

DEC 02 1986

File No. 166-2-15728

No. 240

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

BETWEEN:

J.A. RENE LAUZON,

Grievor

AND:

TREASURY BOARD
(Transport Canada),

Employer

ART 17
CODE 402/35
DENIAL OF LEAVE

Before: Michael Bendel, Deputy Chairman

For the grievor: A.C. Fisher, Canadian Air Traffic
Control Association

For the employer: Micheline Van-Erum, counsel

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Heard at Montreal, August 15, 1986

DECISION

On August 4, 1985, Mr. René Lauzon, an air traffic controller at Dorval, applied for vacation leave for August 11. The employer denied this leave. According to Mr. Lauzon, this denial constitutes a violation of article 17.06(b) of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (code 402/85). The article in question reads in part as follows:

Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

In his testimony, Mr. Lauzon stated that, during July and the first few days of August, he tried to arrange a date, later in the summer, for the baptism of his daughter who was born on June 21. His efforts were complicated by the limited availability of the priest of his choice, the different plans of the members of his family, and his own work assignments. On or about August 3, he decided on the afternoon of August 11, a Sunday, as the date for his baby daughter's baptism. Although he was obliged to work from 2:45 to 11:00 p.m. on August 11, according to the shift schedule posted, he believed, with some justification, that the employer would grant him leave that day.

An explanation of Mr. Lauzon's expectation is in order. According to the shift cycle that had been posted,

five controllers, including the grievor, were scheduled to work the evening shift from 2:45 to 11:00 p.m. on August 11. The policy on personnel utilization in effect in his sector stipulated that only four controllers had to work this shift, as a rule, in order to ensure efficient and safe service.

On August 6, Mr. Lauzon's supervisor gave the following written reply to the grievor's written request for leave for the baptism of his daughter:

The maximum quota for annual leave has already been approved for August 11, 1985.

In the absence of a pressing and urgent need to justify approval of your leave at this time, it will be necessary for you to call within 4 hours of the commencement of your shift to request leave. Your request will be considered at that time.

Although this reply did not explicitly and definitively reject his request, practically speaking, postponement of a decision on the request was tantamount to a denial. How could he plan his daughter's baptism for the afternoon of August 11 if he would not know until around 11:00 p.m. on the day of the baptism whether he could attend it? Mr. Lauzon did not want to abandon the date that had been set for the baptism. He therefore talked to his fellow controllers about possibly changing shifts so that he would not have to work on the afternoon of August 11. Mr. Lauzon and one or more of this fellow workers (the evidence on this point is not very clear)

agreed to change shifts with one another, which meant that the grievor had to work from 6:45 a.m. until 3:00 p.m. that day. Moreover, another fellow controller agreed to relieve Mr. Lauzon at work at 1:00 p.m. At one point, Mr. Lauzon had agreed to work the midnight shift that day instead of the evening shift, but he changed his mind because he would have been too tired that afternoon to take part properly in the baptism.

On August 11, the grievor started work at 6:45 a.m., but around 12:30 p.m., his supervisor, after noticing the relatively light volume of traffic scheduled for that afternoon, granted him leave for the remainder of the shift. This meant that Mr. Lauzon was no longer obliged to have his fellow worker relieve him between 1:00 and 3:00 p.m.

In his testimony, Mr. Vincenzo Della Serra, manager of operations at the Montreal Control Centre, gave a more detailed explanation of the employer's position than was given to Mr. Lauzon by his supervisor on August 6. According to Mr. Della Serra, there was an absenteeism problem among controllers at Dorval. In June 1985, forty days of sick leave and four days of special leave had been granted. In July, forty-three workdays had been lost to illness and one to special leave. The witness admitted that, on August 4, the day on which Mr. Lauzon requested his leave, it was anticipated that operations could proceed without his services on the evening shift on August 11. However, given the recent experience with absenteeism, management did not want to approve

Mr. Lauzon's leave request until it was sure that the other four controllers scheduled to work the shift in question were going to report for duty. The practice followed was for an employee who was ill or who required special leave to notify his supervisor at least four hours before the start of his shift. Mr. Della Serra indicated that on a Sunday evening, as a rule, the volume of air traffic required a minimum of four controllers in order to provide efficient and safe service. Consequently, he added, if one controller had been away, the employer would have had to offer another controller overtime work, at a higher rate of pay. In order to avoid having to pay overtime, Mr. Lauzon's supervisor decided to put off replying to the leave request until four hours before the start of the shift.

Mr. Della Serra added that management was prepared to pay compensation at the overtime rate, if necessary, to enable an employee to take vacation leave that was planned in advance. However, it was management's policy not to pay compensation at the higher rate in order to enable employees to take "ad hoc" leave. He referred in this regard to the unit policy on vacation leave and in particular to the following excerpts therefrom:

5. Granting of leave

The employer agrees to grant vacation leave and/or lieu days a minimum of six weeks before the date requested by the employee, where his leave application is approved.

The employer may grant vacation leave and/or lieu days more than six weeks prior to the effective date provided the employee submits to it in writing the reason(s) why confirmation of his vacation is necessary.

In order to meet operational requirements, avoid overtime work and accommodate as many employees as possible, a maximum of two cycles may be granted to an employee in one or the other of the preferred periods. These two cycles may be granted in the same period or spread over two periods.

Leave requests for a complete cycle will have priority over requests for part of a cycle.

Leave will be granted in accordance with a seniority list based on continuous employment in the Public Service of Canada. Priority based on seniority will apply at all times and for all leave requests submitted, except as provided for in the 11-GEN unit policy (hourly leave).

Once assigned and published in the schedule, vacation leave and/or lieu days must be used.

6. Ad hoc leave

All requests for vacation leave and/or lieu days that are made with less than two months' prior notice will be treated as ad hoc leave and will be granted subject to the following conditions:

- (A) In accordance with operational requirements.

- (B) Approval shall not entail any overtime or shift change premium.
- (C) With less than two weeks' prior notice: bearing in mind (A) and (B), an effort should be made to accommodate as many employees as possible.
- (D) Once assigned and recorded on the schedule, ad hoc leave must be taken.
- (E) Where several ad hoc leave requests are received, the person who has taken the least amount of ad hoc leave in the previous four weeks has priority. If more than one person meets this condition, seniority will be the deciding factor.

(unofficial translation)

Mr. Della Serra also testified that, in this case, an employee scheduled to work the 2:45 p.m. to 11:00 p.m. shift on August 11 (the shift that Mr. Lauzon was supposed to work according to the shift schedule posted) took ill after August 4, which reduced the personnel on this shift to the bare minimum. Had Mr. Lauzon's request been granted on August 4, the employer would thus have been obliged to pay another controller overtime for the shift in question.

According to Mr. Fisher, the grievor's representative, article 17.06(b) of the collective agreement had been contravened because the employer did not "make every reasonable effort to schedule vacations in a manner acceptable to employees".

Referring to the decision in Pinard (Board file 166-2-15381), Mr. Fisher argued that the facts and the wording of the collective agreement in Pinard were similar to those in the present case. Besides asking me to declare that the employer had contravened the collective agreement, Mr. Fisher asked me to fashion a remedy that would compensate Mr. Lauzon for his loss. He suggested that, after being denied a day's leave and granted only two hours leave, Mr. Lauzon should be allowed to take six hours' leave whenever he chose. Mr. Fisher argued that such a corrective measure, tailored to the circumstances of the case, was necessary to deter the employer from any future violations of the collective agreement. In this regard, he cited Jodozi et al. (Board files 166-2-15884 to 1597, 1599 and 1602).

Ms. Van-Erum, counsel for the employer, argued that the employer acted reasonably in leaving a decision on Mr. Lauzon's request to the last minute, given the possibility that one of the other controllers scheduled to work the evening shift would not be available. The employer could not rule out this possibility in view of the absenteeism it had recently experienced. The employer was not guilty of bad faith. Mr. Lauzon should have made other arrangements to be off work during the afternoon by agreeing, for example, to work the night shift on August 11. According to Ms. Van-Erum, the facts in Pinard differed from the facts of the present case. Counsel maintained that the employer was not obliged to make every reasonable effort to grant the leave in question because operational requirements, that is, the wish to avoid

having to pay overtime, were a consideration. Counsel referred in this regard to the following Board decisions: Godin (166-2-8123), Tremblay (166-2-9742), Hill (166-2-14425 and 14426), Milette and Landry (166-2-15368 and 15369), and Yurick (166-2-14585).

Counsel also cited article 15.03 of the collective agreement whose intent is to keep overtime work to a minimum.

In reply, Mr. Fisher argued that the figures on sick leave which Mr. Della Serra discussed in his testimony and on which counsel for the employer relied were not high when one considered that only some forty of a total of nearly 1000 shifts were affected by sick leave. He also asked me to bear in mind that Mr. Lauzon and his fellow workers worked shifts and did not receive days off every weekend. For this reason, the employer was obliged to make a special effort when they needed to take a day of leave for personal reasons.

The matter in issue here, very simply stated, is this: having regard to article 17.06(b) of the collective agreement, can the employer deny an employee a day of vacation leave on the grounds that it may be obliged to offer overtime work?

In Yurick, supra, my fellow adjudicator, Vice-Chairman Cantin, expressed the view that "it [paying overtime] is not within the ambit of making every reasonable effort". He reaffirmed this view in Milette

and Landry, supra. Provided the employer has sufficient staff to permit the normal granting of leave without offering overtime (which was not denied in the present case), I fully subscribe to this view expressed by Mr. Cantin. However, is the employer required to grant leave where there is merely the possibility that it will have to pay overtime as the result of doing so?

In one sense, in the present context, the possibility of having to offer overtime can properly be equated with an obligation to pay overtime. The difference between the two is merely one of degree because some possibility can be presumed to exist.

However, were one to conclude that the possibility of having to offer overtime work amounted, in this context, to an obligation to pay overtime, article 17.06(b) would afford employees precious little protection. The provision would be largely meaningless. What manager could not claim in all honesty that he was afraid of being caught off guard if he were asked to approve leave in advance? This fear could be invoked for any leave application.

According to Ms. Van-Erum, in the present case, the possibility is real, given the figures on recent absenteeism, rather than potential, and this should lead me to conclude that the possibility of having to pay overtime constituted a valid reason for denying the leave. I do not think that this distinction can serve as a useful guideline in this kind of case. First, recent

experience is not always a reliable indicator of the future. High absenteeism in June and July may have been an annual phenomenon, or the experience of June and July 1985 may have been the result of an abnormal situation that is not likely to recur. Second, even if one could assess the possibility quantitatively, on a scientific basis, where does one draw the line? Must we conclude, if the chances are one in two that the employer will have to pay overtime, that it is acting reasonably in denying vacation leave under the provision in question? Or one in three? Or one in four?

In my opinion, under article 17.06(b), the employer can cite an obligation to pay overtime as grounds for denying a request for vacation leave only if it reasonably anticipates that it is certain or almost certain that it will have to pay overtime if it grants the leave requested. In Mr. Lauzon's case, if management acted very cautiously in postponing a decision on Mr. Lauzon's request, it cannot be said that it was certain, or almost certain, at the time Mr. Lauzon made his request, that the granting of this leave would necessitate overtime work. The illness of a fellow worker on August 11, which was declared after August 6, cannot serve to justify management's decision retroactively. It seems to me that the line must be drawn at the employer's expectation at the time of the request, and not retrospectively.

I wish to repeat here what I said earlier, namely, that practically speaking, postponement of a decision on Mr. Lauzon's request was tantamount to a denial of leave

because he could not plan his daughter's baptism without knowing in advance whether he would be granted his leave. I note that, according to article 17.06(b), the employer shall make every reasonable effort to schedule vacations "in a manner acceptable to employees". Mr. Lauzon not only wanted the employer to grant him leave on August 11; he also wanted it to grant this leave in advance. According to the collective agreement, refusal to grant leave in advance in a manner acceptable to an employee, except, of course, where operational requirements or other relevant circumstances are a consideration, constitutes in itself a violation of article 17.06(b), as does a refusal to grant leave on the dates requested by the employee.

On the question of corrective action, my starting point must be the loss sustained by Mr. Lauzon. Since he was able to arrange time off from work to attend his daughter's baptism on August 11, I fail to see how he sustained any loss. Certainly, he did not suffer any financial loss, nor was it alleged that he was seriously inconvenienced. In these circumstances, I see no reason to order the employer to compensate Mr. Lauzon.

The present case can be distinguished from Jodozi, supra, to which Mr. Fisher referred, in that it involved a refusal to grant leave, whereas in Jodozi, employees were granted leave on dates they had not requested. Moreover, in the present case, there was no bad faith on the employer's part, nor are there any other facts that persuade me that special corrective action is necessary in order to discourage such violations of the collective agreement in future.

In these circumstances, I allow the grievor's grievance, declare that the employer contravened article 17.06(b) of the collective agreement, and reject the request for further corrective action.

Michael Bendel,
Deputy Chairman

OTTAWA, September 29, 1986

Certified true translation

Pauline Doucet