IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

(The Employer)

- and -

CANADIAN AIR TRAFFIC CONTROL

ASSOCIATION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF ALGIRDAS GIRDVAINIS

ARBITRATOR:

Kenneth P. Swan

APPEARANCES:

For the Employer:

Patricia Brethour, Counsel

Steve Cooper, Labour Relations Advisor

Hugh Loraine, Manager, Buttonville

Chris Stevens, Safety & Services Design Specialist

For the Union:

Peter Barnacle, Counsel

Richard Nye, Vice President, Labour Relations

A. Girdvainis, Grievor

A W A R D

A hearing in this matter was held in Toronto on October 18, 19 and December 10, 1999. At the beginning of the hearing, the parties were agreed that the arbitrator had been properly appointed, and that I had jurisdiction to hear and determine the matter at issue between them.

This arbitration concerns the grievance of Mr. Algirdas Girdvainis dated December 10, 1998, to the effect that a ten day suspension imposed upon him for an incident which occurred on September 23, 1998 was, in all of the circumstances, an excessive penalty. While there was initially an objection on behalf of the Employer to the timeliness of the grievance, that issue was not pursued at the hearing. The Union, for its part, does not dispute that the events of September 23, 1998 were properly the subject of some discipline. The only question before me is whether a ten day suspension is excessive.

As to the central issue itself, there is very little dispute about the facts. There are, however, issues about the inferences to be drawn from the facts, and the perspective one should take on what occurred on the material occasion. I begin, therefore, by setting out a brief description of the event.

On September 23, 1998 the grievor was on duty as an Air Traffic Controller in the Tower at Buttonville Airport, to the northeast of Toronto, Ontario. His assignment was as Airport Controller, supervising aircraft taking off or landing at the airport, or moving through the airspace controlled from the Tower; another Air Traffic Controller was assigned as Ground Controller, supervising aircraft and vehicle movements around the airport on the ground.

Despite its small physical size and endearing name, Buttonville is a busy airport. While most of the traffic is light aircraft, on the basis of total annual movements, Buttonville is the ninth or tenth busiest airport in Canada, about as busy as Ottawa airport. Actual air traffic control services are only provided by the Buttonville Tower from 07:00 to 23:00, seven days a week. The Flight Service Station, (FSS) which operates from a separate location, provides services on a 24-hour basis, and when the Tower is closed the FSS provides airport advisory services to assist aircraft to know of other aircraft movements, but does not provide air traffic control.

Buttonville has two intersecting runways, associated taxiways, and a large ramp area for parking aircraft located in front of the terminal building where both the Tower and the FSS are located. Runway 15, which permits take-off in a southeasterly direction, and Runway 21, which permits take-off in a southwesterly direction, were both available for use on the morning in question.

On September 23, 1998, the grievor reported for duty about 06:45, and assumed airport control duties at approximately 07:00. The weather was clear, with some high cloud, excellent visibility and very little wind. Traffic volume was low, and in fact the clearances from which the discipline arose were the first aircraft movements handled by the Tower that morning.

The incident involved two aircraft, C-GFGQ and C-GOYR. Both aircraft are Cessna 172s, four passenger, single engine aircraft. Both were owned by Toronto Airways, and leased by Rogers Broadcasting to provide traffic reporting services for radio stations CFTR and CHFI. The pilot of C-GFGQ, Mr. Russ Holden, has been flying as a pilot and traffic reporter from Buttonville since 1977; the chief pilot, Mr. Darryl Dahmer, who was flying C-GOYR, has been flying as a pilot and traffic reporter from Buttonville since 1968. In a typical week, they take off and land at Buttonville twice or more on at least five days, sometimes more. Each has many thousands of flying hours in a Cessna 172.

The grievor has been a licenced Air Traffic Controller since July 12, 1973, and has spent virtually all of his career at Buttonville. He is himself a pilot with a commercial licence, and has about 100 hours flying experience on a Cessna 172. He and the two pilots have known each other for more than 20 years, and have worked together in the professional relationship of controller and pilot on a regular basis throughout that time. Both pilots testified as Union witnesses under *subpoena*. Mr. Dahmer invoked the protection of section 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

What is undisputed is that, around 07:18 on September 23, 1998, the grievor gave clearance for take-off to Mr. Holden in C-GFGQ, and then gave clearance to Mr. Dahmer in C-GOVR, to take off on runways 15 and 21 respectively, within a period of at most 19 seconds. As will be seen, the Canadian Aviation Regulations, and the Employer's Manual of Operations, require that clearance not be given to an aircraft on an intersecting runway

until any aircraft taking off on the other runway has passed through the point of intersection. It is admitted that in this case Mr. Holden's aircraft had not passed through the point of intersection when Mr. Dahmer's aircraft was given clearance.

The participants have somewhat different memories of how these clearances came to be given. Mr. Dahmer recalled that he and Mr. Holden were joking, over a private radio link between the two aircraft as they were taxing out to position on the intersecting runways, about the possibility of being given simultaneous clearances to take off. Mr. Holden recalled such a conversation, but not in the same detail as Mr. Dahmer. All three participants are clear that there was no prior communication with the grievor before he assumed control of the two aircraft when they were in position to take off. That occurred shortly after 07:17, and the best way to assess what happened objectively is simply to quote from the transcript of the official radio communications between the Tower and the two aircraft. The times given are in Coordinated Universal Time, four hours ahead of local time. The aircraft are identified by their registration numbers; "TWR" is the controller in the Tower, in this case the grievor. The spelling and punctuation are as in the original:

> GFGQ 11:17:16 AND TOWER, GOOD MORNING GOLF FOX GOLF QUEBEC READY FOR FIFTEEN FOR SOUTH.
>
> GOYR 11:17:20 AND TOWER YANKEE ROMEOS READY FOR TAKE OFF ON TWO ONE WITH A STRAIGHT OUT.
>
> TWR 11:17:24 GEEZ, I GUESS IF I TIMED IT RIGHT, YOU GUYS COULD MEET RIGHT AT THE INTERSECTION.
>
> GOYR 11:17:28 UH, YOU COULD TIME IT RIGHT AND WE'ED DO OUR BEST.
>
> TWR 11:17:32 WELL SINCE YOUR OTHER BROTHER CALLING FIRST, FOX GOLF QUEBEC CLEARED TAKE OFF ON RUNWAY ONE FIVE.
>
> GFGQ 11:17:37 GOLF QUEBEC THANKS.
>
> TWR 11:17:39 YANKEE ROMEO TO POSITION TWENTY ONE.
>
> GOYR 11:17:42 COME ON, WHERE'S YOUR SENSE OF ADVENTURE?
>
> TWR 11:17:45 IT'S MY LICENCE I WORRY ABOUT.
>
> GOYR 11:17:46 MORTGAGE NOT PAID UP? COME ON!
>
> TWR 11:17:51 YANKEE ROMEO CLEARED FOR TAKE OFF TWENTY ONE.
>
> GOYR 11:17:54 THANK YOU.
>
> TWR 11:18:08 LIKE GETTING RIDE OF TWO BIRDS WITH ONE STONE HERE.
>
> GFGQ 11:18:13 SO TEMPTING WASN'T IT.
>
> GOYR 11:18:15 YOU SEE HOW EASY THAT WAS.
>
> TWR 11:18:20 NAW, THE OTHER ONE, UM..., WAS A LITTLE BETTER.
>
> 11:18:26 [UNRELATED CALL FROM TORONTO ACC].
>
> GOYR 11:18:31 YOU MEAN WHERE YOU LANDED US ON FIFTEEN AND THIRTY THREE AT THE SAME TIME?

TWR 11:18:33 WELL THAT WAS TWENTY ONE AND ZERO THREE DEPARTURE AND LANDING, YES.

GOYR 11:18:36 PERFECT.

The incident was witnessed by Mr. Chris Stevens, at the time the FSS supervisor at Buttonville. Mr. Stevens was at work in the FSS cab, which is built onto the second floor of the terminal building with windows for 360 degrees. Although at a somewhat lower elevation than the Tower, apart from the first hundred feet or less of Runway 15, which is obscured, the FSS cab has visibility over the entire field. The runways are clearly visible over the aircraft and service vehicles parked in the ramp area. The Tower, situated in the same building, has more complete visibility, and views the material part of the runways from a slightly different angle, but there is nothing in the evidence which would indicate that Mr. Stevens had less than an excellent view of what occurred.

His attention had been attracted by the movement of an aircraft, a Cessna 172 that has been identified as C-GOYR, moving toward the threshold of Runway 21. The aircraft caught his attention because it appeared to be moving more quickly than was normal. As C-GOYR moved onto the end of Runway 21 and stopped, he saw another Cessna 172 on Runway 15 already rolling on its take-off run. When that aircraft was less than half way to the intersection, he saw the aircraft on Runway 21 begin its take-off run.

Mr. Stevens testified that he observed that, at the point the aircraft on Runway 15 passed through the intersection and lifted off, the aircraft on Runway 21 had passed the taxiway, and was only a matter of 100 to 200 feet away from the intersection. He testified that he was alarmed, that he attempted to reach a telephone to call the Tower, but by the time he got there both aircraft had taken off and departed. Alerted to the situation by Mr. Stevens' reaction, another employee had turned on the receiver to monitor the Tower frequency, and those present heard part of the exchange, including the "two birds with one stone" comment. At least five people were present in the cab, including one pilot. Mr. Stevens described the general reaction as relief that the clearances had been orchestrated and that the participants were aware of the situation.

In Mr. Stevens' view, however, this was an unsafe situation, and a violation of the applicable separation standards for aircraft taking off on intersecting runways. Over coffee that morning, he raised the incident with his counterpart in the Tower unit, the operations supervisor, who had been unaware of the situation. Together, they discussed the matter with the site manager, Mr. Hugh Loraine, who decided to investigate.

Mr. Loraine approached the grievor in the Tower and asked for an explanation. After a brief discussion during which the grievor explained that it had been quiet and the pilots had asked for a quick clearance, and that he had complied with the request, the discussion continued in Mr. Loraine's office, with a review of the applicable legislation and a clear indication from Mr. Loraine that the matter was certainly not closed. Mr. Loraine explained that there was a legal requirement to report this violation, and that could lead to investigation by local management, by a Fact Finding Board established by the Employer, by enforcement officers from Transport Canada, and possibly by the Transportation Safety Board.

Thereafter, the grievor returned to work, but later reported that his concerns about the incident were adversely affecting his concentration, and asked to be relieved. A day or so later he returned to work at a time when the aviation medicine physician was on the site, discussed his condition, and received a week of certified sick leave. Thereafter, he was authorized to take another cycle of leave, and did not return to work until late in October.

On October 23, 1998, the grievor attended a meeting with Mr. Loraine accompanied by Mr. Omar Battistella, a fellow Air Traffic Controller and a branch officer for the Union. Mr. Loraine gave the grievor an opportunity to explain, and appears to have said that, in his view, the matter was 90% concluded, but that he would have to check with upper management and there would be the possibility of a suspension. He was asked what length of suspension might be involved, and he replied that it might be one day.

Thereafter, however, Mr. Loraine consulted with Mr. Frank Decarlo, General Manager of Airport Operations, and with labour relations. He also reviewed a final copy of the transcript, which had been delayed because of a problem with the time stamping mechanism on the recorder. I shall discuss in greater detail below the process by which he eventually reached the conclusion that an appropriate penalty would be a ten day suspension. That

suspension was imposed by letter dated November 19, 1998, which he delivered to the grievor by hand. The grievor's recollection is that in the course of that conversation Mr. Loraine said that part of the reason for the length of the suspension was that upper management wanted to standardize discipline across Canada. Mr. Loraine does not recall making such a statement, but he does not seem to deny that he took the views and advice of others into account in assessing the length of the suspension.

> The letter of suspension is as follows:
>
> The investigation into your work performance on September 23, 1998, with respect to willful non-compliance with the ATC Manual of Operations and the Nav Canada Code of Business Conduct has been completed.
>
> You willfully failed to comply with ATC MANOPS 352.5 when you issued a take-off clearance to C-GOYR, departing runway 21 at the Buttonville airport, prior to C-GFGQ, departing runway 15 at the Buttonville airport, having passed the intersection.
>
> You willfully failed to comply with federal legislation and regulations, in this case CARS 801.01(2), when you issued an air traffic control clearance to C-GOYR that was not in accordance with the Canadian Domestic Air Traffic Control Separation Standards.
>
> Your conduct was unprofessional and disrespectful to our customers.
>
> Further, your actions demonstrated a flagrant disregard for air safety and, in particular, ATSI 9702, functional goal number 1.
>
> I have taken into account that you have no history of discipline, have been supportive of system goals and have had, to date, an excellent record as an air traffic controller. I have also considered the role that the pilots of the aircraft involved, C-GOYR and C-GFGQ, played in the event. Lastly, I have considered your statement that you recognize the inappropriate nature of your conduct. Having taken these factors into consideration, you will be suspended without pay for a period of ten days effective January 8, 1998. [*Sic*. This was later corrected to January 8, 1999.]
>
> I expect this discipline will impress upon you how seriously Nav Canada views your actions. I caution you that a future instance of such misconduct may result in termination of your employment with Nav Canada.

There is no dispute between the parties that the take-off clearances issued by the grievor were prohibited, and indeed unlawful. The Canadian Aviation Regulations (CARs), section 801.08, provides:

> No holder of an ATS operation certificate shall provide air traffic services at an operation or location unless the services are provided in accordance with
>
> (a) the ATS Site Manual; and
>
> (b) in the case of air traffic control services, the *Canadian Domestic Air Traffic Control Separation Standards*.

The *Separation Standards* are set out in section 821 of CARs, and the relevant provision is paragraph 2.4, of which subparagraph (a) applied in the present circumstances:

> A departing aircraft shall be separated from an aircraft using an intersecting runway, or non-intersecting runway if flight paths intersect, by ensuring that the departing aircraft does not begin its take-off roll until one of the following conditions exists:
>
> (a) a preceding departing aircraft has:

(i) passed the intersection,

(ii) crossed the departure runway, or

(iii) turned to avoid any conflict.

A materially similar regulation is found in the Employer's Manual of Operations (MANOP) at paragraph 352.5, accompanied by illustrative diagrams. Finally, Buttonville Control Tower Operations Letter 96-69, entitled "Sequential Runway Operations" again repeats the same requirement in materially identical terms. There is no question that the grievor was aware of the substance of all of these requirements on September 23, 1998.

There is no doubt that the Employer makes the safety of its operations a very high priority. It is also true that the Union supports this focus on safety, provided it is enforced within the requirements of the collective agreement.

In the ATS Information Bulletin ATSI-9702, dated October 2, 1997, the scope of this concern for safety is set out in some detail:

INTRODUCTION

NAV CANADA's primary role is to ensure safe and efficient movement of aircraft within Canadian airspace and International airspace for which it has accepted responsibility to provide air traffic services. In consideration of this role, this Bulletin is a reminder to all personnel that the maintenance of a superior level of safety remains NAV CANADA's number one priority.

NAV CANADA'S SAFETY GOALS

NAV CANADA's Safety Charter states in part, that "safety is a part of everyone's job. Safety applies to everything we do without exception". At NAV CANADA the goal is to meet or exceed our own safety targets as well as our customers' expectations. In the provision of air traffic services, three specific areas have been identified as requiring concentrated attention in order to meet this goal. The following Functional Goal #1 was designed to clearly state and stress the importance of NAV CANADA's safety orientation.

Functional Goal # 1

In the provision of air traffic control and flight information service, all Air Traffic Services units shall provide:

A. uniform application of approved standards and procedures;

B. professional communications; and

C. full-time attentive fight monitoring and flight information services.

All other assignments are secondary. Full and active individual support is essential.

FUNCTIONAL GOAL #1 ANALYSIS

A. Uniform Application of Approved Procedures

Over the years, new procedures and techniques have been developed to enhance safety. Changes have included the mandatory use of the phonetic alphabet, procedures concerning the use of altitudes inappropriate for the direction of flight, and clarification as to how vehicle operators shall be instructed to remain off an active runway. Since uniform application of these and similar procedures is essential to ensure safety, the application of these procedures is mandatory.

These procedures have been designed to avert accidents. Operational staff who willfully neglect to use approved procedures may be in an indefensible position if an accident occurs.

B. Professional Communications

In Canada, as in other countries, assurance of reliable communications between parties involved in the provision and use of air traffic services is based on the exclusive use of a standard, published phraseology.

It is not acceptable for operational personnel to use alternatives to published phraseology. Where published phraseology does not exist, operational personnel are expected to use language that is clear and concise.

C. Attentiveness

ATC Fact Finding Boards and Operating Irregularity Investigations have determined that many occurrences are primarily a result of "acts of omission" or "lack of attention" rather than errors in judgment or lack of skills. These situations often arise because an individual's attention is diverted by items having a much lower priority.

Individual professional discipline is required to maintain full-time situational awareness.

NAV CANADA SAFETY EXPECTATIONS

A. For Operational ATS Staff

1. All operational personnel are required to maintain knowledge of, and be competent in the use of approved standards, procedures and techniques, and to routinely utilize these standards, procedures and techniques.

2. All operational personnel shall utilize published phraseology.

3. All operational personnel are required and expected to exercise personal, professional self-discipline to ensure that attention and awareness are focused on those aircraft or vehicles that are being provided control or advisory services. Logical priorities for attentiveness must be honored.

. . .

The disciplinary letter of November 19, 1998, reduced to its simplest terms, alleges two culpable acts. The first, which was in breach of the provisions of both CARs and MANOPS, is characterized as willful non-compliance with those requirements by issuing an improper take-off clearance to C-GOYR. This is also characterized as "a flagrant disregard for air safety". The second alleged offence was unprofessional and disrespectful conduct, a reference to the use of non-standard phraseology in radio communication with the pilots at the time of granting the improper clearance.

The Employer's position is that this was a willful breach of the separation standards, and must be distinguished from cases where those standards are contravened by inadvertence or even negligence, thus justifying a higher penalty both on the concept of individual deterrence, to ensure that the gravity of this offence is brought home to the grievor himself, and general deterrence, to impress upon all operational Air Traffic Controllers the seriousness with which such a breach is viewed. On these principles, the Employer argues that immediate discharge would be a reasonable response, and that imposing a ten-day suspension instead more than adequately recognizes the fact that the grievor is a long service employee with an excellent record as an Air Traffic Controller.

The Union's position is that, while there was an admitted breach of CARs and MANOPS in issuing the clearance in the circumstances, there was absolutely no compromise of safety, and there was never any risk of collision or

accident created by the grievor's actions. It characterizes the issuance of the clearance as a momentary aberration which must be viewed in the light of a long career and excellent performance. It also argues that the heavy penalty imposed in this case is part and parcel of a corporate policy, clearly recognizable from experience although not expressly articulated in writing to the employees or the Union, to increase significantly penalties for safety-related offences.

I turn first to the question of the actual danger involved from the issuance of the improper clearance. The objective facts are readily ascertainable from the transcript. The take-off clearances are given 19 seconds apart, and the acknowledgments from the pilots are 17 seconds apart. There is no obligation on a pilot to take off immediately upon receiving and acknowledging a take-off clearance, nor is there any evidence of an objective nature as to how quickly either pilot responded to the clearances issued in this case. The evidence of Mr. Stevens is that the spacing between the two aircraft had been significantly reduced by the time C-GFGQ passed the intersection; he estimated the location of C-GOYR at that moment to be at taxiway B or beyond.

The grievor, in his testimony, estimated the location of C-GOYR at the time C-GFGQ passed the intersection in relation to the banks of lights for the Visual Approach Slope Indication System. He recalled that C-GOYR was just passing the second bank of lights at the material time, and he located those lights on the map of the airport which was placed in evidence. The distances involved may be easily calculated from that map, which indicates that the distance from taxiway B to the intersection is about 200 feet, while the distance from the second set of VASIS lights is about 500 feet. The Tower is at a higher elevation than the FSS CAB, and the angle is slightly different, but neither of these physical circumstances seems likely to account for the difference. Mr. Stevens and the grievor simply disagree on the distance between the two aircraft when their paths crossed.

As to the pilots, Mr. Holden was, understandably, looking forward as C-CFGQ lifted off, which he recalled took place immediately before the intersection. Mr. Holden had, however, observed the other aircraft at the end of the runway when he was already well advanced on his take-off run, and his opinion was that it would have been impossible for the two aircraft to have come within a dangerous distance of each other.

Mr. Dahmer, who was better placed to see Mr. Holden's aircraft during his own take-off run, recalled that he was "probably" somewhat short of the position identified by the grievor as Mr. Holden passed through the intersection. Mr. Dahmer was scornful of the suggestion that there was any actual danger, asserting that he had the other aircraft in view at all times, and that he would have been able to avoid a collision under any circumstances that could possibly have occurred. It is clear from Mr. Dahmer's testimony that he places his reliance in this regard on his own skill as a pilot as well as that of Mr. Holden, on the reliability and maneuverability of the aircraft, and on the near perfect weather conditions and light traffic. Mr. Holden's testimony is to a similar effect, and the grievor himself testified that he relied significantly, in giving clearance to Mr. Dahmer before Mr. Holden had cleared the intersection, on his long experience with the two pilots and his confidence in their skill.

There is no reason for me to doubt this assessment of their skill, although in the case of the pilots it is a self-assessment, and in the case of the grievor it is an assessment made by someone who has never actually flown with either of the pilots. Neither is there any reason for me to doubt that the Cessna 172, particularly with only one person on board, is an extremely maneuverable aircraft. But that does not end the determination of whether the grievor's conduct endangered the safety of the pilots and the aircraft. There are certain factors which suggest that a hazardous situation was indeed created.

The first factor is the degree of communication between the two pilots. The evidence is that they have a private radio link between the two aircraft on which they can communicate separate from the Tower frequency. Mr. Dahmer says that they knew that they were going to try to induce the grievor to let them take off at or about the same time because they had communicated on the radio. Mr. Holden agreed that some such conversation occurred, but also said that he knew that no such thing would ever take place. No one suggests that they let the grievor in on this proposal prior to the communications from Mr. Dahmer egging him on to grant an early clearance. Moreover, the transcript seems to suggest that it was the grievor who raised the possibility of sending them both off at the same time when he realized that they were both reaching take-off positions simultaneously.

Mr. Holden testified that he did not expect the grievor to give anything but the proper clearances, and his recollection was that there was no discussion over the radio apart from the initial suggestion that it would be an interesting idea. In addition, by the time the grievor actually did give clearance Mr. Holden was committed to his take-off. If Mr. Dahmer commenced his take-off run at about that time, as must have been the case, there would have been no time for any discussion of how they would deal with an unforeseen event.

Second, there is the problem of visibility. The angle between the two runways is a parking area for aircraft and airport service vehicles. On the material occasion, the evidence suggests there would have been 50 or 60 aircraft parked there, as well as fuel trucks. While both pilots insisted that they could see enough of the other aircraft to keep tabs on it, the fact is that Mr. Holden was not looking toward Mr. Dahmer, except for a glance when he heard the clearance being granted, and Mr. Dahmer could only see Mr.Holden's aircraft through gaps in the parked aircraft and vehicles, or by the antennae and the top of the tail fin showing over those obstacles. There is no reason not to believe that Mr. Dahmer could keep tabs on the other aircraft; there is reason to doubt, however, the amount of warning he would have received had there been an unforeseen occurrence.

The evidence suggests that occurrences which could cause an aircraft to abort a take-off run, while rare, nevertheless occur from time to time. A blown tire, an engine malfunction, a bird strike or an unexpected trespass on the runway by a vehicle, animal or person are all at least real possibilities, if not very likely. Had there been such an event, slowing but not stopping Mr. Holden's progress toward the intersection, Mr. Dahmer might well have had to take heroic evasive action to avoid a collision. He may very well have been capable of doing so successfully, as he insisted in his testimony, but aircraft at controlled airports are not supposed to take heroic evasive action. The separation standards are specifically designed to ensure that such action, which may depend upon split second timing and may endanger not only the pilots directly involved but other property and persons as well, need never occur.

The Union next argues that none of the other regulatory authorities which might have been concerned about this event took any action, as might have been expected had any actual danger existed, and asks me to conclude that the Employer's reaction was excessive.

It appears that the Transportation Safety Board did send an investigator who interviewed Mr. Loraine, and listened to the tape of the radio communications. Mr. Loraine was given to believe that there would be no general communication arising from the incident, apparently because of its isolated and unusual nature.

As to the Transport Canada enforcement authorities, any investigation seems to have been pre-empted by Mr. Dahmer, who telephoned someone he knew well there and "set out the circumstances". Mr. Dahmer says that he received the opinion that there had been "no law broken", and at the grievor's request Mr. Dahmer arranged for the grievor to speak to the same person who, the grievor reports, administered a "verbal counselling" to him over the telephone.

The difficulty with this account is that I do not know what version of events Mr. Dahmer recounted. It was clear from his testimony at the hearing that his version of what occurred was significantly different from that of Mr. Stevens. Since both parties to this arbitration agree there was a breach of the separation standards mandated by CARs, the alleged conclusion that there had been "no law broken" suggests that a version of the facts very favourable to the grievor and the pilots was presented. No one from Transport Canada was called to testify in this matter, so I reach no conclusions at all about what occurred. If Mr. Dahmer's account were correct, however, this would be a very unsatisfactory way to enforce federal safety regulations. In my view, no inferences favourable to the grievor can be drawn from the failure of Transport Canada to take any further action.

There was, however, a Nav Canada fact-finding board convened to deal with the matter as "an operating irregularity". That was not a disciplinary procedure, but it is instructive that the board, composed of one management and one bargaining unit member, concluded that a hazardous situation had been created by the grievor's conduct.

For all of these reasons, I have concluded that the Union's assertion that this was a mere technical breach, risking no actual harm, is not supported by the evidence. The risk may have been small, but it was real. And the consequences risked were very serious indeed, including loss of life and damage to property of significant value.

The next issue to be considered is whether, in all of the circumstances, the penalty imposed was too severe. In this regard, it is important to consider the nature of the grievor's offence, and all of the mitigating circumstances. It is also necessary to consider the Union's argument that the grievor has somehow been caught up in a national campaign to increase the sanctions imposed for safety-related infractions.

Frankly, there can be no doubt that the grievor knowingly and deliberately committed a breach of the Separation Standards. It is obvious from the conversation recorded in the transcript that he knew from the beginning that what he was being asked to do was forbidden, and that doing it constituted a danger to his licence as an Air Traffic Controller. It may be that he carefully weighed the risks against the skill of the pilots and the maneuverability of the aircraft in the 19 seconds available to him before breaching the standards, but he nevertheless broke the standards knowing that he was doing so. That mental element was a critical factor in Mr. Loraine's assessment of the penalty, one which he apparently did not fully appreciate until he reviewed the transcript after the meeting of October 23, 1998, when he expressed the view that a lesser penalty might be sufficient.

There is also little doubt that the transcript demonstrates a level of informal communication that goes well beyond the description of "non-standard phraseology" applied to it in the report of the fact-finding board. The grievor suggested that the phraseology he used to issue the actual clearances was entirely in accordance with standard phraseology, and the rest of the discussion was merely light-hearted banter akin to wishing someone a good day. In my view, however, it goes quite beyond offering non-standard but perfectly innocuous courtesies, given that it is occurring on the official Tower frequency among three people engaged in the business of issuing take-off clearances at a controlled air field. A pilot overhearing the conversation, but not in on the joke, could not take much comfort from hearing an Air Traffic Controller suggest that he could arrange for a collision or a near-miss.

Taking all of this together, I am of the view that there were grounds for the imposition not merely of a disciplinary penalty in this case, but of a serious disciplinary penalty. There are considerations here both of specific deterrence and general deterrence, and I shall return to those issues below. Before doing so, however, it is necessary to deal with the Union's argument that the grievor has somehow been caught up in a new policy by the Employer to increase the sanctions imposed for safety-related offences.

The evidence in relation to this purported policy comes from Mr. Richard Nye, Vice- President, Labour Relations for the Union since July 1, 1999, and previously a Union steward. Mr. Nye has national responsibility for grievance and arbitration, as well as for proceedings before the Canadian Industrial Relations Board, with Transport Canada enforcement officers, and at the Civil Aviation Tribunal. He is also in regular contact with senior management of the Employer.

Mr. Nye gave evidence of different kinds. His impressionistic evidence was to the effect that he has observed more cases where suspension and dismissal have been invoked as penalties than was the case when the Air Navigation System was operated by Transport Canada, and that the severity of the penalties imposed has also increased over that time.

He also testified about the evidence given by a manager in an arbitration in Vancouver in August and September of this year, to the effect that there was a new policy in effect based on the role of NAV CANADA as a corporation responsible to its customers and insurers, in contradistinction to the previous role of Transport Canada as an arm of government. Mr. Nye testified that one consequence identified of this change in role was a much sterner view of breaches of the safety-related regulations.

The award in that arbitration is now available, *Re NAV CANADA and The Canadian Air Traffic Control Association, Schroeter and Dooling grievances*, unreported, November 30, 1999 (Chertkow). As it happens, the arbitrator recorded the evidence of the Employer witness, Mr. Rick Johannson, General Manager, IFR at the Vancouver ACC. The arbitrator's version largely confirms Mr. Nye's recollection. At pp. 13-14, the following appears:

> The witness was then questioned as to the quantum of discipline for both grievors - three day suspensions. He said that was a difficult decision. He noted that Controllers had been briefed only two weeks prior to the incident and there needed to be a change in work habits and that they would be held responsible for their actions. He said NAV Canada is a new private organization, not the Ministry of

> Transport that operated the system previously, and he had to send a message or a signal to all Controllers. He felt that a three day suspension would be a minimum given the seriousness of the error. Anything else would not send the proper signal.
>
> In cross-examination, Mr. Johannson agreed that when the system was operated by the Department of Transport a no-fault system was in place and there was no process for an administrative inquiry. He was asked about the meetings with Controllers which he said took place during the first two weeks of July prior to the incident in question. When it was put to him the grievors say they did not attend such meetings, Mr. Russo [*sic*] replied that he was quite sure Mr. Schroeter attended and he noticed for sure Mr. Dooling was there. He also agreed with counsel for the Association that Controllers sign off on rules, procedures and staff memoranda. He agreed there is nothing in writing about the new policy for discipline as instituted by NAV Canada.

Mr. Nye also attributed to Mr. Tor Veltheim, Director, Labour Relations for the Employer, a statement that the Employer expects all employees to obey and grieve later. Mr. Nye took this as evidence that the Employer was "playing hardball" and that it was indicative of a general policy on a national level to tighten up the disciplinary structure.

Mr. Nye identified the inception of this new approach as about July 1998. Since that time, he estimated that there were between 12 and 15 disciplinary grievances working their way through the arbitration process. He also testified that he detected some increase in investigative activity by Transport Canada enforcement officers. In his view, all of this was part and parcel of a significant change introduced by the Employer in the way it would deal with discipline for safety-related breaches, introduced without consultation with the Union.

There is another aspect of Mr. Nye's testimony that causes me some difficulty. In cross-examination, in response to a question whether he could recall any other incident of willfully failing to comply with a separation standard other than the present case, Mr. Nye gave two examples from his own experience as an Air Traffic Controller. The essence of his testimony was that these breaches, which occurred in 1996 and 1998, came to the attention of management but did not lead to any discipline more serious than counselling.

I do not propose to repeat the details of these cases; they involve individuals who were not parties to the present arbitration, and who have had no opportunity to comment on the allegations. I observe that this was not part of the Union's case-in-chief, and I have come to the conclusion that I am simply unable to make any use of this evidence. Without knowing the circumstances, the degree of knowledge of management, the explanations of the employees involved, and all of the other surrounding circumstances, it is simply impossible to judge whether such anecdotal evidence can have any value in respect of the matter before me.

Returning to the central issue, the Union's complaint that a new disciplinary policy has been introduced without consultation, it is not clear how this can stand as an independent ground for reviewing the penalty imposed on the grievor. I was not referred to any provision of the collective agreement which would require the Employer to take specific steps in relation to consultation before adopting, as a matter of management policy, a more coherent, or even more rigorous, disciplinary policy. Article 21 of the expired collective agreement (which was in effect at all material times) provides for consultation, but not in terms which would specifically require such consultation on this subject.

Appendix "B" to the *Memorandum of Understanding to Apply during Transition Period*, dated December 13, 1996, deals with the grievance and arbitration procedure, and provides some quite specific content for the concept of just cause in paragraph 2, which is as follows:

> **Just Cause**
>
> No employee shall be disciplined or discharged except for just cause. However, the discharge of a probationary employee for non-disciplinary reasons may be carried out at the discretion of the Employer at any time during the probationary period. The Employer's discretion must be exercised in good faith, without discrimination and in a non-arbitrary fashion.

Faced with a new corporate structure, a new regulatory regime, and a requirement to exercise discipline in accordance with stringent requirements, it is not surprising that the Employer would have taken steps to develop a coherent disciplinary policy both to emphasize the distinction between the former public service regime and the current corporate regime, and to respond to the new challenges of public liability, insurers, and the conversion into regulations of separation standards which had hitherto been essentially internal government documents.

It may be that such a policy, to the extent that it has been articulated, might be the subject of a policy grievance by the Union. In the case before me, however, the only way in which it can be tested is by the justice of the penalty imposed on the grievor, in the circumstances of the present case and having regard to all of the mitigating factors applicable.

I observe that, in the *Schroeter and Dooling* case referred above, arbitrator Chertkow dealt with this matter directly. He was presented with stipulated facts indicating that some discussions had been initiated between the parties, and that the Employer established a "Human Factors Committee" in which Union participation had been solicited. In the context, it seems that the discussions included the question of discipline for Air Traffic Controllers in relation to "operational irregularities". After describing the evidence before him, including the stipulated facts, arbitrator Chertkow, at page 29, came to the following conclusion:

> However, nothing from those stipulated facts establishes that the employer has agreed, in case of operational irregularities, to resile from its right to discipline Controllers for acts of carelessness or negligence.
>
> So too, the evidence of what the Department of Transport might or might not have done in the past in that regard is not binding upon NAV Canada. It is a new private sector employer operating the air traffic control system in Canada.

I therefore turn to a review of the arbitral jurisprudence relied on by the parties. The Employer identified two arbitration awards involving deliberate conduct, as distinct from merely negligent or inadvertent conduct, as the subject of discipline. The first of these is *Whittley and Treasury Board (Transport Canada)* [1987], C.P.S.S.R.B. No. 31; (1987) 11 PSSRB Decisions 40(Digest); PSSRB No. 166-2-16119, February 10, 1987 (Young). In that case, the grievor had left the Tower unattended at a time of significant traffic activity, stretching a purported washroom break to perform some personal errands in relation to his imminent departure on vacation. Later, he had left two hours before the end of his shift, leaving the Tower in the control of an Air Traffic Controller working an overlapping shift to whom he handed over control outside the Tower, when they passed as the incoming Controller reported for duty and the grievor absented himself. The adjudicator found that the grievor had been deliberately in breach of the provisions of MANOPS provisions requiring that the Controller only leave his post when properly relieved, except for washroom breaks which were to be carried under stringent conditions. The adjudicator upheld the penalty of discharge imposed by the Employer.

The other case is *Green and Treasury Board (Transport Canada)*, PSSRB No. 166-2-26720, June 14, 1996 (Simpson) and April 6, 1998 (Chodos). There were intervening judicial review proceedings as well, but the full details of this rather complex transaction do not need to be set out here.

The grievor absented himself for some 35 minutes from the Tower, during which time he "went to the washroom, attended to other matters of personal hygiene, and had lunch in the airport restaurant". The effect was to leave the Tower unattended for that time, during which a number of aircraft movements occurred in circumstances of potential danger. Adjudicator Simpson found that the grievor's deliberate conduct breached the bond of trust between him and the Employer, and upheld the penalty of discharge imposed. Adjudicator Chodos, to whom the issue of penalty was remitted following judicial review proceedings, substituted a suspension of three months as a disciplinary penalty, and reinstated the grievor in employment.

In the Employer's submission, these two cases indicate that the presumptive penalty for a deliberate breach of regulations or operational standards is discharge, whether that might be subject to mitigation in particular circumstances or not. This conclusion is reinforced by a decision of an arbitrator between the present parties, *Re NAV CANADA and Canadian Air Traffic Control Association, Grievance 97-002, Gary Crompton*, March 8, 1999 (Rousseau).

In that case, the grievor was found to have reported to work while under the influence of alcohol. Despite orders from the two supervisors on duty at the time, the grievor then undertook air traffic control duties. Again, this is in deliberate breach of prohibitions set out in MANOPS, and resulted in the discharge of the grievor. The arbitrator, given the seriousness of the conduct and a pre-existing disciplinary record, concluded that the discharge should be upheld.

I was referred to four other arbitration awards between the present parties, all of which deal with inadvertent or negligent conduct as opposed to deliberate conduct. In *Re NAV CANADA and Canadian Air Traffic Control Association, Senyck Grievance*, May 12, 1999 (R.M. Brown), a five day suspension was imposed on the grievor for negligence and inattention to duty. The grievor made an number of personal telephone calls while on duty, and committed a number of errors in carrying out his duties in the course of these distractions. Both the Employer and arbitrator Brown seemed to have treated this as a breach of the rules about personal telephone calls with the result of "inappropriate vehicle clearance instructions". While the rules about personal telephone calls were clearly established, they were established by memos promulgated by Transport Canada and later by NAV CANADA, rather than constituting either MANOPS provisions or CARs requirements. The arbitrator concluded that "deliberately and repeatedly disregarding instructions concerning his primary obligation of ensuring the safety of others" merited a penalty more serious than a warning or a one day suspension, but found sufficient mitigating factors to reduce the penalty to three days.

In *Re NAV CANADA and Canadian Air Traffic Control Association, Kelly Grievance*, August 10, 1999 (Thistle), the arbitrator upheld the termination of the grievor's employment as an Air Traffic Controller following a serious loss of separation requiring two aircraft to take evasive action to avoid collision. This error, apparently caused by negligence and inattention, was the culmination of a number of errors of a similar nature over the last two years. Because of the grievor's lengthy seniority, however, and his previous satisfactory service, the arbitrator awarded that he should be reinstated, with some compensation, in a position "as a TSS or such other position that might be mutually agreeable to the parties". The arbitrator determined, on a review of the evidence before him, that where negligent inadvertence rose to the level of apparent incompetence to continue performing air traffic control duties, the Employer had a practice of attempting to place employees with significant seniority in alternative employment, and the arbitrator concluded that this was an appropriate case to take such an action.

Finally, arbitrator Chertkow issued two awards on November 30, 1999, the*Schroeter and Dooling* award referred to above, and *Re NAV CANADA and Canadian Air Traffic Control Association, Spencer Grievance*, November 30, 1999 (Chertkow). In the *Schroeter and Dooling* case, two Air Traffic Controllers were suspended for three days for permitting a commercial aircraft to venture into restricted military airspace at a time when that military airspace was active. The arbitrator reduced those penalties to written warnings, after a review of the circumstances, as well as the factors already discussed above in this award. The arbitrator found that there were "significant mitigating factors which contributed, in my view, to the errors committed by the grievors". On page 33, he observes:

> The impact of all of the circumstances, both avoidable and unavoidable, contributed to the operational irregularity. Messrs. Schroeter and Dooling were the last link in the chain of events which contributed to the extent that the incident would not have occurred, in my judgment, had any one or more of them not been present.

In the *Spencer* grievance, a hazardous situation arose requiring urgent air traffic control corrective action to re-establish appropriate separation. The grievor failed to pass appropriate information to another Air Traffic Controller, which the arbitrator found to be serious negligence in the performance of his duties. On the basis of the same principles established in the *Schroeter and Dooling* award, the arbitrator concluded, at page 18:

> First, I have concluded, given the serious nature of the grievor's negligence, that the employer was entitled to bypass the principles of progressive discipline. This is in contrast to my decision in *Schroeter and Dooling* where no hazardous situation occurred. Further, I cannot find in this case any mitigating factors, again in contrast to *Schroeter and Dooling*, which would persuade me that a three day penalty was excessive and ought to be reduced. None of the many contributing factors which are set out in detail in *Schroeter and Dooling* are present in this case.

In its attempt to establish that there has been a significant increase in the quantum of penalties pursuant to the new policy discussed above, the Union referred me to a number of decisions of the Public Service Staff Relations Board between individual Air Traffic Controllers, represented by the Union, and Transport Canada, the predecessor employer to NAV CANADA. I have reviewed these cases in some detail. With respect, I do not think that they stand for the proposition advanced. All but one of the cases involve inadvertent or negligent conduct producing operational irregularities, with varying degrees of danger to public safety. Each of them turns on its own facts, as some of my fellow arbitrators have also observed, and they cannot really be used to establish any general trend except that inadvertent or negligent conduct resulting in a breach of the safety rules can, in an appropriate case, lead to a suspension even of an employee with a clear disciplinary record and significant seniority.

Only one of the cases deals with conduct which appears to be more advertent than negligent, *Fortin and Treasury Board (Transport Canada),* PSSRB No. 166-2-17772, August 29, 1989 (T.W. Brown). In that case, a Flight Service Specialist, who found himself unexpectedly working alone, decided to issue a notice to airmen (Notam) closing a piece of airspace to flight services. It is clear that this closure was unlawful, and terminated services which were important for flight safety in that area.

The adjudicator reduced the ten day suspension imposed by management to five days on the following basis, set out at page 7:

> The grievor has a clean disciplinary record and his actions on January 15, 1988 represent an aberration in his conduct. He is recognized by management for his ability, knowledge and good work habits. He is a leader by nature and has strong opinions. He over and improperly reacted to management's decision regarding the replacing of absent employees through the use of overtime. His reaction could have had serious consequences which, fortunately, did not occur in the instant case. He is remorseful, however, and recognizes that his actions were wrong and cannot re-occur.

I confess that I find this award somewhat difficult to follow. Not only is there a finding that the grievor issued a Notam "unlawfully", there is also a finding that he did so a second time in the face of an order to cancel the Notam. Obviously, it is difficult to know what factors were before the arbitrator, and second-guessing what amounts to a discretionary remedy based on findings of fact which may or may not have been set out extensively in the reasons is always a difficult exercise. On the face of it, however, my impression is that this award deals only with the issue of specific deterrence of the grievor himself, and not with the broader question of general deterrence.

On the subject of general deterrence, arbitrator Richard Brown in the *Senyck*award specifically recognizes the Employer's interest in sending a message to all other employees about the seriousness with which it regards certain kinds of conduct. At page 23, he concludes:

> As well as correcting the grievor's behaviour, the employer has a legitimate interest in deterring others from engaging in similar misconduct. More than a one day suspension is warranted to provide general deterrence. Bearing in mind the need for such a deterrent, the grievor's seniority and the fact that he had not been disciplined in the preceding two years, I conclude the appropriate penalty is a suspension of three days.

The *Senyck* case is important because it is based on a finding by the arbitrator that the grievor "deliberately and repeatedly disregarded instructions concerning his primary obligation of ensuring the safety of others". It must be distinguished from the present case, however, in one important regard. The rules being broken by Mr. Senyck were administrative rules about the use of telephones; the resulting safety-related errors were themselves inadvertent. In the case before me, the grievor was deliberately in breach of a rule expressly relating to safety, and he breached that rule within seconds of recognizing that his licence as an Air Traffic Controller might be in jeopardy for doing so.

There is also the question whether the lack of adverse consequences, or in the Union's submission which I found not supported by the evidence, the lack of any real danger, means that the full penalty ought not to be applied. There is a theme throughout the arbitral jurisprudence that the consequences of unsafe conduct, while they sometimes loom very large, ought not to be a part of the calculation of the appropriate penalty. In *Re British*

Columbia Ferry Corporation and B.C. Ferry and Marine Workers Union (1993), 37 L.A.C. (4th) 332 (Korbin), the arbitrator considered the appropriate mitigating factors despite the fact that the careless conduct of the grievors had resulted in the deaths of three people. In *Re Oshawa General Hospital and Ontario Nurses' Association* (1976), 12 L.A.C. (2d) 182 (O'Shea), the arbitrator applied the usual principles to an error in identifying blood for transfusion by a Registered Nurse, disregarding the fact that, by good fortune, the error had produced no direct serious consequences. This theme is also found in a series of Canadian Railway Office of Arbitration cases submitted by the Employer. For example, in CROA Case No. 1941, September 1, 1989 (M.G. Picher), the arbitrator considers this questions as follows:

> In approaching that issue the Arbitrator is mindful of the following comment found in CROA 690:
>
> > The extent of the damage is not in itself an element to be considered in assessing the grievor's conduct - just as, in Case No. 494, the fact that a fatality occurred was not such a factor. Rather, it is a question of the employees' compliance or otherwise with the rules and general seriousness, or degree of risk, of their conduct.

On the face of it, arbitrator Chertkow's awards in the *Schroeter and Dooling* award and in the *Spencer* award might appear to depart from this general trend. In *Schroeter and Dooling*, he observes that there was no risk of collision and therefore no potential for a serious incident which would have placed aircraft or persons in jeopardy. Similarly, he contrasts the situation in the *Spencer* case with that in *Schroeter and Dooling* "where no hazardous situation occurred". Upon reading all of these two awards, I have concluded that the arbitrator has not, in fact, departed from the principle that the actual consequences of a particular action ought not to increase or decrease the appropriate penalty. Rather, he has made an assessment of the risk created by those actions, and concluded that in one case there was no hazardous situation, while in the other case there was.

Applying all of these principles to the facts before me is not easy. The most significant feature of the grievor's conduct, in my view, is that the transcript clearly indicates that he took an action which he knew to be both forbidden and unlawful, and that he did so fully aware that taking that action could jeopardize both his employment and his licence as an Air Traffic Controller. It is that element of deliberation which struck Mr. Loraine so forcefully when he reviewed the transcript, and it is an irresistible conclusion that this case is very different from all of the cases involving inadvertence or negligence, even where that inadvertence rises to the level of carelessness. In the *Kelly* award, arbitrator Thistle notes the distinction between inadvertence and recklessness, and held that the conduct there involved was on the borderline between those two kinds of conduct. He then mitigated the penalty imposed, but in the process still left that grievor with a penalty far more serious than the one imposed in the case before me.

But in the present case, the conduct goes beyond even recklessness, to a deliberate creation of a hazardous situation for, apparently, the amusement of the participants. Cases of deliberate disregard of safety obligations have, as in the *Whittley, Green and Crompton* awards, normally led to the imposition of discharge. While in the *Green* case the arbitrator considered a number of mitigating factors, and reduced the penalty of discharge to a lesser penalty, the penalty remaining was still far more severe than that which has been imposed by the Employer in the present case.

I am, in my view, entitled to consider both the importance of the rule breached, and the state of mind of the grievor when he was breaching it. I am also entitled to consider factors of specific deterrence and general deterrence. On the question of general deterrence, the Employer wishes to send a very clear message to all Air Traffic Controllers that deliberate breaches of the safety rules, particularly the separation standards which are prescribed by regulation, will not be tolerated, even when they arise in the interests of "fun". I find myself unable to disagree with the Employer's motives in this regard. The separation standards are clearly and firmly established both as publicly- known standards which pilots and the general public can expect will be adhered to, and as standards having the force of law. Everyone involved in civil air navigation, and indeed everyone who happens at any particular time to be in the area of an airport, even if they are unaware of the particulars of the rules, has a right to expect that the rules will be obeyed and enforced under all circumstances. Obedience to and enforcement of the separation standards is the very essence of the Air Traffic Control function; deliberate departure from those standards for any reason goes to the very heart of the employment relationship.

As to the question of specific deterrence, I think it is extremely unlikely that the grievor would ever engage in such a breach again. The extent of his own dismay at what occurred, and his consequent absence from work, is a strong indication that he would not act in such a way in the future.

On the other hand, there are some disconcerting features of his evidence. There is the reference in the transcript to another event "where you landed us [on intersecting runways] at the same time". While the grievor testified in cross-examination that the event referred to did not constitute a breach of the separation standards, the obvious inference from what was said in the radio communications is that some form of horseplay occurred on at least one other occasion.

The grievor also testified, in giving reasons for his trust in the flying ability of Mr. Dahmer, to a third event where he proposed a manoeuver to Mr. Dahmer which Mr. Dahmer then carried out successfully. This incident was never put to Mr. Dahmer, who testified before the grievor, and I do not intend to comment on it in any further detail. It is enough to point out that the grievor's own attempt at exculpatory testimony indicated yet another occasion when he was prepared to engage in questionable interactions with a pilot in the spirit of horseplay. All of this suggests that reinforcing the message to the grievor himself is an appropriate purpose for the imposition of a serious penalty.

In all of the circumstances of this case, I have concluded that the grievor deliberately engaged in a breach of the separation standards prescribed by regulation, that he did so knowing that it was a breach and that he was putting himself in jeopardy of both employment and professional consequences, and that a hazardous situation was thereby created. While there are significant mitigating features in this case, including the grievor's own remorse and his long and satisfactory service as an Air Traffic Controller, I am of the view that those mitigating factors have already adequately discounted the penalty imposed. In the result, therefore, the grievance must be denied.

DATED AT TORONTO this 26th day of January, 2000.

Kenneth P. Swan, Arbitrator