

IN THE MATTER OF AN ARBITRATION  
OF GRIEVANCES OF JAN. 23 & APRIL 26, 2001  
CONCERNING **ATSAC USE OF RADAR**

BETWEEN:

**NAV CANADA**

Corporation,

- and -

**CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,**

Union

- and -

**AIR TRAFFIC SPECIALIST ASSOCIATION OF**

**CANADA,**

Intervenor

**A W A R D**

For the Employer: Mary J. Gleason., Counsel

For the Union: Sean McGee, Counsel

For the Intervenor: J.P. Duclos, Bargaining Unit Chair

Before: Ken Norman

Heard in Ottawa, June 21 & 22; November 1 & 2, 2001

Although the initial grievance of January 23, 2001 flagged three issues including "technological change" and "failure to consult", these grievances were jointly argued before me by the Canadian Air Traffic Control

Association [CATCA] on the sole question of "work of the bargaining unit". The relevant article of the CATCA collective agreement with NAV CANADA is 5:01 (a). It provides:

Functions that are presently only performed by members of the Air Traffic Control group will not be assigned to members of other bargaining units.

The triggering event that, for CATCA shows a violation of this article, was the installation of a NAV CANADA Auxiliary Radar Display System [NARDS] for use by flight service specialists in Victoria Harbour FSS. Notice to commercial operators was first provided by NAV CANADA in a letter of July 27, 2000. This letter advised that:

Effective August 5, 2000, the Victoria Harbour FSS will commence conducting an operational trial using radar as an aid in the provision of airport advisory service to aircraft operating within Victoria Harbour's control zone.

The substance of this initial letter was incorporated into a formal Aviation Notice published on January 25, 2001 by NAV CANADA advising pilots that:

NAV CANADA has installed a radar display system at the Victoria Harbour FSS as an aid in the provision of airport advisory service to aircraft operating within Victoria Harbour's control zone. Radar will improve the situational awareness of the flight service specialist in an advisory service environment and will enhance the accuracy of aircraft traffic information, require fewer requests for position reports and reduce frequency congestion.

The Aviation Notice further advises pilots that the airspace in question remains in the same visual flight rules [VFR] class [Class E]; mandatory frequency procedures remain the same; the advisory service remains the same; and that the flight service specialist will not provide a control service, such as vectors or conflict resolution. Finally, pilots are advised that the use of radar will not change any of their existing procedures. However, the Notice states that:

The flight service specialist may provide information on observed radar targets. When radar traffic information is issued to radar-identified aircraft, the position of the traffic will be given with reference to the "o'clock position".

The flight service specialist may also issue traffic information on aircraft that are not radar-identified by using references to geographical locations.

If necessary, the flight service specialist may ask a transponder-equipped aircraft to "squawk ident". The specialist will acknowledge the squawk followed by the phrase "This is an advisory service only". The phrase is included in the acknowledgment to remind pilots that it is not a radar control service and that pilots remain responsible for collision avoidance and terrain (obstacle) clearance.

The Aviation Notice concludes with this request of pilots.

**As this is the initial implementation of the use of radar at an FSS, NAV CANADA is seeking feedback from pilots who operate in the Victoria Harbour area. We encourage you to provide us with your comments related to the use of radar as a tool in the provision of airport advisory service, especially with respect to the accuracy and timeliness of traffic information and any noticeable reduction in frequency congestion.**

[Emphasis added]

As framed by Sean McGee for CATCA, the threat to "the work" of the CATCA bargaining unit that is revealed by the above-emphasized words and by the corresponding testimony of Kathy Fox, Vice-president, Air Traffic

Services, amounts to the prospect of "death by a thousand cuts". It would appear that the installation of NARDS, in various locations for use by flight service specialists, is in the cards. In short, the argument is that this amounts to assigning to members of the ATSAC bargaining unit the function of utilizing a civilian radar signal, *i.e.*, "the work" of the CATCA bargaining unit, in violation of article 5.01 (a).

This argument speaks of utilizing a civilian radar signal in order to deal with the use of radar by flight service specialists on Arctic Radio, which is located in the DND Sector Air Operations Centre in North Bay [the ROCC]. Richard Nye, Vice-president Labour Relations, testified that CATCA did not regard this as any sort of adverse precedent because Arctic Radio operated under DND authority utilizing a military signal and a military HUGHES HMD-22 radar display system. David Lewis, sometime VP Labour Relations and sometime President, gave evidence that he was aware that Arctic Radio provided radar position information to pilots from around the time of the closure of the North Bay Tower. Mr. McGee submitted that his testimony made the same point about flight service specialists working on Arctic Radio solely under military authority. [However, the submissions of Mr. Duclos; those of Ms. Gleason; my own notes; and my recollection of the testimony of Mr. Lewis do not bear out this fine point.] When asked by J. P. Duclos of ATSAC if CATCA had decided not to challenge the use of radar by flight service specialists on Arctic Radio, Mr. Lewis responded that he didn't recall it becoming an issue at that time. In any case, Mr. McGee submitted that there is nothing in the story of flight service specialists utilizing the military HUGHES HMD-22 radar display system on Arctic Radio at the ROCC for these past 12 years which prevents CATCA from asserting its 5.01 (a) rights with regard to the installation of the NARDS system in Victoria Harbour FSS.

With regard to how NARDS is employed in Victoria Harbour FSS, Mr. McGee submitted that three out of five categories of what ATC MANOPS defines as "radar service" is being provided. That is, from the lengthy evidence which has been called, it is clear that Victoria FSS is providing a "Radar Advisory"; "Radar Monitoring"; and "Radar Navigational Assistance" (except for vectors). Two of the definition's categories, "Radar Control Service" and "Radar Separation" are not provided by Victoria FSS. The provision of "radar service" is "the work" of the CATCA bargaining unit. That, on paper, should be the end of the matter. Another part of the paper trail supporting CATCA's grievance is the apparent "cut and paste" job in putting together the draft Victoria Harbour FSS Advisory Radar Plan. Bits of this text come straight out of the Victoria Tower Radar Plan. In other words, what was for ATC eyes only in Victoria Tower becomes for flight service specialists eyes as well in Victoria Harbour.

In addition, in practice, when Victoria Harbour FSS calls for a "SQUAWK IDENT", a "control" function is being exercised. A pilot understands this as a direction. He or she is to push the transponder button a.s.a.p. so as to enable the radar display to "tag" the aircraft. Further, when a flight service specialist notices a "tag swap" on the NARDS display caused by two converging aircraft, that person is trained to sort out the situation. This is what ATC's do when their radar screens display such a glitch. When a flight service specialist provides pilots with "radar observed traffic information" in Victoria Harbour air space "the work" of CATCA is again usurped.

J.P. Duclos began his argument for ATSAC with the wording of 5.01 (a). For CATCA to succeed it would have to show that "advisory services" were "presently only performed" by CATCA. Well, they are not. They are shared by CATCA and ATSAC. Flight service specialists provide en route, airport and remote airport advisory services. That is their *raison d'être*. As for Victoria Harbour FSS, in terms of what service is being provided to a pilot, NARDS changes nothing. A VFR pilot enters Victoria Harbour FSS airspace, now as before, by calling in on a MF belonging to the FSS. What the pilot then receives is an advisory service. This was never provided by ATC's. ATC MANOPS defines VFR Control Service as including "radar service" as a control service provided by ATC units to VFR aircraft operating in Class B, C and D airspace and aircraft in a Tower Radar Area. Victoria Harbour FSS is Class E airspace. Thus, by definition, there is no "radar service" being provided from there to pilots. NARDS is a piece of equipment made available to a flight service specialist in providing an advisory service. Over time, thanks to technology, several such pieces of equipment, such as weather radar and VHF/DF, have come to be so used. Finally, it is well known that flight service specialists operating Arctic Radio have been utilizing radar in providing a civilian aviation advisory service for the past 12 years. In sum, the introduction of NARDS does not show any delegation of ATC work to the Victoria Harbour FSS.

Mary Gleason began her argument for NAV CANADA with the submission that no case has been made out by CATCA establishing that a "function ... presently only performed by members of the Air Traffic Control group" has been "assigned to members of [a]nother bargaining unit". CATCA members exclusively provide "control" services to pilots. CATCA members share the provision of advisory and information services. Victoria Harbour FSS has always been Class E airspace which provides only advisory services. The use of radar is not owned by ATC's. As Kathy Fox pointed out in her evidence, not all ATC's use radar. Not every airport has radar coverage. As well, vast reaches of airspace in the high north are not covered by radar. ATC's perform their function of controlling aircraft to maintain separation by other means. Radar is a tool, not a function.

With regard to Mr. McGee's "cut and paste" argument, Ms. Fox testified that the Victoria Harbour FSS Advisory Radar Plan was only a draft and that these "typos" would not appear in the final document. What matters is that the Plan makes it plain that what is being offered to pilots is an advisory service only. Finally, Ms. Gleason endorsed Mr. Duclos' argument concerning the ATC MANOPS definitions. As she put it, CATCA can't be allowed to "cherry pick" a few items from the definition of "radar service" so as to piece together an article 5.01 (a) case. "Radar Service" is all five categories. And, as such, it is not being provided to VFR pilots in Victoria Harbour FSS. These pilots fly into this airspace knowing that avoidance of accidents is their responsibility. They are not under air traffic control. NARDS changes nothing in this regard. These points alone put an end to CATCA's grievances.

Alternatively, even if I were to consider radar to be a function, CATCA has not met article 5.01 (a)'s burden of proving that radar was "presently and only" theirs. There are two arguments here. First, flight service specialists have been utilizing radar in operating Arctic Radio to provide a civilian aircraft information and advisory service for some years. That the radar display in question is DND equipment is beside this point. With regard to Richard Nye's opinion about military authority, Ms. Gleason reminded me that Arctic Radio utilizes both military and civilian radar feeds. But, this too is really neither here nor there. Quite apart from what, if anything, CATCA knew and when, if at all, it knew it concerning Arctic Radio's services via the admission of David Lewis, they have been published to *civilian* pilots well before the advent of this collective bargaining agreement. It is not a matter of CATCA's knowledge, it is a matter of fact finding for me to determine, under article 5.01 (a) whether certain functions "are presently only performed by members of the Air Traffic Control group". As an exhibit in these proceedings; as an incontrovertible fact, there is a Transport Canada Aeronautical Information Publication stating, at 1.1.5, that Arctic Radio provides services similar to those offered by FSS through Remote Communication Outlets [RCO's]. In point (c) civilian pilots are told that Arctic Radio offers "radar position information (latitude and longitude, bearing and distance, altitude and ground speed)". In addition, flight service specialists on Arctic Radio may call for a "SQUAWK IDENT". Second, the use of NARDS in Victoria Harbour FSS to verify information if a function at all, is certainly not an exclusive function of CATCA. It is a shared function. It is no different that a flight service specialist using the functioning of a DHF/DF to verify information from a pilot.

However, this alternative argument was presented to me by Ms. Gleason as very much a last option. For, starting with dictionary definitions, of which I was given four, she argued that it makes no sense to think of "function" in other than an active sense. A piece of equipment, however sophisticated, is a means, not a function. Ms. Gleason offered me the example of a computer system used both by herself and by her secretary. Ms. Gleason uses the system in her function as a lawyer. Her secretary uses the system in order to produce hard copies of legal documents drafted by Ms. Gleason. CATCA's function argument concerning the use of NARDS by flight service specialists in Victoria Harbour FSS as amounting to usurpation of the function of NARDS utilization by ATC's in Victoria Tower and of ATC's sitting in front of other radar systems elsewhere only stands up if one can accept the proposition that a lawyer and her secretary, by using the same computer system, share a function. They do not. They share a technology; a means. No more. Their functions have to do with their skill sets and qualifications. Existing arbitral opinion concerning air traffic control bears out this crucial point of distinction. As do a number of arbitration awards from the general case law.

Mr. McGee replied with his own computer hypothetical. He submitted that, flight service specialist utilization of NARDS in Victoria Harbour FSS stands in relation to the radar work of CATCA members as might use by his secretary of the office computer system to research a case on Quicklaw stand with regard to his work as a lawyer.

NARDS is not being used by a flight service specialist to do something completely different from an ATC's use of radar. Therefore, Ms. Gleason's hypothetical is not apt.

Before dealing with the meaning of article 5.01 (a), I will summarize the facts which I find to be relevant. The introduction of NARDS equipment in Victoria Harbour FSS, from the trial period beginning August 5, 2000, changed nothing in terms of the type of service being provided to VFR pilots in this Class E airspace. For such pilots in such airspace I take Mr. Duclos' point that ATC MANOPS makes it clear in its definition of VFR Control Service that no "radar service" is provided. What did change is that, with NARDS, flight service specialists had at hand a sophisticated means of enhancing their situational awareness. The call for a "SQUAWK IDENT" is part of achieving this awareness. Out of abundant caution the Aviation Notice makes it plain to pilots that they are not receiving a control service. The VFR pilot should know thus already since the airspace is Class E. However, for good measure, when the specialist acknowledges the squawk the pilot will hear the phrase "This is an advisory service only". Further evidence in this same vein is provided by the draft Victoria Harbour FSS Radar Plan which notes in its procedures that SSR Code Assignment will not be provided by Victoria Harbour FSS. If warranted, it will be provided through coordination with Victoria Terminal and Victoria Control Tower. The procedures go on to state that flight service specialists "shall not assign altitudes to aircraft " and will "not utilize RADAR to provide emergency services to lost or disoriented aircraft. Such aircraft shall be assisted by Victoria Terminal Control."

As I have found to be the case with the "SQUAWK IDENT", so it is with specialists having the "know how" to sort out a "tag swap" when the display falls prey to this glitch. It is all part of achieving enhanced situational awareness. With regard to a large slice of airspace to the south of the FSS cab, that is not visible due to buildings and land forms, enhanced situational awareness is an understatement. In effect, NARDS gives flight service specialists in this location eyes in the back of their heads.

With these findings in mind, I turn to article 5.01 (a)'s requirements. Bargaining unit work is expressed in terms of "functions". I am persuaded by dictionary definitions and by arbitral authorities that this word is about activities, not about means. For the purposes of this arbitration, leaving the use of radar to one side for now, all agree that a flight service specialist has no right to issue clearances or instructions to pilots in order to ensure proper separations in the air and proper windows on runways for take offs and landings. These activities are the exclusive domain of CATCA members. I need not concern myself here with what appears to be a less distinct line between ATC's and flight service specialist activities with regard to vehicles on the ground at airports.

The most similar case to this is *CATCA and Treasury Board (Transport Canada) [Fredericton FSS]*, PSSRB File No. 169-2-591, [1997] C.P.S.S.R.B. No. 36. This was an arbitration by P. Chodos, Deputy Chairperson concerning whether the precursor to article 5.01 (a) [Letter of Understanding (4-91)] was violated by a change in procedure involving a new piece of equipment concerning IFR take off clearances at an uncontrolled airport. Instead of the flight service specialist in Fredericton placing a telephone call to the area controller in Moncton for an IFR take off clearance and then reading it verbatim back to the pilot, as of May 1, 1996, the specialist simply took the "ATC CLEARS" from a printout strip of an electronic message from the area controller via operational support staff at Moncton. Arbitrator Chodos was not persuaded by CATCA's argument that this change amounted to the assignment of an ATC function to a flight service specialist. At para 21, he states:

The communication of information directly from a printed strip, as opposed to reading off the same information by an Air Traffic Controller to the Flight Service Specialist, does not constitute a delegation of clearance responsibilities to the FSS; that responsibility continues to reside with MACC under the agreement and pursuant to the current practice. In my view, management's characterization of the May 1, 1996 changes as a "streamlining" is essentially accurate.

Another unsuccessful effort by CATCA to protect the work of its bargaining unit is *CATCA and Treasury Board (Ministry of Transport) [Sept-Iles Tower]*, PSSRB File No. 169-2-397, (1984) PSSRB Decisions 5 (Digest) (Brown, Chairperson) This case was not about the placement of any new equipment into the hands of

flight service specialists. Rather, it involved their activities in providing "positive advisory" instead of simply "advisory" services to ground vehicles on and around runways. Arbitrator Brown looked to the history at Sept-Iles Tower when, at night, it was in the hands of flight service specialists for the conclusion that this was a distinction without a difference. In effect, he found that the control of such ground vehicles by flight service specialists when the Sept-Iles Tower was closed for the day was not an assignment of an ATC function because controllers had never exercised that function after hours in that location. As I indicated earlier I need not concern myself with this decision because it is grounded in a particular location and deals with practice there concerning the "control", by whatever name, of ground vehicles on or around runways. I have found no "control" being exercised by Victoria Harbour FSS. That said, I read arbitrator Brown as endorsing the submission of counsel for the employer that "function" means a work activity.

A more recent case between CATCA and NAV CANADA is the award of arbitrator Bird [1997] C.L.A.D. 687. As Mr. McGee put it, this is the "flip side" of the issue here because it involved an improper assignment of operation support specialist [OSS] functions to air traffic controllers at the Vancouver and Victoria Towers. I disagree. There was no introduction of new equipment in play before arbitrator Bird. Thus, he was dealing with OSS activities simply being shifted to ATC's in order to deal with the consequences of under-staffing. Thus, what arbitrator Bird says about the work of the OSS bargaining unit in these facilities has no bearing on what I have to deal with.

Though there is nothing in the general case law that matches the text of article 5.01 (a) or the situation at hand, there are a few analogous awards. First, I will discuss a bargaining unit work case involving new equipment, *Pacific Press Limited*. Then I will review a couple of awards dealing with pay, *i.e.*, job classification, which are of some guidance on the introduction of new equipment.

*Pacific Press Limited*, [1996] B.C.C.A.A.A. No. 158 (Kelleher) is one of many bargaining unit work jurisdiction cases involving the introduction of electronic technology into the newspaper business. Arbitrator Kelleher had before him a claim by the Engraver's union that their work effectively had been assigned to a member of the Guild bargaining unit due to the introduction of a computer software program called ScanPrepPro. At p. 5 of the award arbitrator Kelleher states that:

The focus of the enquiry should not be on the type of equipment being used. Rather, one must have regard to the nature of the work being performed... What must be considered is the nature of the work being done on the scanners.

Arbitrator Kelleher discusses, at p. 5, a number of principles which have emerged over the years in the work jurisdiction/tech change struggles between Pacific Press and its bargaining agents. Among these principles are some which Ms. Gleason submitted are relevant.

- The fact that a union can point to language in its collective agreement which appears to give it a claim to the work is not determinative.
- There is no presumption that in the absence of bad faith, management's decisions on how the work should be allocated should prevail. What is required is a fully independent inquiry by the mediator/arbitrator.
- There must be a consideration of the resemblance between the work required by the new technology and the work which the competing bargaining units previously performed.
- Relevant considerations include the location of the work and the skills needed to carry out the work.

- One should take equitable principles into account. That is to say, a relevant consideration is whether technological change will have an unduly severe impact on a particular bargaining unit.

In the end, arbitrator Kelleher dismisses the bargaining unit work claim of the Engravers. At p. 6 he concludes, "I am influenced by the level of skill required of the position. Simply put, the tasks do not require the graphic arts skills of the Engravers."

*Wilson Concrete Products* (1973), 3 L.A.C. (2d) 32 (Weatherill) tested the question whether the introduction into the yard of a very new and different piece of mobile crane equipment, a Drott Travel Lift, substantially changed "the job" of yard crane operator such as to create a new job. Arbitrator Weatherill ruled, at p. 34 that where:

a job is described in terms of the performance of certain general tasks then a change in the equipment with which those tasks are performed does not necessarily constitute either a substantial change in the job or the creation of a new job.

*Caterpillar Tractor Company*, (1979) 73 L.A. 945 (Cox) is an American case that involved the introduction of a computerized system for a parts warehouse. At issue was whether the use of this system by an order filler called for pay at the higher wage rate of the storage checker classification. The arbitrator dismissed the grievance on the footing that the use of the computer system by the order filler is not determinative. What matters is the objectives or purposes for which the order filler and the storage checker use the computerized system. With this distinction in mind, arbitrator Cox finds that the work of the storage checker had not been taken over by the order filler.

In other words, it is the nature of the task activity, not the equipment being used that matters. The arbitral search for an answer in such cases includes an analysis of the skill levels required as well as of the responsibility borne by the person in question. There are three stories on the evidence before me where this analysis results in the conclusion that the functions being performed are not altered by the advent of new equipment. First, many air traffic controllers perform their control, advisory and information tasks without the assistance of a radar display at some airports and over the high north air space. Providing them with a radar display would not change their objectives or responsibilities. Second, flight service specialists provide advisory services in some locations, including Victoria Harbour, without the assistance of a VHF/DF system. Providing them with such equipment would not change their objectives or responsibilities. Third, in the past, flight service specialists in Victoria Harbour FSS performed their advisory tasks relying, in the main, on their eyes; radio and telephone communications and their judgment. Providing them with a NARDS display, as of August 5, 2000, did not change their objectives and responsibilities. They continued to provide VFR pilots with what everyone knows will be available in Class E airspace, *i.e.*, an advisory service.

With regard to arbitrator Brown's narrow *Sept-Isle Tower* decision and arbitrator Kelleher's equitable principle, I am not persuaded that they have a bearing in this case. I take Mr. McGee's point, in reply, that this case was not brought before me on a site specific basis. These two grievances, in effect, raise a national question about utilization of NARDS by flight service specialists. All agree that Victoria Harbour FSS is just the first step. Therefore, it is not appropriate, in this case, to give weight to Ms. Gleason's argument that there has been no impact on the CATCA bargaining unit. In times to come this issue may loom large.

On this basis, these grievances fail at the first stage of article 5.01 (a). CATCA has not demonstrated that "functions that are presently only performed by" their members have been assigned to members of ATSAC. Function calls for an analysis of the nature of the task activity including its responsibilities and the requisite skill sets. For what is relevant to this hearing, air traffic controllers presently only perform functions of control of aircraft. Of course, there is more to their activities than issuing clearances and giving instructions. However, these other activities are shared with other bargaining units. This is what the second stage of article 5.01 (a) is about. I need not delve into this stage because I have found that utilization of a radar display is not a function. Therefore what has gone on at the ROCC over these past 12 years is not helpful to NAV CANADA or ATSAC.

Dated at Saskatoon this

21 day of November, 2001.

"Ken Norman"

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Arbitrator