THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

Canadian Air Traffic Control Association,

Complainant,

- and -

Treasury Board, Transport Canada,
J.P. Little and R.G. Bell,

Respondents.

RE: Complaint under section 20 of the Public Service Staff Relations Act.

BEFORE: J. Harold Brown, Q.C., Chairman.

APPEARANCES AT THE HEARING: D. Power for the Complainant;
R. Cousineau for the Respondents.

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Heard at Ottawa June 7 and 8, 1983.

LEGAL REPRESENTATION AT A FACT FINDING BOARD OR ADMIN INQUIRY

DECISION

1. This is a complaint made under section 20 of the Public Service Staff Relations Act.

2. In its complaint, the Complainant alleges that the named Respondents have acted in contravention of subsection 8(1) of the Act. More particularly, it is alleging that the Respondent, Mr. J.P. Little, in concert with and under the direction of the Respondent, Mr. R.G. Bell, interfered with the right accorded to the Complainant by the above subsection to represent two of its members, namely, Mr. J. Lycan and Mr. R. Scott.

3. The material facts relating to the complaint are not in dispute. Mr. Little was chairman of a three person board established to inquire into certain operating irregularities at Ottawa International Airport. The operating irregularities involved Mr. Lycan and Mr. Scott, both of whom are air traffic controllers. A hearing for purposes of the inquiry was scheduled at Ottawa for May 16, 1983. Mr. Lycan and Mr. Scott were to appear as witnesses. Mr. David Jewitt of the law firm of Nelligan/Power was retained by the Complainant to represent Messrs. Lycan and Scott at the inquiry hearing. Mr. Little refused to allow Mr. Jewitt to remain at the hearing in any capacity. He did, however, allow Mr. Marchand, an officer of the Complainant, to remain at the inquiry and to represent the two air traffic controllers concerned. The foregoing evidence was given by Mr. Jewitt.

4. The Complainant alleges that the refusal of Mr. Little to allow Messrs. Lycan and Scott to be represented by legal counsel retained by the Complainant violated subsection 8(1) of the Act, particularly having regard to the provisions of Article 6.01 of the current collective agreement in effect between the Complainant and the Treasury Board. That Article under the heading "Operating Irregularities" reads:

6.01

At any administrative inquiry, hearing or investigation into an operating irregularity, where the actions of an Air Traffic Controller may have had a bearing on the events or circumstances leading thereto, and the Controller is required to appear at the administrative inquiry, hearing or investigation being conducted into such irregularity, he may be accompanied by an employee representative of his choice.

(The underlining is added for emphasis).

5. Counsel for the Complainant made the following submissions. Article 6.01 gives to controllers the right to choose a lawyer as his or her "employee representative" at any administrative inquiry, hearing or investigation into an operating irregularity. While the collective agreement refers to the representation of employees in a number of its provisions, the terminology and circumstances vary from situation to situation. Also, nowhere in the collective agreement is the term "employee representative of his choice" defined. However, the plain ordinary meaning of the term "employee representative" is a person chosen by the affected employee as his representative. This is certainly broad enough to encompass legal counsel.

6. Counsel for the Complainant made the further following alternative representations. If the term "employee representative" does not clearly include legal counsel retained by the bargaining agent on behalf of the employee or by the employee, the term is patently, or at the least, latently ambiguous. In such circumstances extrinsic evidence of past practice is admissible to aid in the interpretation and application of the terms of a collective agreement. While the Complainant does not concede that the term "employee representative" is patently ambiguous, counsel admits that it might be

latently ambiguous. If such is the case, evidence of past practice can be taken into account in determining the meaning that should be attached to the language in question.

7. Counsel for the Complainant made an additional alternative submission in the event that the Board should find that the words "employee representative" in Article 6.01 do not give air traffic controllers the right to have legal counsel, retained by the bargaining agent, represent them at administrative inquiries, hearings or investigations into operating irregularities. More specifically, counsel submitted that the employer should be held estopped from exercising any right it might have to exclude legal counsel from such hearings, at least until the bargaining agent is in a position to give notice to bargain to the employer and to negotiate new terms relating to rights of representation at such hearings. Further, evidence of past practice is admissible to establish estoppel by conduct. By way of elaboration, counsel argued that in order to establish estoppel by conduct there must be some conduct by one party which induces the other party to believe that the strict legal right under the collective agreement will not be enforced. Stated another way, estoppel by conduct may be created by acquiescence to a past practice which is inconsistent with the strict legal rights of the parties under the terms of the collective agreement.

8. Counsel for the Respondents made the submission set out below. When one reads "employee representative" in Article 6.01 of the collective agreement in the context of references to "employee representative" or "representatives of employees" or "representative of the Association" in other provisions of the collective agreement, it is abundantly clear that there is no ambiguity as to the meaning

to be attached to those words in Article 6.01. That is to say, the reference to "employee" clearly means an employee of Transport Canada in the Air Traffic Control Group bargaining unit. In particular, counsel relied on Article 6.05 which reads:

> A Controller, his representative or employees called by the inquiry as witnesses will suffer no loss of normal pay while appearing before an administrative inquiry, hearing or investigation.

9. Counsel argued that there would be no need or reason to refer to "pay" if it was the intention that "employee representative" in Article 6.01 included outside legal counsel. He accordingly submitted that there was no ambiguity that warranted allowing counsel for the Complainant to adduce extrinsic evidence of past practice.

10. After recessing and considering the submissions of counsel for both parties, I ruled that I was not prepared to say, at that point in the proceedings, that there was no latent ambiguity as to the meaning of "employee representative" in the context of Article 6.01. Accordingly, I further ruled that I was prepared to allow counsel for the Complainant to adduce evidence relating to past practice.

11. Counsel for the Complainant adduced evidence relating to past practice set out below. Steven McCormack, a solicitor with the Toronto law firm of Stikeman, Elliott, Robarts and Bowman testified that he represented air traffic controllers on May 22, 1980, March 9, 1982 and May 24, 1983 at investigations into the crash of aircraft. On one occasion, March 30, 1983, he represented three controllers during the conduct of a "comprehensive investigation" (which will be referred to later) with the consent of the chairman of the inquiry, a Mr. D. Campbell. The evidence is, however, that this was the only such investigation at which legal counsel was permitted to represent

controllers involved in a "comprehensive investigation". Mr. Jewitt was denied that entitlement in a similar type of investigation on May 16, 1983, the details of which are recorded above.

12. The remaining evidence of past practice was given by William Robertson, the immediate past President of the Complainant from the spring of 1979 to 1983 and the Vice-President of that organization during the four previous years. A brief summary from his testimony is set out below. In 1975 the then President of the Complainant, Mr. J.M. Livingston, and the then Director General of Civil Aeronautics for Transport Canada, Mr. W.M. McLeish, agreed upon a program for the investigation of air traffic control operating irregularities which involved the establishment of air traffic control Fact Finding Boards. The ultimate goal of such boards was to prevent the recurrence of an operating irregularity while at the same time not using that forum to attribute responsibility as a basis for disciplinary action against controllers. Indeed such boards were not authorized to make recommendations concerning disciplinary action. Rather the goal of the investigation was to determine the causes of operating irregularities and if possible, implement corrective action to eliminate or reduce the possibility of a recurrence. If a controller error, as opposed to a systems error, was revealed in such an investigation, recommendations for retraining might be made for a controller but no disciplinary measures were imposed. By this procedure controllers were encouraged and, in fact, did report operating irregularities without fear of disciplinary reprisals. In this type of fact finding inquiry, most often the controllers were not represented by legal counsel although the language of Article 6.01 has been essentially the same in all collective agreements between the Complainant and the Treasury Board since 1967. Similarly Article 6.05 has been a part of all collective agreements between the parties during the same period.

13. Mr. Robertson testified that prior to 1983 the guidelines governing operating irregularities had last been revised by a document dated June 12, 1979 prepared by Mr. P.S. Arpin, the current Director General of Civil Aeronautics. This document provided that when Air Traffic Services personnel became aware of the existence of an ATS operating irregularity, the person concerned was to initiate appropriate action which would result in the Director of Air Traffic being notified as soon as possible. Clause 2.3 of the same document reads:

> Receipt of this report of DAT will normally generate additional co-ordination between Regional and Headquarters ATS specialists. At this time, the necessity for further investigation shall be evaluated and, if this preliminary investigation indicates any possibility of a deficiency in the provision of ATC service, arrangements will be made to convene a Fact Finding Board. If it is determined that a Fact Finding Board is not necessary, a brief summary of rationale and conclusions shall be forwarded, by teletype to DGCA/DAT. DAT will have the final decision as to whether or not a Fact Finding Board will be convened.

14. Mr. Robertson's evidence is that, by letter dated September 14, 1982, from Mr. P.J. Proulx, Director of Air Services for Transport Canada, addressed to him, the Complainant was advised that the Air Traffic Services Directorate intended to amend Clause 2.3 in the manner set out below:

(i) if the preliminary investigation indicates that a system deficiency is probably the principal cause for a deficiency in the provision of Air Traffic Control services, arrangements will be made to convene a Fact Finding Board; or

(ii) if the preliminary investigation indicates that a deficiency in the provision of Air Traffic Control services was principally caused by the substandard performance of one or more operating personnel, ATS Headquarters (ATO) will be notified and Line Management will carry out an on site investigation.

15. Mr. Robertson's evidence is that he strongly objected to this change as the effect would be to prevent a Fact Finding Board from being held where local representatives of management felt that an irregularity had occurred because a controller had committed an error rather than because of a general system deficiency. After consultation between the Association and Transport Canada in October of 1982, Mr. Robertson advised Mr. Arpin by letter dated October 21, 1982 that CATCA was not consenting to the change and requested that the Department revert to the original wording of paragraph 2.3. By letter dated October 27, 1982 from Mr. Arpin to Mr. Robertson, Transport Canada confirmed its refusal to revert to the 1979 agreed upon procedure despite the Association's objection to the change.

16. Early in January of 1983, the Association was advised by a memorandum over the signature of P.J. Proulx of amendments to the Operating Irregularities Guidelines (Exhibit #1). More particularly, Clause 2.3 was amended unilaterally by Transport Canada to permit ATS Headquarters to require line management to carry out a comprehensive investigation in place of a Fact Finding Board when the preliminary investigation indicated that a deficiency in the provision of air traffic control service was principally caused by the substandard performance of one or more operating personnel. The document goes on to read:

> A comprehensive investigation by line management is neither a Fact Finding Board nor an Administrative Inquiry. The investigation simply involves the exercise of responsibilities and authorities which are an inherent part of each line manager's position.
>
> Conducting a comprehensive investigation does not preclude convening a subsequent Fact Finding Board. When line management's investigation reveals that a system deficiency was also a factor, then DAT will cause a Fact Finding Board to be convened to complete that aspect of the examination.

The "Guidelines for Conducting a Comprehensive Investigation" contained in the same memorandum provides in part - "The line manager will investigate the occurrence and may interview personnel involved. (Article 6 of the TB/CATCA contract applies)". Mr. Robertson in his evidence disagreed with the above statement that a "comprehensive investigation" was not an administrative inquiry.

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17. "Operating Irregularity" is defined in clause (6) of Article 1 of the collective agreement between the Complainant and Treasury Board as meaning "a situation in which it is alleged that flight safety may have been jeopardized, less than minimum separation may have existed, or both". Mr. Robertson stated that all of the investigations, Fact Finding Boards, discipline interviews, other reviews and discussions listed in Exhibit #4, prepared by the Complainant, arose out of "operating irregularities" and that all of them fell within the ambit of "administrative inquiry, hearing or investigations into an operating irregularity" referred to in Article 6.01 of the collective agreement.

18. Mr. Robertson's evidence is that according to the Complainant's records the 39 situations listed in Exhibit #4 that took place between September 14, 1977 and May 24, 1983 were the ones at which the Complainant was represented by legal counsel. Eight of those cases involved an investigation into the crash of an aircraft and 18 others were disciplinary interviews. Three were the "comprehensive investigations" of March 30, 1983 at which the three air traffic controllers concerned were represented by Steven McCormack as legal counsel. The remaining ten were of a miscellaneous nature. The position of Gordon Allan, the Director of Employee Relations for Transport Canada, was that the disciplinary interviews and other proceedings on the list did not fall within the purview of "administrative inquiry, hearing or investigation into an operating irregularity" within the meaning of Article 6.01 of the collective agreement.

19. Mr. Robertson testified that prior to 1983, Fact Finding Boards could not impugn the conduct of controllers and any evidence of substandard performance could not be used in subsequent disciplinary proceedings against a controller. For that reason, the controllers concerned seldom were represented by legal counsel notwithstanding the Complainant's right to have them so represented. On the other

hand, the Complainant had always elected to be represented by legal counsel in investigations involving the crash of aircraft. He admitted that not all "comprehensive investigations" conducted during 1983 were included in Exhibit #4. There was such an inquiry at Edmonton and at Thompson, Manitoba. In both instances, however, the controllers chose not to be represented by legal counsel. There are "comprehensive investigations" still pending in Victoria and Thunder Bay. According to Mr. Robertson, in both cases, the Complainant requested to have the controllers concerned represented by legal counsel but the requests were denied by management.

20. With respect to the "comprehensive investigations" into "operating irregularities" in the instant case, John Little testified that prior to the inquiry hearing, scheduled for the morning of May 16, he was advised that a Mr. Smith, a tower controller and a branch chairman of the Complainant would be the employee representative for Mr. Lycan and that a Mr. Laviolette, another controller, would be the employee representative for Mr. Scott. Mr. Little arranged for all four of them to hear the tapes and read the transcripts in question prior to the commencement of the inquiry. It was only at the outset of the hearing that Mr. Jewitt arrived on the scene and announced that he was legal counsel representing Mr. Lycan and Mr. Scott.

21. Mr. Little's evidence is that he denied Mr. Jewitt status in the proceedings because he was not an "employee representative" as defined in Article 6.01 of the collective agreement. This position was in accord with instructions he had received from his supervisor, a Mr. Middlestadt. I would mention that Mr. Robertson's evidence is that it was his understanding that Mr. R.G. Bell, Regional Manager, Air Traffic Services, in Toronto, had issued a memorandum to that effect to all unit chiefs. He had not seen the document, however, and Mr. Little and Mr. Allan testified that they had no knowledge of it.

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22. Mr. Little's evidence is that, on request, he had explained the difference between a "comprehensive investigation" and a Fact Finding Board to both Mr. Lycan and Mr. Laviolette in accordance with Exhibit #21, an Information Bulletin placed in evidence by the Complainant titled "Investigation of Operating Irregularities". The Bulletin dated April 1, 1983, inter alia states that the purpose of the Fact Finding Board which had been in place since 1975 was designed to detect system orientation errors but did not become involved in questions of discipline. At the same time, however, it was contemplated that outside the Fact Finding Board process, line management would "recognize and react to situations involving substandard performance" and hold controllers accountable for their actions.

23. According to the Bulletin, the ATS Operating Guidelines, as amended in December of 1982, were intended to give line managers time to properly investigate incidents where the principal cause, as determined by the preliminary investigation, was substandard performance by one or more operating personnel. Conducting such an investigation, nevertheless, would not preclude a subsequent Fact Finding Board. That is, when line management's investigation revealed that a system deficiency also was a factor, a Fact Finding Board would be convened to complete that aspect of the examination. However, when the preliminary investigating disclosed substandard performance, a "comprehensive investigation" was envisaged under the amended guidelines to be conducted by a three-man board. But unlike the Fact Finding Board, it is open to the board in a "comprehensive investigation" to attribute responsibility for human error. Nevertheless, any disciplinary action against a controller for substandard performance could only be imposed following a separate inquiry. It is, of course, open then to the controller to grieve the penalty and if necessary, to refer it to adjudication. Mr. Robertson testified that it is because the

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"comprehensive investigation" could adversely affect a controller's career that the Complainant was affording to them the benefit of legal counsel.

24. Counsel for the Complainant, upon the introduction of all the evidence, made the following additional submissions. The evidence of past practice, as set out in Exhibit #4, and the evidence of Mr. Robertson clearly establishes the right of a controller to have legal counsel to act as his "employee representative" at administrative inquiries, hearings or investigations into operational irregularities. This right is accorded by Article 6.01 and the Complainant, at its option, has never been denied that right until the introduction of the "comprehensive investigation" early in 1983. It was that denial of legal counsel to Messrs. Scott and Lycan that led to the making of this complaint.

25. In the alternative, counsel for the Complainant submits that even if the Board should find that Article 6.01 does not provide controllers with a right to have legal counsel to represent them at administrative inquiries, the employer is estopped from denying that right by reason of past practice. More specifically, over the course of many years and the duration of several collective agreements, the Employer under Article 6.01 has allowed controllers to be represented by legal counsel at all administrative inquiries, hearings and investigations and induced the Complainant to believe that such an entitlement existed even though it may not have been legally provided for in the collective agreement. In this circumstance, counsel argues that the employer is estopped, at least for the duration of the existing collective agreement, from denying the Complainant that entitlement. Finally, counsel submits that, since important rights of controllers could be undermined by the new "comprehensive investigation", an application of the principles of natural justice, gives to the controllers concerned an entitlement to legal representation in such a proceeding.

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26. Counsel for the Respondents made the following submissions. He reiterated that, on a reading of all of the provisions relating to the representation of employees, it is clear that the reference to "employee representative" in Article 6.01 means exactly what it says and does not include legal counsel. The word "employee" is a modifying adjective to the word "representative". Had it been intended that a representative should include legal counsel, the word "employee" would not have been used. Accordingly, since there is no ambiguity as to the meaning of "employee representative", the extrinsic evidence adduced by counsel for the Complainant is irrelevant. Further, counsel argues that Exhibit #4, in particular, and the evidence adduced in respect of it, does not reveal a long term consistent past practice that would constitute the kind of estoppel asserted by the Complainant.

27. Finally, counsel submits that the refusal of the Employer to permit legal counsel to represent the two controllers concerned at the May 16 "comprehensive investigation" in Ottawa, does not constitute a contravention of subsection 8(1) of the Act. Neither Mr. Little nor any other person employed in a managerial capacity interfered with the Complainant's representation of any employees. Indeed, Mr. Little was prepared to allow Mr. Smith and Mr. Laviolette respectively to represent Mr. Lycan and Mr. Scott and indeed the CATCA Ontario Regional Director, Mr. Marchand, in fact, did represent their interests in the "comprehensive investigation" before Mr. Little. On that basis alone, counsel asserted that the complaint must be dismissed.

28. In reply to the latter argument, counsel for the Complainant submits that since Mr. Little refused to allow Mr. Jewitt to act as legal counsel at the inquiry, as he had a right and entitlement to do, there was an interference by management in the representation of employees by the bargaining agent in violation of subsection 8(1) of the Act. Counsel, therefore, asserts that the Complainant is entitled to the remedy which it is seeking.

Determination of the Board

29. Article 6 of the collective agreement between the Complainant and the Treasury Board under the heading "Operating Irregularities" reads as follows:

6.01 At any administrative inquiry, hearing or investigation into an operating irregularity, where the actions of an Air Traffic Controller may have had a bearing on the events or circumstances leading thereto, and the Controller is required to appear at the administrative inquiry, hearing or investigation being conducted into such irregularity, he may be accompanied by an employee representative of his choice.

6.02 The Controller and his representative may require the Department's representative in charge to state the circumstances leading to the inquiry, hearing or investigation before the Controller is required to answer any questions put to him.

6.03 The Controller and his representative may make representations and direct questions concerning the irregularity or events and circumstances leading thereto, to the Department's representative in charge.

6.04 The Department shall notify the Controller and where applicable his representative, of the completion of the report of an investigation pursuant to clause 6.01 of this agreement. Such notification shall be in writing and shall stipulate that an immediate opportunity will be provided to the Controller, and where applicable his representative, to read the report, including the findings of the investigation, and to take such personal notes as they deem necessary.

Subsequent opportunities to read the same report and findings will be provided to the Controller, and where applicable his representative, upon written request.

6.05

(a) A Controller, his representative or employees called by the inquiry as witnesses will suffer no loss of normal pay while appearing before an administrative inquiry, hearing or investigation.

(b) A Controller or employees called by the inquiry as witnesses outside of their scheduled hours of work shall be compensated at the appropriate overtime rate.

6.06 With respect to the conditions laid down in MANOP 2209.3 (or its replacement relating to the play-back of recorded information), it is incumbent upon the Employer to treat video and audio recordings, computer readouts of ATC operations, and transcripts of audio recordings as restricted information not (normally) available to the public. However, in cases where Department of Transport legal counsel has determined that there will be no departmental involvement in any subsequent civil litigation the Employer may permit lawyers to make their own transcript under supervision.

6.07 Until such time as the Air Administration redesigns its safety services and redefines authorities and procedures for Accident/Incident Investigations, it is agreed that an operating controller will be named as a member of any fact-finding board investigating an operating irregularity in which Air Traffic Services has an apparent involvement.

6.08 A controller required to appear before any inquiry, hearing or investigation shall, in the company of his representative if he so desires, but under supervision, be allowed to review any relevant video and audio recordings and computer readouts of ATC operations where available. In addition, the controller shall be provided with a transcript of relevant audio recordings. The foregoing shall take place prior to the controller being required to answer questions put to him by the Department's representative.

6.09 The parties agree that audio or visual tape recordings and transcripts of ATS communications are intended to provide a record of such communications for use in the monitoring of ATS operations and the investigation of operating irregularities, infractions, incidents or accidents. The parties further agree that audio or visual tape recordings and transcripts of ATS communications are not normally intended to provide direct evidence before third parties in disciplinary cases, or incompetency cases under Section 31 of the Public Service Employment Act. It is further agreed that if they are to be used in such cases, a review of the recording or transcripts will be made by a senior official of the Employer and the Association, and following such review, there must be mutual consent of these officials to introduce such recordings or transcripts as direct evidence.

6.10 Where an operating irregularity occurs that could be the subject of a Fact-Finding Board investigation, and where the circumstances that gave rise to the operating irregularity are not as a result of wilful misconduct or gross negligence on the part of an air traffic controller, and where as a result of that operating irregularity the employee's air traffic control licence is suspended, excluding suspensions of the licence validation certificate, by a regulatory agency of the Employer, then the employee will suffer no loss of his normal pay during such period of licence suspension while performing other assigned duties.

6.11 Legal Representation

The Employer shall provide legal advice and assistance to an employee who is required to appear at a coroner's inquest or judicial/magisterial inquiry, or who is a party to civil legal action, arising out of the performance of his duties as an air traffic controller.

In the circumstances outlined above:

(a) if the employee so desires, he may select legal counsel of his choice, and the legal fees for such representation shall be borne by the employee;

(b) where a conflict of interest exists, the employee may select legal counsel of his choice and the Employer shall pay the legal fees for such representation, in accordance with the schedule of fees established for agents of the Department of Justice.

A grievance arising from the application of this clause shall begin at the final step of the grievance procedure.

30. It is an accepted principle of interpretation that a particular provision must be interpreted in the context of the collective agreement as a whole. The reference to "the controller and his representative" in Articles 6.02, 6.03 and 6.04, by implication must be interpreted as the controller and his employee representative having regard to the language of Article 6.01. The provision of Article 6.05 which states that "his representative" will suffer no loss of normal pay while appearing before an administrative inquiry, hearing or investigation clearly implies that "employee representative" in Article 6.01 means an employee of Transport Canada in the Air Traffic Control Group bargaining unit. I would mention that the added words "of his choice" in Article 6.01 cannot be interpreted to mean that the choice would encompass legal counsel as was suggested by counsel for the Complainant. It is interesting to note that Articles 6.02 and 6.03 refer also to "the Department's representative". In Article 6.06, however, there is a specific reference to "Department of Transport legal counsel", albeit in a different context than the earlier clauses. Article 6.08 once again refers to a controller in terms of "his representative" as in Articles 6.02, 6.03 and 6.04. It is to be noted also that Article 6.11 spells out a special situation when "the Employer shall provide legal advice and assistance to an employee". Moreover, clauses (a) and (b) of Article 6.11 specifically provide that the employee may select legal counsel of his choice.

(Underlining added for emphasis).

31. I would also refer to other provisions of the collective agreement where reference is made to "representatives". Article 2.04 provides inter alia that "the Collective Bargaining Committee may be assisted by representatives other than employees". In respect of the grievance procedure, Article 5.04 provides that "an employee may be assisted and/or represented by an authorized representative of the Association when presenting a grievance at any step". Article 5.12 reads, in part, that "an employee who is a representative of the

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Association may be granted time off during working hours to assist an employee in the presentation of a grievance". Article 5.14 states that "a representative of the Association other than an employee will be permitted access to the Employer's premises to assist in the settlement of a grievance". Under the heading "Adjudication", clause (a) of Article 11.05 reads that "where operational requirements permit, the Employer will grant leave with pay to an employee who is a party". Clause (a) of Article 21.02 under the heading "Association-Management Consultation" reads - "An Association National Committee consisting of not more than five (5) employee representatives of the Association". Clearly "employee representatives" in the above context means members of the Air Traffic Control Group bargaining unit.

(Underlining added for emphasis).

32. The provisions of Article 6 referred to in paragraph 30 and the provisions of those Articles referred to in the foregoing paragraph demonstrate that the word "representative" and indeed other words such as "employee" are specifically qualified or modified to make it clear as to the persons that are designated. In light of the above examples which well illustrate the point, I am satisfied that there is no ambiguity as to the meaning that should and must be attached to "employee representative" in Article 6.01 of the collective agreement. It can only mean an employee of Transport Canada in the Air Traffic Control Group bargaining unit. The interpretation of the words "employee representative" in Article 6.01 cannot be stretched to include legal counsel.

33. In light of the above finding, the extraneous evidence adduced by counsel for the Complainant can have no bearing on the interpretation of the words "employee representative" in Article 6.01 since there is no ambiguity as to their meaning. In the result, the evidence of past practice can only have possible relevance in respect

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of counsel's argument that the Employer is estopped from exercising any right it might have to exclude legal counsel from the "comprehensive investigation", or indeed any administrative inquiry, hearing or investigation into an operating irregularity falling under Article 6.01, until the Complainant has had an opportunity to again negotiate on the question of the Complainant's rights of representation at such hearings.

34. In respect of the above argument, based on the evidence, I find that the "comprehensive investigation" introduced by the employer late in 1982 constitutes an administrative inquiry, hearing or investigation into an operating irregularity within the meaning of Article 6.01 of the collective agreement currently in effect between the parties. In this regard I fail to understand or appreciate the basis of the statement contained in paragraph 3 of Mr. Proulx's memorandum of December 23, 1982 (Exhibit #1) that a "comprehensive investigation by line management is neither a Fact Finding Board nor an Administrative Inquiry". Simply unilaterally so stating does not make it so. Further there is no evidence that even suggests that during the 15 years that Article 6.01 has been incorporated in the series of collective agreements between the parties the Complainant ever has been denied representation by legal counsel when it has made the choice to be so represented. Furthermore, there an uncontradicted evidence that in all administrative inquiries since September of 1977, whenever controllers so desired, they were permitted to be represented by legal counsel provided by the Complainant.

35. The doctrine of estoppel by conduct has been dealt with by the courts over many years and more recently in labour arbitrations with the sanction of the courts. In this regard I would cite Re CN/CP Telecommunications and Canadian Telecommunications Union (1982) 4 L.A.C. (3rd) 205 which is an arbitration award of David M. Beatty dated February 12, 1981. His award and the reasoning contained therein with respect to the use of estoppel by conduct was upheld by the Ontario Divisional Court in a judgment rendered by Mr. Justice Osler dated November 26, 1981 which is cited as Canadian National Railway et al v. Beatty et al (1982) 34 O.R. (2d) 385.

36. In his award Professor Beatty at pages 212 and 213 quoted with approval a careful analysis of the doctrine of estoppel and its effect as set out by Denning L.J. in a passage from Combe v. Combe [1951] 1 All E.R. 767 at pp. 769-70 (C.A.). I propose to quote only two excerpts from that passage which read:

> ...It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties.... The principal, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

37. In Re General Concrete of Canada Ltd. and United Cement, Lime & Gypsum Workers, Local 387 (1976) 11 L.A.C. (2d) 187 at p.200, Mr. Beatty interpreted the principles enunciated by Denning L.J. in Combe v. Combe (supra) in the following manner:

> More specifically as elaborated in an extrajudicial exposition, Denning, L.J., explained that the doctrine is only applicable in those circumstances (i) where the parties have already entered into a definite and legal contractual or analogous relationship (but see Watson v. Canada Permanent Trust Co. (1972), 27 D.L.R. (3d) 735, [1972] 4 W.W.R. 406 (B.C.S.C.) and generally David Jackson, "Estoppel as a Sword", 81 L.Q.R. 84 (1965); (ii) that there must be some conduct or promise "which induces the other party to believe that the strict legal rights under the contract 'will not be enforced or will be kept in suspense'" and (iii) that "having regard to the dealings which have taken place between the parties" it will be inequitable to allow that party to enforce their strict legal rights. With respect to this last condition Denning, L.J., has written:

> But where the party has made no promise, express or implied, and all that can be said against him is that he by his conduct has induced the other to believe that the strict rights under the contract will not be enforced or kept in suspense, then the position is different because there is no question of good faith--no question of a man keeping his word. In those circumstances it may be necessary for the other party to show not only that he acted, but also that he acted to his detriment, in the belief that the strict rights would not be enforced. That is what is necessary in the case of an estoppel and there is no good reason why it should not be necessary here.
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> A.T. Denning, "Recent Developments in the Doctrine of Consideration", 15 Mod. L. Rev. 1 (1952) at p. 5.

38. Mr. Beatty in his award then proceeded to apply the above quoted tests to the fact situation before him. I have done the same, adapting the tests to the situation before me. What is in issue is (1) whether there is some conduct on the part of Transport Canada that induced the Complainant to believe that the strict legal rights under Article 6.01 would not be enforced, and (2) whether having regard to the dealings which have taken place between the parties it would be inequitable to allow the employer to insist on those rights.

39. As in the Beatty case, in the complaint before me the first issue is one of fact. The question is whether there was a course of conduct which, reasonably construed, could have induced the Complainant to believe that Transport Canada would not insist on its strict legal rights under Article 6.01 of the collective agreement. In light of my finding, set out in paragraph 34 above, that question can only be answered in the affirmative. That is, Transport Canada has permitted legal counsel to represent the Complainant and controllers in administrative inquiries, hearings or investigations into operating irregularities, which include "comprehensive investigations",

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at their option. In other words, I am satisfied that the Complainant has established the first aspect of the doctrine of estoppel by conduct.

40. The second condition of the doctrine of estoppel is that of showing that it would be inequitable to allow Transport Canada and the Treasury Board to insist on the terms of Article 6.01 of the collective agreement, i.e., that representatives in administrative inquiries into operating irregularities be confined to members of the Air Traffic Control Group bargaining unit. This aspect of the doctrine turns essentially on a finding of detrimental reliance.

41. The undisputed evidence of Mr. Robertson is that the Complainant was generally content not to have controllers represented by legal counsel before Fact Finding Boards between their inception in 1975 and the end of 1982 since that forum could not be used to attribute responsibility as a basis for disciplinary action against them. However, controllers, in fact, were represented by legal counsel retained by the Complainant before some Fact Finding Boards as well as at various other administrative inquiries conducted during that period. Under the altered procedure of "comprehensive investigations" into operating irregularities that was instituted at the end of 1982, however, that guarantee of immunity from the imposition of disciplinary penalties as a result of evidence of substandard performance by controllers, ceased to exist. In other words, the change in procedures governing administrative inquiries into operating irregularities, indirectly at least, could jeopardize controllers in a variety of ways including financial penalties and career progression.

42. The detrimental reliance then of assuming that the choice to be represented by legal counsel would continue lies in the Complainant's inability to require the Treasury Board to negotiate a change in its new practice during the life of the present collective agreement. I would mention here that in his judgment in Canadian National Railway Co. et al v. Beatty et al (supra), upholding Beatty's award in the CN/CP Telecommunications Case, Osler J. stated as follows at page 394:

> I am aware of no decision by the Court of Appeal to the effect that the doctrine of estoppel by conduct may not in a proper case be applied by an arbitrator. As I have already stated, this is such a case. The reliance by the union on the company's long-established practice and the company's failure to indicate or request any change in that practice led the union not to make any proposals on its part regarding the maintenance or the alteration of that practice and represented an act by the union to its detriment. That act justified the invocation of the doctrine.

43. In the instant situation the Complainant relied on the practice of Transport Canada since 1977, if not considerably earlier, of allowing it or the controllers concerned, when they so desired, to be represented by legal counsel retained by CATCA in all administrative inquiries. Further, Transport Canada did not at any time until May of this year suggest or request a change in that practice. In these circumstances quite naturally the Complainant felt no need to make any proposals during any previous negotiations to secure guarantees in writing to the above entitlement to representation by legal counsel of its choice. The foregoing properly can be characterized as conduct on the part of the Complainant to its detriment. Accordingly, I am satisfied that the remaining element for the imposition of the doctrine of estoppel has been met.

44. The sole remaining issue before me is whether there has been a contravention of subsection 8(1) of the Act. Based on its language I am forced to conclude that the Respondents, the Treasury Board, Transport Canada and Mr. John P. Little interfered with the representation of employees by the Complainant in violation of subsection 8(1). The evidence does not warrant a similar finding in respect of the Respondent, Mr. R.G. Bell.

45. Accordingly, pursuant to subsection 20(2) of the Act, I direct that henceforth Mr. Little cease to interfere with the representation of

controllers by the Complainant and that he permit those controllers involved in a "comprehensive investigation" to be represented by legal counsel. Pursuant to clause 20(2)(a)(ii) I direct that the Secretary of the Treasury Board cause the Complainant and the members of the Air Traffic Control Group bargaining unit to be allowed to be represented by legal counsel in all future administrative inquiries, hearings or investigations into operating irregularities, falling under the purview of Article 6.01 of the collective agreement, which includes the "comprehensive investigations" introduced in December of 1982.

DATED AT OTTAWA this 10th day of June, 1983.

"J. Harold Brown, Q.C."
for the Board.