

PUBLIC SERVICE STAFF RELATIONS ACT  
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

C.J.J. BRIEN,

grievor,

AND:

TREASURY BOARD  
(Department of Transport),

employer.

DECISION

Before: Patrice Garant, Board Member and Adjudicator.

For the grievor: Yves Aubry, Canadian Air Traffic Control Association.

For the employer: Mrs. Marguerite-Marie Galipeau-Mayrand, Treasury Board.

ART 110  
COPIÉ 402/77

Heard at Québec City, December 7, 1978.

SPECIAL LEAVE FOR SNOWSTORM

## DECISION

The grievance before me was filed by Mr. C.J.J. Brien, an air traffic controller, AI 2, at the Québec City airport. He claims entitlement to one day of special leave in the following terms:

This grievance is further to the reply from Mr. Yves Dupré, unit supervisor at the Québec City control tower, dated January 25, 1978. (see Appendix 1)

As I was working the night shift on December 15 and 22, 1977, I had to report for work on December 14 and 21 at 11:15 p.m. local time. If you consult pages 2 and 3 of the appendix, you will note that there was indeed a snowstorm. I would mention that I do not have an automobile and that there is no bus service in my neighbourhood. Therefore, I have three possible ways of getting to work: a chance of getting a ride with a friend, by taxi or on foot. Clearly, my friends do not go out driving in a snowstorm. When I called for a taxi, I was told on two occasions that there would be no cabs to Ancienne Lorette before 5:00 a.m. at the earliest.

As for walking to work, I dealt with this option in my application for special leave dated January 24, 1978.

In addition to turning down my application ("I hope that in future your absences from work will be justified"), my unit supervisor gave me a verbal warning. I realize that it is left up to the employer's discretion to grant or refuse special leave; however, this implies judgment and impartiality on the employer's part. It is evident from this reply that both of these are lacking. I would point out that in six years, I have almost never taken special leave and that there can therefore be no question of abuse - on the contrary.

For these very clear indications of a direct contravention of clauses 1.01 and 1.02 of our collective agreement, I request that: (1) my special leave be granted, (2) I be sent a letter of apology for the abusive written remarks, and (3) the official but unjustified warning that I received be withdrawn.

Clause 10.04 of the applicable collective agreement, between Treasury Board and the Canadian Air Traffic Control Association, reads as follows:

Leave for Other Reasons

At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the employee, including illness in the immediate family as defined in clause 10.02, prevent his reporting for duty.

I THE FACTS

Mr. Brien lives one and a half miles from the airport. There is no public transportation between his home and the airport; Mr. Brien does not have a car of his own; he travels either by taxi, with friends or occasionally on foot.

On the evening of December 14, at approximately ten o'clock, Mr. Brien called for a taxi; the line was busy. Outside, it had stopped snowing, but the wind was blowing, and driving was difficult. He tried in vain to obtain a taxi and at about midnight he was informed that it would be impossible to have one before 5 a.m.

Earlier, at about 11 p.m., Mr. Brien had telephoned a fellow employee who had already left his house. He went out as far as the Marie-Antoinette Restaurant at the intersection of the road to Montréal and the one to the airport, and did not see anyone who was able to give him a ride.

Because of the poor condition of the roads, which were apparently made narrower by drifting snow, he did not attempt to walk to the airport.

On the evening of December 21, approximately the same scenario was repeated except that it was Mr. Pilotte, the shift supervisor, who called Mr. Brien at about 11:30 or 11:45 p.m.

According to the evidence submitted by the employer, driving was normal; none of the other employees had any trouble driving in to work.

According to the monthly meteorological report (Exhibit S-1), during the night of December 14 and 15, the average wind speed was from 21.8 to 31.9 km per hour; at midnight it had stopped snowing, but approximately 21.9 cm of snow had fallen on the 14th; the temperature fluctuated between -10.8 and -5.6<sup>o</sup> C. On the evening of the 21st, the weather was milder: there was less snow and wind and it was somewhat warmer. It would therefore seem that it was a very normal situation since from December 1 to 22, for example, the average wind speed was about 20 to 25 km per hour.

## II ANALYSIS OF THE EVIDENCE

The employer explained its reasons for refusing to grant the special leave as follows:

The weather conditions prior to the commencement of the two work shifts did not prevent people from driving their cars. It is up to the employee to provide his own means of transportation to work and he must necessarily ensure that means is adequate and reliable. (reply at the first level)

The immediate supervisor, Mr. Dupré, stated his belief that it is up to each employee to plan and arrange his own means of transportation. An employee must ensure an adequate means of transportation for himself and must make provision for situations which are normally foreseeable given Quebec winter weather conditions and the location of the airport.

Taxi service is apparently quite irregular in Mr. Brien's neighbourhood when driving is difficult, particularly when it snows. There seem to be fewer taxi drivers and they seem to prefer working in other areas of the city of Ste-Foy where there tends to be a greater concentration of customers. Clearly, this problem is not the fault of either Mr. Brien or the Department.

Is Mr. Brien to blame for relying on taxi service since he was fully aware of this situation? Should he have instead made prior arrangements with his fellow employees whenever driving conditions led him to believe that it would be difficult to obtain a taxi?

It must now be asked whether or not these circumstances were directly attributable to the employee. This is a difficult question to answer. To be sure, it is not Mr. Brien's fault if taxis refuse to service his neighbourhood; however, he is responsible for his choice of a means of transportation. Moreover, it has not been shown that he did everything possible to get a ride with a fellow employee. Finally, was it possible for him to walk the mile and a half to work? It has not been shown that this was impossible even though it was difficult.

### III THE PROBLEM OF THE EXERCISE OF DISCRETION

The relevant clause of the collective agreement is identical with that found in some agreements but not the majority of them; in the majority of cases the following sentence may be found:

Such leave will not be unreasonably withheld.

In both these instances, we must ask ourselves whether the employer's discretionary power was exercised arbitrarily. This does not authorize the adjudicator to substitute his opinion for that of the employer. As Mr. Norman stated in Rosario (166-2-2443):

It is not for an adjudicator to purport to step into the shoes of the employer by asking himself what he would have done in the circumstances (page 8).

Administrative authority is arbitrary when it is exercised unreasonably in that the considerations on which the decision is based are erroneous and irrelevant or meaningless. This is the proper meaning of the term "unreasonable" in the context. Our best guideline in this matter remains the precedent set by the courts of justice in

establishing the limits of discretionary power in the civil service. The courts of justice refuse to intervene unless there has been an abuse of power because the discretionary power has been exercised, either:

- (a) for improper purposes;
- (b) in bad faith;
- (c) according to erroneous principles or irrelevant considerations; or
- (d) in an arbitrary, unjust, discriminatory or unreasonable manner.

(See R. Dussault, *Traité de Droit Administratif canadien et québécois*, PUL, Québec City, 1974, pp. 1402 to 1422).

In our opinion, in overseeing the employer's discretionary power, the Public Service Staff Relations Board exercises a true power of supervision and control over the Public Service with respect to personnel management and the application of collective agreements as provided for by section 91 of the Act. Its jurisdiction may therefore be compared to that of an administrative court of appeal. As such, however, it is not authorized to purely and simply take the place of the employer; it is not supposed to perform "management by arbitrator". As a Board member I am not a senior manager, but rather a "judge" who must intervene only when there has been an abuse of power on the part of management.

In the present case, there does not seem to have been such an abuse of power, in view of the evidence submitted and the governing legislation. I may personally differ in opinion with management, but that does not in any way authorize me to intervene unless it is proven that there has been an abuse of power.

IV THE QUESTION OF ABUSIVE REMARKS

In our opinion, it has not been proven that the employer representative, Mr. Dupré, made abusive remarks. Therefore, there is no reason for us to ask ourselves whether a letter of apology should be sent to Mr. Brien.

V CONCLUSION

It is difficult for me to find it unreasonable that an employer should require that its employees arrange adequate means for getting themselves to work. Strictly speaking, this is not the employer's problem. Should the employer be required to grant special leave to an employee who cannot report for work because taxi service is inadequate when other employees use their own cars? No one requires those employees to have cars and to drive them to work. Should they be denied special leave because they have their own cars and keep them in order?

The act of establishing rules is not, on the part of the employer, an abusive or arbitrary use of its discretionary power. The employer's rule with which we are concerned is to the effect that an employee must ensure an adequate means of transportation for himself. In Mr. Brien's case, the fact that he depended entirely on taxi service in his neighbourhood during the wintertime and at night when driving is more difficult, is considered by the employer representative as showing a lack of prudence or precaution.

Is the employer too demanding of its employee? This is a matter of opinion: some would say yes, while others would say no. I would humbly submit that I am not obliged to involve myself in matters of opinion. My mandate is to control the abusive exercise of the



employer's discretionary power in order to protect the employee from any arbitrary action.

In the present case, I am not satisfied that the employer acted in an arbitrary manner. For these reasons, the grievance is dismissed.

For the Board,

Patrice Garant,  
Board Member and  
Adjudicator.

STE-FOY, December 21, 1978.

Certified true translation

Denis Sabourin

