File: 166-2-26597

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DOUGLAS B. OATES

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Louis M. Tenace, Vice-Chairperson

For the Grievor: James Shields, Counsel, International Brotherhood of Electrical Workers, Local 2228

For the Employer: Robert E. Smart

Heard at Edmonton, Alberta,
December 12, 1995

This grievance arises from the denial of a request for annual leave made by the grievor on November 15, 1994 to cover his scheduled shift on November 16, 1994.

As corrective action, the grievor is seeking a declaration that the employer has violated sub-clause 17.07(c) of the collective agreement between the Treasury Board and Local 2228 of the International Brotherhood of Electrical Workers, Code 404/89, for the Electronics Group.

Summary of the Evidence

The parties submitted the following agreed statement of facts:

AGREED STATEMENT OF FACTS

1. *The grievor is employed as an Electronics System Technician at the EL-4 level, with Transport Canada in Edmonton, Alberta.*

2. *The grievor is covered by the collective agreement for the Electronics Group, entered into between the Treasury Board and the International Brotherhood of Electrical Workers Local 2228, expiry date August 31, 1991 and extended by the Compensation Restraint Act.*

3. *During the week of November 14, 1994, the grievor was scheduled to work the 15:00 to 23:00 shift; he was the only Technician scheduled for this shift for the week in question.*

4. *The grievor requested vacation leave for November 16, 1994 at or near the beginning of his shift on November 15, 1994.*

5. *The grievor was advised on November 16, 1994 that his request was denied.*

6. *The grievor grieved the denial was a violation of his collective agreement on December 21, 1994.*

7. *The parties reserve the right to call witnesses and to present additional evidence at the hearing of this matter.*

(Four exhibits were attached, G-2, G-3, G-4, G-5).

Mr. Kent Gardner testified on behalf of the grievor as did the grievor himself. The employer's representative called no witnesses.

Mr. Oates testified that during the week prior to November 14, 1994, he had been on annual leave hunting and had shot a moose. Following a "hanging" period of from three to seven days, it was necessary to butcher the animal, a process that took twelve to fifteen hours.

On November 14, 1994, Mr. Oates reported for his scheduled shift which was to run Monday to Friday, from 1500 hours to 2300 hours (Exhibit G-5). Minimum staffing requirements for that shift required one technician to be present, although up to three technicians were sometimes scheduled (see Note #1 of Exhibit G-4). In the event that only one person was scheduled, the staffing requirement provided that another person would be on standby. During the week of November 14, 1994, Mr. Oates was the sole technician scheduled for the 1500 hours to 2300 hours shift.

Mr. Oates testified that he was unable to locate his supervisor on November 14, 1994 but finally did so at about the commencement of his next shift on November 15, 1994, at which time he requested annual leave for November 16, 1994. Later that day, his request was denied.

During cross-examination, the grievor acknowledged that it was necessary to have at least one technician on duty to cover the 1500 hours to 2300 hours shift. He also acknowledged that he was aware that a second technician had also been scheduled to work that same shift but that he had to undertake a special assignment on an Ottawa project. He testified that it was normal to have two or more technicians work that particular shift and that the operation would suffer if there was no technician on duty. The grievor also testified that he did not attempt to get any other employee to agree to an exchange of shifts as this was management's responsibility. The grievor also acknowledged that he had used up all his other annual leave in 1994-95 as he had requested it. Also, he had requested and had been granted leave on short notice in the past.

Kent Gardner is also employed as an Electronics System Technician with Transport Canada in Edmonton, Alberta. He testified that he was scheduled to work the 0800 hours to 1600 hours shift the week of November 14, 1994, but that he was available and willing to work the grievor's shift on November 16, 1994, on an overtime basis but that management never approached him.

Argument

Counsel for the grievor submitted that the employer offered no evidence that its refusal to accede to the grievor's request was based on operational requirements. Mr. Gardner testified that he was available to work the grievor's shift. The employer's only basis for refusing the grievor's request appears to be to avoid the payment of overtime.

In support of his submission, counsel referred me to the following: Rooney, (Board file 166-2-21306); Dillon, (Board file 166-2-21922); McConaghy, (Board file 166-2-22945).

The employer's representative submitted that the grievor made no attempt to seek a shift exchange with another technician. On this occasion, minimum staffing requirements were in effect and operational requirements did not permit management to grant the grievor's request. He submitted that this was not a situation involving a chronic staffing problem as existed in the cases referred to by counsel for the grievor. Management's refusal was reasonable in the circumstances and there is no obligation on management to resort to overtime to grant an ad hoc request by the grievor. Such requests cannot be expected to be accommodated on the same basis as requests for blocks of normal annual leave.

In support of his submission, the employer's representative referred me to the following: Barry, (Board file 166-2-26144); Bouffard, (Board file 166-2-21327); Earle, (Board file 166-2-21407); Nicholson, (Board file 166-2-16080); Milette and Landry, (Board files 166-2-15368, 15369).

In reply, counsel for the grievor submitted that the cases submitted by the employer's representative were all distinguishable from the instant case. The employer had made no attempt to accommodate the grievor. If the employer intends to rely on operational requirements, then the employer must adduce evidence to that effect. The employer has given no reason for refusing the grievor's request.

Reasons for Decision

The burden of proof to demonstrate that management has violated sub-clause 17.07(c) of the collective agreement by refusing to grant his request for annual leave on November 16, 1994 rests with the grievor.

Set out below are the provisions of clause 17.07 and, for reasons which will become apparent later, of clause 23.10.

> *17.07 An employee's vacation shall normally be taken in the fiscal year in which he/she becomes eligible for it. The Employer shall, subject to the operational requirements of the service, make every reasonable effort:*
>
> *(a) to schedule an employee's vacation leave for at least two (2) consecutive weeks, if so requested by the employee not later than May 1st;*
>
> *(b) to give next priority to periods of vacation for which a request is made by employees prior to June 1st;*
>
> *(c) subject to (a) and (b) above, to schedule an employee's vacation leave at a time acceptable to him;*
>
> *(d) after October 1st and after consultation with the employee, to assign him/her available vacation periods if the Employer has been unable to schedule vacation during the periods preferred by the employee or if the employee has not filed with the Employer his/her vacation preference by October 1st;*
>
> *(e) to permit an employee to use at an agreed time in the following vacation year, any unused vacation credits earned by him/her in the current vacation year, provided that the employee has filed by October 1st a request in writing which includes his/her reason(s) for such request. Approval of such requests will be limited to exceptional circumstances which would require a vacation period of longer consecutive duration than that to which the employee would be entitled in the following vacation year, and which can be accommodated having regard to the projected vacation entitlements of others for the time requested. However, if the circumstances warrant, consideration will be given to requests which, while not entailing a longer consecutive duration, do entail a longer period of vacation than the employee would otherwise have available in that year;*

> *(f) to comply with an employee's request that he/she be permitted to take vacation leave of five (5) or more days in accordance with the shift schedule so as to provide for the employee's normal days of rest immediately preceding and following the period of vacation leave.*

> *23.10 Shift Exchange - Operating Employees*
>
> *Provided sufficient advance notice is given and with the approval of the Employer, employees may exchange shifts if there is no increase in cost to the Employer.*
>
> *Such approval shall not be unreasonably withheld.*

The grievor wanted a day of annual leave on Monday, November 16, 1994, to butcher a moose, a task that takes the better part of a day to accomplish. The grievor testified that he attempted unsuccessfully, to locate his supervisor on November 14, 1994; however, he did not make his request until November 15, 1994. The grievor had just completed a week of annual leave.

The evidence of the grievor also revealed that it was normal to have two or more technicians on each shift. The grievor believed that arranging for shift exchanges was a managerial responsibility. The grievor also acknowledged that he had been granted leave on short notice in the past.

There is no dispute between the parties that the grievor's request could have been accommodated in one of two ways:

a) by means of a shift exchange with no additional cost to the employer;

b) by calling in another technician to work on an overtime basis.

In my view, the making of arrangements for shift exchanges are a responsibility of the employee(s) seeking such exchanges. One need only refer to the language of clause 23.10 and it seems apparent to me that the employer's role is to ensure that there are no additional costs accruing from a shift exchange and that sufficient notice was given. The employer, thus, plays the role of considering such requests and then, approving them or not, subject to the proviso that approval "not be unreasonably

withheld". There is always, of course, the underlying assumption that the employees involved in the shift exchange are compatible, i.e., qualified to carry out the work involved.

The grievor's case is founded on the proposition that at least one employee, Mr. Kent Gardner, was available and willing to take over the grievor's shift on November 16, 1994, and that the employer was obliged to have him do so, regardless whether it was necessary to have him do so on an overtime basis. I have already stated why it is that I believe it was incumbent on the grievor to initiate a shift exchange. I must also disagree with the grievor's proposition with regard to the payment of overtime.

The Board jurisprudence relied upon by the grievor does not stand for the proposition that the employer can never deny leave on the basis that the granting of leave would occasion the payment of overtime premiums. The payment of overtime premiums is a factor among others in assessing operational requirement.

This jurisprudence, as I understand it, advances the proposition that in cases of chronic understaffing, the employer will contravene the provisions of the collective agreement if it denies leave to prevent the payment of overtime premiums where it is responsible for the chronic understaffing in the first place. There is no evidence of chronic understaffing in the case before me. Thus, in a case such as this one, the payment of overtime is but one factor to assess in determining whether the employer has made every reasonable effort to grant leave in view of operational requirements. Other factors include the steps undertaken by the employee such as the amount of notice given to the employer.

In the case before me, while it is conceivable that the grievor could have discussed a potential future request for leave even before having gone on his hunting trip, it was not established in evidence that his request for leave was denied because it was made on short notice. Nor has it been established in evidence that the grievor's request was denied because he failed to attempt a shift exchange with a colleague. While it may be inferred from the employer's responses in the internal grievance process that the employer's motivation was based on its reticence in paying overtime premiums, I have no evidence to that effect before me. In fact, the reasons for the employer's denial have not been established before me. The grievor, although he

bears the burden of proof in this case, does not bear the burden of establishing the reasons for the employer's refusal. Thus, the corrective action requested, a declaration that the employer has violated sub-clause 17.07(c) of the collective agreement, is hereby granted.

The grievance is, therefore, allowed.

Louis M. Tenace,
Vice-Chairperson.

OTTAWA, January 16, 1996.