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File: 166-2-30651

Citation: 2002 PSSRB 59

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DONALD BROWN

Grievor

and

TREASURY BOARD
(Fisheries & Oceans Canada)

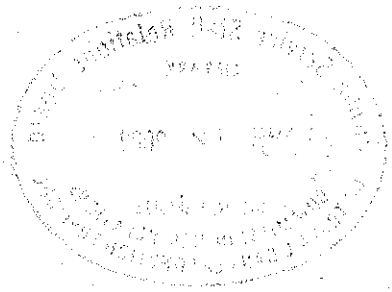
Employer

Before: Léo Paul Guindon, Board Member

For the Grievor: Abe Rosner, National Representative, CAW Canada

For the Employer: Rosalie Armstrong, Treasury Board

Heard at Thunder Bay, Ontario,
January 9, 2002.
(Written arguments filed on January 28 and February 10 and 20, 2002.)



DECISION

[1] The grievor, Donald Brown, is a Marine Communication and Traffic Services Officer (MCTS) working for Fisheries and Oceans Canada at the Thunder Bay Centre.

[2] On June 7, 2000, he grieved his employer's decision to deny him vacation leave from July 2 to 13, 2000. This grievance was referred to adjudication on June 1, 2001.

[3] A violation of clause 16.04, of the collective agreement (Code: 409/2000) between Treasury Board and the Canadian Association of Professional Radio Operators covering all employees in the Radio Operations Group, is alleged. Following a change of name and a merger, the bargaining agent for this bargaining unit is now the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW), Local 2182: *Canadian Association of Professional Radio Operators v. Treasury Board,* 2000 PSSRB 113 (125-2-98 and 142-2-328), *Marine Communications and Traffic Services Association v. Treasury Board,* 2001 PSSRB 10 (140-2-22 and 142-2-328). Clause 16.04 (Exhibit G-1) reads as follows:

> ***Scheduling of Vacation Leave With Pay***
>
> ***16.04*** *An employee shall take vacation leave on the basis of the schedule he is working. In scheduling vacation leave with pay to an employee, the Employer shall, subject to the operational requirements of the service, make every reasonable effort:*
>
> *(a)* *to schedule the employee his vacation leave during the vacation year in which it is earned;*
>
> *(b)* *to comply with any request made by an employee before January 31 that he be permitted to use in the following vacation year any period of vacation leave of thirty (30) hours or more earned by him in the current year;*
>
> *(c)* *to ensure that approval of an employee's request for vacation leave is not unreasonably denied;*
>
> *(d)* *to schedule vacation leave on an equitable basis and when there is no conflict with the interests of the Employer or other employees, according to the wishes of the employee.*

[4] The proper "full staff" of MCTS officers at Thunder Bay is 13 consisting of six full-time indeterminate and seven seasonal employees, the latter working from April to December inclusive (Exhibit G-7).

[5] By early 2000, the number of available qualified MCTS officers had fallen to nine (Exhibits G-6 and G-7). One employee had gone on long-term sick leave and had not been replaced. Three others had been allowed to transfer to other locations and they also had not been replaced. The employer had a discretionary power to disallow or to delay the transfer of employees to other locations but did not do so.

[6] To the nine qualified MCTS officers were added two ab initio trainees, Charmard and Ferro. They commenced on-the-job training on May 23, 2000 and were pronounced as qualified on or about July 8 (Ferro) and July 10 (Charmard). This brought the complement to 11 as of July 10 (Exhibit G-6).

[7] A draft shift schedule for the period from May 14, 2000 to April 14, 2001 was posted on March 7, 2000 by Brian Lane, Officer in Charge (Exhibit E-4). On April 18, 2000, Mr. Lane posted a NOTOPS memorandum relating to a draft shift schedule for the period May 14 to July 8, 2000 (Exhibit G-5). He requested that "any additional leave requests" be sent to him by e-mail prior to 1600 on April 28. He also stated: "[N]ormally one person will be allowed to be off for leave until ab-initios check out (tentatively July 6th) and then after that back to the normal 2."

[8] In a NOTOPS of May 2, 2000, Mr. Lane posted the draft summer shift schedule for the period July 9 to September 2, 2000 (Exhibit E-3). Mr. Brown did not approach Mr. Lane to raise any objection or to discuss leave after the March 7 and April 18 NOTOPS. On April 29, 2000, after the shift schedule for the May 14 to July 8 period was posted, Mr. Brown gave no indication to Mr. Lane that he wanted leave.

[9] On May 23, 2000, the grievor sent an e-mail to Mr. Lane asking hypothetically if the two trainees checked out earlier than their training times that were posted on the shift schedule could he be granted leave for July 2, 3, 4, 5 and July 11, 12, 13, 14. Mr. Lane replied: "If they checkout prior to the posted date, I see no problem with you getting those dates off. I will put your request for the 11 - 14 on the draft" (Exhibit E-2). Mr. Brown did not reply to that offer from the employer for the second part of his request.

[10] Later that same day, Mr. Lane stated in an e-mail to the grievor that there was a possibility of getting an additional trainee and he might qualify before the end of June. He wrote: "I still have to confirm his reporting date so don't make any plans yet but I

should have the information within the next couple of days" (Exhibit E-2). However, no further information was forthcoming from Mr. Lane.

[11] According to the posted shift schedule (Exhibit G-6), employee L. Bedford had already booked annual leave for July 4 to 7.

[12] On June 2, 2000, the grievor made a formal application through the "PeopleSoft" program for annual leave for the full period of July 2 to 5 and July 10 to 12. Mr. Lane replied denying the request in full without giving any reason.

[13] The grievor testified that he approached Mr. Lane on June 5 asking the reason for denying his request and Mr. Lane replied "not enough notice". Later on, Mr. Lane said that he was denying the leave request due to operational requirements; the grievor's understanding was that this meant one person on leave at a time. Mr. Brown asked Mr. Lane if he would have met the operational requirements if he had a qualified employee to replace him. Mr. Lane answered "no". At some point during this period, Mr. Brown learned that he was being denied only the first cycle, from July 2 to 5, 2000, but he was not interested in taking just the second cycle. In his testimony, Mr. Lane did not recall these meetings but stated "it's possible that they might have taken place".

[14] Mr. Brown testified that he contacted various fellow employees to see whether they could replace him for the needed days (July 2 to 5 inclusively). By June 7, he had confirmed that:

July 2: Mr. Mazur agreed to switch to the day shift, while Mr. Cunningham or Mr. O'Brien could cover Mr. Mazur's original midnight shift on an overtime basis.

July 3: Mr. Cunningham could cover his day shift.

July 4: Mr. Archibald could cover his midnight shift.

July 5: Mr. Cunningham or Mr. Parker could cover his midnight shift.

[15] On June 7, Mr. Brown went to see Mr. Lane and told him that he had found employees to cover all four shifts (July 2 to 5). Mr. Lane did not ask for any names or other details, nor did he offer other suggestions. Mr. Lane accepted the grievance from

Mr. Brown. Mr. Lane did not deny the specific exchange between himself and the grievor on June 7 but stated "it's possible that it took place". In his testimony, Mr. Lane stated that Mr. Mazur spoke to him about the possibility of replacing Mr. Brown in order to accommodate Mr. Brown's vacation leave request.

[16] From this date, Mr. Lane did not make contact or discuss with Mr. Brown any possibility of allowing his vacation at the time requested.

[17] On June 15, 2000, Mr. Lane replied in writing to the grievance (Exhibit G-2) denying leave for the July 2 to 5 period due to operational requirements in accordance with clause 16.04 of the collective agreement. He cited two reasons for the denial:

(1) lack of adequate notice (no request for leave prior to April 29, 2000);

and

(2) there was already one staff member scheduled to be on annual leave during that period and only one person at a time would be allowed leave until July 6, 2000.

[18] On June 16, 2000, in an e-mail to Laurie Lachapelle regarding operational requirements, Mr. Lane outlined that he had approached another employee to see if he could work on Mr. Brown's behalf on July 2, 2000 (Exhibit E-7). In his examination, Mr. Lane stated that he knew how to cover July 3 to 5 to partly accommodate Mr. Brown's request for vacation leave. Neither Mr. Lane, nor any other manager, ever shared that information with Mr. Brown. After a moment of explanation and studying the schedule, Mr. Lane admitted that he could have accommodated Mr. Brown's request for July 2, 2000.

[19] During Mr. Lane's testimony, objection was made by the employer's representative regarding the questioning of the witness about the communications between the grievor and management at various levels of the grievance process. I reserved my decision on that objection at the hearing. After reviewing the decision rendered by the adjudicator in *MacGregor* (Board file 166-2-672), I will consider the written replies made by the employer at each and every level of the grievance process. On that point, I agree with the reasons stated by adjudicator Edward B. Jolliffe, QC, in the *MacGregor* (*supra*) decision where he stated at pages 10 and 11:

> *...it is customary to consider written statements made by or on behalf of the employee and also the written replies made by the employer at each and every level of the grievance procedure.*

[20] I also agree with him regarding the importance of giving "confidentiality" to the discussion held at all levels of the grievance process to encourage settlements between the parties. Consequently, I will consider the documents filed as Exhibit G-2 from the different levels of the grievance process and I will not consider other details from Mr. Lane's testimony relating to the debate held between the parties at those meetings. On June 15, 2000, Mr. Lane replied in writing to the grievance as follows:

> *Decision of Authorized Employer Representative at the First Level of the Grievance Process*
>
> *I have reviewed the details and circumstances of your grievance with yourself and CAPRO representative.*
>
> *You were denied leave for the period July 2, 3, 4, and 5 due to the operational requirements of our service. There has never been any question that you would be granted leave for the second period of time July 11, 12, 13 and 14, however you indicated if you could not get the first cycle you did not want the second cycle. You submitted one leave form for the entire period, part of which could not be granted, so consequently the entire period was denied.*
>
> *In accordance with clause 16.04 of the RO collective agreement annual leave "...is scheduled on the basis of the schedule he is working and is subject to the operational requirements of the service...". In order to assist the staff at Thunder Bay MCTS draft schedules for the period May 14, 2000 to April 14, 2001 were made available on March 7, 2000. On April 18, 2000 as per usual practice a further draft schedule for the next 56 day schedule to be posted was made available via a NOTOP VBA0018/2000 with a request for any additional leave requests be submitted prior to final posting of the schedule on April 29, 2000. At no time prior to the posting of the final schedule did you indicate a request for leave during that shift schedule. The impact of operational requirements on the number of staff who could be on leave at any given time for the period May 14 to July 8, 2000 was also indicated in that same staff memo - "... one person will be allowed to be off for leave until ab-initios check out (tentatively July 6th) and then after that back to the normal 2." There were no complaints received from either yourself or CAPRO on this stipulation. You submitted your leave request on June 2, 2000. There is already one staff member scheduled to be on annual leave during that period.*

> *I find there is no corrective action required or possible, consequently your grievance is denied.*

[21] On or around July 9, 2000, Mr. Ray Pierce replied in writing at the second level of the grievance process as follows (Exhibit G-2):

> *Decision of Authorized Employer Representative at the Second Level of the Grievance Process*
>
> *I am responding to your grievance concerning the denial of your request for annual leave during the period 2 - 13 July, 2000. It is your contention that the leave request was denied in contravention of the provisions of article 16.04 of the CAPRO Collective Agreement.*
>
> *I have reviewed documentation related to your grievance, and have noted the following.*
>
> - *Draft schedules for the period 14 May, 2000 to 14 April, 2001 were posted on 7 March, 2000 to assist employees in planning their leave.*
> - *A further draft schedule for the 56-day period commencing 14 May 2000 was posted on 18 April, 2000. In the NOTOPS that accompanied the schedule was a request that additional leave requests for that period be submitted by 28 April, 2000. Also, it was pointed out that normally one person would be allowed off for leave until the two ab-initio graduates completed their checkout, the anticipated date for which was 6 July.*
> - *You submitted your request for leave on 2 June, 2000 at which time the final schedule for the 14 May - 8 July period was already posted showing approved leave for another employee for 4 - 7 July (the leave actually commencing 1 July on the employee's days off).*
> - *The denial of your leave request related to the 2 - 5 July period only. However, as you submitted a single request for the entire period 2 - 13 July period, the leave had to be denied in its entirety.*
>
> *Article 16.04 of the CAPRO Collective Agreement provides that vacation leave with pay will be scheduled subject to the operational requirements of the service. The Officer-in-Charge had clearly communicated in the 18 April NOTOPS that operational requirements restricted the number of employees off on leave to one until the ab-initio graduates had completed their check-out. You submitted your request for leave well after the deadline that had been established in*

> *that same NOTOPS, and also with the knowledge that leave during that period had already been approved for another employee.*
>
> *From the foregoing, I have concluded that management made every reasonable effort to schedule your leave as required by the CAPRO Collective Agreement.*
>
> *Your grievance is therefore denied at the Second Level. I understand that this decision was communicated verbally to your union representative prior to the period for which you had requested leave.*

[22] On May 10, 2001, Mr. Guy Bujold replied in writing at the final level of the grievance process as follows (Exhibit G-2):

> *This is in response to your grievance related to the denial of your request for vacation leave for the period July 2 to 13, 2000.*
>
> *I have reviewed the article of your collective agreement concerning the granting of annual leave and examined the circumstances which lead to management's decision to deny your request. I have also carefully considered the arguments raised on your behalf by your representative, Martin Grégoire.*
>
> *I have concluded that operational requirements did not allow the granting of your leave for the day of July 2, since there was no one else available to replace you. However, management was prepared to accommodate your request for the rest of the period requested, from July 3 to 13, 2000, which you refused. Therefore, it is my finding that, in accordance with your collective agreement, management made every reasonable effort to respect your wishes and did not unreasonably deny your grievance.*
>
> *Consequently, your grievance is denied and the corrective measures requested are not granted.*

[23] The employer's representative objected to the introduction of Exhibit G-4 entitled "Overtime Hours for Selected Groups" on the basis that the employer produced the document for the purpose of recent collective bargaining and inside the collective bargaining process. At the hearing, I reserved my decision on that objection. I will accept the document filed as Exhibit G-4 because the payment of overtime can be considered in assessing operational requirements. This information may be relevant to the grievance and no evidence was presented that this information was disclosed by

the employer inside the negotiation process under an agreement of confidentiality. The convincing strength of that exhibit will have to be evaluated.

Arguments

[24] The grievor's representative submitted that the employer failed in its two-fold contractual obligation as provided in clause 16.04.

[25] The evidence shows that Mr. Lane could easily have allowed Mr. Brown his requested leave dates without any extraordinary measures. Mr. Lane admitted the dates caused no problem except for July 2. After a moment of explanation and studying the schedule, he admitted that he could have done it for July 2 as well. The responsibility to schedule the staff was assigned to Mr. Lane. He had to do it while considering operational requirements, that is ensuring that all shifts were covered by sufficient qualified personnel according to the needs of the workload and at the same time respecting rights and benefits of the employees as set out in the collective agreement.

[26] The representative summarized what Mr. Lane did:

> On June 2, 2000, Mr. Brown requested two weeks (8 shifts) of vacation, with one month's advance notice. Mr. Lane refused his request immediately by e-mail, without giving any reason or alternative proposal.
>
> On June 5, 2000, Mr. Brown asked for an explanation for the denial. Mr. Lane first said "not enough notice", then changed to "only one person off at a time". Mr. Brown asked if the decision would change if he found people to cover his shift. Mr. Lane said no.
>
> On June 7, 2000, before filing his grievance, Mr. Brown told Mr. Lane he could cover all four "problem" shifts. Mr. Lane expressed no interest. Mr. Lane contacted no employees.
>
> On June 16, 2000, Mr. Lane knew and told Mr. Lachapelle that only July 2 was a problem. However, he did not tell the grievor.
>
> Mr. Lane made no effort to accommodate the grievor's request on each of these occasions.

[27] The employer's effort to get ab-initios in order to solve the staffing shortage is laudable but is totally irrelevant to the present grievance. The employer remained two employees short of the full complement.

[28] The measures worked out by Mr. Brown to cover his absence for July 2 to 5 were not extraordinary or unreasonable and Mr. Lane was able to do the same. The operational requirements for the first week of July 2000, (coverage of three shifts during the day and two at night) could have been met by Mr. Brown's measures for all four days. Mr. Lane knew it could be done for three days and did not work it out for July 2, notwithstanding that he was approached indirectly by Mr. Mazur who showed him how it could be done.

[29] The two reasons given by the employer for denying the grievance were:

First: insufficient notice/missed the deadline, and

Second: normally only one person will be allowed to be off for leave during the period in question.

[30] The April 18, 2000 NOTOPS (Exhibit G-5) called for leave requests to be in by April 29, 2000. Mr. Lane's first (oral) explanation of denial was insufficient notice. At the first and second level of the grievance process, the employer's responses cited the same excuse. Interestingly, the third level response was silent on this question. The silence at the third level of the grievance process was wise, because there is no requirement for any kind of notice whatsoever for the utilization of vacation leave in the collective agreement. What there is, on the contrary, is the strict and strong obligation on the employer to "make every reasonable effort" to grant leave as requested - no matter when it is requested. Had the employer wished to impose a minimum notice period - such as "before the publication of the schedule" - it could do as many private sector employers have done: go to the bargaining table and negotiate it. This, however, it has not done.

[31] Mr. Lane's announcement on April 18, 2000 that he wanted leave requests to be submitted by April 29, 2000 was perfectly legitimate. It could provide management, and the employees with a broad picture of leave requests well in advance. However, does the posting of such a time limit relieve management of its obligations under clause 16.04? Certainly not. Mr. Brown did not know with certainty until June 2 that

he required these particular blocks of leave. Once he knew, he made his application. Once he made his application, the employer's duties under clause 16.04 were triggered. Instead of taking these duties seriously, the employer used its own invented "deadline" to do so - absolutely nothing. The case law has refuted and rejected this type of unilateral "deadline" many times.

[32] The second reason, "Normally only one person will be allowed to be off for leave", appears in the April 18 NOTOPS memorandum. It was cited by Mr. Lane to Mr. Brown, orally, as an "operational requirement". It was invoked at both the first and second level of the grievance process as the primary reason for denying the leave. Following the analysis done in *Sumanila* (Board file 166-2-395), the operational requirement is inherent to the nature of the work to be done. In the present case, the operational requirement is that three shifts need to be covered during the day and two during the night. The rule of "one person off at a time" is at best a guideline. If the work can be covered without respecting this "rule", then the "rule" is irrelevant. If the "rule" interferes with the duties of the employer, and the rights of the employees, under clause 16.04, then the "rule" must fall. Here, even the "rule" said "normally". Mr. Lane cut this word out when he replied at the first level of the grievance process, but it was still there. "Normally" means that there can be exceptions, as long as the exception is consistent with operational requirements. To quote the "rule" and conceal the word "normally" as an excuse not to lift a finger to accommodate a leave request, this is directly in contravention of clause 16.04.

[33] Mr. Lane, in cross-examination, admitted that July 2 had been the only real "problem date" for him. When the grievor's representative pointed out to him that no one was booked for annual leave on July 2 and 3 (L. Bedford's leave began only on July 4), Mr. Lane seemed genuinely shocked. He had no reply. Thus, even following his own "rule" of "one person off at a time", he had absolutely no reason to deny Mr. Brown his full leave request on the basis of July 2 being a problem.

[34] More important, however, is the well-accepted principle that unilaterally promulgated "administrative policies" like the April 18 document cannot trump rights and obligations entrenched in the collective agreement.

[35] The grievor's representative noted that the employer's representative attempted, however briefly, to adduce a brand new ground for refusing the grievor's request, namely that overtime would have been required to cover his absence, a ground never adduced by management at any level of the grievance process. On this point, all three witnesses were unanimous. Mr. Grégoire testified that owing to a shortage of staff, annual leave across the country is regularly covered by overtime. Mr. Brown made the same statement in respect of Thunder Bay. The three sheets of shift schedules covering May 14 to August 5, 2000 (Exhibit G-6) show that overtime is a regular and standard method of covering all forms of leave, no matter how far in advance the leave is requested or how few people take leave at a time. Mr. Lane himself gave the best evidence in this regard. He stated that overtime was not at all a factor in his decision to deny the grievor's leave request. He described overtime as mandatory; indeed, he called it "a condition of employment". In addition, he testified that even though he can order employees to work overtime, it is not necessary, for reasons such as the high cost of living in Thunder Bay, etc.

[36] It is submitted that the employer, in denying Mr. Brown his requested leave, violated clause 16.04 of the collective agreement, specifically both paragraphs (c) and (d) thereof. Not only did the employer fail to "make every reasonable effort", on the evidence it made no identifiable effort whatsoever to allow the grievor's request. Moreover, the employer, either deliberately or through gross negligence or utter indifference to the grievor's rights, needs and feelings, concealed from the grievor the fact that it only perceived an "operational" difficulty for the single shift of July 2.

[37] Had he known this, the grievor testified he might either have cut that day from his vacation or proceeded with his arrangements for a replacement (as explained above). Regrettably, he was denied this opportunity. The grievor asked for "full redress". There was ample time to do just that before July 2, but the employer, as we have seen, did absolutely nothing. Not only were the grievor's feelings hurt, not only was an important vacation plan ruined, but even 18 months later, it is submitted that his frustration and anger at the arbitrary and flippant way he was treated were visible at the hearing itself, although at all times he maintained his courtesy and self-control. The final blow came on May 10, 2001, when Guy Bujold said (in paraphrase): Well, you could have had all your requested days except one all along, but **you** refused the offer, so too bad! Yet in reality, that offer had never even been hinted at.

[38] The grievor's representative respectfully requests the following remedy:

1. A declaration that the employer violated paragraphs 16.04 (c) and (d);

2. An order that the head of MCTS write personally to Mr. Brown, specifying its regret at this violation and specifically the failure to advise him that only one day was a problem.

3. An order that the Coast Guard Commissioner, or his designate, write personally to Mr. Brown, expressing regret at the May 10, 2001 grievance reply, the factual errors contained therein, and the withholding of the information about July 2 prior to that date.

4. An order that the employer post copies of the adjudication decision, and the above-requested letters, prominently in all MCTS centres across the country, with the aim of deterring other managers from ignoring their responsibilities in this area.

[39] The authorities relied upon by the representative of the grievor were: *Oates and Treasury Board (Transport Canada),* [1996] C.P.S.S.R.B. No. 3 (Q.L.) (Board file 166-2-26597); *Sumanik* (Board file 166-2-395); *Whyte* (Board file 166-2-17992); *Tremblay and Treasury Board (Employment and Immigration Canada)* [1989] C.P.S.S.R.B. No. 37 (Q.L.) (Board file 166-2-17538); *Macdonald and Treasury Board (Transport Canada)* [1991] C.P.S.S.R.B. No. 52 (Q.L.) (Board files 166-2-20526 and 20527); *Graham and Treasury Board (Transport Canada),* [1991] C.P.S.S.R.B. No. 217 (Q.L.) (Board file 166-2-21414); *Rooney and Treasury Board (Transport Canada),* [1991] C.P.S.S.R.B. No. 212 (Q.L.) (Board file 166-2-21306); *Dillon and Treasury Board (Transport Canada),* [1992] C.P.S.S.R.B. No. 70 (Q.L.) (Board file 166-2-21922); *MacGregor and Treasury Board (Transport Canada),* [1993] C.P.S.S.R.B. No. 1 (Q.L.) (Board file 166-2-22489); *Cloutier and Treasury Board (Transport Canada),* [1993] C.P.S.S.R.B. No. 195 (Q.L.) (Board files 166-2-23628, 23795 and 23797 to 23799); *Hester and Treasury Board (Transport Canada),* [1996] C.P.S.S.R.B. No. 44, Q.L. (Board file 166-2-26833).

[40] On behalf of the employer, the representative submitted that the adjudicator must decide whether or not the employer breached clause 16.04 of the collective agreement. The employer must make every reasonable effort to schedule the leave and

he must consider the "operational requirements" of the service on the basis of the adjudicator's decision in *Barry and Treasury Board (Transport Canada)* [1995] C.P.S.S.R.B., No. 66, Q.L. (Board file 166-3-26144).

[41] Article 16 says that the employer must make every "reasonable effort" to accommodate the grievor. It does not say that the employer must make "every effort" nor does it say "every possible effort". The employer must make its decision with the best information available at the time.

[42] The employer fulfilled its obligation to make every reasonable effort to accommodate the grievor's leave request. The employer hired ab initio trainees to help accommodate summer leave but it was not possible to have them finish their training before the holiday weekend in July 2000 due to Coast Guard College policy.

[43] Mr. Lane gave several opportunities for employee input into the schedule. On May 2, 2000, a NOTOPS was posted and Mr. Lane gave the employees an opportunity to submit their leave requests. A draft schedule was posted on March 7, 2000 and input was sought. On April 18, 2000 the employees were notified that a 56-day draft schedule was to be posted on April 27, 2000 and workers were given until April 28, 2000 to have input. The grievor did not participate in these opportunities for input.

[44] Particular efforts were made to help the grievor notwithstanding the fact that he did not respect the April 28, 2000 deadline when he "hypothetically" requested leave on May 23, 2000. Mr. Lane replied to that request on the same day. The employer answered that Mr. Brown could have leave at the time requested if the trainees finished their training before. Mr. Lane also offered to put the request for leave for the July 11 to 14, 2000 period on the draft schedule. The grievor never replied to that aspect of the employer's offer, leaving the employer with the impression that the grievor wanted all the leave. Mr. Lane was seeking other solutions. Steve Train came on strength, but he was not able to report for duty.

[45] The formal request for leave from Mr. Brown came on June 2, 2000 on the "PeopleSoft" program and was answered by the check boxes of the program on the same day. The "PeopleSoft" program, by its very nature, allows for somewhat cursory communication and the reply cannot be considered as a curt denial on the part of the employer. In his testimony, Mr. Lane did not recall walking away in a definite manner

or ignoring the grievor and his concern or a presentation by Mr. Brown of a hypothetical replacement scenario. The grievor did not outline in writing details of these replacements or possible shift-switches to management. Mr. Brown stated on two occasions during his examination that it was "not his job" to seek replacements, that this cast doubts on the vigour with which he sought replacement.

[46] The June 16, 2000 e-mail from Mr. Lane to his supervisor proved that the employer continued to make efforts to accommodate the grievor's request. The "sticking" day on the leave request was July 2 and as explained in the June 16, 2000 e-mail, no one was available to work on the grievor's shift without working a double shift.

[47] One of Mr. Lane's duties was to meet operational requirements. The March 7, 2000 NOTOPS planned the summer 2000 operational requirements with the assignment of the shifts with the students. More details were provided as to the accommodation of the training of the students in the draft schedule attached to the April 18, 2000 NOTOPS. The second NOTOPS stated that "normally one person will be allowed to be off for leave until ab-initios check out (tentatively July 6TH) and then after that back to the normal 2". On May 16, 2000, Mr. Lane circulated another NOTOPS related to minimal staffing level to maintain required coverage from June 30 to late August 2000. There would be two persons working days, two working the midnight shift, and a 10:00 a.m. to 10:00 p.m. shift covered by a third person. The middle shift would be covered by a swing shift or an 8-hour day and evening shift until ab initios checked out. The training of these people formed part of the operational requirements of the workplace. Management made every reasonable effort to accommodate leave within the ambit of the operational requirements.

[48] The grievor never successfully demonstrated that the Thunder Bay MCTS Centre was so severely short-staffed that it could not function. Even if the adjudicator accepts the evidence as to national standards, any staff shortage was a temporary shortage.

[49] The employer fulfilled its responsibilities under the collective agreement. The bargaining agent has not met its onus in this case of demonstrating that the employer did not make a reasonable effort. The bargaining agent did not establish that the leave was not granted for any other reasons than the operational requirements of the service. The grievance should not be allowed.

[50] The authorities relied upon by the representative of the employer were: *Barry and Treasury Board (Transport Canada),* [1995] C.P.S.S.R.B. No. 66 (Q.L.) (Board file 166-2-26144); *Barnes and Treasury Board (Transport Canada)* (1993) C.P.S.S.R.B. No. 66 (Q.L.) (Board file 166-2-27867); *Earle and Treasury Board (Transport Canada)* (1991) C.P.S.S.R.B. No. 255 (Q.L.) (Board file 166-2-21407); *Bouffard and Treasury Board (Employment and Immigration Canada)* (1991) C.P.S.S.R.B. No. 211 (Q.L.) (Board file 166-2-21327).

Reasons for Decision

[51] The primary issue is whether the employer violated clause 16.04 of the collective agreement by failing to make every reasonable effort to grant the grievor's request for annual leave when the employer denied his request for the period from July 2 to 13, 2000. These efforts are to ensure that the employee's request for leave was not unreasonably denied (paragraph 16.04(c)). The scheduling of vacation leave shall be done on an equitable basis, respecting the wishes of the employee and when there is no conflict with the interests of either the employer or the other employees (paragraph 16.04(d)).

[52] Both parties agree that the grievor bears the onus of proof. The grievor has to establish a *prima facie* case that his request for vacation leave was denied following the principle stated in the adjudication decision in *Oates* (*supra*).

[53] The evidence met the grievor's initial burden of proof that his request for vacation leave was denied on June 2, 2000 through the "PeopleSoft" program. On June 5, 2000, the employer explained to him that it was being denied for two reasons: (1) not enough notice; and (2) an operational requirement, understanding that this meant one person on leave at a time. At some point in the June 5 meeting and the June 7 meeting between Mr. Brown and Mr. Lane, it was clarified that only the first part of the request was denied for July 2 to 5, 2000. The employer's replies at the first and second levels of the grievance process are to the same effect (request made after the April 28, 2000 deadline, leave approved for another employee). On May 10, 2001, the employer advised Mr. Brown, by reply at the third level of the grievance process, that only the request for leave on July 2, 2000 could not be granted.

[54] The evidence submitted by Mr. Brown relating to his conversations on June 5 and 7, 2000, with Mr. Lane was not contested. Mr. Lane acknowledged that it is possible that those conversations may have taken place. I give credibility to Mr. Brown when he testified that he contacted various fellow employees to get their agreement to replace him for the days from July 2 to 5 inclusively. The fact that Mr. Mazur discussed the situation with Mr. Lane (as per Mr. Lane's testimony) corroborates that Mr. Brown made this effort. I understand that Mr. Lane was not open to those possibilities of replacements because he wanted to maintain the policy of "one employee on leave at a time" until July 6, 2000. When Mr. Brown submitted his request for vacation leave, L. Bedford was already scheduled to be on annual leave starting July 4, 2000 and, taking advantage of the days off on July 1 to 3, this employee planned to be out of town as of July 1, 2000.

[55] I cannot consider the June 16, 2000 e-mail as proof of the employer's effort to accommodate the request of the grievor. This e-mail was an argument to support the decision rendered by Mr. Lane at the first level of the grievance process on June 15, 2000 (Exhibit G-2) and to give substance to the employer's reply at the second level. The operational requirements of "normally one off on leave until ab-initios check out" was confirmed and the July 2 "sticking date" was pointed out as "possible but this would leave us vulnerable if there was any sick leave for the day shift". Mr. Lane refused to consider the potential solution worked out by Mr. Brown for July 2 when Mr. Mazur talked to him of the possibility of replacement. With this attitude, Mr. Lane was wilfully blind to possible options for accommodating the grievor's request for vacation leave.

[56] I do not consider the April 28, 2000 deadline stated in the April 18, 2000 memorandum (Exhibit E-6) as a formal policy of the employer. This guideline was weakened by the May 2, 2000 memorandum, which stated that additional leave requests would be subject to a reminder by the employer approximately two weeks prior to the posting of the schedule (Exhibit E-3). The schedule was posted normally two weeks in advance. This means that it was possible to modify the schedule (for the period starting July 1st) until June 1st or one month prior to the application of the schedule. That guideline of April 28 could have been bypassed without damages for the employer who had plenty of time to make arrangements to switch shifts to accommodate Mr. Brown's leave request.

[57] Regarding the employer's new policy of "normally one person will be allowed to be off for leave until ab-initios check out (tentatively July 6th) and then after that back to the normal 2" as stated in the April 18, 2000 memorandum (Exhibit E-6), it has to be considered in the context of the entire operation to assess the reasonableness of the employer's efforts. I agree with the reasoning of adjudicator Francine Chad Smith who outlined the following principle in her decision in *Morhart*, 2002 PSSRB 36 (166-2-30513) as follows at paragraph 64:

> *The request was denied pursuant to the employer's written annual leave policy. The annual leave policy allowed up to three employees to be on scheduled leave each day of the year, with advance notice, out of a total daily staff complement of twenty-three nurses. Other provisions of the annual leave policy and other formal and informal policies could also have been relied upon to facilitate obtaining leave where three vacation leaves had already been granted for a specific day. The annual leave policy included a provision whereby an employee could request approval one hour before a scheduled shift when the employer would know whether other persons reserved for unscheduled leave would be available to cover the shift. The employer allowed the employees to make arrangements, subject to approval, to switch shifts between themselves to facilitate leave. Lastly, the employer did grant leave outside its policy parameters in special circumstances. The vacation leave policy and other formal and informal policies in place should then be considered in the context of the entire operation to assess the reasonableness of the employer's efforts.*
>
> [Emphasis added]

[58] The employer's policy of "one off at a time" until ab-initio trainees check out (July 10, 2000) and the normal of "2 off at a time" thereafter can be justified by the "understaffing" of four employees (nine qualified available MCTSO's) going down to two employees after the two ab-initio trainees checked out. Mr. Lane gave his assessment of the situation in the June 16, 2000 e-mail (Exhibit E-7) to Ms. Lachapelle denying the request for vacation leave made by Mr. Brown for the period between July 2 and July 13, 2000. That e-mail stated that:

...

> *July 2 is the sticking date – it is possible but this would leave us vulnerable if there was any sick leave for the day shift.*

...

[59] This July 2, 2000 sticking date raised two different questions. The first is that the possibility to grant the request for that day did not take into consideration the solution worked out by Mr. Brown. The second is the fact that the employer did not inform Mr. Brown that July 2, 2000 was the only day which could not be accommodated before the May 10, 2001 reply of the Deputy Commissioner, Mr. Bujold, at the final level of the grievance process.

[60] On the first question, I have come to the conclusion that Mr. Lane did not make every reasonable effort to ensure that approval of Mr. Brown's request for vacation leave was not unreasonably denied. When Mr. Lane refused to consider the details of the replacements worked out by Mr. Brown (at the June 7, 2000 meeting), Mr. Lane just reinforced his first answer that Mr. Brown would not meet the operational requirements even if he found qualified employees to replace him. Mr. Lane appeared to not to want to consider any possible modification in his position to deny the first part of the period requested by Mr. Brown.

[61] On the second issue, I conclude that the employer showed that it did not want to know Mr. Brown's reaction if he was told that only the first day (July 2, 2000) of his request could not be granted. That situation relating to the July 2 "sticking date" was known by the employer on June 16, 2000. Mr. Brown was not advised, on time, that he could take the holiday period he requested, with the exception of the first day. The employer never gave the opportunity to Mr. Brown to modify his request and to take his holiday from July 3 to 13, 2000. Perhaps, the solution worked out by Mr. Brown could solve the "sticking date" problem or Mr. Brown could have pushed back his holiday program one day later. The employer did not act reasonably when it did not inform Mr. Brown that his request could only be granted from July 3 to 13, 2000. In my opinion, the employer's reply, sent on May 10, 2001, provoked Mr. Brown.

[62] I cannot accept the "operational requirements" argument submitted by the employer's representative on the basis of "only one on leave at a time" to support the decision to deny the request for leave for July 2, 2000. This argument was not made by the Deputy Commissioner who stated in his May 10, 2001 reply (Exhibit G-2) that "the operational requirements did not allow the granting of your leave [...] since there was no one else available to replace you." No other employee was scheduled to be on annual leave on July 2, 2000 (L. Bedford would be on annual leave starting July 4, 2000). The evidence showed that Mr. Brown worked out a replacement for that

date. Consequently, this "operational requirement" cannot be accepted to support the employer's decision.

[63] The employer did not meet its onus to demonstrate that the "operational requirements" prevented it from acceding to the grievor's request for annual leave following the principle stated in *Bouffard* (*supra*) as follows:

...

> *The employer's obligation to grant annual leave to an employee under clause 19.05(c) is conditioned by "operational requirements" permitting. This means that unless the employer can establish that "operational requirements" prevented it from acceding to the grievor's request for annual leave to be taken at a specific time or times, it has not met its obligations under the collective agreement in refusing a request for annual leave.*

...

[Emphasis added]

[64] In *Whyte and Treasury Board* (*supra*), the adjudicator concluded as follows:

...

> *I find, therefore, that there were several ways in which Mrs. Whyte's leave request could have been accommodated short of impacting upon the operational requirements of the service. I further find that management acted unreasonably in not fully exploring these options prior to denying the grievor's request for leave.*

...

[65] In the instant case, it is clear that the leave request for Mr. Brown could have been accommodated without any operational problems for all the dates requested with the exception of July 2, 2000. The employer acted unreasonably in denying the first part of Mr. Brown's request without fully exploring Mr. Brown's and Mr. Mazur's solutions. Furthermore, the employer neglected to inform Mr. Brown and give him the opportunity to amend his request for leave. Consequently, the employer violated paragraph 16.04(c) of the collective agreement.

[66] In the circumstances of the present case, the employer did not submit any evidence that Mr. Brown's request for holidays was in conflict with the interests of other employees. The employer did not demonstrate that the solutions, worked out by Mr. Brown and/or Mr. Mazur for July 2, 2000, were in conflict with its interests because it chose to ignore them. Consequently, the employer did not fulfil its obligation as stated in paragraph 16.04(d) of the collective agreement.

[67] I understand Mr. Brown's resentment at the Deputy Commissioner's reply dated May 10, 2001. It is frustrating to learn one year later that only the first day of the request for leave could not be granted. It is discouraging to learn that the employer was prepared to accommodate the request for the rest of the period from July 3 to 13, 2000. It is maddening to be told erroneously by the Deputy Commissioner that the grievor refused the opportunity offered to him by the employer to take vacation leave for the rest of the period.

[68] In the present case, it is deplorable that the employer behaved so badly. An order for the Head of MCTS or for the Coast Guard Commissioner to personally write to the grievor expressing regret cannot remedy the problem. Only an interactive mode of dialogue between the parties can resolve this kind of deteriorated work relationship. The parties are invited to take advantage of the Board's mediation services to improve the quality of their communication.

[69] It is outside my jurisdiction to order the Head of MCTS or the Coast Guard Commissioner to personally write to the grievor specifying their regret as requested by the grievor's representative (*National Bank of Canada v. Retail Clerks' International Union,* [1984] l. S.C.R. 269). The Supreme Court of Canada stated that, ordering the Bank's president and chief executive officer to send a letter to all employees, without allowing them to express how they felt about its content, was in fact forcing them to do something which may be misleading or untrue. For the Court, the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression, must prohibit compelling anyone to utter opinions that are not his own. The Court found that the Canada Labour Relations Board had no authority to order the Bank to create a trust fund and to send a letter to the employee. This principle stated by the Supreme Court of Canada can be applied against the orders to write letters of regret as requested by the representative of the grievor.

[70] For all these reasons, I declare that the employer violated paragraphs 16.04(c) and 16.04(d) of the collective agreement in refusing the grievor annual leave at the times requested for July 2 to 5 and July 10 to 12, 2000. However, I do not consider it to be appropriate under the circumstances to order the employer to post this decision in the workplace. Consequently, the grievance is allowed in part.

Léo-Paul Guindon,
Board Member

OTTAWA, June 19, 2002.