

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

BETWEEN:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,

Bargaining Agent,

- and -

TREASURY BOARD,

Employer.

RE: Reference under section 98 of the Act -  
Air Traffic Control Group

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

APPEARANCES AT THE HEARING: C.H. MacLean and R.A. Marchand  
for the Bargaining Agent.

Luc Leduc for the Employer.

Heard at Ottawa, January 11, 1985.

ART 13  
CODE 402/82

DENIAL OF SHIFT  
EXCHANGE UNLESS  
EMPLOYER ACCEPTS THE  
CHANGE AS A CYCLE  
CHANGE

## DECISION

1. This is a reference made by the Bargaining Agent under section 98 of the Act in which it alleges that the Employer is in breach of the obligation which it owes to the Bargaining Agent by virtue of Articles 13.04 and 13.02(b) of the collective agreement between them (Code: 402/82).

2. Article 13.04 reads:

Equally qualified employees may exchange shifts provided:

- (a) the provisions of clause 13.05(a) or clause 15.04 are not violated,
- (b) the employees shall make every reasonable effort to provide a minimum of twenty-four (24) hours' advance notice of the change,
- (c) the shift change receives the approval of the Employer, which shall not be unreasonably withheld,
- (d) it will not require the payment of overtime,
- (e) once such an exchange of shifts has been approved, it will be the responsibility of the employees involved to report for duty in accordance with the approved revision.

3. Article 13.02(b) reads, in part:

The parties ... agree that it is both appropriate and desirable that in the interests of the employees, shift cycles ... be standardized.

Accordingly, at those air traffic control facilities or portions thereof where

through local consultation between management and the Association a mutually agreed upon shift cycle is now in effect:

(i) such cycle will remain in effect for the term of this agreement unless through local consultation between management and the Association, a different shift cycle is agreed to,

or

(ii) a party who desires a shift cycle change shall notify the other in writing and shall include the reasons for the change. The parties shall consult on any request. A party shall not withhold its consent unreasonably. A party who refuses to consent shall deliver in a timely fashion its reasons in writing for withholding its consent.

4. What prompted the making of the instant application was a memorandum directed to all managers in the field, over the signatures of Pierre J. Proulx Director, Air Traffic Services and G.M. Allan, Director, Staff Relations, Ministry of Transport. The memorandum in its entirety is set out below:

The purpose of this memorandum is to clarify the administration of shift exchanges, clause 13.04 of the CATCA collective agreement.

The shift exchange clause was adopted to allow equally qualified controllers to exchange shifts, provided such shift exchange did not result in overtime costs to the department. Provision was made for shift

exchanges to allow individual controllers a degree of flexibility in meeting their own personal commitments.

In the past, the shift exchange provision has been expanded to allow controllers to arrange for a volunteer controller to come in on days of rest to replace a controller on his regularly scheduled shift.

This practice has been reviewed in light of several adjudication decisions, supported by a Federal Court decision, which have held that shift cycles cannot be changed without an agreement between management and the Association.

Consequently, there is a valid argument that a controller on a regularly scheduled shift, replaced by a controller on days of rest, constitutes a change in shift cycle as it changes the recurring sequence of employees' days of work and days of rest.

Furthermore, in a recent adjudication hearing, the CATCA representative argued that once management had approved a shift change under clause 13.04, the scheduled work day in question became a day of rest for the controller requesting a change. In this particular case, the controller who had agreed to replace the scheduled controller fell sick, could not report for duty, and the controller originally scheduled was instructed to report as scheduled. He claimed an entitlement to overtime for working on a day of rest.

Shift exchanges, as contemplated under clause 13.04, provide for a mutual exchange of shifts between controllers and this will usually occur within a 24-hour period. Shift exchanges can only be approved when they involve the exchange of previously scheduled shifts.

Requests for a shift exchange that involve off duty controllers, acting as replacements,

should be denied unless agreement has been reached through consultation in accordance with clause 13.02 (b) for changes in shift cycles.

All ATS units in your region must be advised to implement this interpretation immediately.

5. The above memorandum was sent to Jack Butt, the President of the Bargaining Agent under a covering letter dated October 30, 1984 signed by G.M. Allan, Director, Staff Relations. The body of the letter reads as follows:

Attached is a copy of an instruction to the field dealing with the interpretation of clause 13.04 of the AI collective agreement. This interpretation was issued to the field on October 30.

For some time now, we have been reviewing the application of clause 13.04 in light of adjudication decisions and the Federal Court decisions which dealt with changes to operating controllers' shift cycles. In our view, clause 13.04 contemplates an exchange of scheduled shifts between equally qualified controllers and should not result in a change of days of rest.

At a recent adjudication hearing in Winnipeg (the Stuart case), the Association representative argued that once management had approved a shift exchange, involving days of rest under clause 13.04, the day in question became a day of rest for the controller who had made the initial request. There is no provision in the AI collective agreement that provides for a change in employees' days of rest, except for those provisions contained in clause 13.02(b). This clause of course requires that a cycle change be agreed to through local consultation between management and the Association.

Should you wish to meet and discuss this interpretation, I would be pleased to arrange a meeting with P. Proulx, Director of Air Traffic Services.

6. In her application, counsel for the Bargaining Agent stated that the effect of the above new instructions is that any request for a shift exchange pursuant to Article 13.04 that would result in a controller working on what otherwise would have been a day of rest can only be granted if the consultative process outlined in Article 13.02(b) for a change in shift cycle, has been followed. As stated at the outset, counsel asserts that as a result of these instructions the Employer is in breach of the obligation it owes to the Bargaining Agent under the above-quoted articles of the collective agreement. Counsel argues in the application that the Employer cannot require a consultation provided for in Article 13.02(b) as a pre-condition to entertaining a request for a shift exchange under Article 13.04.

7. In his reply, counsel for the Employer submitted that the Bargaining Agent's reference under section 98 should be dismissed because there is no obligation owed to it. More particularly he stated that two conditions must be met in order for the Board to determine if a section 98 reference is valid. First, the Board must find the existence of an obligation arising out of the collective agreement and secondly, the enforcement of that obligation cannot be enforced by an employee through a grievance. He argued in his reply that the obligation referred to in Article 13.04 is an obligation which can be enforced by employees through the grievance process. He further

argued in his reply that the alleged obligation owed to the Bargaining Agent is a general undertaking given by both parties to correctly apply the collective agreement but this type of undertaking is not the kind of obligation referred to in section 98 of the Act.

8. In her response to the Employer's reply, counsel for the Bargaining Agent admitted that if an employee requests a shift exchange under Article 13.04 and if that shift exchange is refused as a result of the Employer's new instructions, then that refusal can be grieved by an individual controller. However, the obligation that the Bargaining Agent is seeking to enforce under section 98 is a misuse of the consultative process under Article 13.02.

9. In light of the challenge made by the Employer, in setting down the reference for hearing the parties were advised that its purpose was to deal with the allegation of the Employer that the issue raised by the Bargaining Agent is one that could be the subject of a reference under section 91 of the Act and that accordingly the Board was without jurisdiction to deal with it in the instant reference made under section 98. In the Notice of Hearing the parties nevertheless were advised that they should be prepared to deal with the merits of the reference in the event that the Board deemed it advisable to so proceed. Counsel for the parties informed the Board in advance of the hearing and confirmed at the hearing that they both wished a determination by the Board on the jurisdictional issue before dealing with the merits. The Board acceded to this request.

10. Before proceeding with the argument on jurisdiction counsel for the Bargaining Agent filed as a single exhibit five grievances submitted by individual air traffic controllers, in each of which the controller stated that he was denied approval of a shift exchange by his supervisor in contravention of Article 13.04. In all cases the corrective action requested was a declaration that the Employer violated Article 13.04 and a declaration that a shift exchange does not constitute a change in the shift cycle.

#### Arguments

11. The position of counsel for the Employer on the issue of the Board's jurisdiction to entertain the instant reference made by the Bargaining Agent under section 98 can be briefly stated as follows. There must be the existence of an obligation on the part of one party to a collective agreement to the other the enforcement of which cannot be the subject of a grievance presented by an individual employee. What is contemplated by Article 13.04 is not merely the exchange of a day of rest for a shift. Rather it is an exchange of shifts. This being so, when days of rest are involved in the exchange there is a change in the shift cycle for the employees concerned within the meaning of Article 13.02(b)(ii). In these circumstances an employee could grieve the refusal of the Employer to grant the requested exchange of shift cycles. The five grievances filed as an exhibit by the Bargaining Agent in the former circumstance serve to confirm the validity of the above assertion. In support of his position counsel cited Board decisions in Graham and Onieu (Board file 166-2-9787 and 9833);



Johnson (Board file 166-2-10027) and Richard (Board file 166-2-13797) as well as the judgments of the Federal Court of Appeal on those two cases (respectively Court Files A-281-83 and A-866-83); Exley (Board file 166-2-14005); Cantin (Board file 166-2-14081); Stuart (Board file 166-2-14687); Bernier (Board file 166-2-13603); Schildwachter (Board file 166-2-14506); National Film Board and Le Syndicat général du cinéma et de la télévision, section Office national du film (Board file 169-8-389).

12. The submissions of counsel for the Bargaining Agent on the issue of jurisdiction may be summarized as follows. It is admitted that if an employee requests a shift exchange pursuant to Article 13.04 and if that shift exchange is refused as a result of the Employer's new directive, then that refusal can be grieved by an individual employee. However, the obligation the Bargaining Agent is seeking to enforce is one owed directly to it and is different from the remedy sought by an individual employee. What the Bargaining Agent wants in this reference under section 98 is to prevent the Employer's misuse of the consultative process provided for in Article 13.02. More specifically, the Employer is obliged to have recourse of Article 13.02(b)(ii) only when a change of the shift cycle for the whole unit is contemplated. Counsel argued that the Employer is breaching that policy by establishing an employer-bargaining agent consultation under Article 13.02 when a single shift exchange is involved. This has an impact directly on the union, not only as the representative of affected members who might be entitled to refer grievances to adjudication under section 91, but as the body that

must undertake the consultation. The fact that the Employer is requiring Article 13.02 consultation before granting an individual's request under Article 13.04 is irrelevant. The obligation the Bargaining Agent is seeking to enforce under this section 98 reference is the obligation to respect the consultative process envisaged by Article 13.02.

In support of her position counsel relied on the Board's decision in Chase (Board file 166-2-14387) and decisions quoted therein and, in particular the decision in Smith (Board file 166-2-847).

#### DETERMINATION

13. There is no question that the requirement imposed by the Employer to carry out the consultation process provided for in 13.02(b)(ii), as a pre-condition for consent to the exchange of days of rest for a shift as contemplated by Article 13.04, is an obligation which can be grieved by an individual employee. Indeed, counsel for the Bargaining Agent admits that such is the case. For that matter, an employee could grieve not only the refusal of the Employer to grant the requested exchange of shift cycles under Article 13.04 but also the application of the consultative process provided for in Article 13.02(b)(ii), even if the requested exchange were granted.

14. Briefly stated, the argument of counsel for the Bargaining Agent is that, notwithstanding the foregoing, the mandatory application of the consultative process in Article 13.02(b)(ii) to requests for individual shift

exchanges made pursuant to Article 13.04, is the breach of an obligation directly owing to the Bargaining Agent. However, the consultative process provided for in Article 13.02(b)(ii) becomes operative only when there is a proposed change in the shift cycle for the whole unit at an air traffic control facility. This being the case, the misapplication of Article 13.02(b)(ii) to what is no more than an exchange of a day of rest for a shift between individual controllers, is a breach of an obligation owed by the Employer to the Bargaining Agent. Moreover, it is a different obligation than that owed by the Employer to an individual controller. By reason of this difference the Bargaining Agent has an entitlement to seek the enforcement of the obligation owed to it by the Employer by way of a reference under section 98 of the Act.

15. I fail to appreciate the distinction made by counsel between the obligation owed by the Employer to an individual employee and that owed to the Bargaining Agent by virtue of an alleged improper application of Article 13.02(b)(ii) to Article 13.04. The fact remains that any alleged misuse of the consultation process provided for in Article 13.02(b)(ii), with respect to a request for a shift exchange under Article 13.04, can be determined on a reference to adjudication under section 91 of the Act of an unresolved grievance presented by the employee who made the request. Indeed, the application of Article 13.02(b)(ii) to Article 13.04 is presently the subject of a number of grievances presented by employees. Accordingly, the enforcement of the obligation alleged by the Bargaining Agent is one which may be the subject of a grievance of an employee

in the bargaining unit to which the collective agreement applies.

16. In the result the Board finds that it is without jurisdiction to deal with this reference on its merits. Accordingly, the reference must be and is hereby dismissed.

Dated at Ottawa, this 29th day of January, 1985.

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