

Files: 166-2-1614, / 1619,  
1620, 1653 and  
1674.

PUBLIC SERVICE STAFF RELATIONS ACT  
DECISION

BETWEEN:

EMIL BRYKSA, ARTHUR H. DERBYSHIRE,  
EDWARD HOLT, ROBERT J. MERCER  
and R. GRANT PRICE,

Grievors,

AND:

THE TREASURY BOARD  
(Ministry of Transport)

Employer.

Before: R. D. Abbott, Adjudicator.

For the Grievors: J. P. Nelligan, Q.C.

For the Employer: H. A. Newman, counsel.

ART 16  
Code 402/3/72

Heard February 10, 1975, at Ottawa.

DESIGNATED HOLIDAY MOVED TO  
FIRST WORKING DAY

## DECISION

(These grievances were heard together by order of the Chief Adjudicator under Rule 55C dated November 15, 1974.)

These grievors contend that days designated as holidays in their collective agreement fell on days which were, for them, days of rest. They assert that by virtue of another clause of the collective agreement those coinciding holidays must be moved to their first individual actual working days after the holiday. Since they worked on those subsequent working days they claim entitlement to premium compensation (one and one-half times straight time rate) for that day plus a day off in lieu of the holiday. At the final level of the grievance process the employer took action which in effect granted the grievors the lieu day they sought (by restoring one day to their credit of lieu days). What remains in issue is the grievors' entitlement to premium pay for time worked on the day to which they allege the designated holiday should have been moved.

The material facts, common to all the grievors, were not in dispute. The grievors are all air traffic controllers in the operational category. In each case, a day designated as a holiday under the pertinent collective agreement (Air Traffic Control (all employees) Group, Code 402/3/72) fell on a day which was, for that employee, a day of rest. In some cases the holiday in question was

Dominion Day; in the others, it was Civic Holiday, August 5 (the first Monday in August) 1974. No grievor worked on the actual day of the designated holiday. Following the day of the designated holiday each grievor had a period of several days off work composed of further days of rest together with vacation leave. In the case of the grievor Mr. Holt his days off work included in addition two days charged against the "lieu days" standing to his credit.

In every case the employer initially treated the grievors' first vacation day following the day of the designated holiday as a "lieu day" and reduced by one day the number of lieu days standing to each grievor's credit. At the final stage of the grievance process this move was reversed so that the day in question was charged as a day of vacation and one day was restored to each grievor's credit of "lieu days".

#### Submissions for the Grievors

What remains in issue is the entitlement of each grievor to premium pay for all hours worked on the first day he worked after the day of the designated holiday and after the intervening period composed of days of rest, vacation leave and, in Mr. Holt's case, lieu days. The case for the grievors is quite simple. Clause 16.01 (the entirety of Article 16 is set out in Appendix "A" to this Decision) designates some eleven days as holidays.

Clause 16.02 requires that when, as in this case, the day designated as a holiday coincides with an employee's day of rest the holiday is to be moved to the employee's first working day thereafter. In the decisions in Warren (166-2-89) and Campbell (166-2-90), involving identical language, it was held that the day to which the holiday is to be moved is the employee's first actual working day, not the first day on which he is scheduled to work. In the Warren case the actual return to work was delayed by a day of sickness; in Campbell it was delayed by a period of several days composed of days of rest and vacation leave. Thus, in the present cases, the intervening days of rest or vacation leave or lieu days have no effect and the day to which the holiday must be moved is the employee's first actual working day.

On that first actual working day each grievor worked. This constituted work on a holiday and for that work, by virtue of Clause 16.04 he is entitled to one and one-half times his straight-time hourly rate for all hours worked by him on that holiday, plus a paid day of leave in lieu of the holiday. This was the corrective action granted in the Warren and Campbell decisions.

Concluding the case for the grievors, Mr. Nelligan pointed out that the same language was repeated in three collective agreements between these same parties subsequent to the Warren and Campbell decisions (wherein the same

parties and issues were involved). What evidence there was in this case as to the employer's past practice either indicated a highly variable practice or was in accord with the grievors' position. The employer could have challenged the Warren and Campbell decisions at the time, or sought to change the pertinent provisions at the renegotiations of the succeeding agreements. Having failed to do so, the employer is bound by the interpretation placed on the pertinent provisions in those decisions.

#### Submissions for the Employer

For the employer, Mr. Newman presented two basic arguments. First, he said, it must be taken that for these grievors, the designated holidays did not fall on their days of rest. For employees in the operational category, all designated holidays are anticipated under Clause 16.05(a) and a bank of "lieu days" to be taken as replacements therefor is credited to each employee. He pointed to the French version of the collective agreement where the "lieu days" become "jours de remplacement". Under Paragraphs (b) and (c) of Clause 16.05 the employee is left with some opportunity to choose when to take off his "lieu days". These grievors did not designate their first actual working days following their periods of vacation and other leave as lieu days. Since those first days of work were not

days of work on holidays or on days designated in lieu thereof, they could not be days of work on a holiday and could not attract the benefits of Clause 16.04.

Mr. Newman cited the decision in Empson (166-2-319) in support of his argument. That decision emphasizes the desirability of regularizing and humanizing the employee's working life by giving him free time to spend with his family or friends when they too have free time, on general public holidays. The premium pay and other benefits for work on a holiday compensate for the loss of this. Mr. Empson was re-scheduled to have as a day off work the first day after a holiday in place of the holiday which fell on one of his days of rest. This alternate day was a day on which he would normally have worked. Adjudicator Arthurs held that there was no obligation on the employer to provide work on that day (compensable at premium rates) and denied the grievance. (It would seem that this decision, which Mr. Newman candidly admitted was "not germane to the situation of these grievances", is in fact quite consistent with the principles of the Warren and Campbell decisions. It maintains the principle of moving the holiday from the day of rest to the next regular working day, and paying premium pay if work is performed on that day).

Mr. Newman's second major argument was that, for operating category employees, the "lieu day" system established in Clause 16.05 is a complete replacement for the system of

designated holidays. For these employees, their holidays are their lieu days. If they were to select a day as a lieu day some time in advance, it might turn out to be a day of rest for them in accordance with their working schedule. Only then would Clause 16.02 take effect to move the holiday, i.e. the day off in lieu of a holiday, to the next working day. Clause 16.04 has a very limited operation, Mr. Newman submitted. It would apply only if an operating category employee were called in to work on a day previously selected or designated as a lieu day, i.e. a day off in lieu of a holiday. The general scheme of Article 16 is to treat operating and non-operating employees differently and, for the former, the lieu day scheme must be taken to supplant the system of designated holidays and premium benefits for work on holidays.

#### Decision on the Grievances

These grievances must succeed. I would be prepared to find that the employer's past practice has not been proven to invariably concur with the interpretation put forward by the grievors. But there is simply no need to use past practice here as an aid to interpretation. The words used in Article 16 are, in this context, unambiguous. The meaning to be attached to them and their result in application to the facts of these cases is clearly set out in Mr. Nelligan's argument and I would adopt that reasoning as my own.

Furthermore, it is striking that the Campbell situation was exactly the same as that here in issue. The Empson decision makes that decision no less reliable. The reasoning of Chief Adjudicator Martin in the Campbell decision is precisely applicable to these grievances and I would respectfully adopt it to determine these grievances. The fact that the collective agreement provisions there in issue have been repeated in subsequent agreements between the same parties is highly significant. To take account of that fact is not to apply "past practice" but rather to consider the jurisprudential treatment and the history of the very words I have to interpret here. That those words have been repeated, and, one must surmise, acquiesced in even after an interpretation unfavourable to the employer at adjudication, is strong evidence that the Chief Adjudicator's interpretation was and is in accord with the parties' intent in using those words.

To conclude, my determination is that Dominion Day and August 5, 1974, were for these grievors designated holidays. Since they fell on days which were for them days of rest, the holidays were moved to their first working days thereafter, by virtue of Clause 16.02 of the pertinent collective agreement. The days of rest, vacation leave and lieu days which intervened before the grievors' return to work had no bearing on their entitlement to enjoy a holiday on that first day of work. By working on that first day of



work they became entitled to the benefits of Clause 16.04. I understand that they have had restored to them one "lieu day" representing the benefit conferred by Paragraph 16.04 (b). Now they must receive the benefit of the premium pay secured to them by Paragraph 16.04(a). If any difficulty arises in calculating the correct amount of that benefit I remain seised of these grievances in order to deal with any such difficulty.

R. D. Abbott  
Adjudicator

Ottawa, Ontario,  
April 6, 1975.

Appendix "A" to the

Decision of R.D. Abbott, Adjudicator

(Bryska, Derbyshire, Holt, Mercer and Price)  
(Files 166-2-1614, 1619, 1620, 1653 and 1674)

Air Traffic Control (all employees)  
Group Collective Agreement  
(Code 402/3/72) expiring December 31, 1973.

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ARTICLE 16

HOLIDAYS

16.01 Subject to 16.02 the following days shall be designated holidays for employees:

- (a) New Year's Day;
- (b) Good Friday;
- (c) Easter Monday;
- (d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;
- (e) Dominion Day;
- (f) Labour Day;
- (g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;
- (h) Remembrance Day;
- (i) Christmas Day;
- (j) Boxing Day;
- (k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August.

An employee shall not be paid for the holiday if he is absent without pay on both the working day immediately preceding and the working day following the holiday.

16.02 When a day designated as a holiday under 16.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first working day following his day of rest.

16.03 When a non-operating employee works on a holiday he shall be paid, in addition to the pay he would have received had he not worked on the holiday, one and one-half (1½) times his straight-time hourly rate for all hours worked by him on the holiday.

16.04 Where an operating employee works on a holiday he shall:

- (a) be paid at one and one-half (1½) times his straight-time hourly rate for all hours worked by him on the holiday, and
- (b) be granted a day of leave with pay at a later date in lieu of the holiday.

16.05

- (a) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established.
- (b) Lieu days may be granted as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on the basis of one shift for one day.
- (c) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to grant lieu days at times desired by the employee.
- (d) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or commencement of retiring leave or after he becomes subject to clause 13.01 shall be subject to recovery of pay.

