

Date: 20061201

Files: 566-02-140
566-02-141
566-02-142

Citation: 2006 PSLRB 131



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

**WILLIBRORDUS (BILL) VERMUE, JOHN ROBERT STONIER
AND DEAN GEORGE ATKINSON**

Grievors

and

**TREASURY BOARD
(Department of Transport)**

Other party to the grievance

EXPEDITED ADJUDICATION DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievors: Phil Hunt, counsel

***For the Other party
to the grievance:*** Eric Daoust, employer representation advisor

Note: The parties have agreed to deal with the grievances by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.

Heard at Ottawa, Ontario,
November 24, 2006.

REASONS FOR DECISION

[1] The parties presented an “Agreed Statement of Facts” (reproduced below) and documentary evidence applicable to John Robert Stonier. The parties agreed that the decision, although based on Mr. Stonier’s evidence, would be applicable to all three grievors. The “Agreed Statement of Facts” reads as follows:

Agreed Statement of Facts

- PSLRB File 566-02-141 - John Robert Stonier
- PSLRB File 566-02-140 - Willibrordus Vermue
- PSLRB File 566-02-142 - Dean George Atkinson

Whereas the parties have agreed to handle the above-cited matter by way of expedited adjudication, the parties jointly agree to the following facts:

1. *Mr. Vermue, Mr. Stonier and Mr. Atkinson are currently employed with the Department of Transport Canada, as Training Pilots, Turbo-Prop, AO-CAI-03, operating out of the Aircraft Services Directorate at the Macdonald-Cartier Airport in Ottawa. The three grievors are members of the Canadian Federal Pilots Association and are subject to the provisions of the Aircraft Operations Collective Agreement.*
2. *The relevant collective agreement in this matter is the Aircraft Operations collective agreement signed on July 30th 2003 with an expiry date of January 25, 2004.*
3. *The grievors were required by the employer to either provide or receive training in Wichita, Kansas on a flight simulator for a period of time between the end of May and early June 2005. The grievors, in accomplishing these functions, are considered to be Flight Crew Members (FCM).*
4. *The functions of Flight time, Flight Duty times are subject to the Departmental Operations Manual, Fixed Wing. The Operations Manual, Fixed Wing emanate from the Civil Aviation regulations, which are made pursuant to the Aeronautics Act, and which are applicable to all fixed wing Flight Crew in Canada. More specifically to the matters at hand, section 3.1.6 - Time Free from Duty states that Aircraft Services shall provide each Flight Crew Member (FCM) with the following time free from duty:*

1. *one period of at least 36 consecutive hours with each 7 consecutive days **or one period of at least 3 consecutive calendar days within each 17 consecutive days;***

The bold portion is applicable to these cases.

5. *Mr. Vermue proceeded to Wichita, Kansas as a FCM for June 3, 4, 5 and 6th, 2005. As such, Mr. Vermue's 17 consecutive days started on May 30, 2005 and ended on June 15, 2005. As outlined in the Operations Manual, Mr. Vermue's time free from duty was June 13, 2006. Mr. Vermue requested and was denied "other leave with pay"; however, he was granted compensatory leave.*
6. *Mr. Stonier proceeded to Wichita, Kansas as a FCM for June 3, 4, 5 and 6th, 2005. As such, Mr. Stonier's 17 consecutive days started on May 30, 2005 and ended on June 15, 2005. As outlined in the Operations Manual, Mr. Stonier's time free from duty was June 13, 2005. Mr. Stonier requested and was denied "other leave with pay"; however, he was granted compensatory leave.*
7. *Mr. Atkinson proceeded to Wichita, Kansas as a FCM for May 27, 28 and 29 and 30th, 2005. As such, Mr. Atkinson's 17 consecutive days started on May 23, 2005 and ended on June 8, 2005. As outlined in the Operations Manual, the time free from duty was June 3, 2005. Mr. Atkinson requested and was denied "other leave with pay"; however, he was granted compensatory leave.*
8. *The grievors submitted their grievances on July 11, 2005.*
9. *A final level reply was provided on December 23, 2005.*
10. *Although the parties are presenting documentary evidence on the specific case of Mr. Stonier, the decision of the PSLRB will be applicable to the three grievors outlined above.*

...

[Sic throughout]

[Emphasis in the original]

[2] Phil Hunt, counsel for the grievors, argued on behalf of the grievors that this was a case relating to pay for “time free from duty”. The regulations and the *Operations Manual* state that the employer “shall provide” time free from duty under certain prescribed conditions. There was no dispute that these conditions existed. It is not the obligation of the employee to provide this time. Mr. Hunt also referred me to dictionary definitions of “provide”.

[3] Mr. Hunt noted that June 13, 2005, was a normally scheduled day of work, and one of the days that made up Mr. Stonier’s overall annual salary. The employer is saying to Mr. Stonier that he should stay at home, but it will not pay him for his normally scheduled hours. Compensatory leave is an earned benefit belonging to the employee, and the employer should not be able to penalize the employee by deducting compensatory leave in this case. Such an employer practice represents a double benefit to the employer: the employer does not have to pay for a day otherwise scheduled for work, and the employer gets to reduce its accumulated liability for compensatory leave.

[4] Mr. Hunt submitted that the grievances should be allowed and that each of the three grievors should have 7.5 hours of compensatory leave reinstated into his compensatory leave bank.

[5] Eric Daoust, employer representation advisor, argued on behalf of the employer that the grievors had not met their burden of proof. The scheduling of compensatory leave was a management right set out in the collective agreement (clause 19.04). The *Operations Manual* requires time off from duty, but it does not determine how this is to be accounted for. The *Operations Manual* does not specify that leave with pay shall be granted; it simply states that the employee shall be provided with time free from duty. If the parties had wanted paid leave for time off duty, they would have specified so in the collective agreement. The options available for addressing the time off from duty include annual leave, compensatory leave and leave without pay. Management has the unfettered right to schedule compensatory leave. The employer may have been premature in granting compensatory leave without first granting leave without pay. In this case, management exercised its right to schedule compensatory leave rather than exercise its discretion under the other leave with pay article (clause 25.19). Mr. Daoust submitted that for these reasons the grievances should be dismissed.

[6] Mr. Daoust argued in the alternative that the only other option was to grant leave without pay for other reasons.

[7] Mr. Hunt argued in reply that the leave articles cited by the employer were simply not at issue here.

Reasons

[8] I expressed my appreciation for the submissions of the parties, which were very helpful in framing the issue from two very different perspectives. The employer sees this as a leave issue, whereas the bargaining agent sees it as a pay issue. Although it is possible to look at the grievances from both perspectives, in my view it makes more labour relations sense to look at the grievances from the pay perspective.

[9] Mr. Stonier's required day of rest (June 13, 2005) was a normally scheduled day of work. The general principle is that an employee should be paid for a normally scheduled day of work unless leave has been requested and granted. This is especially the case if the employee, by operation of law arising directly out of the performance of his other duties, is not permitted to work on a scheduled day of work.

[10] Although the employer is free to schedule compensatory leave rather than pay it out, I find that this is an exercise of discretion that relates to the operation of the leave bank itself. It should not be used to cover situations such as the one here, where a normally scheduled day of work is displaced because of a regulatory requirement arising out of an employee's performance of his duties.

[11] There was also no evidence that the employer "scheduled" this day of rest as compensatory leave. From the facts before me, it appears that the day was granted as a compensatory leave day after the fact; in other words, after the schedule had been completed.

[12] For all of the above these reasons, I made the following order:

(The Order appears on the next page)

Order

[13] The grievances are allowed.

December 1, 2006.

**Ian R. Mackenzie,
adjudicator**