

No. 164

File No. 166-2-13616

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

BETWEEN:

R. A. PENNEFATHER

grievor,

AND:

TREASURY BOARD  
(Transport Canada)

employer.

DECISION

Before: J. D. O'Shea, Q.C., Board Member and Adjudicator

For the Grievor: R. A. Marchand  
W. Barry

For the Employer: Mrs. Lois Lehmann  
Mr. T. Brown

Heard at Toronto, November 10th, 1983.

*COPY/BOD  
7/12/83  
9/12/83*

*ART. 7*

*code 402/82*

*DISCIPLINE*

## DECISION

The grievor R. A. Pennefather has been employed as a Air Traffic Controller for eighteen years. In August 1981 the grievor was employed as an Instrument Flight Rules Controller at Toronto. August 10th, 1981 was one of the grievor's scheduled days off work; however he had volunteered to work overtime that day. The Air Traffic Controllers in the United States were engaged in a work stoppage which had commenced on August 3rd, 1981. When the grievor arrived at work shortly before the 6:25 a.m. starting time on August 10th, 1981 he was handed two documents by a member of supervision. One document, which is marked Exhibit 4 in these proceedings, was from the President of the Canadian Air Traffic Control Association and it reads:

### Telex

Ottawa, Sunday, August 9, 1981, 2200 EDT

Notice to All Users of Canadian ATC Services

At the request of our members we wish to advise you that effective August 10, 1981, 1100 GMT, Canadian air traffic controllers will no longer co-ordinate IFR flights to, from, or through adjacent United States airspace except for emergency flights. Operators are requested to plan all IFR operations so that they remain within Canadian airspace or exit into adjacent non-U.S. controlled airspace. This is a direct result of the high number of incidents that have occurred due to inadequate U.S. co-ordination with Canadian ATC units since unqualified personnel began to operate the U.S. ATC system on August 3.

Full IFR ATC service will be provided within Canada and into adjacent non-U.S. airspace. VFR services will be provided to all traffic.

W.J. Robertson  
President  
Canadian Air Traffic Control Association  
c.c.: FAA Washington

The other document which is marked Exhibit 5 in these proceedings was from the Director, Air Traffic Services and it reads:

The following message should be duplicated and a copy given to each controller prior to his/her commencement on duty today (August 10):

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 controller: to violate the existing 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.
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.

P.J. Proulx  
Director, Air Traffic Controllers

The evidence established that the grievor reported for work on August 10th, 1981. However, after he received and read the two documents described above, he advised Mr. Spence, one of the Toronto Centre Supervisors (and a member of the bargaining unit) that he wished to cancel his overtime shift. The grievor was in the operations room at the time. Mr. Spence did not challenge the grievor's decision. The grievor performed no work on August 10th and left the premises shortly after his scheduled starting time.

Following the incident on August 10th, 1981 the Employer caused the matter to be investigated. The investigators findings are contained in a report which reads, in part, as follows:

Findings

August 9, 1981 - normal duties

1. On August 10, 1981, R. Pennefather reported for duty for his scheduled overtime shift. - Pennefather refused to perform any duties and left the premises.
2. On August 11, 1981, R. Pennefather failed to report for his assigned shift.

3. On August 12, 1981, R. Pennefather failed to report for his assigned shift.

Conclusion:

1. On August 10, 1981, R. Pennefather was insubordinate in refusing to perform his assigned duties.
2. On August 11, 1981, R. Pennefather was absent from duty without authorization.

Previous Discipline:

One day suspension for leaving work without permission on 5/9/80.

The evidence established that the grievor had on his record a disciplinary notice which reads:

DATE AND TIME OF OFFENCE: September 5,  
1980 0715 - 0945

NATURE OF OFFENCE: LEAVING YOUR WORK  
POSITION WITHOUT PERMISSION WHILE ON  
DUTY.

This letter is to inform you that as a result of your refusal to perform your assigned duties from 0715 to 0945 on Friday, September 5, 1980 you will not be paid for the time you were absent from duty and your regular pay will be adjusted accordingly. In addition, you will be suspended for one (1) day to be scheduled at a time to be determined by your supervisor.

Your action as detailed above constituted an unlawful withdrawal of services as your collective agreement was in effect. Therefore, your action was a clear violation

of the Public Service Staff Relations Act. Furthermore, your action in concert with the others seriously disrupted air traffic and created a potentially hazardous situation. Management considers your unjustified refusal to perform your duties not acceptable conduct.

Should you again participate in this type of activity you will be subject to more severe disciplinary measures up to and including discharge.

If you feel this decision is unwarranted, you have the opportunity of presenting a grievance in the normal matter.

After receiving the report of the August 10th incident, Mr. Campbell, the Unit Chief of Air Traffic Control at Toronto interviewed the grievor on September 25th, 1981 for the purpose of obtaining the grievor's version of the incident. Mr. Campbell's report of the interview reads:

Mr. Pennefather advised that Mr. Barry would act as his spokesman during the interview.

Mr. Barry then asked:

- (a) is this interview for the purposes of discipline? and
- (b) are there any charges against Mr. Pennefather?

Mr. Campbell answered NO to each question.

Mr. Campbell explained that the interview covered certain events that occurred between August 6 to 12, 1981, inclusive. He further explained that an Administrative Enquiry had been conducted into these events.

Mr. Campbell then reviewed the results of the inquiry as it applied to Mr. Pennefather's actions during that period. Mr. Campbell then asked questions regarding a sick leave request for August 11th. and 12th. Mr. Barry replied NO COMMENT.

Mr. Campbell then asked Mr. Pennefather if he wished to comment on the interview contents. Mr. Barry replied NO COMMENT.

Interview terminated.

The grievor was suspended for three days. The grievor filed a grievance wherein he alleged that his suspension was contrary to the provisions of the collection agreement and he requested that the suspension be rescinded and be removed from his record and that he be reimbursed for lost wages.

The evidence also established that the Employer had issued the following guidelines for discipline of those employees who refused to work during the period when the Air Traffic Controllers in the United States were engaged in the work stoppage.

DISCIPLINE - AIR TRAFFIC CONTROLLERS

This will confirm our telephone discussions of September 22 concerning discipline for AI's who refused to handle traffic to and from United States airspace. In consideration of the various positions put forward and after further discussions with DAT, the following policy has been established with respect to "simple refusals to handle or process traffic."

- a) Up to 2 shifts - 1 day suspension
- b) More than 2 shifts

Less than 5 shifts - 3 day suspension

c) Five or more shifts - 5 day suspension

For those cases involving a refusal to handle or process traffic where the individual also has a history of previously recorded disciplinary action for which he/she was suspended, final decision on the length of suspension for the current situation will be left to each Region but the following is recommended:

- a) where the previous suspension was two (2) days or less - an additional two (2) days; and
- b) Where the previous suspension was more than two (2) days - an additional three (3) days.

As agreed during our telephone conversation, those situations involving more than the above examples where Regions are recommending more severe disciplinary measures will be forwarded, along with the appropriate documentation, to DPR (Attention: B. Giroux) for review and further discussion as may be required.

Mr. Campbell testified that while, generally, overtime work is voluntary when employees present themselves for work on an overtime shift for which they volunteered, it was the Employer's expectation that they would perform the work for which the overtime shift had been scheduled.

Mr. Riseborough, who was acting as Shift Manager at the Toronto Area Control Centre on August 10th, 1981, testified that he was responsible for the control tower operations on the day shift on August 10th, 1981. It was his evidence that he had no contact with the grievor on



August 10th although he was aware that the grievor was one of the members of the work force who left the premises shortly after the start of the day shift, August 10th, 1981. It was his evidence that while overtime work is voluntary, once an employee reports for overtime work, the voluntary nature of the work ceases. It was also his evidence that he would be the person who would receive a telephone call if an employee who is scheduled to work on August 10th was unable to report. He received no such call from the grievor on August 10th.

Mr. Spence, who is a Supervisor, testified that the grievor came into the Operations Room on August 10th and failed to sign in. He testified that prior to the employees arriving at work he had been instructed to ask each employee whether they would work traffic into and out of the United States controlled air space, and he was instructed to obtain a definite answer. He testified that some employees agreed to work while others refused to work. However, it was his evidence that he did not believe that he had had an opportunity to discuss the matter with Mr. Pennefather since Mr. Pennefather asked to cancel his overtime assignment before he had an opportunity to question Mr. Pennefather about the matter. Mr. Spence testified that he acknowledged the request and signed a sheet to indicate that Mr. Pennefather had cancelled his overtime shift. It appears from the notes made by Mr. Spence that Mr. Pennefather was one of the last employees to cancel his overtime assignment.

The grievor testified that when he arrived at work for his scheduled overtime assignment on August 10th, 1981 at about 6:24 a.m., he was presented with the two documents which are reproduced above. After reading the documents he approached Mr. Spence and asked permission to cancel his overtime shift. It was his evidence that

Mr. Spence said "Fine" and the grievor replied "Thank you" and he left the premises. The grievor denied being asked on August 10th, 1981, whether he was prepared to perform his full range of duties before he cancelled his overtime shift. He acknowledged however that he had not given any advance notice of his intention to cancel his overtime shift.

The Employer argued that on August 10th, 1981 the grievor reported for his scheduled overtime shift. However, after the grievor received and read copies of the documents which are marked as Exhibit 4 and Exhibit 5 in these proceedings, he refused to perform his duties and he went home. The Employer pointed out that Exhibit 5 contained a warning that if a controller engaged in a work stoppage, as counseled by Mr. Robertson's statement, the controller would be subject to discipline.

The Employer also pointed out that the report of the investigators of the incident indicated that because the grievor refused to perform his assigned duties on August 10th, he was guilty of insubordination. When this report was read to the grievor by Mr. Campbell, the grievor had "No comment" to make. The Employer therefore argued that in the absence of some explanation the Employer was justified in its decision to impose discipline.

It was also the Employer's position that once the grievor accepted an overtime assignment and reports for the assignment, the Employer has the right to expect that the assignment will be worked. Since the grievor reported for his overtime assignment, he must have been prepared to work the assignment up until the time he learned that Mr. Robertson had requested that the Canadian Air Traffic Controllers should not co-ordinate IFR flights to, from, or through adjacent United States air space. The Employer further argued that once an

overtime assignment is accepted, there is an obligation to work the assignment in the same way as there is an obligation to work a regularly assigned shift. In support of this argument the Employer relied on the reasoning in the following cases: re: Ingersoll Cheese Co. and Amalgamated Meat Cutters & Butcher Workmen of North America, Local 458, 10 L.A.C. (2d) 268 (O'Shea); Georges-Michel Nadon (166-2-9429); Adams et al (166-2-12832 to 12866).

The Union argued that there were two issues to be determined in this case. First was the issue as to whether the allegation of misconduct was proven by the Employer and second was the severity of the penalty justified. The Union pointed out that when the grievor arrived at work he was handed the two documents described above and then went to the operations room. After analyzing the situation the grievor approached the supervisor and advised that he wished to cancel his overtime assignment. The Union took the position that the grievor was not given a clear order to remain on duty. It was also the Union's position that no one asked whether the grievor was prepared to perform the full range of his duties. While the Union acknowledged that the practice at Toronto on a normal day was for employees to telephone, in advance, to report their intention to cancel an overtime assignment they had previously agreed to work, it was the Union's position that August 10th, 1981 was not a normal day.

The Union was also critical of the fact that Mr. Campbell had relied on a report of the investigators and that he would not listen to any excuse that might have been offered after the decision was made to discipline the grievor.

The Union argued that Mr. Spence accepted the cancellation of the grievor's overtime. The Union pointed out that Mr. Spence was

the grievor's immediate supervisor and was therefore the person to whom the grievor was to address his complaints under Article 5.02 (b) of the collective agreement. Since the situation which existed in the Operations Room was one of confusion and caused the grievor to feel uncomfortable, it was the Union's position that the grievor was therefore entitled to cancel the overtime assignment since overtime was a voluntary matter. The Union therefore asked the adjudicator to uphold the grievance and to direct that the grievor be reimbursed for the time he was suspended.

Having considered all the evidence and the representations of the parties I find that the grievor arrived at work on August 10th, 1981 with the intention of working an overtime assignment which he had voluntarily accepted. However, upon his arrival at work he was made aware that the President of the Canadian Air Traffic Control Association had requested the Canadian Air Traffic Controllers not to handle any flights from, to or through United States controlled air space, except for emergency flights. It is readily apparent that because of this request there was considerably confusion in the operations room at Toronto at the time the grievor's shift was scheduled to commence. Other controllers had refused to work by booking off sick or by cancelling their scheduled overtime after they had arrived at work. Rather than sign the attendance register in the usual manner, the grievor approached Mr. Spence and informed him that he was cancelling his overtime assignment. Mr. Spence noted this fact on the attendance register and also made a separate notation that the grievor "will not work" because he cancelled his overtime. The grievor then left the premises.

While the Union argued that the grievor was entitled to cancel his overtime because overtime assignments are voluntary, I cannot agree

with that submission, in light of the facts of this case. When an employee agrees to voluntarily accept an overtime assignment, his obligation to perform the overtime work is identical to the obligation he has to perform work on a regularly scheduled shift. In either case, if there is some good and valid reason why an employee cannot perform the work, the employee is required to give the Employer as much advance notice as reasonably possible in order that the Employer can have sufficient time to make alternate arrangements for the performance of the work. Without making a definitive statement concerning the amount of advance notice that may be reasonably required (indeed it may differ for some Employers), it is sufficient for the purpose of the present case to find that the notice of cancellation of the grievor's overtime assignment, which was given at the commencement of his shift on August 10th, after he arrived on the premises, is not sufficient notice, unless he was physically incapable of performing the work. There was no evidence of physical incapacity in the present case. Indeed, there was no evidence which would justify the grievor's refusal to work the overtime shift which he had volunteered to work.

Again, while the Union argued that the grievor was not given a direct order to stay at work, I am of the view that the memorandum from Mr. Proulx which was handed to the grievor constituted such an order. The fact that it was given in writing tended to reduce any possibility of misunderstanding. Mr. Proulx not only stated that it was the Employer's position that all controllers were expected to perform their full range of duties, but went on to point out the penalties that would flow from a refusal to do so. He also advised the controllers, including the grievor, that a refusal to perform their full range of duties would constitute an unlawful work stoppage which would make them liable for discipline. While it may be that Mr. Spence may have acknowledged the cancellation of the overtime by

saying "Fine" or "Okay", in light of the manner and the circumstances in which the grievor announced his intention to cancel the overtime, it would not only be unreasonable but would be a complete distortion of the facts if I were to find that Mr. Spence gave permission to the grievor to cancel his overtime assignment. Indeed, in view of the contents of Mr. Proulx's memorandum, it is readily apparent that Mr. Spence had no authority to do so and this would have been known to the grievor.

Finally, although the Union was critical of the fact that Mr. Campbell based his decision on the report of the investigators, it must be recognized that the grievor was appraised of the contents of the report and was given the opportunity to offer an explanation. His refusal to comment on the report gave Mr. Campbell no alternative but to accept the report as factual. In any event, my decision in this case is not based on the contents of the report but is based on the evidence presented at the hearing in this matter.

I not only find that the three day suspension imposed on Mr. Pennefather was in accord with the Employer's guidelines but was also justified in view of the serious nature of the grievor's misconduct on August 10th, 1981 as well as his prior record of discipline. The very existence of the confusion would dictate that controllers would attempt to alleviate the confusion by performing their full range of duties. I therefore find that the Employer has established just cause to impose the three day suspension in this matter.

My decision in this matter appears to be supported by the reasoning in the cases referred to by the Employer.

My decision therefore is that the grievance of Mr. Pennefather is dismissed.

J.D. O'Shea, Q.C.,  
Board Member and Adjudicator.

TORONTO, December 5, 1983.