R.A.M.
JUNE 1983

File Nos.: 166-2-12832 to 12866

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

BETWEEN:

ADAMS, T.D., BAKER, B.R., BATEMAN, A.J.,
BYRNE, P.M., COFFEY, D.J., CORNISH, J.B.,
DRUMMOND, R.F., DUPLAIN, M.R.W.,
ELMS, H.L., FLYNN, M.W., JARDINE, L.G.,
KIMBALL, B.H., KING, G.E., LARSEN, H.C.,
LUSH, R.J., MACLEAN, A.G., MCKINNON, J.,
MEANEY, R.M., MERCER, D.G.,
MERCER, R.G.R., MOREY, J.R., PARROTT, G.W.,
PINSENT, G.T., PINSENT, J.M.,
PRITCHETT, E.D., SAUNDERS, L.L.,
SMITH, W.W., STILES, B.R., TUCKER, N.C.,
WELLS, W.D., WENTZELL, L.B., WILKIE, G.P.,
WOODD, R.A., WOOLFREY, G.C., YETMAN, S.E.

grievors

AND:

TREASURY BOARD
(Transport Canada),

employer.

COPY BOD + BR + FAE
RETURN RAM

DECISION

Before: Innis Christie, Board Member and Adjudicator.

For the Grievors: Catherine H. MacLean, Counsel.

For the Employer: Harvey Newman, Counsel.

Heard in Gander, Newfoundland, April 26 and 27, 1983.

ART 7
~~DISCIPLINE~~
CODE 402/82

DISCIPLINE

DECISION

In August of 1981 some 13,500 American air traffic controllers went on an illegal strike. On the direction of President Reagan they were fired. Across Canada Canadian air traffic controllers, members of the Canadian Air Traffic Controllers Association, reacted to the strike and the firing. This adjudication concerns air traffic controllers at the Gander Control Centre who were suspended, in almost all cases for one day, for their reactions. Vice-Chairman J. Maurice Cantin has already made an award with respect to the Toronto air traffic controllers who were discharged for activities arising from the American strike and firing.

In Gauthier, Batchelor and Reasin, (Board files 166-2-12727, 28 and 29) Vice-Chairman Cantin found each of the grievors to have been insubordinate. He notes, at p. 106, that:

> The three grievors admitted having been asked personally if they were going to work normally. They admitted having said no.

Vice-Chairman Cantin held that "the safety of the public or of others" was not a reasonable defence in the circumstances because he was "not convinced that the grievors honestly believed that the safety of others was in jeopardy" (at p. 109). He concluded, however, that discharge was not a reasonable penalty because,

> The principle of equality of treatment has not been respected and a short term suspension in line with the disciplinary measures imposed on the other air traffic controllers throughout the country should be substituted for the discharge. (at p. 112)

Accordingly, he reduced the penalty of discharge to three days for Frank Gauthier, three days for John Batchelor and five days for Cecil Reasin.

Part of the evidence before Vice-Chairman Cantin was testimony on behalf of the grievors by air traffic controllers from across Canada with respect to their activities in relation to the American strike and firing, and the discipline imposed upon them. I refer below to the evidence in that proceeding of James McKinnon who, in 1981, was branch chairman of CATCA for Gander.

At the outset of the hearing before me counsel for the grievors advised me that the grievance of James McKinnon (Board file 166-2-12848) had been withdrawn. She also advised me that six other grievances were being withdrawn: those of D. J. Coffey, B.H. Kimball, H. C. Larsen, L. L. Saunders, W. W. Smith and G. C. Woolfrey, (Board files 166-2-12836, 43, 45, 57, 58 and 65). Further, counsel agreed that the hearing would deal only with the grievances of B. R. Baker (Board file 166-2-12833), G. T. Pinsent (Board file 166-2-12854), J. M. Pinsent (Board file 166-2-12855), and L. B. Wentzell (Board file 166-2-12862). Counsel agreed that I should remain seized of the remaining twenty-four grievances and reconvene the hearing with respect of them at the request of either party.

Counsel also agreed that I could take account of Vice-Chairman Cantin's award in Gauthier, Batchelor and Reasin (supra) not only in the normal way but also by taking account of evidence in the hearing before him as set out in the very full account in his award and by accepting his findings of fact. Specifically, counsel agreed that everything in that award except

.../3

material under the heading "Arguments", from pp. 91 to 101, could be taken into account.

In capsule form, what happened in Gander on August 10 and 11, 1981 was that, following some refusals to clear aircraft into U.S. airspace, management temporarily closed parts of the Gander air traffic control operation and systematically questioned each of the thirty-five air traffic controllers about his willingness to perform his full duties, including his duty to clear aircraft into U.S. airspace. Based on their answers the four grievors with whom I am concerned here were given one day suspensions, except Baker who received a three day suspension because of his previous disciplinary record. The grievors claim that they did not refuse to perform their duties and that no discipline was warranted. In the alternative they claim that if any discipline was warranted the suspensions imposed upon them were unduly harsh when their alleged misconduct is compared with that disclosed in the Gauthier, Batchelor and Reasin award (supra) and the discipline allowed there. I heard evidence from D. L. Ivany, a Gander air traffic controller whose grievance against his one day suspension was allowed. Counsel submitted on behalf of the grievor Jack Pinsent that his situation was so similar to Ivany's that his grievance must also be allowed on that basis.

Ronald Chafe, Unit Chief at Gander in August of 1981, was called as a witness by the employer. Counsel for the grievors called the four with whom I am here concerned and Mr. Ivany as witnesses. Based on that testimony and the Gauthier, Batchelor and Reasin award (supra) I will now elaborate as fully as necessary the context in which these grievances arose and consider specifically the alleged insubordination of each of the four grievors. It is not disputed that Mr. Baker did, in fact, have on his record a previous incident

.../4

of discipline arising in sufficiently similar circumstances that it could legitimately be taken into account to differentiate his discipline from that of the other three. I will not consider in detail the misconduct of the grievors in Gauthier, Batchelor and Reasin (supra). It suffices to say that there was no dispute that it was significantly more serious, involving as it did aircraft actually in flight, than the insubordination alleged against the grievors here.

According to Vice-Chairman Cantin's award in Gauthier, Batchelor and Reasin (supra):

> On August 3, 1981, about 13,500 American air traffic controllers, members of the Professional Air Traffic Controllers Organization (PATCO) began an illegal strike. On the same day,President Ronald Reagan gave the striking controllers an ultimatum which was to return to work within forty-eight hours or be fired. The regularly scheduled flights were immediately reduced and the United States government imposed a 25% cut in commercial flights designed to reduce peak traffic at air towers. Approximately 11,500 PATCO members were fired for not respecting the back to work ultimatum. On August 9, Mr. William Robertson, the President of the Canadian Air Traffic Controllers Association, urged CATCA members to refuse to handle U.S. air traffic as of 7:00 a.m. on August 10. He said that his reason for these instructions was the unsafe conditions in U.S. airspace due to the situation with PATCO.

The Gander Aircraft Control Centre controls Canadian domestic airspace over Newfoundland and international oceanic airspace roughly to the middle of the Atlantic between the 45th and 63rd parallels of latitude. The abutting oceanic sector to the east is identified as Shanwick Oceanic and is controlled by air traffic controllers in Prestwick. Operations Bulletin 81-89, under date of August 8, 1981, which was introduced in evidence, states, in part:

> that Gander O.A.C. will not accept Westbound aircraft proceeding to U.S. destinations unless prior approval is obtained from Shanwick O.A.C. These flights will be included in the combined flow rate of ten aircraft per hour over Yarmouth.

In other words, contingency methods were in effect; but up until August 9 management at Gander had experienced no difficulty in deploying controllers. On August 8 James McKinnon, who, as I have said, was branch chairman of CATCA, gave the first indication there of unwillingness to clear aircraft into U.S. airspace. His testimony as set out in the Gauthier, Batchelor and Reasin award (supra) at pp. 80 and 81 is:

> Mr. McKinnon stated that he resides in Gander, Newfoundland. He has been an air traffic controller, AI-4, during the last eight years. He worked on August 7 or 8, 1981. He had read information from the national office of CATCA on different happenings and he felt that he had a moral obligation. He wanted no part in clearing traffic to and from the U.S.A. He had a letter when he came to work and he handed it to the central operation supervisor

.../6

> indicating that he was not prepared to clear traffic into the U.S. because he thought that it was unsafe. On August 10, he was at the radio position. He cleared an aircraft short. He was advised that he was relieved of his duties and he was told to go home. His supervisor was behind him at the time of the short clearance. He reported on the next shift. He was asked if he had changed his mind. He said no. He was sent home. The same thing happened again on the next shift. He was off the day after. He was given a three day suspension. In 1981, he was a branch chairman of CATCA for Gander. The maximum penalty to an air controller in Gander was three days. He had no prior record.

Mr. Chafe, Unit Chief at Gander at the relevant time, testified that this evidence was accurate except that his recollection was that Mr. McKinnon's first refusal occurred on August 9, not August 10. On the 10th, at about 11:00 a.m. local time, other Gander controllers refused to clear aircraft into U.S. airspace. When Moncton refused to accept further aircraft cleared short the result was a build up in aircraft holding in Gander airspace. A potentially dangerous situation was alleviated by having aircraft land in Gander and then Moncton informed Gander that they would once again accept aircraft cleared short. Following this Mr. Chafe contacted Shanwick and told them he would not accept aircraft other than those already on their way until the situation clarified. He was then directed by employer's headquarters operation to interview each controller and ask the specific questions to which I will turn shortly. Mr. Chafe then arranged for interviews with each controller in the presence of another member of management, Frank Tibbo, who took brief notes of the interviews, and Mr. McKinnon, branch chairman of CATCA.

.../7

Out of twenty-nine air traffic controllers interviewed on the 10th twenty-six gave what Mr. Chafe considered to be a "no" answer when asked whether they intended to perform all the duties of their positions as air traffic controllers, specifically including their duties to clear aircraft into U.S. airspace. Of the twenty-six who gave negative answers twenty-two were due to report at some point the following morning. The management people in Moncton were gravely concerned that a repeat of traffic backup of the 10th would be unsafe. As a result a management decision was taken not to permit any traffic to function in the Gander oceanic area. As a result the following "N.O.T.A.M.N.'s", or notices to traffic, were issued shortly after midnight and at 16:41 on the 11th.

> DUE TO THE UNCERTAINTY OF CONTROLLER LABOUR PROBLEMS WITHIN THE GANDER AREA CONTROL CENTRE, NO WESTBOUND TRAFFIC WILL BE APPROVED WEST OF 30W AFTER 0800Z AUG 11/81. ALL EAST BOUND TRAFFIC MUST EXIT GANDER OCEANIC AIRSPACE BY 1000Z AUG 11/81. THE AIRSPACE CLOSURE WILL REMAIN IN EFFECT UFN.

> DUE TO THE GANDER AREA CONTROL CENTRE CONTROLLERS RELUCTANCE TO GIVE ASSURANCES TO PROVIDE NORMAL ATC SERVICES THE GANDER OCEANIC AIRSPACE WILL REMAIN CLOSED UFN.

On the 11th controllers on the morning shift and the second day shift agreed to perform the full scope of their duties, apparently because they knew there were no aircraft to be cleared into U.S. airspace in any event. Mr. Chafe testified that on the basis of these responses and consultations with Mr. McKinnon he planned a tentative reopening

.../8

of the airspace at 2030 local time on August 11 but decided that before making a firm decision he would question controllers scheduled for the 4:00 p.m. to midnight shift. Most of them were contacted by phone and because of the indefiniteness of their answers Mr. Chafe decided to delay his decision to reopen the airspace. When the members of that shift came to the Centre Mr. Chafe advised them that he would be questioning each of them individually and give them an opportunity to meet with Mr. McKinnon. When the controllers were questioned all but two of them gave an indefinite answer which Mr. Chafe interpreted as a "no" and as a result they were sent home and the airspace remained closed.

Management's consultations continued, the branch council of CATCA met and the upshot was that with the midnight shift of the 11th, that is on the morning of the 12th, normal operations resumed.

I am satisfied that in the context of the incidents at Gander on August 10 and the call by Mr. William Robertson, President of CATCA, on his membership to refuse to handle U.S. air traffic management was justified in closing the Gander oceanic area when the controllers refused to affirm that they would perform their duties. In other words, if there was in fact a refusal by the grievors to affirm that they would perform their duties that refusal had serious effects for the employer's operation. Mr. Chafe admitted in cross-examination that it might not have been necessary to close the oceanic area to eastbound traffic. He maintained that once westbound traffic dried up there would shortly be no eastbound traffic in any event. It does not seem to me that I need concern myself about the necessity of closing the area to eastbound traffic. It suffices to say that I have no doubt that what management interpreted as refusals by the air traffic controllers to affirm that they would perform

.../9

their duties had a serious impact. I now turn to the question of whether the four grievors with whom I am concerned here did in fact misconduct themselves.

When Mr. Chafe questioned the grievors on August 10 and 11 on their intentions to perform their duties he did so in accordance with a formula established at the employer's headquarters and apparently used across the country. Mr. Chafe's notes of that formula, which were introduced in evidence, were as follows:

> 1) I have a question which I must ask you and any answer other than 'yes' will be interpreted by management as being NO.
>
> 2) Do you intend to perform all the duties of your position as an AI controller. Specifically, I am referring to your duties to clear aircraft into U.S. airspace.
>
> 3) I must interpret your remarks as a NO answer.
>
> 4) You are counselled that your actions may be subject to disciplinary action up to and including dismissal.
>
> 5) Transport Canada's position is that there is a court injunction against you which requires you to perform all your duties, and failure to perform your duties may result in a fine and/or imprisonment.

It is clear from the evidence that, at least with respect to the four grievors here under consideration, Mr. Chafe stuck quite closely to the formula, although at least in the case of Jack Pinsent he

did not take the items in his interview formula in order. He may, in fact, have stated items #4 and #5 before putting the question #2. Item #3 only came into play, of course, if the interviewee gave other than a clear "yes".

The full import of Item #5 can be gathered from a consideration of two documents referred to in the Gauthier, Batchelor and Reasin award (supra) and set out below. According to that award, at p. 104, these two documents were handed to each of the grievors there. That does not appear to have been the case at Gander. Jack Pinsent testified that he had seen the documents. Ben Baker testified that he had not seen them and that he would have, had they been posted. There was no evidence with respect to whether Gary Pinsent and Lynn Wentzell had seen them. In my view nothing much turns on whether or not the grievors had seen these documents as I am satisfied that each of them was aware, or was made aware by Mr. Chafe, of the seriousness with which the employer was putting to question #2. The documents in question are the following:

> IN VIEW OF THE STATEMENT MADE LAST EVENING BY WILLIAM ROBERTSON,PRESIDENT OF CATCA, WHICH INSTRUCTED ALL CATCA MEMBERS TO REFUSE TO HANDLE ALL U.S. TRAFFIC AS OF 7 A.M. AUGUST 10th, IT HAS NOW BECOME NECESSARY FOR THE DEPARTMENT OF TRANSPORT TO ADOPT THE FOLLOWING POSITIONS:
>
> 1. ALL CONTROLLERS ARE EXPECTED TO PERFORM THE FULL RANGE OF THEIR DUTIES WITHIN AIRSPACE UNDER CANADIAN JURISDICTION.
>
> 2. IN THE DEPARTMENT'S VIEW, MR. ROBERTSON'S STATEMENT COUNSELS CONTROLLERS TO VIOLATE THE EXISTING

.../11

FEDERAL COURT INJUNCTION WHICH PROHIBITS ANY RESTRICTION OR LIMITING OF OUTPUT BY ANY CONTROLLER. VIOLATION OF THE INJUNCTION MAKES A CONTROLLER SUBJECT TO CONTEMPT OF COURT CHARGES AND THUS LIABLE TO A FINE UP TO $5,000 AND/OR UP TO A YEAR IN JAIL FOR EACH OFFENCE.

END PART 1

3. IN THE DEPARTMENT'S VIEW, MR. ROBERTSON'S STATEMENT COUNSELS CONTROLLERS TO PARTICIPATE IN AN UNLAWFUL WORK STOPPAGE AND ANY CONTROLLERS WHO PARTICIPATE IN SUCH AN UNLAWFUL WORK STOPPAGE ARE LIABLE TO THE SANCTIONS PROVIDED FOR IN THE PUBLIC SERVICE STAFF RELATIONS ACT AND/OR DISCIPLINARY ACTION.

4. SHOULD CONTROLLERS FOLLOW MR. ROBERTSON'S INSTRUCTIONS, IT WILL CREATE AN EXTREMELY SERIOUS SITUATION INVOLVING THE DEPARTMENT AND OUR GOVERNMENT IN A LABOUR DISPUTE TAKING PLACE IN ANOTHER COUNTRY.

END 2 PARTS
P. J. PROULX
DIRECTOR, AIR TRAFFIC SERVICES, DPR/X,
OTTAWA. (E-7)

IAE127 TBE028TDE015 TFE103 THE101 TIE015
TKE100 TLE138 100800
JJ CYZZLY KDCAYN
100758 CYHQYN
810494 NOTAMN CYHQ OPS
ATS CONTINGENCY NO. 7 CANADA/USA

THE CANADIAN AIR TRAFFIC CONTROLLERS ASSOCIATION (CATCA) HAS ADVISED ITS MEMBERS TO REFUSE TO HANDLE AIR TRAFFIC

.../12

PROCEEDING TO OR FROM THE UNITED STATES WHILE WITHIN CANADIAN CONTROLLED AIRSPACE EFFECTIVE 1100 GMT 10 AUG 81

TRANSPORT CANADA HAS ADVISED THE CONTROLLERS THAT FAILURE TO PERFORM ALL OF THEIR NORMAL DUTIES WHICH INCLUDES THE HANDLING OF AIR TRAFFIC TO OR FROM THE UNITED STATES WILL RESULT IN DISCIPLINARY AND LEGAL ACTIONS BEING TAKEN BY THE DEPARTMENT AGAINST ANY OFFENDERS

AIR CARRIERS ARE ADVISED THAT SOME DELAYS MAY OCCUR AS A RESULT OF ANY ILLEGAL ACTIONS THAT MAY BE TAKEN BY SOME CONTROLLERS

IN ADDITION WE ARE INVESTIGATING THE VALIDITY OF INCIDENTS CLAIMED TO HAVE COMPROMISED THE SAFETY OF FLIGHTS OPERATING BETWEEN CANADIAN AND U.S. CONTROLLED AIRSPACE

AIRCRAFT OPERATORS KNOWING OF SUCH INCIDENTS WHICH MAY HAVE OCCURRED SINCE AUG 01, 81 ARE REQUESTED TO ADVISE DGCA OTTAWA TELEX 053-3130 ON AN URGENT BASIS

AIRCRAFT OPERATORS ARE ADVISED TO MONITOR CLASS 1 NOTAM FOR FURTHER INFORMATION (E-8)

Before turning to the evidence with respect to Mr. Chafe's interview with each of the four grievors it should be pointed out that air traffic controllers at Gander are assigned on each shift to one of four sectors; Oceanic, High Domestic, Low Domestic and Planning. Each controller is, and must be, qualified in at least two sectors. Mr. Chafe's uncontradicted evidence was that when each controller is assigned to a particular sector on each shift there is nothing to preclude management from moving a controller from one

.../13

sector to another, provided it is one for which he is qualified.

Jack Pinsent was qualified for the Oceanic and Planning Sectors and on the 1000-1800 shift on August 10, 1981 he was assigned to the Planning Sector. Late on in that shift he was advised that Mr. Chafe wanted a personal interview with him. All the controllers to be interviewed were lined up at the door to a cubicle in the lounge area of the Air Traffic Control Centre. Mr. Pinsent was first in line. He was interviewed by Mr. Chafe in the presence of Mr. Tibbo and Mr. McKinnon, as Mr. Chafe testified. Mr. Chafe informed him that he had a question he had to ask and that any answer other than "yes" would be interpreted as "no". Mr. Chafe then, according to Jack Pinsent's testimony, discussed with him the injunction, contempt of court and the possibility of dismissal and a $5,000 fine and/or one year in jail. He then asked the question:

> Do you intend to perform all the duties of your position as an AI controller. Specifically, I am referring to your duties to clear aircraft into U.S. airspace.

Mr. Pinsent recollected that he said:

> Do you think I am going to answer a question that may put me in jail... nuts...I need legal advice.

He then left the room abruptly. As he left the other controllers noticed and asked him what he had said. As Mr. Pinsent testified that his response, to the effect that he needed legal advice, became the general pattern at Gander. He said that he gave that answer because, first, it was not part of his job to clear aircraft into

.../14

U.S. airspace and, second, because air traffic controllers are very sensitive with respect to legal liability.

The following day Mr. Jack Pinsent was one of those who responded "yes" to the question of whether he intended to perform all duties of his position because, as he testified, there was no traffic anyway.

Under cross-examination Mr. Jack Pinsent testified that he did not tell Mr. Chafe that he did not in fact clear flights into U.S. airspace. However, he also testified that in the Planning Sector he did on rare occasions clear eastbound traffic to U.S. Oceanic airspace where a flight crossed the 45th parallel. Mr. Pinsent took the position that he had been intimidated by Mr. Chafe because of the way the question was asked but agreed with counsel for the employer that he knew it was not being suggested that he would be required to do anything illegal.

Mr. Gary Pinsent was qualified on the Low Domestic and Oceanic Sectors. On the August 11 2400-0800 shift, when he was questioned by Mr. Chafe, he was assigned to the Oceanic Sector. Mr. Pinsent testified that during his preceding shift, on August 10, he was twice asked by supervisors whether he would perform his duties and clear aircraft into U.S. airspace and both times he answered affirmatively. Shortly after the start of his shift on the morning of the 11th he was called for his interview with Mr. Chafe. According to his careful notes made shortly thereafter, and uncontradicted by the employer's evidence, it went as follows:

> Discussion with Local Management with
> R. E. Chafe, Unit Chief; F. F. Tibbo, Data

.../15

Systems Supervisor, acting as witness (and taking notes on conversation); J.F. McKinnon, Local CATCA Chairman, as employee representative; and the undersigned.

I was advised by the Unit Chief that any answers other than an unqualified "yes" would be considered as a "no".

Management: Do you intend to carry out the duties of your position as air traffic controller?

Undersigned: In as far as possible, I will carry out the duties for which I am employed.

Management: Is that a "yes" or a "no"?

Undersigned: What do you consider it, Ron?

Management: A "no".

Undersigned: I consider this as nothing more than harassment.

Management: Do you intend to clear aircraft into American airspace?

Undersigned: Your question is hypothetical since I am working at the Oceanic Sector where clearances into American airspace are not issued and I am not qualified to work the High Domestic position where such clearances are issued.

Management: Is that a "yes" or a "no"?

Undersigned: This is foolish.

Undersigned: What happens again if I say "no"?

Management: If your answer is "no", you could possibly be found in contempt of court; in which case you could be

.../16

subject to a $5000 fine or up to one year in jail.

Undersigned: Under these conditions, would I not be crazy to answer "no" to the question posed?

Management: Is that a "yes" or a "no"?

Undersigned: This is ridiculous. I have to go back to work. I obviously need legal counselling with respect to your questioning.

Under cross-examination Mr. Pinsent agreed that when working the Low Domestic Sector he might issue clearances into U.S. airspace. He also suggested that on rare occasions an air traffic controller working the Oceanic Sector might be called upon to grant clearances to U.S. airspace in the context of a plane rerouted while in flight or to a plane on an operations mission off the coast. He testified that he might only encounter three such operations missions in the course of a year working as an Oceanic controller.

Ben Baker was qualified for the Low Domestic and Oceanic Sectors. On the shift when he was questioned, the 2400-0800 shift on August 11, he was assigned to Low Domestic. Mr. Baker testified that during his preceding shift, the 0800-1600 shift on August 10, he was asked by his supervisor if he would clear aircraft into U.S. airspace and answered "yes". Near the start of the shift on August 11 he was interviewed by Mr. Chafe, together with Mr. Tibbo and Mr. McKinnon. When asked for his response he asked for an opportunity to seek legal counsel. He said that he did so because "A lot of others had been asked that question and it seemed like a good answer." On cross-examination Mr. Baker said that he had not subsequently consulted a lawyer but he did not think it had been unreasonable for him to ask

.../17

for an opportunity to get legal advice, to unscramble the situation and try to understand it. He acknowledged that it was not a normal sort of answer but he said that management did not normally threaten him. He stated that he gave the only answer he could in the circumstances and that he had gotten the answer from what other people had said.

Lynn Wentzell was qualified for the Low Domestic, High Domestic and Oceanic Sectors. On the 1600-2400 shift for August 11, when he was questioned, he was assigned to the High Domestic Sector. Prior to that shift Mr. Wentzell had been on days off. In the forenoon he was called on the telephone. He was advised that the call was being monitored by Mr. Tibbo and Mr. McKinnon and he was then questioned according to Mr. Chafe's formula. He testified that his initial reaction was defensive and that, because he was very conscious that one of the prerogatives of a controller is to consider each flight on its own, he responded that he would provide for a "safe, orderly and expeditious flow of traffic" as the Operations Manual demanded. Mr. Chafe told him that any answer other than a straight "yes" would be treated as a "no" and repeated the question. Mr. Wentzell apologized and repeated his answer. Mr. Chafe then told him that he would probably be asked the question again when he reached the Centre.

When Mr. Wentzell did report for work he and the other members of his shift were briefed by Mr. Chafe and Mr. Tibbo on the questions that would be asked and the ramifications of a "non-yes" answer, and were given time to talk to Mr. McKinnon. Mr. Wentzell testified that in the discussion with Mr. McKinnon it was stressed that each controller had to make an individual decision as to how he would answer Mr. Chafe's question. Mr. Chafe and Mr. Tibbo then

.../18

returned and read the question to each controller and each gave the same answer; that he would prefer to discuss the matter with a lawyer. In cross-examination Mr. Wentzell acknowledged that he never did try to contact a lawyer and that his answer had been given because he hoped the union would come forward and tell the controllers what to do. He wanted to get a reading on what was happening. He testified that doing anything illegal or unsafe was never regarded as part of his duties.

David Ivany testified that on August 10, 1981 he was scheduled to do a raw radar check. In fact the check plane did not turn up that day so he did nothing. He testified that Mr. Chafe had given him the opportunity to go home or stay at work so he stayed in order that he would be paid. Apparently simply because he was there, he was asked the formula question by Mr. Chafe and responded that he needed legal advice. Subsequently, Mr. Ivany's grievance was granted in the following terms:

> Your grievance concerning the one-day suspension assessed against you, as per management's letter of October 14, 1981 has been reviewed and this matter discussed with your Association representative.
>
> In light of your assigned duties on August 10, 1981 which effectively precluded you from active control duty on that date, a revision of the circumstances surrounding your suspension has been made and the letter rescinded.

Each of the four grievors received identical disciplinary notices, except that Mr. Jack Pinsent's referred to Monday, August 10

.../19

where the others referred to Tuesday, August 11 and Mr. Baker's notice takes note of his previous discipline. Mr. Gary Pinsent's disciplinary notice reads as follows:

> After consideration of the matters associated with your verbal notification of your intent not to process U.S. airspace-bound aircraft on Tuesday, August 11, 1981 this letter is to inform you that you shall be suspended from duty, without pay, for one day, at a time to be determined later. You will be advised in writing, in due course, as to the specific date this suspension is to be effected.
>
> Needless to say, I consider your actions to be serious and unacceptable and you are reminded that misconduct in the future could lead to more severe disciplinary action including discharge.

These notices were grieved. The grievance was denied in the following terms:

> Your grievance was discussed with your authorized representative.
>
> The one-day suspension assessed against you, as per management's letter of October 14, 1981, was as a result of your failure to immediately confirm that you would be carrying out all of your assigned duties as an operational air traffic controller on the C and D shift(s) of August 10 and 11, 1981.
>
> This action created a potentially

.../20

dangerous situation with regards to the safety of the travelling public as well as adversely affecting the efficient and effective operations of the Regional Air Traffic Services.

Your grievance is denied.

THE EMPLOYER'S POSITION

The position of the employer was that in the context management was entitled to seek unequivocal confirmation from the grievors of their intention to carry out their duties and that the grievors had an obligation to give that confirmation. Failure to do so had a serious impact on the employer's operation and constituted breach of the grievors' very grave job responsibilities. Discipline was therefore warranted and the imposition of the one-day suspension for those without a previous disciplinary record and a three-day suspension for Mr. Baker was not unreasonable.

THE GRIEVORS' POSITION

The position of the grievors was that Mr. Gary Pinsent had, in fact, answered "yes" and confirmed his intention to fulfill his duties. The other three employees in responding that they needed legal advice were acting entirely properly, given the uncertainty of their situation, the inapplicability, in Mr. Jack Pinsent's case, of the question to his actual duties and their entirely proper concern about any potential legal liability to which they, personally, might become subject. Alternatively if there was cause for discipline the suspensions imposed on these four grievors were unduly harsh in comparison with the suspensions imposed by Vice-Chairman Cantin in Gauthier, Batchelor and Reasin, (supra) given the more

.../21

serious nature of the misconduct of the grievors in that case. Furthermore, the same reasons which had led the employer to allow the grievance of David Ivany, that his assigned duties on August 10 effectively precluded him from active control duty on that date, applied in substance to Jack Pinsent, who was working the Planning Sector on the relevant date.

REASONS FOR DECISION:

With respect to all four grievors I have concluded that the employer had cause for discipline. The interview formula used by Mr. Chafe was unusual but I see nothing in it that justified the grievors' refusal to confirm they would fulfill their duties. The grievors took the position that for management to spell out the consequences of a "no" answer was intimidating. Undoubtedly it underlined the seriousness of the question and, whatever its other effects, fairly put the grievors on notice of the potential consequences of a "non-yes" answer. I note that for the grievors to say that they were intimidated into giving the answer they gave involves reverse logic. Had they said "yes" when they did not want to do so the plea of intimidation would have made some sense. In the context of a "no" answer it does not.

Mr. Chafe's opening statement, that anything other than a clear "yes" would be taken as a "no", is somewhat more troublesome. However, in the context of Mr. Robertson having urged CATCA members to refuse to handle U.S. air traffic and the actions of Mr. McKinnon and others on August 10, 1981 the employer was within its rights in insisting on an absolutely unequivocal confirmation by CATCA's members of their intention to fulfill their duties, particularly with respect to clearing air traffic into U.S. airspace. As has been said in a different but related context "an industrial plant is not

.../22

a debating society". (See Ford Motor Company (1944), 3 L.A. 779 at pp. 780-81 and Brown and Beatty, Canadian Labour Arbitration (1977), para. 7:3610, the awards cited there and Christie, York Farms Limited, Sardis (1981), 2 L.A.C. (3d) 112 at p. 117). Even more obviously an air traffic control centre is not a debating society. Not only the object but the obligation of such an operation is the safe management of air traffic. If there was any room for serious dispute about the scope of the grievors' duties that dispute should have been settled in the grievance procedure and could not be left up in the air (to use a perhaps unforgivable pun) in the very serious circumstances of August 10 and 11, 1981. Like Vice-Chairman Cantin in Gauthier, Batchelor and Reasin, (supra) at p. 108, I am of the opinion that the grievors had a clear duty to conform to the employer's request that they confirm their intentions to fulfill their duties.

In the cases of Ben Baker and Lynn Wentzell the facts are straightforward. The question was posed and instead of answering affirmatively they responded by expressing their wish to consult a lawyer. Clearly, that answer was not proper in the circumstances. No reasonable person in their position would think, and on the evidence I have concluded that they themselves did not think, that they were being asked to agree to do anything illegal. Potential personal legal liability of an air traffic controller is undoubtedly a significant concern but it was not a concern that was raised by Mr. Chafe's question. Given the way the question was posed both Mr. Baker's and Mr. Wentzell's answers were legitimately taken by the employer as refusals to confirm that they would fulfill their employment obligations. There was, therefore, cause for discipline.

.../23

Mr. Jack Pinsent was, it appears from the evidence, the originator of the tactic of avoiding the employer's question by requesting to see a lawyer. In that respect his case is no different than that of Mr. Baker's or Mr. Wentzell's. There are, however, two additional issues in his case: He was assigned to the Planning Sector for the shift when he was questioned and refused to answer so, counsel submitted, the employer's question was inappropriate. Further, it was submitted that his case was like that of Mr. Ivany's, whose grievance the employer allowed.

On the evidence I have concluded that it was possible, although not likely, that Jack Pinsent would have been asked to clear aircraft into U.S. airspace on the shift in question. Although he was assigned to the Planning Sector there was the remote possibility of an eastbound aircraft crossing into the New York Oceanic Sector. It was also management's right to reassign him to the Oceanic Sector. There too, because of the "sterilization" of U.S. airspace it was unlikely that he would have been called upon to grant clearances into U.S. airspace, but according to the testimony of Gary Pinsent there was the possibility of clearances into U.S. airspace to be granted to rerouted aircraft or operations missions. The percentage likelihood of such clearances being requested is not the point. The employer is entitled to assurance that if such were requested the air traffic controller would fulfill his job obligations. I am not by any means satisfied that an employer cannot ask employees hypothetical questions about their intentions to fulfill their obligations but it is unnecessary to deal with that because I have concluded that the questions addressed to Mr. Jack Pinsent were not entirely hypothetical.

.../24

The employer's decision to allow David Ivany's grievance states that his assigned duties on August 10 "effectively precluded [him] from active control duty on that day". I am not sure why Mr. Ivany could not, potentially, have been reassigned during his shift to active control duty. I have concluded that I need not concern myself further with that question to differentiate his case from that of Jack Pinsent. Jack Pinsent was on active control duty. Even in the Planning Sector there was some, albeit remote, chance of his being called upon to clear an aircraft into U.S. airspace and Mr. Chafe's uncontradicted evidence was that he could have been reassigned to the Oceanic Sector, where there was also a chance that he would be called upon to clear an aircraft into U.S. airspace.

These additional factors for consideration in the case of Mr. Jack Pinsent have not convinced me that he is in a different situation than Mr. Baker and Mr. Wentzell. In his case as well the employer had cause for discipline.

Mr. Gary Pinsent's case differs in that the submission on his behalf is that he in fact did confirm his willingness to fulfill his duties in response to management's questions. In this submission there is considerable reliance on the evidence that in the course of the preceding shift Mr. Pinsent twice told his supervisor that he would fulfill his duties and clear aircraft into U.S. airspace. That evidence is uncontradicted. The question, therefore, is whether his having been thus questioned and having responded affirmatively precluded management from questioning him again and being entitled to again receive an affirmative answer. I suppose it is conceivable that employer questioning of an employee can so far degenerate to badgering that the employee is being put through an ordeal which is not legitimately part of his job. However, the questioning that

.../25

Mr. Gary Pinsent chose to characterize as "harassment" did not in my opinion reach that level. On a realistic view of the circumstances management did not go beyond its rights in Mr. Chafe's questioning of Mr. Pinsent.

With respect to the responses that Mr. Gary Pinsent actually gave on August 11, as set out in his notes reproduced above, in the context of the way the question was framed, like management, I would interpret his responses as being a "non-yes". With respect to him, therefore, I have also concluded that the employer had cause for discipline.

Had these four grievances stood alone I would have had no difficulty in concluding that in the circumstances the employer's disciplinary response was well within the range of reasonableness. Indeed counsel for the grievors did not suggest otherwise but relied on the fact that the grievors in Gauthier, Batchelor and Reasin (supra) received suspensions of three and five days for the more serious misconduct of

> having failed to perform their duties as required, for having contributed to a needlessly complicated and unsafe situation by denying proper air traffic control service to an aircraft in flight and for having been insubordinate. Cecil Reasin [who was given the five day suspension by Vice-Chairman Cantin] is also blamed for having made unauthorized and improper transmission to an aircraft in flight and to another controller.

Clearly "denying proper air traffic control service to an aircraft in flight" is much more serious misconduct than that of the grievors

.../26

here. In taking the position that it is so much more serious that it would be unjust or unreasonable to allow a one day suspension for these grievors to stand the grievors are relying on the same "principle of equality of treatment" which led Vice-Chairman Cantin to reduce the discharges in Gauthier, Batchelor and Reasin (supra) to short suspensions. In his award, at p. 110 he quoted at length from Brown and Beatty as follows:

> In Canadian Labour Arbitration, Brown and Beatty report that:
>
> Arbitrators have generally been sensitive to the basic principle that similar cases must be treated in a like fashion, which simply reflects a universal precept of fairness and justice. Accordingly, in assessing the reasonableness of a sanction imposed on an employee, arbitrators have regarded the penalties imposed by the employer in similar circumstances in the past as tending to reveal the actual concern that management has for such behaviour. Accordingly, when an employee is able to prove that other employees who engaged in the same conduct for which he was disciplined were either not disciplined at all, or suffered much less severe disciplinary sanctions, arbitrators generally will find the employer to have discriminated against that employee even though it may be established that the employer did not act in bad faith or did not intend to discriminate against him personally. To the contrary, in the former circumstances arbitrators would likely completely exonerate the employee of any wrongdoing, while in the latter, the penalty imposed would be reduced to conform to that which was or had been

.../27

> traditionally imposed in the past. However, it is obvious that the principle demanding equality of treatment is only applicable where it can be shown that the material circumstances of the grievor's case substantially conform to the circumstances of those who were treated more leniently.
>
> (pages 378 to 380)

I note that learned authors and the awards that they cite in support of their statement of the principle of equality of treatment deal only with the case where the grievor has been more severely disciplined than others who are guilty of the same or similar misconduct. They do not deal with grievors who have in fact been disciplined less severely but without due regard to the relativities of the extent of the misconduct and the degree of discipline. In such a case the circumstances of the grievors' case do not in fact "substantially conform to the circumstances" of those with whom they are being compared but that is a technical distinction which I think is inappropriate. Clearly, the underlying force of the concept of justice through equality of treatment does apply to the relativity of misconduct and discipline, but how far can an adjudicator go with this?

Generally, in the determination of whether an employer's disciplinary response is appropriate an adjudicator or arbitrator should not substitute for the employer's discipline precisely that which the adjudicator would have thought justified where there is no significant difference. The question is whether the employer's disciplinary response was within an appropriate or reasonable range. I have already asked that question, and answered it, in this case. Even more obviously, an adjudicator should not too readily impose

.../28

his or her notion of precise relativities between misconduct and discipline. Rather, he or she should ask whether the discipline imposed in two different cases bears a reasonable relationship to the extent of the misconduct proved. When I ask that question here I must conclude that it does. To conclude that the employer acted unreasonably in imposing one day suspensions on these grievors because three days has been deemed appropriate for Batchelor and Gauthier would be to demand mathematical precision, not appropriateness within a reasonable range. Mr. Baker's three day suspension is merely the next step up the employer's scale of progressive discipline, based on his previous record which was not disputed.

In conclusion, all four grievors with whom I am here concerned misconducted themselves in a way that justified discipline and I do not find that the employer's disciplinary response was inappropriate standing alone or considered with the suspensions imposed in Gauthier, Batchelor and Reasin (supra) by Vice-Chairman Cantin. The grievances of B. R. Baker (Board file 166-2-12833), G. T. Pinsent (Board file 166-2-12854), J. M. Pinsent (Board file 166-2-12855), and L. B. Wentzell (Board file 166-2-12862) are therefore denied.

For the Board,

Innis Christie,
Board Member and Adjudicator.

HALIFAX, June 13, 1983.