

JAN 6 1987

File: 166-2-16090

No. 334

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

BETWEEN:

WILLIAM DEAN BAKER,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: David Kwavnick, Board Member.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Mary Aitken, counsel.

ART 13
CODE 402/85
MEAL + RELIEF
BREAKS

Heard at Gander, Newfoundland, November 21, 1986.

DECISION

The present reference to adjudication concerns a grievance by Mr. William Dean Baker (AI-4) employed by Transport Canada at its air traffic control centre at Gander, Newfoundland. Mr. Baker grieves the employer's interpretation and application in respect of him of certain provisions of a collective agreement between the Treasury Board of Canada and the Canadian Air Traffic Control Association (Code 402/85). In particular, the grievance concerns Article 13.01(b) of that collective agreement, which reads: Where operational requirements permit, the employer will provide operating employees with meal and relief breaks.

The specifics of the present grievance concern the grievor's shift on the night of 30 November -1 December 1985, and center on the allegation that he worked for over four hours under especially stressful conditions without relief.

The present reference to adjudication is further complicated by the fact that at the time in question the employer was conducting a test of "A-Base Staffing". Based upon observed traffic flows during the 1982/83 period, estimates were prepared of the number of air traffic control employees which would suffice to handle that traffic load. The employer then attempted to operate the facility with only that number of employees. Employees in excess of the number required under the A-Base calculations reported to work and were paid but they were confined to the lunch room and not permitted to take shifts.

At the start of proceedings, counsel for the grievor said that the grievor was denied his break not through the exigencies of "operational requirements" but as a result of a decision by the employer not to make use of the employees who were available and on duty at the time. She said that a staffing experiment is not an operational requirement and, in any case, the experiment was based upon 1982/83 traffic volumes and it was clear to all concerned that those volumes were much higher in 1985.

Counsel for the employer said that there was no breach of the collective agreement as the grievor was given breaks during his shift. She said that the staffing experiment conducted by the employer came within its powers under Article 3 of the collective agreement.

ARTICLE 3

MANAGEMENT

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

- (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location

of facilities and the extent to which these facilities or parts thereof shall operate;

- (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

The grievor testified in his own behalf. He said that he has been employed as an air traffic controller at the Gander Air Traffic Control Centre (ACC) since January 1983. He said that the control tower at the local airport controls only local traffic while the ACC controls trans-Atlantic traffic between North America and the British Isles or Europe. The Gander ACC controls all trans-Atlantic traffic south of Greenland and north of New York to a point approximately half-way across the Atlantic Ocean.

The witness then described in some detail the organization of the Gander ACC, the distribution of work, the types of tasks performed by controllers and other related matters. With respect to meal and relief breaks he said that prior to the start of the A-Base

staffing experiment, the pattern for the E-shift (1945 hours to 0400 hours local time) had been to have three breaks of approximately 45 to 50 minutes each. The first began at approximately 2030 hours, the second between 2330 hours and 2400 hours, and the third at approximately 0200 hours.

The witness said that as a result of a staff memo from the Manager of the Gander ACC dated 14 November 1985, staffing levels were reduced on an experimental basis in accordance with the A-Base review. This memorandum (Exhibit G-1) reads:

OPERATION AT APPROVED STAFFING LEVELS

1. This Unit has been directed to operate within the personnel resource level identified in the recent A Base Review when providing services.
2. With respect to the ACC Opps Room, this direction means that a maximum of 81 AI-04 Controllers and AI-05 Team Supervisors (approved A Base Staff) can be used in support of operations during the peak summer period. During the Low Traffic period when less staff is required in the Operations Room, that resource level will permit relief potential for other activities, i.e., PAIRS, Refresher Training, Fam Flights, projects, etc.

Operational staff in excess of eight-one are deemed surplus (to A Base) staff and are not to be used in support of the operation.

3. The schedule has been republished to reflect designation of personnel in one of the two groups.
4. As you are aware, the A Base staffing level was based on traffic experienced in 1982/83. The purpose of operating at the A Base resource level is to determine if that level of staffing is adequate to handle the workload associated with current traffic volumes. Detailed records will be maintained on any problem which may be experienced.
5. The following points are pertinent to operation at A Base level:
 - (1) Initially, we will operate with nine crews consisting of two team supervisors and seven controllers each. It is anticipated that 'demand' schedule will be required.
 - (2) Team Supervisors:
 - (a) Team Supervisors are fully integrated in operational staff and are included in staffing guidelines which are published from time to time.

- (b) Team Supervisors will be required to maintain only one currency.
 - (c) Team Supervisors will, to the extent possible, assume control of an active work station on a "last in - first out" basis.
- (3) Each team has been designated with personnel whose qualifications total: 5 HLD, 5 Ocean, 3 LLD, and 3 Planners.
- (4) Operating AI-04 Controllers will be required to maintain only two designated qualifications.
- (5) Extra shifts applicable to designated A Base personnel will be realigned following the December 15 - January 15 period to reflect 3 such shifts daily.
- (6) All normal Sector Assignments must be made from designated A Base staff except when a Team Supervisor has specified a currency shift for surplus personnel. When designating a currency shift for surplus personnel, the Team Supervisor shall ensure substitution is effected for personnel with the same qualifications.

(7) Surplus staff must report for duty and be available in the building at all times but are not permitted in the Operations Room unless required to work.

(8) Relief Potential:

(a) The relief potential afforded through A Base staffing levels is that which can be used for those designated as A Base staff. Additional relief potential cannot be provided A Base staff through use of surplus staff unless required because safety is being compromised. The Shift Manager must authorize use of surplus staff in such circumstances.

(b) Surplus staff are not required for the normal relief potential of A Base staff. Surplus staff may obtain leave or be used as replacement for A Base staff (leave/currency), provided satisfactory mix of qualifications are available among A Base staff.

- (c) Designated 'A Base' staff may obtain casual leave when reduced operational requirement permits staffing below guidelines.
- (9) Developmental cross training, identified by management, may be accomplished through use of 'surplus' staff.
6. Problems or questions concerning application to particular circumstances should be referred to the Shift Manager for resolution.
7. All personnel are urged to identify unusual circumstances which may require detailed documentation.
8. Your usual co-operation is solicited.

The witness noted, in particular, the concluding sentence of paragraph 2. It meant, he said, that fully qualified controllers would be available in the ACC but would not be permitted to undertake any duties. If they were used, their employment would be deemed, for purposes of the experiment, to be equivalent to the use of overtime work. He said that each crew consists of 12 to 14 persons. For purposes of the A-Base experiment, the crews were reduced to only 9 persons each. The remainder were deemed to be "surplus" and spent their shift in the lunch room. He noted also paragraph 5(8)(a) of Exhibit G-1 which provides that

persons deemed "surplus" to A-Base requirements cannot be used to provide relief for employees who are required to work their shift.

With respect to the night of 30 November -1 December 1985, the witness said that he was assigned to work the E-shift. He referred to the Sector Assignment Form for that shift (Exhibit G-6). It showed that he had taken his first break at 2030 hours and returned to duty at 2120 hours. He next went off duty at 0125 hours. Thus, he remained on duty without a break for four hours and five minutes. He then went off duty at 0125 hours and returned at 0200 hours.

The witness noted that during the four hours on duty he had worked position 61, as shown on Exhibit G-6. He explained that this position is opened up only during peak night hours. He said that this position involves giving flight paths to pilots. It is necessary to obtain a flight path from a controller, read sets of co-ordinates to pilots and then check for accuracy as the pilots read back those co-ordinates. As well, on that shift he was responsible for a trainee. This had the effect of doubling his workload since he not only had to verify the figures being read back by the pilots but also the figures being read to the pilots by the trainee. Moreover, the slowness of the trainee resulted in a backlog which added to the stress of an already stressful position. He said that he spent three hours doing this work. He was then moved to an ocean sector and worked there for 65 minutes.

The witness said that there is no formal system for requesting breaks. One simply looked over towards the supervisor, caught his eye and asked for a break. He said that he did this several times but was refused a break on each occasion. The supervisor indicated that there was nobody available to replace him.

The witness then referred to the AI Status Sheets for the period prior to 2400 hours on 30 November (Exhibits G-3 and G-5) and noted that there were three controllers available who could have relieved him -- Crann, Drummond and Pearce -- but that they had been designated as "surplus" and could not be called out of the lunch room. With respect to the period commencing after midnight he noted that one controller was available to replace him -- a Mr. Green -- but he had been designated as being "surplus".

The witness said that ultimately it had been decided that the traffic could not be handled properly on the basis of 1982/83 staffing figures and the A-Base staffing experiment was concluded.

In cross-examination the witness said that his supervisor on the shift in question had been Brian Connors, that he had several times requested a break and that his requests had been refused.

The witness reiterated that the basis of his complaint is the fact that he was required to work for four hours and five minutes without a break. He said that under A-Base staffing guidelines he had often worked

three or three and one-half hours without a break. On one occasion he had been obliged to work for four hours and fifteen minutes without a break.

There was no re-examination.

Carl Fisher testified for the grievor. He said that he has been the Vice President, Administration of the Canadian Air Traffic Control Association since July 1985. During 1985, he was involved in consultations with the employer with respect to A-Base staffing. This was an attempt by the employer to determine whether operational staffing levels could be reduced. The problem at Gander was that the recommended staffing levels were based upon the traffic for 1982/83. In 1985, traffic was 30% in excess of that level. Ultimately, the A-Base staffing experiment was abandoned.

In cross-examination, the witness said that he had discussed A-Base staffing with management on several occasions. A major problem had been that the experiment had caused considerable inconvenience for the airlines.

There was no re-examination.

Mr. ^{*Bowers*} Brian Powers testified for the employer. He said that he is a shift manager at the Gander ACC and has held this position since March 1983. He reviewed the procedures for setting staffing guidelines and explained the linkage between the guidelines and traffic data.

With respect to the present reference to adjudication he said that it is not the policy of the employer to have controllers work four hours without a break and if that happened on a regular basis staffing changes would be recommended.

In cross-examination reference was made to the Hourly Staff Count for the shift in question (Exhibit E-2). After reviewing it, the witness said that from the start of the grievor's shift on 30 November 1985 until 0030 hours the following day, there were always at least three persons available who could have relieved him even under the A-Base staffing guidelines.

The witness said that, if necessary, the supervisor could have drawn upon "surplus" staff even though this would have resulted in notional "overtime". He concluded that the grievor's supervisor must not have realized that the grievor was working for an extended period without a break. He gave it as his opinion that the circumstances which led to the present reference to adjudication were the result of an oversight on the part of the grievor's supervisor.

In re-examination, the witness said that there was only one hour, from 0030 hours to 0130 hours, when nobody would have been available to relieve the grievor.

ARGUMENT FOR THE GRIEVOR

Counsel for the grievor said that the normal pattern of breaks for operational air traffic controllers

is one break near the start of the shift, one at mid-shift and one towards the end of the shift. She said that the employer was in a position to give the grievor a break at the normal times but failed to do so.

Referring to the testimony of Mr. Bowers, she said that from 2130 hours to 0030 hours there were always at least three people available to relieve the grievor even without drawing upon the "surplus" persons. With respect to the period between 0030 hours and 0125 hours, she said that the employer could have made use of the "surplus" persons who were in the lunch room. The supervisor was prevented for doing so only by the provisions of paragraph 5(8)(a) of the Staffing Memo of 14 November 1985. She noted Mr. Bowers' testimony to the effect that he would have resorted to the use of "surplus" staff.

Counsel then referred to the jurisprudence of the Board in references relating to work breaks for operational air traffic controllers. She cited the case of Randall et al. (Board Files: 166-2-4828 to 4831) in support of the principle that the need to pay overtime rates in order to provide breaks is not an "operational requirement" upon which the employer may rely in order to deny employees their breaks. She noted that in the present case the "overtime" would have been notional or spurious since the employees were available on the premises and were already being paid at straight time rates.

In the case of Lawes (Board File: 166-2-6437) it was the employer's staffing policy rather than "operational requirements" which prevented the provision of relief breaks to the employees. It was held that staffing policy is not an "operational requirement".

In the case of Noakes (Board File: 166-2-9688) it was found that the employer had not breached the provisions of the then equivalent of Article 13.01(b) of the present collective agreement. However, counsel said that this decision merely stood for the principle that the employer was not required to go to unreasonable lengths in order to provide relief breaks.

In the case of Randall and Yates (Board Files: 166-2-13810 and 13811) it was held that the employer cannot escape its obligation to provide relief breaks by reducing staffing levels to the point where breaks become impossible to schedule.

Counsel said that the employer has a positive obligation to provide meal and relief breaks and it cannot cite deliberate understaffing as an "operational requirement". Since the purpose of the breaks is to provide relief in a very stressful employment situation, those breaks must be properly spaced. A four hour stint in mid-shift without relief violates the collective agreement.

In conclusion, counsel asked for a declaration to the effect that the employer had violated

Article 13.01(b) of the collective agreement in respect of the grievor during his shift beginning on the evening of 30 November 1985. She also sought a prospective declaration to restrain the employer in future.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer took the position that there had been no violation of the collective agreement. She said that meal and relief breaks are always subject to operational requirements. The evidence here shows that the grievor did, in fact, receive two breaks: from 2030 hours to 2120 hours and, later, from 0125 hours to 0200 hours. These were the breaks which could be accommodated subject to operational requirements and the grievor was given those breaks. Therefore, there was no breach of the collective agreement. The fact that the usual pattern of breaks was varied on that day does not constitute a violation of the collective agreement.

She said that the testimony of Mr. Bowers indicates that it is not the policy of the employer to have persons in the grievor's position work for four hours without a break; it is the intention of the employer to provide the customary meal and relief breaks where operational requirements permit. What happened to the grievor on his 30 November 1985 shift was neither deliberate nor planned.

Counsel noted the testimony of Mr. Bowers to the effect that until 0030 hours on the night in question

there was always someone available who could have relieved the grievor. She said that the failure to provide the grievor with a relief or meal break during a four hour stint was obviously an unintentional oversight on the part of his supervisor and did not reflect the policy of the employer.

Counsel said that it is within the rights of management under the provisions of Article 3 of the collective agreement to conduct experiments for the purpose of improving the efficiency of its service. It was in pursuit of such an experiment that the employer designated certain persons as being "surplus" and prohibited their use on regular duty.

In conclusion, she said that even if it is found that there was a violation of the collective agreement on the shift in question there are no grounds for a prospective declaration. She cited the decision of Deputy Chairman Kates in the case of Lawes (supra) with special reference to paragraph 48 of that decision.

REPLY FOR THE GRIEVOR

Counsel for the grievor agreed that the employer enjoys considerable flexibility under the collective agreement and that it may conduct experiments with a view to improving the efficiency of its operations. However, that flexibility and those experiments are always subject to the proviso that the employer's obligations under the collective agreement must be respected. The employer's right to be flexible and

to engage in experiments is restricted by the terms of the collective agreement.

With respect to the claim that the failure to give the grievor a relief or meal break had been due to an unintentional oversight on the part of his supervisor, she said that if that had been the case the employer need only have admitted as much during the various steps of the grievance procedure. The employer made no such admission.

In conclusion, counsel said that the term "operational requirements" refers to such matters as weather, equipment failures or emergencies. That is, it refers to matters which are beyond the control of the employer. The conduct of experiments and deliberate decisions by management to reduce staffing levels cannot be deemed to be operational requirements.

REASONS FOR THE DECISION

The present reference to adjudication has undergone some changes during its year of life. In the latter part of November 1985, the employer undertook a staffing experiment. This was known as A-Base staffing. It was an attempt to determine if the Gander ACC could operate effectively with a smaller complement of air traffic controllers. It would appear that in the early stages of this experiment some problems arose with respect to the scheduling of meal and relief breaks.

In his grievance, the grievor complained of the fact that he had been required to work for four hours and five minutes without a break. The remedy which he sought was that: "Staffing Guidelines" be changed to "operational requirements" and adhered to. What he was asking was that the pre-experimental staffing levels be made mandatory and that the employer be required to staff at those levels.

At the hearing, counsel for the grievor said that the remedy being sought was a declaration to the effect that the employer had violated the collective agreement by requiring the grievor to work for four hours and five minutes without relief. She also sought an order with prospective application to staffing changes which the employer might implement at some future date.

We may begin our consideration of the specifics of the present reference to adjudication by noting that it is entirely within the discretion of the employer to establish staffing levels and to undertake staffing experiments. The employer's discretion is circumscribed only by the requirement that it must respect its obligations under the collective agreement.

What obligations has the employer assumed under the collective agreement with respect to meal and relief breaks? The only such obligation would appear to be that set out in Article 13.01(b):

Where operational requirements permit, the Employer will provide

operating employees with meal and relief breaks.

What is the evidence with respect to the meal and relief breaks accorded the grievor during his shift of 30 November 1985? The Sector Assignment Form for that shift (Exhibit G-6) indicates that the grievor was given a break from 2030 hours to 2120 hours and a second break from 0125 hours to 0200 hours. In addition, the reply to the grievance at the final level indicates that the grievor was given a further break of 30 minutes duration during that shift. Thus, the evidence before me shows that during the course of the shift in question the grievor was accorded three meal and relief breaks totalling one hour and 55 minutes.

During argument, counsel for the grievor cited a number of previous decisions on the question of meal and relief breaks for our traffic controllers.

In the case of Lawes (supra), the evidence showed that the grievors there had been denied any break at all during shifts of eight and one-quarter hours. The reason for this denial was that the employer had reduced staffing levels to what it considered to be an acceptable minimum and then attempted to plead that lack of sufficient staff to permit meal and relief breaks resulted in an "operational requirement" to forgo such breaks. Deputy Chairman Mitchell found, understandably, that the employer's actions constituted a violation of the collective agreement.

In the case of Randall and Yates (supra) the evidence showed that staffing levels had been reduced in response to a government programme of restraint. As a result, the staffing level for the West Complex of the Vancouver ACC on the midnight shift was reduced to only one controller. Although that controller was able to absent himself for a few moments from time to time in order to use the washroom, he was unable to take meal or relief breaks. Adjudicator Weiler found that the deliberate reduction of staffing levels so as to preclude relief and meal breaks did not give rise to an "operational requirement" which would justify denial of those breaks. Accordingly, the employer was found to be in violation of its obligations under the collective agreement.

In the case of Randall et al (supra) it was found that there was one period of five and one-half hours when no relief was available to enable the controllers to be given meal or relief breaks and, on another day there was a three and one-half hour period when such relief was not available. However, the report of this case does not indicate whether the grievors were given breaks, how many and of what duration.

In his decision in the case of Lawes (supra), Deputy Chairman Mitchell commented upon the conditions under which air traffic controllers work and the necessity of meal and relief breaks for both their own welfare and the safety of air transport. I am in agreement with those statements and it follows that I sympathize with the grievor's plight in being obliged to work for

more than four hours, under particularly stressful circumstances, without a break. However, the question before me is whether the employer violated the provisions of Article 13.02(b) of the collective agreement.

The evidence shows that during those four hours the grievor could have been relieved by available staff without resort to the "surplus" controllers. Counsel for the employer ascribed the failure to provide relief to an inadvertent oversight on the part of a supervisor. I am inclined to accept this explanation. The fact that relief was available does not appear to have been discovered until Mr. Bowers, during the course of his testimony, examined certain documents placed before him. He seemed rather surprised to make that discovery. This would explain why the employer failed to make use of the inadvertent oversight argument during the various steps of the grievance procedure.

The evidence shows, further, that there was only one hour during that shift when no relief was available.

Finally, the evidence shows that during the shift in question the grievor was accorded three meal and relief breaks aggregating a total of one hour and 55 minutes. Thus, while the grievor was obliged to work for an unusually long period without a break, he did receive breaks during his shift. The onus is on the grievor to demonstrate that those breaks fall short of meeting the employer's obligations under the collective agreement. This, I must conclude, has not been done.

In summary, while the grievor was required to work an unusually long stint without a break, he did receive three breaks of a total duration of almost two hours. In view of this evidence, I am unable to find that the employer defaulted on its obligation to "provide operating employees with meal and relief breaks".

David Kwavnick,
Board Member.

OTTAWA, December 29, 1986.