SEVENTY-THIRD SESSION

In re HORSMAN, KOPER, McNEILL and PETITFILS

Judgment 1203

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Gerrit Horsman, Mr. Wilhelmus Geradus Koper, Mr. John McNeill and Mr. Patrick Henri Auguste Petitfils against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 September 1991 and corrected on 17 September, the Agency's replies of 13 December, the complainants' single rejoinder of 3 March 1992 and Eurocontrol's surrejoinder of 15 May 1992;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal, Article 12 of the amended Eurocontrol Convention and Articles 11, 21, 24a and 91 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are on the staff of the Eurocontrol's Centre at Maastricht, in the Netherlands. Mr. Koper, Mr. McNeill and Mr. Petitfils are principal controllers at grade B 2; Mr. Horsman is an air traffic supervisor at grade B 1.

In January 1987 staff committees at the Agency's headquarters in Brussels and all its other offices but the Maastricht Centre resigned in protest at lack of consultation in the Agency on working conditions.

In April 1990 the Staff Committee of the Centre followed suit and officials in the Operations Division set up an ad hoc "co-ordinating" group to safeguard staff rights. On 5 September 1990 they put their grievances to the Director General in a letter to which they got no answer. On 10 December they wrote again asking him to start "genuine" negotiations by 1 January 1991; failing that, they contemplated collective action. In his reply of 18 December 1990 the Director General said he was willing to talk and hoped to meet the staff representatives in Maastricht on 21 January 1991, notwithstanding the Staff Committee's resignation.

On 8 January 1991 the staff of the Operations Division decided to stop on-the-job instruction for trainee air traffic controllers. On 21 January the Director General went to Maastricht and spoke to the staff. But most of the staff of the Operations Division turned down the proposals he then made and decided to carry on the training boycott.

On 29 January the complainants got two letters dated 25 January from the Director General. One was addressed to each of them by name and the other was headed "Open Letter to Maastricht Control Room Staff".

Paragraph 1 of the open letter said that the "current refusal to do on-the-job training has to be seen as industrial action which will do great harm to Maastricht Centre"; the rest of the letter spoke of the proposed improvements in conditions of service.

The personal letters each of the complainants got said: "On-the-

Job Training is an integral part of the duties which, as stated in the General Conditions of Employment, you shall not cease to exercise without previous authorisation".

On 8 April 1991 they submitted separate "complaints" under Article 91(2) of the General Conditions of Employment against the requirement of prior authorisation for protest action. On 30 May they sent a joint letter to the Director General pointing out that they had got no reply to their individual "complaints".

B. The complainants see their provision of on-the-job training as a voluntary service because it is not one of the duties listed in their detailed job descriptions. They submit that it was a breach of staff rights for the Administration to try to put pressure on them by making their refusal to provide such instruction and indeed any sort of collective action by them subject to prior leave from the Director General. The Agency's letters of 25 January 1991 therefore caused them injury.

The Agency's position was at odds with Article 24a of the General Conditions of Employment, which says that "Servants shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials". The right is hollow if officials have to get prior discretionary leave to exercise it.

Requiring prior leave reflects an outmoded idea of staff rights in the international civil service since its effect is to check protest. Rules on collective action, such as those intended to ensure continuity of service or the safety of operations, must still respect such rights.

The complainants submit that the requirement constituted an abuse of authority and they ask the Tribunal to declare it unlawful.

C. In its replies Eurocontrol gives its own version of the facts. It observes in particular that since the staff representatives withdrew from the Staff Committee the Agency is not answerable for any lack of consultation. The petitions dated 5 September and 10 December 1990 made collective demands. Without waiting to see the Director General the officials stopped providing on-the-job training though it is an essential function and a professional duty, not voluntary or optional. What the complainants are really objecting to is Articles 11(2) and 21(1) and (2) of the General Conditions of Employment, which lay on them a duty to ensure continuity of service.

Eurocontrol submits that the complaints are irreceivable. Under Article 91(2) of the General Conditions of Employment a "complaint" must be directed against an act adversely affecting an official. Neither the individual letters of 25 January 1991, which merely reminded the complainants of their duties under the rules, nor the merely informative "open letter" of even date adversely affected them. Since the Director General had imposed no sanction on them for refusing to give on-the-job training there is no decision for them to challenge. Even supposing the letters did affect them adversely, their claim to a change in the rules would be irreceivable since the Director General has no authority in such a matter: it is for the competent authorities to adopt and amend the General Conditions of Employment.

On the merits Eurocontrol observes that because of the nature of their duties air traffic controllers may not resort to wildcat stoppages, which are a hazard for air navigation. That alone warrants the requirement of prior authorisation.

Besides, Article 24a must be read together with other rules. One such is the second paragraph of Article 11 of the General Conditions, which says: "On accepting service with the Agency, a servant shall undertake, unconditionally, to refrain from any act which might jeopardize the safety of air navigation; he shall be

bound to ensure the continuity of the service and shall not cease to exercise his duties without previous authorization". Article 21 stipulates that "A servant, whatever his rank, shall assist and tender advice to his superiors; he shall be responsible for the performance of the duties assigned to him". If an official heads a team the second paragraph of Article 21 also applies: "A servant in charge of any branch of the service shall be responsible to his superiors in respect of the authority conferred on him and for the carrying out of instructions given by him. The responsibility of his subordinates shall in no way release him from his own responsibilities". So stopping on-the-job training was in breach of Article 11.

It is mistaken to say that giving such training is optional because it is not listed in the job description in the Controller's Manual. The Manual does not give an exhaustive list of controllers' duties, and in any event the complainants are bound to perform any duty that the provision of a public service requires.

Lastly, every country has rules about the right of air traffic controllers to stop work. Eurocontrol is therefore bound, in accordance with Article 12 of the amended Eurocontrol Convention, to include clauses in contracts of employment to safeguard continuity of service. The complainants subscribed to those clauses on taking up duty and the Agency's reminders cannot have come as a surprise.

Eurocontrol asks the Tribunal to declare the complaints irreceivable and, subsidiarily, to dismiss them as devoid of merit.

D. In their rejoinder the complainants take issue with the Agency's version of the facts. As to receivability they submit that the letters of 25 January 1991 may be treated as adversely affecting them even though there was no sanction imposed on them. By passing those letters off as mere reminders Eurocontrol seeks to prevent challenge to the lawfulness of the provisions of

the General Conditions of Employment that afford the basis for them. Yet their wording is plain enough: they were not reminders but an order to stop the collective action and therefore they did amount to administrative decisions.

The complainants enlarge on their case on the merits.

E. The Organisation presses in its surrejoinder the pleas in its replies.

CONSIDERATIONS:

1. The Organisation submits that the complaints are irreceivable on the grounds that the individual and open letters sent to the complainants on 25 January 1991 did not constitute acts "adversely affecting" them within the meaning of Article 91(2) of the General Conditions of Employment of staff at its Maastricht Centre. It contends that the individual letters merely drew the complainants' attention to their obligations under the terms of their appointment and that the open one did no more than impart information. It observes that no sanction was imposed on the complainants for their refusal to provide instruction for trainee air traffic controllers at the Centre.

For their part the complainants retort that the letters did adversely affect them, being administrative decisions whose real purpose was to deter exercise of their right to strike by pointing out the need for prior leave.

2. According to Article VII, paragraph 1, of the Tribunal's Statute what the complainant is required to impugn is a "decision". The term appears in Article VII(3) too.

As was held in Judgment 112, a plea to quash may be directed only against a decision, that is, "an act deciding a question in a specific case". And in Judgment 532 (in re Devisme) the

Tribunal construed the term to mean "any action by an officer of the organisation that has a legal effect". In sum, a decision is any act by the defendant organisation that has an effect on an official's rights and obligations.

3. The individual letters of 25 January 1991 read:

"In view of the refusal by a number of staff to provide On-the-Job training, I must remind you that such work has been carried out by air traffic controllers and flight data assistants since the inception of the EUROCONTROL Maastricht Centre. On-the-Job Training is an integral part of the duties which, as stated in the General Conditions of Employment, you shall not cease to exercise without previous authorisation. Such authorisation has not been given."

As for the open letter, it begins:

"The current refusal to do on-the-job training has to be seen as industrial action which will do great harm to Maastricht Centre. Your managers understand your complaints and are trying to secure improvements. Why continue with industrial action when better conditions of service are being offered?"

It goes on to describe such conditions under several headings. It concludes:

"Instead of taking industrial action I urge you to tell your staff representatives to talk to management."

The Tribunal finds nothing in either the individual letters or the open one that it may properly construe as a "decision" within the above definition.

4. In the complaint forms the complainants state under the point that asks them to identify "the challenged decision": "No express

decision". So even on their own admission there is no formal decision. Nor does the Tribunal find that any decision may be inferred from the texts of the letters.

5. Since the complaints do not challenge any decision, be it express or implied, they are irreceivable. There is therefore no need to go into the merits.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, the Right Honourable Sir William Douglas, Deputy Judge and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Mella Carroll
William Douglas
José Maria Ruda
A.B. Gardner