

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

BETWEEN:

M. A. MOXHAM

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 to Board
RAM 9/12/83*

*ART 7
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DISCIPLINE

DECISION

The grievor, M. A. Moxham has been employed as an Air Traffic Controller since September 1979 and he checked out as a qualified Air Traffic Controller on May 18th, 1981. In August 1981 the grievor was employed as a Controller, west side-Toronto Centre. August 10th, 1981 was one of the grievor's scheduled days off work; however he had volunteered to work an overtime shift 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 had 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

cc: 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 controllers 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 par-

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 Services

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, the Employer caused the matter to be investigated. The investigators findings are contained in a report which reads, in part, as follows:

FINDINGS:

August 7 & 8, 1981 - normal duties.

1. On August 10, 1981, M. Moxham failed to report for his scheduled overtime shift. - Moxham refused to control

traffic to or from United States
Airspace. - Supervisor Spence advised
Moxham that his services would not be
required and directed him to leave
the premises.

August 11, 1981 - normal duties.

2. August 12, 1981, M. Moxham failed to report for his assigned shift.

CONCLUSION:

1. On August 10, 1981, M. Moxham was insubordinate in refusing to perform normal duties.
2. On August 12, 1981, M. Moxham was absent from duty without authorization leave.

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

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

Mr. Barry then asked:

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

Mr. Campbell replied 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 Inquiry had been conducted into these

events.

Mr. Campbell then reviewed the results of the Inquiry as it applied to Mr. Moxham's actions during that period. Mr. Campbell asked several questions regarding a sick leave certificate. Mr. Barry replied NO COMMENT.

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

Interview terminated.

The grievor was suspended for one (1) day. The grievor filed a grievance wherein he alleged that his suspension was contrary to the provisions of the collective agreement and he requested a series of remedies which included having the discipline rescinded and that he be compensated for time lost.

The evidence 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 a 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 voluntarily, once employees present themselves for work on an overtime shift for which they have 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 of August 10th, 1981. It was his evidence that he had no direct contact with the grievor on August 10th although he was aware that the grievor was one of the members of the work force who had left the premises shortly after the start of the day shift on August 10th. It was also 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 to receive a telephone call if an employee scheduled to work on August 10th was unable to report. He received no such call from the grievor.

Mr. Spence testified that the grievor came into the operations room on August 10th and signed in. He further testified that prior to the employees arriving at work he had been instructed to ask each employee whether they would work traffic into an out of the United States controlled airspace, and he was instructed to obtain a definite answer from the employees. He testified that some employees agreed to work while others refused to work. It was also his evidence that Mr. Moxham asked to cancel his overtime assignment. Mr. Spence testified that he acknowledged the request and signed the sheet to indicate that he had cancelled the overtime shift. It appears from the notes made by Mr. Spence that Mr. Moxham had been one of the employees to cancel his overtime assignment and he made a notation that "Mr. Moxham will not work".

The grievor testified that Monday, August 10th, 1981 was a regular day off on which he was scheduled to work overtime. When he arrived at work a supervisor was handing out literature relating to the Air Traffic Controllers strike in the United States. He identified Exhibits 4 and 5 in these proceedings as the documents that were handed to him, which he read at the time. He also testified that he was not aware of the contents of either of the documents until he read them on August 10th. He went to his work position at about 6:24 a.m. where he found people milling about in the area around the west sector. The other sectors were not open at that time. He spoke to some of the people that were there. Although he signed in, he did not take over his position on the west side. He testified that quite a few other

controllers were not taking their positions. When he realized what was taking place south of the Canadian border, it was his evidence that he felt he should not be there since there were too many unusual situations present. He testified that there was no clear direction as to what the two documents meant. He also testified that "I did not need this at this point in my career. In order to save myself problems I felt it would be more appropriate for me to cancel my overtime and go home". It was also his evidence that he was concerned about his ability to do his job, which he was new to, since there was no positive direction from his supervisors. He therefore informed Mr. Spence that he was cancelling his overtime and was going to go home. It was his evidence that Mr. Spence initially responded "Okay, you are refusing to work" and he had replied to Mr. Spence that he was not refusing to work but that he was cancelling his overtime. Mr. Spence then said he understood what the grievor was saying. The grievor further testified that he had received no direct orders to stay to perform his duties. He left the premises about five minutes later.

The grievor testified that later on August 10th he had telephoned a fellow controller and sought his advice. After discussing the problem he decided to return to work the following day and work an overtime shift. It was also his evidence that had he been aware of the situation prior to reporting for work on August 10th, he would have telephoned and cancelled his overtime assignment. He acknowledged however that he had known about the strike of the controllers in the United States since it began on August 3rd.

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 referred to as Exhibits 4 and 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 counselled 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 reported for the assignment, the Employer was entitled to expect that the assignment would be worked. Since the grievor reported for his overtime assignment on August 10th he must have been prepared to work the assignment up until the time that he learned that Mr. Robertson had requested that the Canadian Air Traffic Controllers not co-ordinate IFR flights to, from, or through adjacent United States airspace. The Employer further argued that once an overtime assignment is accepted, there is an obligation to work the assignment, the same as a regular 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); and Adams et al (166-2-12832 to 12866).

The Union argued that there were two issues to be decided in this case. First, was the allegation of misconduct 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 which they had previously agreed to work, it was the Union's position that August 10th, 1981 was not a normal day.

The Union also was critical of the fact that Mr. Campbell had relied on the 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. 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 volunteered to work. 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 flight from, to, or through United States airspace, except for emergency flights. It is readily apparent that because of this request there was considerable 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 overtime shift, after they had arrived at work. After signing 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 act 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 overtime work is identical to the obligation 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 notice as reasonably possible in order that the employer will 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 reasonably be 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 shift which was given at the commencement of his shift, after he arrived on the premises, was not sufficient notice unless he was physically incapable of performing the work. While the grievor testified that he had some doubts about his ability to cope with the situation because he was newly qualified as an Air Traffic Controller, I cannot accept that as an excuse. Indeed, he had not discussed that matter with Mr. Spence on August 10th. There was no evidence which would justify the grievor's refusal to work the overtime assignment which he had volunteered to work.

Again, while the Union argued that the grievor was not given a direct order to stay on the job, I am of the view that the memorandum of 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 he 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 "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 also be a complete distortion of the facts if I were to find that Mr. Spence gave permission to the grievor to cancel the overtime assignment. Indeed, in view of the contents of Mr. Proulx's memorandum, it is apparent that Mr. Spence had no authority to give his permission to cancel the overtime assignment and this ought to have been known to the grievor, in view of Mr. Proulx's statement.

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 content of that report and was given an opportunity to offer an explanation. His refusal to comment on the report gave Mr. Campbell no alternative except to accept the report as factual. In any event, my decision 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 one (1) day suspension imposed on Mr. Moxham 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. The very fact that confusion existed should have caused Mr. Moxham to recognize his responsibilities as an Air Traffic Controller and to do what he could to relieve the confusion. This he did not do. I accordingly find that the Employer has established just cause to impose the one day suspension in this matter. My decision appears to be supported by the reasoning in the cases referred by the Employer, which are cited above.

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

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

TORONTO, December 5, 1983.