

MAY 27 1982

File: 166-2-10428

No. 56.

PUBLIC SERVICE STAFF RELATIONS ACT  
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

JEAN-LUC PATENAUDE,

Grievor,

AND:

TREASURY BOARD  
(Ministry of Transport),

Employer.

DECISION

Before: J.-Gaston Descôteaux, Board Member and Adjudicator.

For the Grievor: Jean-Luc Patenaude.

For the Employer: Luc Leduc, counsel.

Heard at Quebec City, February 26, 1982.

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SMOKING IN WORK PLACE

## DECISION

Mr. Jean-Luc Patenaude, an air traffic controller employed by the Ministry of Transport of Canada, Air Traffic Services Division, Air Traffic Control Section, works in the "Quebec City terminal control unit".

Under the collective agreement concluded between the Canadian Air Traffic Control Association (Group: Air Traffic Control) and Treasury Board, in effect from January 1, 1979 to December 31, 1980, Mr. Patenaude filed a grievance which reads as follows;

That employees and visitors alike be prohibited from smoking in the operations room. That this directive be issued officially and applied. That a smoking area be made available to smokers. (see Annex).

During the hearing held at the Quebec City Courthouse, various documents were submitted in evidence. Only one witness testified, Mr. Gaston Labonté, at the grievor's request.

### 1- OBJECTION BY COUNSEL FOR THE EMPLOYER

Prior to the hearing, on February 22, 1982, counsel for the employer, Mr. Luc Leduc, sent the following letter to the Deputy Registrar of the Public Service Staff Relations Board, Mr. J.A. Vautour. In this letter, counsel for the employer announced that he would raise a preliminary objection at the hearing:

I hereby wish to inform you that when the hearing scheduled for February 26 begins, I intend to raise a preliminary objection to the adjudicator's jurisdiction to hear the grievance as described in the attached document.

The employer will argue that the Board is not properly seized of the grievance because it was referred to adjudication on the understanding that the bargaining agent represent the employee during the adjudication proceedings (see form 32); however, in a letter dated August 17, 1981 which it sent to you, the bargaining agent informed you that it would not represent the employee at adjudication.

Yours truly,

In order to answer this objection concerning my jurisdiction, I should explain, in some detail, the various formalities or procedures followed between the time the grievance was filed and heard.

On January 8, 1981, the employer gave the following reply at the first level:

DECISION OF AUTHORIZED EMPLOYER  
REPRESENTATIVE AT THE 1st LEVEL

I acknowledge receipt of your grievance of December 17, 1980.

Health and Welfare Canada, which is responsible for public health, and Treasury Board's Occupational Health and Safety Group have not formulated any policy or issued any guideline concerning cigarette smoking in the workplace.

Without official authorization, it is difficult to introduce a policy that applies exclusively to Air Traffic Control Services. I wish, however, to inform you that concrete steps have been taken to install special filters in the Quebec City operations rooms to improve the air purification process.

If granted, the corrective action requested would discriminate against employees who wish to smoke on the job.

For these reasons, I am obliged to dismiss your grievance.

This decision, which the grievor received on January 12, 1981, was followed, on February 20, by the employer's reply at the second level, which reads as follows:

Having examined your grievance and the arguments you made during our meeting on February 11, I wish to inform you that I support the reply you received at the first level.

Accordingly, your grievance cannot be allowed.

Finally, there is the employer's reply at the third level which reads as follows:

Your collective grievance concerning the effects of cigarette smoking on your work environment has been examined and discussed with your union representative.

I realize that cigarette smoke may be offensive to your personal and individual tastes and that it can have certain effects on people. With this in mind, special filters that improve air purification have been installed in the operations room. Moreover, management is studying the possibility of setting up a special area for smokers. I consider that your grievance has been satisfied in part.

On August 26, the grievance was referred to adjudication under Mr. Jean-Luc Patenaude's signature and was accompanied by the following authorization from the bargaining agent, the Canadian Air Traffic Control Association:

On behalf of the bargaining agent, I approve of the reference of this grievance to adjudication and state that the bargaining agent is willing to represent the employee in the adjudication proceedings.

This approval by the bargaining agent was signed by Mr. J.C. Butt, Vice-President of the Association.

The day after he signed this authorization, Mr. Butt sent the following letter to the Deputy Registrar of the Staff Relations Board:

Enclosed are two copies of Form 32, Notice of Reference to Adjudication submitted by Mr. Jean-Luc Patenaude, a member of the Air Traffic Control Bargaining Unit employed at Quebec Terminal Control Unit, Quebec City, Quebec.

Two copies of the grievance are also enclosed.

It is requested that the hearing be held in Quebec City.

The grievor will be represented by himself.

On September 4, 1981, the office of the Board's Deputy Registrar acknowledged receipt of this letter from Mr. Butt dated August 27, 1981.

Following receipt of Mr. Leduc's letter of February 22, 1982, the complete text of which is quoted at the beginning of this decision, the Deputy Registrar of the Board sent the Vice-President of the Association, Mr. J.C. Butt, the following letter, which speaks for itself:

This letter is to confirm my telephone conversation, with you, of Tuesday, February 23, 1982, concerning a letter dated February 22, 1982 from Mr. Luc Leduc, Counsel for the Employer in the Jean-Luc Patenaude grievance, scheduled for hearing on February 26, 1982. In view of the lateness of Mr. Leduc's letter and the hearing date for this matter, it was thought advisable to ascertain the allegation made by Mr. Leduc in view of the contents of your letter of August 27, 1981, to the Board, and page 2 of Form 32, Block 15, whereby, yourself, on behalf of the Canadian Air Traffic Control Association, were approving the reference to adjudication.

Again, in view of the lateness of the Employer's Counsel's intervention, it is believed advisable to confirm the information you have supplied the Board during our conversation, that is that

- (a) CATCA is, in fact, supporting the grievance, and
- (b) In view of Mr. Patenaude's past experience, it was believed advisable to have him (Mr. Patenaude) represent himself at the hearing.

Copy of this is being forwarded to Mr. Leduc which will serve as an acknowledgement of his letter of

February 22, 1982, and at the same time, I am providing the adjudicator selected to hear this case, a copy of Mr. Leduc's letter as well as a copy of this letter for his information.

That same day, the President of the Association, Mr. W.J. Robertson, made clear to Mr. Jean-Luc Patenaude, in a letter dated February 23, 1982, the Association's position concerning the present adjudication proceedings. This letter reads as follows:

Re: Patenaude Adjudication Scheduled for February 26, 1982 at Quebec City; Board File no. 166-2-10428

Your grievance filed on December 17, 1980, re Smoking, was properly referred to adjudication by CATCA, on August 27, 1981, as per the Forms 32, Notice of Reference to Adjudication, Part III, page 2 (see attached).

This referral was acknowledged by Mr. J.A. Vautour, Deputy Registrar of PSSRB, on September 4, 1981 (see attached).

This letter will again confirm that the Canadian Air Traffic Control Association approves of the reference of your grievance to adjudication and that we have authorized you to represent CATCA in the adjudication proceedings.

A copy of this letter was sent by the Deputy Registrar of the Board to Mr. Luc Leduc, as indicated in the Deputy Registrar's letter of February 24, 1982:

RE: Jean-Luc Patenaude -Adjudication  
case scheduled for February 26, 1982

I refer to my copy of your letter of February 23, 1982, addressed to Mr. Jean-Luc Patenaude. Although not mentioned in your letter, it is assumed that it is a result of my telephone conversation with you on February 22, 1982 concerning a letter from Mr. Luc Leduc, Counsel for the Employer, by which he advises that a preliminary objection would be made re the jurisdiction of the adjudicator in this case.

Undoubtedly, your letter of February 23, 1982 and mine of even date have crossed in the mail. As I have done in the case of my letter of February 23, I am also sending a copy of my letter together with a copy of your letter and attachments to Mr. Leduc as well as to the adjudicator selected to hear the case for and respective information.

Counsel's objection to the adjudicator's jurisdiction is based on the provisions of section 91 of the Public Service Staff Relations Act. These provisions read as follows:

91. (1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(b) disciplinary action resulting in discharge, suspension or a financial penalty,



and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance relating to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies signifies in prescribed manner

(a) its approval of the reference of the grievance to adjudication; and

(b) its willingness to represent the employee in the adjudication proceedings, 1966-67, c. 72, s. 91.

Specifically, counsel for the employer bases his objection on subsection (2) of the said provision. Counsel's argument is that the bargaining agent, the Canadian Air Traffic Control Association, indicated in a letter dated August 27, 1981 that it would not represent the grievor at adjudication.

As counsel for the employer points out, there is no doubt that the bargaining agent agreed, in the Notice of reference to adjudication, not only to have the grievance referred to adjudication but also to represent the grievor.

However, I cannot subscribe to counsel for the employer's argument that the bargaining agent withdrew its approval in the letter of August 27, 1981. Since the problem appears to be one of application,

and since it is necessary, therefore, to interpret the provisions in question, all the relevant facts should be taken into consideration in doing so.

I should begin by pointing out that the Notice of reference to adjudication (Form 32) states the following on page 2:

On behalf of the bargaining agent, I approve of the reference of this grievance to adjudication and state that the bargaining agent is willing to represent the employee in the adjudication proceedings. (Emphasis added)

This is the context in which we must interpret the following sentence found in the letter of August 27, 1981 which the Vice-President of the Association, Mr. J.C. Butt, sent to the Deputy Registrar of the Board:

The grievor will be represented by himself.

I find it hard to believe, on the one hand, that in the Notice of reference to adjudication, the Vice-President of the Association indicated the willingness of the bargaining agent to represent the grievor and, on the other hand, that in his letter to the Board that accompanied the Notice of reference to adjudication, the same Vice-President stated the Association would not represent the grievor.

The intention expressed by the Vice-President of the Association, when he included the sentence in question in his letter of August 27, 1981 to the Deputy Registrar, becomes very clear when we

examine the contents of the letter that the President of the Association sent Mr. Jean-Luc Patenaude on February 23, 1982, in particular the following passage:

This letter will again confirm that the Canadian Air Traffic Control Association approves of the reference of your grievance to adjudication and that we have authorized you to represent CATCA in the adjudication proceedings.

As stated earlier in this decision, a copy of this letter from Mr. Robertson, President of the Association, was also sent to the Board.

I agree with the following principle expressed in Timothy J. Dooling (166-2-308):

The collective agreement has been entered into by the employee association, not by an individual employee. The interpretation of that agreement, as contrasted to grievances relating to discipline, is something in which the collectivity has the primary interest, as the Act makes abundantly clear. The bargaining agent must screen all grievances relating to the interpretation of collective agreements, since these involve questions of policy affecting the employees collectively.  
(pp. 11 and 12).

However, nothing in the Act prohibits the bargaining agent from using the services of counsel to act in adjudication proceedings. In some cases, the bargaining agent does so through a full-time union representative, while in others, it retains a lawyer on an ad hoc

basis. I do not see why the bargaining agent could not use the services of a grievor, as in the present case, to fulfil the same function as a full-time union representative or a lawyer retained on an ad hoc basis would fulfil. I should perhaps add here that Mr. Patenaude's grievance was also signed by a number of other employees.

Consequently, the objection raised by counsel for the employer as regards my jurisdiction must be dismissed.

## 2 - THE MERITS OF THE CASE

### (a) The facts

At the hearing, evidence relating to the merits of the case was adduced by the grievor only, since counsel for the employer stated that he had no evidence to present.

The facts presented at the hearing are as follows.

The grievor began by submitting a copy of an Air Traffic Controller Licence (exhibit S-2). This document shows that an air traffic controller must have his licence renewed annually and that renewal depends on the results of the electrocardiogram he must take.

The next exhibit submitted was an article from The Globe and Mail of February 23, 1982 (Exhibit S-3) entitled:

("100,000 TO DIE FROM SMOKING THIS  
YEAR, U.S. REPORT WARNS.")

The grievor also submitted an article from the medical journal "The New England Journal of Medicine" of March 27, 1980. This article, by James R. White Ph.D., and Herman F. Froeb, M.D., entitled:

Small-Airways dysfunction in nonsmokers chronically exposed to tobacco smoke, is on pp. 720 to 724. Specifically, the grievor first drew attention to the abstract of this article which reads as follows:

Abstract. We evaluated the effect of long-term passive smoking (involuntary inhalation of tobacco smoke by non-smokers) and long-term voluntary smoking on specific indexes of pulmonary function in 2100 middle-aged subjects. Regardless of sex, non-smokers chronically exposed to tobacco smoke had a lower forced mid-expiratory flow rate (FEF 25 to 75 per cent) and forced end-expiratory flow rate (FEF 75 to 85 per cent) than nonsmokers not exposed (P=0.005). In addition, values in passive smokers were not significantly different from those in light smokers and smokers who did not inhale. (p. 720).

He then focused in particular on the last paragraph of this article, on page 723, which reads as follows:

Although many nonsmokers believe that exposure to tobacco smoke is irritating and generally obnoxious, our studies and Tager's show the adverse effects of passive smoking on the small-airways function of both adults and children. With these data now available, health officials and the medical profession must consider potential for small-airways dysfunction in nonsmokers chronically exposed to tobacco smoke.

Finally, the grievor relied heavily on a study prepared for the Quebec Minister responsible for the Environment by the Conseil consultatif de l'environnement du Québec, entitled "L'usage du tabac

dans les endroits publics et la protection des non-fumeurs" (1979, Editeur officiel, Québec). In particular, the following excerpts were cited:

/Trans/

Even so, irrespective of the degree of risk incurred and for the rest of their lives, the nonsmokers that constitute the majority of Quebec's population do not have a choice and are very often forced, as things now stand, to be passive or unwilling smokers. (p. 9).

A cigarette is totally consumed ten to eleven minutes after it has been lit. During this time, the average smoker inhales for only a brief period -a total of twenty seconds. The "direct" smoke coming from the lighted end of a cigarette, whether held in the hand or resting on an ash tray, contains higher concentrations of compounds that are likely to enter the body than does the "indirect " smoke exhaled (sic) by the smoker. Studies show in fact that "direct " smoke contains twice as much tar and nicotine, three times more 3, 4 -benzopyrene, approximately five times more carbon monoxide and fifty times more ammonia. In indoor environments frequented by the public, the concentrations of substances contained in tobacco smoke often exceed the levels recommended for outdoor air and even those for the workplace. All these compounds of smoke enter the body in a matter of minutes, but it is often several hours before they are eliminated. Even though the plight of the nonsmoker is just beginning to receive attention, medical literature around the world has now recognized the problem that nonsmokers face. (p. 10.)

. . . .

Under the conditions normally encountered in places where there are smokers, we know that tobacco smoke has a deleterious effect on all nonsmokers owing to the chemical substances (aldehydes and ketones) and tar that cling to the skin and, of course, permeate clothing. Minor physiological changes are also observed in all nonsmokers. Moreover, a vast majority of nonsmokers, whether in good health or not, experience discomfort or irritation that is associated with the odours and irritants of smoke, and is affecting in particular the eyes, nose and throat. This may even be accompanied by psychological irritation of varying intensity.

In the normal smoking environment, the health of certain groups of nonsmokers can also be affected... (p. 10).

. . .

In his day-to-day existence, the nonsmoker absorbs, in the air he breathes, the substances released by the combustion of tobacco. For the middle-aged person considered to be in good health, brief exposure to smoke triggers a host of physiological changes: a significant increase in the level of carboxyhemoglobin, minor changes in certain parameters associated with lung function, and an increase in heart rate similar to that which habitual smokers experience when smoking a cigarette. However, it should be added that at present, there is no proof that these changes affect his health. (p. 14).

. . .

If the odour of tobacco smoke is scarcely perceptible to the smoker, owing to the destructive effect that chemical substances (aldehydes and ketones) have on his nasal passages, the same, however, cannot be said of nonsmokers who can readily detect it. Moreover, for the nonsmoker, this odour can sometimes be a source of annoyance and/or psychological irritation.

. . .

In Western society, until the last thirty of forty years when the cigarette has become very popular, people generally did not smoke in the presence of others without asking their permission. Gradually, smoking became so widespread that it became a socially acceptable habit. Apart from a few places such as churches, smokers took it for granted that smoking was permitted by custom and tolerated implicitly.

. . .

Over the past few years, smoking in public places has become increasingly unacceptable socially and public support for banning this practice is growing. The response of governments to this new attitude took different forms. We will examine briefly in this chapter steps taken both internationally and at the national and provincial levels to improve the situation. These remarks are for the most part taken from the legal study attached to this document (annex II)... (p. 19).

. . .



In West Germany, in 1974, the government called for the development of a program to protect nonsmokers in the workplace, on public transit and in establishments and places accessible to the public. This program was to be published in 1977. We do not have more recent information on this program, other than to report that nonsmokers in West Germany are making headway through a host of administrative measures; however, there is still very little co-ordination of efforts nationally... (page 20).

. . .

The situation is different in Bulgaria where, since 1973, smoking in the workplace, and more particularly in the presence of women who are pregnant or breast-feeding has been banned by decree. In 1976, this prohibition was even extended to eating places, youth centres and so on... (page 21).

. . .

Some countries try to go even further in their efforts to protect nonsmokers. For example, since 1977, Finnish law has banned smoking in all places to which the public has access and more particularly in public offices, hospitals, schools, theatres, on buses, in taxis, in meeting halls, at meetings to which minors are admitted and in Parliament. Outside these places, areas may be set aside for smokers provided their smoke does not reach nonsmokers.

. . .

Like Finland, France took legislative action in 1976 and 1977, banning

smoking in all public places and vehicles, with the exception of places used primarily for the on-site consumption of food, namely, restaurants and certain places where the air conditioning is adequate (see Rochette, 1978, annex II).

. . .

Other countries such as Belgium, the Netherlands, Portugal, Denmark, Czechoslovakia, Roumania and Turkey have also taken steps to ban smoking in various places and locations, in particular in educational institutions... (page 22).

. . .

The feverish legislative activity witnessed in several European countries and American States during the period 1974 to 1978, with a view to limiting the use of tobacco in public places, was not matched in Canada where the number of pieces of legislation and their success rate have been limited. (page 24).

. . .

On March 15, 1974, a bill was introduced in the Alberta legislature. On May 23, 1974, it received second reading but never became law. The bill stated in particular that the smoking of tobacco in any form constituted a violation of the rights of the public and posed a danger to public health (page 24).

. . .

In Ontario, the Christmas Seal Association drew up a Declaration of

the Rights of Nonsmokers which was subsequently adopted by the Ontario Legislature on November 18, 1974. Article one, entitled "The right to breathe clean air", states that "Non-smokers have the right to breathe clean air free from harmful and irritating tobacco smoke. This right supersedes the right to smoke when the two conflict". (Canadian Council on Smoking and Health, 1978). A special committee was established in 1975 to examine what further action the Ontario government could take. In 1976, this committee produced guidelines for the establishment of areas for nonsmokers which were endorsed and adopted by the government (Canadian Council on Smoking and Health, 1978). This strategy, which relies solely on the good will of citizens, is in keeping with the course of action recommended in England. However, some Ontario cities, Ottawa and Toronto in particular, were not content to simply issue directives. Thus, a municipal by-law of Ottawa, in effect since January 1, 1977, severely restricts the use of tobacco in public places, taxis, on school buses, and so on (see Rochette, 1978, annex II). The city of Toronto, for its part, adopted, on June 20, 1977, a by-law very similar to Ottawa's. It is doubtful whether their example will be emulated across Ontario, thereby defeating the province's good intentions.

. . .

Certain steps have also been taken in Quebec. These will be outlined in the next part. (page 25).

. . .

Although Canada's record is undistinguished, there is still reason to believe that the plight of non-smokers should improve in the coming years. The document presented in April 1974 by the Minister of National Health and Welfare, entitled A New Perspective on the Health of Canadians (Lalonde, 1974), substantially alters the medical approach by urging health professionals to devote more energy to prevention than to treatment, and thus to give high priority to the environment. This study was well received by the public and since its release, the numerous statements made by paramedical and medical organizations indicate that they have already begun to adjust to this new approach. This policy, moreover, is beginning to make an impression on the provincial health ministers. At a federal-provincial conference held on June 22 and 23, 1977, they issued the following press release concerning nonsmokers: /Trans./ "The Ministers recommend that areas be designated for smokers and nonsmokers in closed work areas and in public places" (Canadian Council on Smoking and Health, 1977). (page 26).

...

Recently, the Commission des droits de la personne du Québec (Quebec human rights Commission) (1978, in litteris) had the following to say: /Trans./ "The right of the nonsmoker to breathe clean air in public places should be recognized and respected, even if it affects the exercise by smokers of another freedom, although not a basic one, namely, the freedom to smoke in public places." (p. 30).

As we have seen, in Canada, legislation banning smoking in public places has yet to be enacted. For example, Chappell (1975), after examining Canada's statute and customary law, came to the conclusion that the nonsmoker was poorly protected. Rochette, (1978, annex II), also concluded that the traditional legal recourses in Quebec are not satisfactory tools for protecting the nonsmoker.

...

The Conseil consultatif de l'environnement also recognizes the right of the nonsmoker to insist on clean air in public places and feels that it is up to the appropriate authorities to legislate in this matter. It will no doubt be argued that legislation seems superfluous now that the Department of Social Affairs has introduced a policy designed to decrease the smoking population and thereby reduce, if not eliminate, the risk of air pollution from tobacco smoke in public places. Since smoking is rooted in the customs of a good part of Quebec's population, we cannot expect, over the short and medium term, to alter dramatically the behaviour of our society through information campaigns, price increases and education programs and thus afford nonsmokers adequate protection. In short, legislative action is essential in this area. (pp. 30-31).

Besides these various documents, the evidence consisted of the testimony of Mr. Gaston Labonté, supervisor of operations at the Quebec City control tower since January 1972. This witness, who has worked in this capacity at various other airports, including St-Hubert, Dorval,

the Montreal control centre and the St-Jean control tower, described the workplace in question, namely, the control tower itself and the terminal, located beneath the tower. Mr. Labonté described the layout of the workplace and its various components and identified the personnel that work there. Mr. Labonté stated that he himself is a smoker and that he is bothered by the smoke generated by persons around him who smoke.

According to the witness, filters were installed, as indicated in one of the employer's replies to the grievance, but areas were not set up for nonsmokers. In answer to questions from counsel for the employer, Mr. Labonté stated that his Air Traffic Controller Licence was renewed annually.

(b) Arguments of counsel

The arguments of counsel can be summarized as follows:

(i) Arguments of the grievor

The grievor argued that air traffic controllers must have their licence renewed annually, and that renewal depends on the results of the electrocardiogram they must take. Smoke, in these circumstances, is a danger to the controller because it may affect his heart function.

Moreover, the grievor added that while the Department of National Health and Welfare was trying to promote legislation to enable them to offer their services in a smoke-free environment, the Department itself was doing precious little to ensure that its own employees who dispense these services were themselves protected from smoke.

Various levels of government had made certain high-minded commitments to provide clean air in the workplace, but nothing concrete was done. As a result, workers did not have the choice that customers in restaurants might have.

Finally, the grievor contended that the present grievance was meant to prod the government and the various information media into insisting on the necessity of creating as healthy a physical environment as possible for workers. The grievor added that it was time a directive were issued that would make it possible for workers to breathe clean air and consequently, it was becoming increasingly important that the Department of National Health and Welfare and the Ministry of Transport work together to achieve this common goal.

(ii) Arguments of counsel for the employer

Counsel for the employer, for his part, contended that the grievor was asking that a directive be issued banning smoking in the operations room. Counsel pointed out that the grievor based his claim on the provisions of clause 23.03 of the collective agreement, entitled "Working Conditions and Safety". According to counsel, the grievor did not establish that smoke caused him or those who associated themselves with his grievance any illness. In other words, the grievor failed to prove that he himself and these other persons suffered any personal harm because of the alleged situation. More particularly, counsel for the employer maintained that no evidence was adduced showing that an air traffic controller had his licence revoked or suspended because of the effects of smoke.

Counsel for the employer further argued that the grievor did not relate the principles cited to the concrete situation prevailing

either in the control tower or in the terminal of the airport in question. He pointed out, in particular, that no evidence was presented as to the number of smokers and nonsmokers. According to counsel, smoke may be unpleasant, either physically or psychologically, but it was in no way established that it was the cause of any occupational illness.

Counsel for the employer contended that the various documents submitted in evidence, namely, the article from The Globe and Mail and the article from The New England Journal of Medicine, as well as the study by the Conseil consultatif de l'environnement du Québec, could not be used as evidence because it was impossible for him to cross-examine the authors of these various documents.

In support of these arguments, counsel for the employer cited Griffith (166-2-8443).

(c) Decision and reasons

It is appropriate, at the outset, to cite two articles of the collective agreement that were mentioned specifically during the hearing.

These two articles read as follows:

- 1.02 The parties to this Agreement share a desire to improve the quality and to increase the efficiency of the Air Traffic Control Service and to promote the well-being of its employees so as to provide safe and efficient services to the public.
  
- 23.01 The Employer will continue to make provision for the safe and healthful working conditions of employees and in so far as is feasible, having regard to



building and space limitations, will provide accommodation for employees to have their meals and keep their clothes. The Association agrees to cooperate fully in the prevention of accidents to employees and in the enforcement of safety rules.

In his grievance, Mr. Patenaude is requesting that a directive be issued banning smoking, by employees and visitors alike, in the operations room. He is also asking that a smoking area be made available to smokers.

Certainly, the present decision must be based solely on the facts submitted in evidence at the hearing. It should perhaps also be pointed out that although adjudication proceedings, and in particular the hearing, must take a form that is appropriate to the field of labour relations, and bearing in mind in particular that the representatives of the two parties are not equally experienced in the techniques of legal proceedings, this hearing must not be equated with a hearing of an investigative body whose results would constitute the expression of an opinion. Adjudication is a quasi-judicial proceeding and as such, must meet certain standards, in particular the fundamental principles of natural justice. However, this is not to say, let me repeat, that I do not agree that flexibility must characterize grievance adjudication proceedings. On the contrary, if the legislature intended to adopt a particular form for settling labour disputes, it is because it wanted to make it more effective in resolving these disputes, and it has done this gradually, as the situation in the field of labour relations has evolved.

One of the fundamental principles of natural justice which must be applied to grievance adjudication, as to other proceedings of this kind, is the possibility for the opposing party to question the

arguments put forward by the other party. For example, in the present case, several documents were submitted in evidence by the grievor; however, these documents could not be identified by their authors and most importantly, these authors could not be cross-examined by counsel for the employer. In this context, all of the above-mentioned documents, namely, the articles from the newspaper or the scientific journal and the reports of a specialized study, cannot be submitted in evidence in order to show the harmful effects of tobacco use on the workplace, and in particular to show the harmful effects on the physical health of the worker or on his mental health, which would, if the latter assumption is correct, jeopardize the safety of air traffic owing to the reduced powers of concentration caused by tobacco smoke. It is not my duty, in this case, to deny the scientific value of these documents but rather to ask myself if they should simply be admitted in evidence, that is, without the possibility of examining or cross-examining the authors of the documents in question. I would have to say no in answer to this question.

Moreover, I note - and this is meant simply as a observation that does not have the force of a decision - that certain steps were taken by the employer to eliminate some of the effects of tobacco smoke. In its reply at the first level, dated January 8, 1981, the grievance having been received by it on December 17, 1980, the employer makes clear that "concrete steps have been taken to install special filters in the Quebec City operations rooms to improve the air purification process". At the third level, the employer described the measures in question in these words:

... With this in mind, special filters that improve air purification have been installed in the operations room.

Moreover, management is studying the possibility of setting up a special area for smokers.

This reply from the employer was received by Mr. Patenaude on August 20, 1981.

Moreover, at the hearing, witness Gaston Labonté confirmed that the filters in question have been installed. However, regarding the possibility of setting up a special area for smokers, no action has been taken yet.

In summary, I conclude that I have jurisdiction to decide the present grievance on its merits. However, I decide that I cannot, legally, on the basis of the evidence adduced at the hearing, allow Mr. Patenaude's grievance with which other employees associated themselves.

Accordingly, THE GRIEVANCE IS DISMISSED.

For the Board,

J.-Gaston DesCôteaux,  
Board Member and Adjudicator.

AYLMER, Quebec, March 19, 1982

Certified true translation

Serge Lareau

ANNEX

Document attached to the grievance form

Air traffic controllers are required by their employer to satisfy a number of very stringent medical criteria. Moreover, in order to maintain their controller's licence, they must successfully undergo an annual medical examination whose standards are similar to those for commercial pilots. Failure to undergo a medical results in immediate suspension from operational duties. The work area is confined and an employee must of necessity put up with the habits of his fellow workers.

Tests have shown that the effects of the cigarette are as harmful to the nonsmoker as to the smoker. Side-stream smoke, which comes from the lighted end of the cigarette and which is not inhaled by the smoker, is six times denser than smoke that is inhaled and exhaled by the smoker. Side-stream smoke contains twice as much tar and nicotine as a puff of smoke exhaled by the smoker, four times more cadmium, which may cause emphysema, three times more benzopyrene, a carcinogen, five times more carbon monoxide, which has a greater affinity for hemoglobin than does oxygen, and fifty times more ammonia, which are respiratory irritants.

After an hour of exposure to smoke in a closed environment, the urine of a nonsmoker contains as many compounds resulting from the combustion of tobacco as it would if he had smoked three cigarettes. The pulse, blood pressure and level of carbon monoxide in the blood of a nonsmoker increase after thirty minutes in a smoky room. Tobacco smoke irritates the eyes. It can cause conjunctivitis. The substances in smoke attack the mucous lining of the nose and pharynx, thus creating a risk of rhinitis or pharyngitis. Tobacco smoke, because of its many compounds, is unquestionably an irritant that plays a role in precipitating acute attacks of dyspnea in asthmatics.

Vision, blood pressure and the cardiovascular system are the principal items checked during the medical examination and the most frequent causes of controllers losing their licence. Moreover, having a smoker beside him may cause serious stress in a nonsmoker who is aware of the dangers inherent in the cigarette.

Nonsmokers have the right to insist that their freedom of choice be respected. They cannot exercise this freedom when they are captives of a smoke-filled work environment. Smokers are free to light up when they chose, just as an individual has the right to consume alcohol or take another drug, provided he does not force those around him to consume along with him.

Pursuant to article 1.02 of the collective agreement concluded between CATCA and the Treasury Board, in which the parties agree to promote the well-being of the employees, pursuant to clause 23.01, in which the employer agrees to make provision for safe and healthful working conditions, and in the light of the present policies of the federal government, the warnings from Health and Welfare Canada on this subject and the bills introduced in the House of Commons on the use of cigarettes by the public in buildings under federal jurisdiction, I am submitting this grievance to you.