absence which had to be taken then to avoid the aforementioned disproportionate absence later on. In the result, he had had to assign five days of leave to each of the grievors, who were the least senior at the time.

Mr. Daigle's leave program for FY 1974-75 was discussed at a meeting of management and bargaining agent personnel on September 27, 1973. At that meeting the bargaining agent representatives indicated they felt the policy was basically sound, but proposed two additions, neither being relevant to the disposition of these grievances. It was not established in evidence whether that portion of the policy which foresaw the assignment of leave in unrequested periods was discussed. The leave program went into operation with Mr. Daigle's memorandum of January 25, 1974, and the employees' indication of their preferences for at least three cycles. A new executive for the local branch of the bargaining agent had just come into office. A management-bargaining agent meeting was held February 20, 1974. At that meeting the bargaining agent representatives expressed dissatisfaction with the intended assignment of leave to unrequested periods and with the policy against carry-over of leave. At that meeting Mr. Daigle indicated he was unwilling now to put into

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operation an entirely new program but would be glad to discuss with the representatives a revised policy for FY 1975-76.

Mr. F. Falardeau was the statistician and scheduler for the Montreal Air Control Centre. He testified that it was he who had, on orders from Mr. Daigle, scheduled the grievors' leave. He did not approach any of them to ascertain their wishes in this regard. However, three employees, including two of the present grievors, Messrs. Boulet and Prevost, came to Mr. Falardeau to ask to have days changed and he complied. Mr. Daigle had not himself approached the employees to learn their preferences, except by way of his January 25, 1974, memorandum, but had asked Mr. Falardeau to do so, after the scheduling had been completed.

Finally, there was testimony that Mr. Falardeau had told Mr. Daigle about an alternate plan he had which could avoid the problem of assigning leave at undesired times. Furthermore, Mr. Daigle admitted that a revised policy for 1975-76 had been worked out, incorporating such changes as a transfer of refresher training to the April and May period when leave was rarely desired. He was prepared to say that the new method was "more equitable" than the 1974-75 method.

Submissions for the Parties

For the grievors, Mr. Ager made the following submissions. First, since the 1975-76 program was described as "more equitable" it must follow that the 1974-75 program was not equitable. Secondly, the verb "schedule" as it appears in the last sentence of Clause 17.06 must involve some element of

request. It is not the same as "assign". Thirdly, Mr. Daigle had felt it desirable ultimately to order Mr. Falardeau to consult with the employees who were assigned leave. But this was not done. Fourthly, management has shown a reluctance to consult with the bargaining agent or to consider alternative leave programs. Fifthly, the 1975-76 program incorporates many improvements which were suggested before and could have been part of the 1974-75 program Sixthly, the word "grant" in Article 17 means to give what has been earned or agreed upon. In the first sentence of Clause 17.06 the word "schedule" must mean publish a list of times. But these times must be the times assigned for leave. Thus, the schedule's contents must be what must be "acceptable" in the terms of the last sentence of Clause 17.06.

Seventhly, Mr. Ager asked me to follow my own decision in Low and Duggan (166-2-855 & 886) to find that the employer has no power unilaterally to assign leave. The power to "schedule" does not imply this added power. Furthermore, if leave is to serve its purpose of maintaining physical and mental health, through enjoyment, rest and relaxation, it should be taken at a time to some extent in accord with the employees' wishes.

As to Clause 17.04, Mr. Ager submitted that the word "grant" appearing there implies a preceding request from the employee It is a protection from the unilateral assignment of leave, not merely a means of ensuring that unused leave is not forfeited.

Mr. Ager was aware of the reversal by the Public Service Staff Relations Board of my decision in Low and Duggan (PSSRB file 168-2-56). He sought to distinguish that decision. The Air

Traffic Control Group collective agreement does not contain the limitations on the employees' right to carry-over leave that were in the CR and PM contracts in issue in Low and Duggan. The emphasis of those limitations was on protecting the employer. But in the Air Traffic Control agreement there is a significant obligation imposed on the employer: Clause 17.04 indicates that the employer shall make every reasonable effort to grant leave in the year earned. This is mandatory, unlike the similar provision of the CR and PM agreements where the word "may" was used. In the CR and PM agreements there was provision for granting vacation leave in the current fiscal year at a time specified by the employee. But in this agreement, there is added emphasis, in the last sentence of Clause 17.06, that the employer must make "every reasonable effort" to meet the employees' wishes.

Next, Mr. Ager pointed out that it was accepted by the employer that lieu days or holiday leave could not be forced on an employee at a time he had not requested and did not wish. The same approach should be taken for vacation leave.

Finally, Mr. Ager pointed to Clauses 1.01 and 1.02 of the agreement, indicating the parties' intention to foster harmonious relationships, the quality and efficiency of the Air Traffic Control Service, and the well-being of the employees. In its treatment of these grievors the employer is scarcely adhering to the spirit of those clauses.

For the employer, Mrs. Saltman first argued that the employer had the authority to require the grievors to take vacation leave at times not acceptable to them. The Management Rights

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Article, Article 3, includes an express reservation of the power to assign work and schedule shifts. There is no restriction on management's rights to schedule leave in the agreement. Clause 17.06 confirms this right. The employer's power confirmed there is a power to schedule leave at any time and "schedule" there must be the same as "assign". "Schedule" cannot mean merely posting up a list of times, since it would be absurd to allow the employer to post up the schedule at any time, even after the leave was to be taken. In dictionary and common usage, the word "schedule" often means to appoint, designate, plan or fix for a future time, i.e. assign.

Mrs. Saltman agreed that Clause 17.04 did limit the employer's otherwise unfettered right to schedule leave, by requiring it to make every reasonable effort to grant leave in the year earned. This reflects the parties' recognition that air traffic control is a stressful occupation, one requiring at least an annual break in the tension. But the obligation imposed in Clause 17.04 does not include an obligation to grant leave at a time requested by the employee. The term "grant" here does not import a prior request. Rather it means "allow to use".

Mrs. Saltman relied heavily on the decision of the Public Service Staff Relations Board in Low and Duggan. That decision upheld the right of the employer unilaterally to grant a period of vacation leave to an employee notwithstanding that the employee had not requested that period. This reinforced her earlier submission that a "grant" need not be in response to a prior request. She argued that the situation here was even more

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strongly in favour of the employer's position. Here, Clause 17.06, first sentence, gives a unilateral power to the employer to schedule leave at any time in the fiscal year. No such broad power was present in the collective agreements in question in Low and Duggan. That case was decided by the Board on the basis of the equivalent of the Management Rights Article (Article 3) plus Clause 17.04 found in this agreement. Here there is the added confirmation of management rights in Clause 17.06. Furthermore, in Low and Duggan there was a limitation of management's rights in the provision for carry-over of leave on request of the employee. No such limitation exists here. In Low and Duggan the agreements required the employer to make a reasonable effort to schedule leave at a time specified by the employee. No such requirement is present in the Air Traffic Control agreement.

According to Mrs. Saltman, the only limits on management's right as to leave scheduling are contained in Clauses 17.04 and 17.06. As set out above, she would argue that neither limits the right to schedule (or assign) unilaterally. The second paragraph of Clause 17.06, she said, is not applicable here. It must be seen as an entirety, and as a whole it deals with consultation with the bargaining agent only. The reference to "acceptable to employees" must mean acceptance by the employees as a group, not individually. Furthermore, there is a reference to the "manner" of scheduling, which implies only the process of scheduling or posting of the schedule. Finally, although the paragraph uses two different words ("Association" and "employees"), if it had been intended to refer to each individual employee the singular

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would have been used.

Mrs. Saltman went on to present alternative arguments, that the employer had made reasonable efforts to grant leave in the year earned, that operational requirements were such that assigned leave was necessary, and that every reasonable effort was made to meet the employees' wishes. The employer found that it would not grant leave in the current year entirely according to the employees' wishes. Thus, it had to assign leave and it is for the grievors to show that this was not necessary. The grievors' case includes references to alternative plans and the improvements in the 1975-76 program. But those factors do not prove that the 1974-75 program was not a "reasonable effort". Nor was the employer obliged to use overtime work in order to satisfy a requirement to use "reasonable efforts" (Wessell (166-2-676); Laberge (166-2-99); and Adams (166-2-965)). The operational requirements of the service, such as the need to maintain a continuous service, resulted in a situation in which someone would have to take leave at other than "prime time". Through his memorandum of January 25, 1974, Mr. Daigle did try to ensure that the employees had at least some of their leave at times desired by them.

Finally, Mrs. Saltman submitted that consultation had occurred and that, if Clause 17.06 established a right to consultation for individual employees, such had also occurred. The bargaining agent's representatives had met with management September 27, 1973, and had agreed that the 1974-75 program was "basically sound". Then, by inviting employees to request at

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least three cycles of leave, and meeting those requests according to seniority, Mr. Daigle had done what he could to take account of the employees' preferences. When it became known that the requests for leave left some months with a deficit of absences, it then was necessary to use a different approach, namely, the assignment of leave without request. The employer was scarcely obliged to keep going back again and again to the employees and their bargaining agent to re-ascertain their preferences.

In reply for the grievors, Mr. Ager first dealt with the Management's Rights Article argument. Those rights, he said, must be subordinate to the general law of the land. That law would not permit the seizure and forfeiture of something already earned, namely paid annual leave. Thus, there was no need for protection against such forfeiture and Clause 17.04 must have a wider purpose. That purpose was, as he had argued before, to protect against unilateral assignment of leave. As to the Low and Duggan Board decision, Mr. Ager suggested that that decision hinged more on the Board's treatment of the carry-over provisions. It was not essential to its decision that the Board find that "grant" does not imply a prior request. Thus, in this case, such an implication could be made. This leads also to a consideration of the last sentence of Clause 17.06 where the requirement of acceptability is imposed. But how can the employer ascertain acceptability except through employee requests or some sort of dialogue with them? It is acceptability to "employees" that is required. Clause 1.01 states that the purpose of the agreement is to "establish and maintain harmonious

relationships between the Employer, the Association and the employees ..." thus distinguishing between the Association and the employees. In Clause 17.06 the two words are used and are intended to make the same distinction.

Finally, Mr. Ager re-emphasized that the employer could not be found to have made "every reasonable effort" if, as was the case here, there were alternatives and efforts had been made to communicate those alternatives to management. Mr. Daigle had refused to consult the new executive of the Montreal branch of the bargaining agent or to consider their proposals for the 1974-75 program, and this shows he was not making "every reasonable effort".

Decision on the Grievances

The decision of the Public Service Staff Relations Board in Low and Duggan (168-2-56) is determinative of the major issue in this matter. The approach employed by the Board in deciding that case was first to point to the general reservation of management rights and then to examine what limitations had been placed on those rights by the express provisions of the collective agreement. They found first that there was a right in the employer unilaterally to assign leave without prior request from or acceptability to, the grievors. The provisions of the collective agreements there in question for carry-over of leave on request of the employee were found not to fetter this management right. I would agree with Mrs. Saltman that the Air Traffic Control agreement places the employer in an even

stronger position. I can find no basis in Clause 17.04 for a holding that a "grant" of leave implies a prior request for that leave. This assertion, in a similar context, was rejected by the Board in Low and Duggan. I would also agree with Mrs. Saltman that the first sentence of Clause 17.06, empowering the employer to schedule leave at any time in the year is not a mere authorization of the publication of a list of times for leave at any time in the year. It must mean that the times for taking leave may occur anytime in the year. I furthermore feel bound by the Board's Low and Duggan decision to find that the word "schedule" in Clause 17.06's first sentence does not imply a precedent request from the employee. For these reasons, I find that the employer has not violated the collective agreement by assigning leave to these grievors to be taken at times not requested, or desired, by them.

There is, however, a second major issue in this matter, arising out of the second paragraph of Clause 17.06. The first sentence of that paragraph unambiguously requires the employer to consult with local representatives of the bargaining agent. The evidence in this case establishes that such consultation did occur, at meetings in September, 1973, and February, 1974. The minutes of the latter meeting make it clear that the problem of unilateral assignment of leave and the policy against carry-over were amply aired. If alternatives and variations to the 1974-75 program were suggested, the obligation of the employer was not to adopt them but simply to give an opportunity for an exchange of views. In any event, even if a

violation of the agreement had occurred through a failure to consult the Association, that violation is not the subject-matter of these grievances and probably could not be the subject of a reference to adjudication by individual grievors.

This brings me to the last sentence of the second paragraph of Clause 17.06. That sentence is both patently and latently ambiguous. Its patent ambiguity lies first in its use of the term "... schedule vacations in a manner acceptable ...". Does this refer to the technique of scheduling, e.g. by random selection versus allocation by seniority? Or, does it refer to the specific allotments of leave times? A second patent ambiguity lies in the word "employees". It is unqualified by any article or adjective. Does it mean the employees affected by the vacation schedule as a group, or each and every one of them individually?

Furthermore, the sentence is subject to latent ambiguities, the most striking being the uncertain nature of "efficient operating requirements" and "every reasonable effort". Ambiguities such as these are ambiguities of reference, to be made clear by considering the facts of the case.

For the employer, it is argued that the obligation imposed in the last sentence of Clause 17.06 is an obligation owed only to the bargaining agent or to the employees as a group. Its inclusion in a paragraph providing for consultation with the local representatives of the "Association" (the bargaining agent) must be taken to indicate that it was this wider acceptability which was referred to. For the grievors, it is argued that the first sentence refers to "Association" and the second to "employees".

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Some distinction must have been intended. Furthermore, "acceptability" requires some form of communication between management and each employee since otherwise there is no way of determining acceptability to that employee. Finally, "manner" of scheduling must mean more than just the process of drawing up the schedule.

In my opinion, the sentence in question is reasonably capable of both the alternative interpretations suggested by the parties' representatives. While I find little basis in the English version for preferring one over the other, I am convinced that the equally authoritative French version tips the balance in favour of the interpretation pressed by the grievors' representative. The French version of the sentence reads as follows:

> Sous réserve des nécessités du service, l'employeur doit s'efforcer de fixer les dates de départ en congé en tenant compte des désirs des employés

It will be noted that there is no allusion here to the "manner" of scheduling (which would be translated as "manière" or "façon"). Rather, the French version by employing the phrase "fixer les dates de départ en congé" makes it quite clear that it is the specific periods of leave which are referred to, not the process by which vacation leave is allocated. The French version does not expressly clear up the ambiguity of whether the word "employees" (or "employés") refers to the group of employees or each and every employee. But if it is the specific periods of leave which are to be acceptable, (or are to be fixed taking into account th wishes of employees) it seems more likely that the intention was

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to refer to each and every employee. I would hold, as a result, that the obligation established in this sentence is an obligation owed to the employees as individuals and not to the employees as a group or as represented by their Association.

Another chain of reasoning leads to the same conclusion. If the interpretation is as put forward by the employer's representative, then it would be acceptability to the employees as a group which must be sought. The most effective way of ascertaining the group's preferences would be through their bargaining agent representatives. Yet the first sentence of the second paragraph of Clause 17.06 requires consultation with the bargaining agent representatives "on vacation schedules" ("au sujet du calendrier des congés annuels" in the French version). It would thus seem that, using the interpretation of the employer's representative, the two sentences impose an almost identical obligation on the employer. Such duplication probably was not intended by the parties to the agreement and it is more likely that they intended to create a distinct obligation in the last sentence of Clause 17.06. To be distinct, that obligation surely must be an obligation owed to the employees as individuals and not as a group.

Next, I must deduce from the last sentence of Clause 17.06 the nature of the obligation owed. In this regard, I find little distinction between the English and French versions. "Efficient operating requirements" becomes "[les] nécessités du service"; "make every reasonable effort" becomes "s'efforcer de" (which I translate as "to strive" or "to endeavour"). Both

versions impose a mandatory obligation ("shall make"/"doit fixer"). In the result, I hold that the obligation imposed on the employer is to allocate leave periods to each employee with a special effort to meet the wishes of each employee, consistently with the operational requirements of the service.

Now, I must examine the evidence in this case to determine whether this obligation was satisfied by the employer. It was clearly established that operational requirements, as assessed by Mr. Daigle, required that some employees take leave at times in the year not desired by them. I think this view was justified at least to the extent that all employees could not be allowed to take their leave at the time they wanted which would likely be during the "prime time" (June-September and Christmas-New Year's). I agree with the employer's representati for the reasons advanced by her, that there was no obligation imposed on the employer to use overtime work to free employees to take their leave at the times they wanted. The other operational constraints detailed by Mr. Daigle, such as the demands of continuous operation, the avoidance of excessive carry-over of leave and the avoidance of manpower wastage, all seem legitimate constraints to take into account. In the result, I would find that operational requirements reduced considerably the amplitude of the employer's ability to meet the employees' desires as to vacation leave. I am satisfied that indeed some employees had to be assigned leave in April and May, 1974, when they did not wish to take leave.

But I am not satisfied that the employer made a special

effort (or made "every reasonable effort" or "strove" or "endeavoured") to meet the employees' wishes within the operational constraints set out above. It appeared from the evidence that the period over which a certain number of man-days of leave had to be "eliminated" consisted of the months of April and May. I think it can be inferred that sixteen blocks of five days each of leave might well have been distributed within those two months with some regard for the wishes of the affected employees. In fact, it was established in evidence that three affected employees were able to obtain changes in their leave periods by approaching Mr. Falardeau, the unit statistician and scheduler. What was done for three might well have been done for the others. In any event, it was clearly established in evidence that neither Mr. Daigle nor Mr. Falardeau attempted to ascertain the employees' wishes, even though Mr. Daigle had relented to the extent of instructing Mr. Falardeau to consult them. In these circumstances I must hold that the employer violated the obligation imposed by the last sentence of Clause 17.06.

To conclude, it is necessary to consider the alleged violation of Article 17 set out in the grievances and the corrective action requested therein. It will be recalled that the violation I have held to have occurred was a violation specifically in relation to the five-day "cycles" of leave assigned to the grievors in April and May, 1974. The violation consisted of a failure to make every reasonable effort, or to strive, or to endeavour, or to make a special effort, to meet the grievors' wishes in relation to those specific cycles of leave.

The violation alleged in the grievances (all of which are identical in wording) is "A portion of my earned vacation leave [specifying the dates] has been unilaterally assigned to me to be used at a time I have not requested". The corrective action requested is that "Leave credits thus forced upon me against my wishes be reinstated to my credits [sic]". It will be realized, from my recital of the submissions of the parties, that the case for the grievors was two-pronged: that the employer has no power to assign leave, and that the assignment here was done without the required effort to meet the employees' preferences. I have held that the first argument was ill-founded, but the second succeeds.

All of this is relevant to the determination of the appropriate corrective action. Had the grievors succeeded in both their arguments then the appropriate remedy would be to restore to them the leave credits improperly forced on them, for use at a later time. But the violation which has been proven is, essentially, a procedural violation, namely, the failure to do something (to make an effort to meet the grievors' preferences) before assigning the leave periods. They have had the benefit of the paid leave assigned them. Obviously the status quo cannot be entirely restored by any order that I can make. But it would be out of accord with the violation proven to restore to them the five days leave assigned to them. To do so would be tantamount to holding that the procedural error committed by the employer rendered void its assignment of leave. (One must recognize that, had there been no power to assign leave

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at all, then a purported assignment would have been a nullity and the restoration of that leave credit would have been an appropriate remedy).

I would interpret Clause 96(4) of the Public Service Staff Relations Act as empowering adjudicators to fashion an order for corrective action tempered to the nature of the violation proven. At the same time, I think adjudicators must be very wary of exercising what is essentially a management function through their remedial orders. In this case, tempering the corrective action to the proven violation must involve a recognition that, had the employer strictly complied with the terms of Clause 17.06 (last sentence), it might well have done no more than ascertain the preferences of the grievors as to when in April and May, 1974, they would prefer to take the five days of assigned leave, and thereafter assign leave meeting as many of those expressed preferences as possible perhaps in order of seniority. It would be pointless for me to order the employer to consult the grievors and endeavour to meet their preferences the next time it assigns forced leave, since that would merely be an order to the employer to comply with the collective agreement, something which it can be assumed it will do in future. Therefore, the most appropriate order I can make is to order the employer to go beyond merely making an effort to meet the grievors' preferences. My order for corrective action therefore is as follows:

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> On the next occasion after the release of this decision when, complying fully with Clause 17.06 of the pertinent collective agreement or its successor, the employer exercises its right to assign annual leave to any of these grievors to be taken at times they have not requested beforehand, the employer is to comply with any reasonable request by a grievor to take that assigned leave on any dates to a maximum of five days specified by him in the then current fiscal year. At its unfettered option the employer may instead credit to the grievor on a day-for-a-day basis, one day of additional leave credit for each day of assigned leave which it is unwilling or unable to allow the grievor to take at the time requested by him in accordance with the first sentence of this order, to a maximum of five days.
>
> (Excluded from the benefit of this order for corrective action are grievors L.J.L. Boulet and Serge L. Prevost since it was established in evidence that Mr. Falardeau complied with their request to change their dates of assigned leave. In respect of them there was no violation of Clause 17.06 (last sentence)).

What I have attempted to attain in the foregoing orde is a balance between the employer's continuing right to assign leave and the grievors' right to some appropriate compensation for the wrong done them by the violation of Clause 17.06 (last sentence). At the same time, it must be recognized that operational requirements or other factors may make it extremely inconvenient for the employer to obey my order to comply with a grievor's request to take five days of his annual leave on dates specified by him. For that reason, I have provided an option for the employer to increase the leave entitlement of that grievor for that fiscal year by one day for each day of annual leave which the employer cannot allow him to take on the date or dates specified by him, to a maximum of five additional days of leave.

To sum up, I have determined that, on the authority of

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the Public Service Staff Relations Board's decision in Low and Duggan, the employer in this case did not violate the pertinent collective agreement by assigning annual leave to the grievors at times not requested or desired by them. However, the employer did violate Clause 17.06 (last sentence) by assigning that leave without making the required effort to meet the grievors' preferences. The corrective action ordered, as set out in detail in the body of this decision, requires the employer to comply with each grievor's expressed preference the next time it assigns leave or at its option to increase that grievor's leave entitlement for that fiscal year by an equivalent number of days, to a maximum of five days. To this extent, these grievances succeed except for those of Messrs. Boulet and Prevost which must be denied.

R. D. Abbott
Adjudicator

Ottawa, Canada
January 19, 1975.