

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

TREVOR WHITTLEY,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: Roger Young, Board Member.

For the Grievor: Catherine McLean, counsel.

For the Employer: Sheila Ray, counsel.

CODE 402/85'

DISCHARGE

Heard at Ottawa, September 5 and December 4, 1986.

DECISION

This grievance concerns the discharge from employment of an Air Traffic Controller, AI-02, at North Bay, Ontario. The disciplinary penalty arose out of consequences flowing from the grievor's decision to leave his post somewhat early one day in order to get a head start on a vacation in Florida. The grievor hoped to save himself some modest user fees relating to U.S. Customs clearance which likely would have been assessed had he delayed his departure to the end of his regular shift. Events which took place during the time the grievor's position went unmanned eventually led to the disciplinary penalty assessed. In the account which follows, the time of day is particularly relevant. Some of the records used to establish these times are normally kept according to Greenwich Mean Time, GMT, and some according to local time. All times have been reported herein as they were presented to this adjudicator. In some cases I have provided the local time equivalents for the reader's ease.

Trevor Whittley, the grievor, is 36 years of age. He has been employed in the Air Traffic Services Branch of Transport Canada for the past 15 years, almost since finishing Grade 13, with only some brief intervening employment at the American Can Company. His working life since applying to become a controller has consisted of training courses and working assignments at such centres as Buttonville, Toronto, Ottawa and North Bay. Whittley is cleared to provide VFR (Visual Flight Rules) services at the North Bay Tower. He previously took an IFR (Instrument Flight Rules) conversion course at Toronto Centre but failed to qualify for the Toronto Westside or Toronto Terminal check out. He has provided

VFR advisory services at Buttonville, Ontario, a Grade One control tower operation, as well as at North Bay, a Grade Two tower, where he has been stationed since 1976. Whittley testified that his annual appraisals have consistently rated him as a "Satisfactory" employee. In August 1984 he was disciplined on the only other occasion previous to the present one for using the term "bullshit" over an open radio frequency and suspended for one day. No grievance was lodged concerning that disciplinary action although an explanation of his conduct was given by him to management and also repeated before me.

With respect to the instant matter, for which he has been discharged, the employer alleges that the grievor "potentially jeopardized the safety of the flying public" through "failure to fulfill [his] responsibilities as an Air Traffic Controller". Part of the employer's concern centred on the fact that between 1729 hours and 1749 hours GMT (1229 to 1249 p.m. local North Bay time) on 23 March 1986 the grievor was not at his work station in the cab on the control tower. His absence is alleged to have placed a civilian passenger aircraft and a military jet trainer in a dangerous situation. Later on that day, he is alleged to have again left the control tower, this time without being properly relieved and without completing a proper hand over to an incoming controller. For all of this, the grievor was suspended from duty without pay on 16 April 1986; subsequently, on 25 April, following a further investigation by management of the circumstances involved, he was discharged. It is against this action that he

now grieves. The employer, for its part, alleges that there were some additional circumstances, namely the falsification of duty logs and damage to government property, upon which it relied as well when establishing the appropriate level of discipline.

There is no real dispute as to the facts which gave rise to the employer's action. The grievor does not question their existence so much as he does the gravity or seriousness with which they ought to be viewed. When all is said and done the grievor's case really comes down to a plea for mitigation of the disciplinary penalty imposed.

On behalf of the employer, testimony was provided by David George Gamble, a Flight Service Specialist, FSS, (formerly known as a Radio Operator) of some 27 years experience with Transport Canada; the last 12 of these have been at North Bay. Gamble stated that records kept by the employer establish that the grievor advised Gamble via the radio frequency linking the FSS, the Control Tower and Terminal Control Unit (TCU) that he, Whittley, required a washroom relief break at approximately 1729 GMT on 23 March 1986. These records also note that Whittley advised Gamble and the TCU of his return to his post at roughly 1749 GMT. In other words Whittley had been gone for about 20 minutes. The local time equivalents are determined by subtracting 5 hours from GMT. In the absence of the Tower Controller, the FSS was called upon to provide advisory services to pilots in the area.

The FSS, the Tower Controller and the TCU at North Bay are each located in separate quarters and each performs a different function. The Tower Controller works visually and has jurisdiction over all aircraft to a range of seven nautical miles from the tower and altitudes up to 5000 feet. Additionally all ground movement either of aircraft or of staff vehicles on the airfield is subject to the direction of the Tower Controller. The TCU is the radar portion of air traffic control operations. The FSS relays messages from the Tower Controller or the TCU to the aircraft concerned. Thus when a Tower Controller is absent and the FSS is called upon to provide advisories to pilots, the FSS is being asked to perform duties additional to those he would ordinarily have when the Tower is operating.

Voice communications between the Tower Controller, the FSS and the TCU at North Bay are recorded on a continuous, 24 hour a day basis. A transcript of the recordings taken between 1724.28 GMT and 1812.10 GMT on 23 March 1986 was introduced as Exhibit 3. From the transcript it could be established that no one was on duty in the control tower from 1728.39 GMT (just following the grievor's request to take a break) until 1747.42 GMT when Whittley enquired of the FSS over their radio link "Did I miss anything?", or until 1748.31 GMT when Whittley advised the TCU "I'm back".

What he missed, and what the employer was concerned about, was that during this time a Tudor military jet trainer, identified as "Bandit 28" en route from Trenton, arrived and landed at North Bay just prior

to the take-off of a BE-10 civilian passenger aircraft belonging to Voyageur Airways. The latter was identified as "VAL 525", en route to Toronto. The landing of Bandit 28 and take-off of VAL 525 each took place on Runway 26 within approximately the same minute, during the time Whittley was away from his post.

Other of the employer's records show that Bandit 28 was estimated to arrive at 1742 GMT. At 1734 it was advised to come in on Runway 26; at 1737 it was given permission to do a "touch and go". The transcript records Bandit 28 as "down and clear" at 1742. The same records show that VAL 525 had an estimated departure time of 1742. At 1731 VAL 525 was taxiing from its hangar to the passenger terminal; at 1741 it was given a departure advisory. Also at 1741 a departure clearance was passed from the TCU to the aircraft via the FSS. The transcript describes VAL 525 as "Rolling" at 1742 GMT.

The Flight Services office and the TCU at North Bay are staffed 24 hours a day. The Control Tower, where Whittley worked, is in operation only from 0700 hours to 2300 hours local time. During those hours which the Control Tower is closed, the FSS provides weather briefings to pilots, handles any on-ground telephone communications, performs weather observations and performs air/ground duties including the provision of traffic advisories to pilots. Traffic advisories include landing and take-off information as well as en route information, the relaying of clearances from the TCU to incoming and departing aircraft and the control of vehicular and aircraft movement on the ground.

Gamble testified that when Whittley told him at 1728.04 "I'm gonna go for a little break", Gamble took this to mean that Whittley was going to the washroom. Such a request was not unusual, though there were no formal instructions or directions to be followed by the FSS when such circumstances occurred. Gamble always followed the same pattern, however; he monitored the Tower radio frequency in order to pick up any incoming calls. If any came in, he would provide the same sort of advisory service as would normally be given by an FSS between 2300 hours and 0700 hours when the Tower was closed.

Gamble stated that the type of information which he had passed along to Bandit 28 and to VAL 525 was the same type and form of service that would have been provided by an FSS when the Tower was closed for the night. Some regularly scheduled flights of Norontair and Voyageur routinely left just before 0700 hours, i.e., before the Tower opened, and other aircraft sometimes arrived or departed after 2300 and before 0700. Thus these others regularly received the same level and type of service which was provided to Bandit 28 and VAL 525 on 23 March 1986.

During cross-examination by counsel for the grievor, Gamble agreed that the transcript referred to by him earlier in his evidence also showed that at 1741.53 he had asked Bandit 28 "are you clear" [of the runway]? and that at 1742.10, following a second query, Bandit 28 had replied "just in front of 414 OPS this

time". This would mean that Bandit 28 was well off the runway and was pulling up in front of the military hangar receiving area. Meanwhile, at 1742.15, a few second later, VAL 525 is recorded as advising that he was "rolling runway 26". This meant that Bandit 28 had landed and was clear of the runway before VAL 525 actually commenced his take off.

Gamble also testified that control procedures at North Bay were subsequently revised by memorandum dated 14 April 1986. Now, in the event of a temporary closing of the Tower for a washroom relief break by the Tower Controller, the FSS is simply instructed to advise all aircraft that the Tower is out and to please stand by. The FSS is no longer to provide air/ground advisory services between 0700 and 2300 hours.

Gamble also identified Exhibit 7, a Flight Plan, filed with him on 23 March 1986 for a PA 24 aircraft with call letters FRHV. This flight plan is for a projected journey from North Bay to Pittsburgh departing at 1745 GMT (1245 local time). The flight plan was filed at 1513 GMT (1013 local), the owner and pilot both being shown as Trevor Whittley, the grievor. The actual time of departure, which was only filled in once the departure took place, was 1810 GMT (1310 local time).

David Cunningham is the manager of the North Bay Airport Control Tower and Terminal Control Unit. There is a total of 22 employees who work on various shifts in the TCU controlling the bulk of the air traffic in the northeastern Ontario region by means of radar control.

Another 10 employees work in the Control Tower, a separate facility, and have the job of looking after the local North Bay area air traffic. The control tower works on VFR, Visual Flight Rules, and aircraft are positioned and handled in the airport traffic circuit on a positive control basis.

Cunningham testified that all controllers operate according to the MANOPS, short for Manual of Operations, which they are expected to know and to which they must strictly adhere. Copies of the MANOPS are kept in the Control Tower, the TCU and in libraries as well as being individually supplied to each controller. They are continuously updated and amended. Section 113.1 of the MANOPS states:

113 POSITION RESPONSIBILITY
113.1

Do not leave an assigned operating position unless you are relieved by a person qualified to assume responsibility for that position.

Cunningham testified that Whittley was not due to be relieved until 1500 hours local time on 23 March 1986. His relief would actually arrive at 1445 in order to allow for a 15 minute hand-over and briefing. That is, Whittley's shift that day was from 0645 to 1500. Whittley's relief controller was scheduled to work from 1445 to 2300. A third controller, on an overlapping shift, was scheduled to be on duty from 1045 to 1900 hours to assist with the busiest part of

the day. This was known as the 1-1-1 tower staffing standard.

Cunningham identified Exhibit 13, an Operations Letter dated 21 August 1985 addressed to all controllers in the North Bay Tower and TCU. This directive concerned itself with operating procedures to be followed during those periods when there was only one controller in the tower. It states, in part:

In the event of a necessary washroom "relief" break, the Controller will advise FSS and TCU of his required absence and also request that FSS monitor Tower frequencies available to them for the few minutes required. It is understood that such "relief" breaks be of reasonable length.

The above is reissued as a recap of past decisions and practices.

Cunningham next pointed out that the grievor's work attendance register for March 1986 showed him as having worked his complete shift on 23 March, i.e. from 0645 right through until 1500 hours. Counsel for the grievor intervened to state that the grievor conceded that he had not worked the full day as originally reported. Cunningham also testified that on 24 March 1986 information had been reported to him by a Tower Supervisor that there had been damage done to a refrigerator in the Tower lunch room, to a pair of binoculars and a humidifier and that the interior of the place had been

found in some disarray after Whittley's departure. It was the opinion of Messrs. Cherry and Cunningham, following an investigation, that the damage had likely been caused by Whittley during some form of temper tantrum.

Cunningham's concern about what had transpired in the tower on 23 March 1986 was further aroused when it was also reported to him that maintenance personnel had been unable to gain entry to the Control Tower over the noon hour on the 23rd. When the 24 hour voice tapes were checked it was discovered that the Tower had, in fact, been closed for some 20 minutes just after midday that Sunday. He also later discovered that Whittley had filed flight plans for a trip from North Bay to Pittsburgh and then to Florida on 23 March 1986 and that the grievor had departed shortly after 1300 hours local time that same day.

According to Cunningham, Whittley left the cab of the control tower for his "relief" break while the pilot of the military aircraft, Bandit 28, was on an instrument approach into North Bay expecting to find a clear runway and to receive full tower control services. Because of Whittley's absence, the pilot was not being given the full range of published services he would have expected to receive. At the same time VAL 525 was preparing to depart. Both aircraft were operating in the same area at the same time, without positive control and likely in ignorance of their relative positions vis-à-vis one another.

Cunningham testified that when he later interviewed Whittley to determine what had happened Whittley said to him: "I took a chance to get away early; I took a chance and I got caught". With respect to the damage to the refrigerator door, Cunningham testified that Whittley admitted kicking it out of frustration at finding there was no bread for him to make his morning toast. When asked why he had left the control tower when Bandit 28 was on an IFR approach Cunningham testified that Whittley told him that he was hungry. Whittley had also said that he had gone to the DND snack bar and then over to his own aircraft to give the key to his wife in order for her to load their personal and their passengers' luggage for the trip to Florida.

In response to the question why had he improperly left his post in the control tower a second time that day, Cunningham stated that Whittley told him he "had seen Savage driving in as slowly as he could". Whittley told Cunningham that he, Whittley, went from the tower one flight down to the lunch room "to do a few things", expecting that Savage would soon appear. When, after a few minutes, Savage still had not come up, Whittley went on down and the two men passed at the base of the tower.

Cunningham stated that his first move was to place Whittley on non-operational duties for three days. A discussion ensued concerning a temporary suspension and Whittley had asked if he might be allowed to return to Florida to conduct some personal business. Cunningham

agreed and an investigatory meeting was arranged for 14 April 1986. Cunningham asked Whittley to provide him with a memorandum in the meantime answering several questions concerning the events of 23 March 1986. The memorandum was never received.

Cunningham testified that prior to 14 April 1986 some discussions took place with Messrs. Barry of CATCA and Middlestadt of Transport Canada concerning the grievor. Then on 15 April a disciplinary hearing was held in North Bay which also included representatives of CATCA, Transport Canada, the grievor and Cunningham. At this second meeting Whittley was asked to provide answers to ten major questions which were recorded. Whittley responded but far less candidly than he had at the first meeting on 7 April with Cunningham alone.

Cunningham testified that Whittley's relief controller was Burton who was scheduled to report in at 1445. If, for any reason, Burton could not have done so, Whittley would have had to remain on contiguous overtime until 1900 hours. Savage was the overlap controller on the 1-1-1 coverage standard and could not properly be considered as Whittley's relief. Whittley was therefore in violation of section 113.1 of the MANOPS. Only before 1100 hours and after 1900 hours was the tower to be staffed by one controller. This was only done during quiet periods of the year such as those weekends and holidays from Thanksgiving to St. Patrick's Day when military aircraft in the North Bay area were not usually doing much flying.

Cunningham stated that when Whittley left the control tower for the first time it was not for a "necessary washroom relief break"; he had in fact gone out of the tower to the DND snack bar and then to his private aircraft. When Whittley left the tower the second time, again it was not for a relief break. Additionally, he had not even advised the FSS of his absence. Furthermore, he had never been properly relieved. During Whittley's absences conditions at the North Bay airport had been unsafe because there was no way of providing services according to the level of advertised standards. Even though advisories given by the FSS might have been no less than the level normally provided between 2300 hours and 0700 it was not what would have been expected by aircraft arriving or departing between 0700 and 2300.

Fortunately, according to Cunningham, there had been no tragedy. What was evident, though, was that because of Whittley's absence, there had been some measure of confusion. The pilot of VAL 525 had managed to figure things out and had realized that he had been given some garbled departure instructions by the FSS. The military jet had changed from doing a straight-in landing to doing a "touch and go", all without the proper changes being made known to the TCU. All this time the TCU had thought that Bandit 28 was in the hands of the tower controller in that he believed that Whittley had already returned from his washroom relief break.

On cross-examination it became clear that the closest washroom was actually two levels below the control

tower cab. Also, it became clear that once the overlapping controller arrived at 1100 hours it would be quite permissible for the morning controller to take a coffee break if the traffic was not heavy. However, it was unusual for a controller to leave the control cab because facilities for making coffee were available right there. The even more elaborate lunch room was just below the cab, down a ladder.

It was also made clear that while a hand-over briefing need not necessarily take 15 minutes, that period of time had been set aside in order for controllers to completely familiarize themselves with all necessary details such as checking up-dated MANOPS, checking equipment, reviewing instructions, NOTAMS, etc. The 15 minute hand-over is specifically set out in the collective agreement. Cunningham also conceded that, following this incident, the instructions on washroom relief breaks had specifically been amended to forbid controllers leaving the tower control cab while aircraft were on an IFR approach.

Cunningham also maintained that Whittley should have known, before he left the tower, that VAL 525 was due to depart in spite of the fact that Whittley had said he was ignorant of the matter. Cunningham maintained that Whittley could have asked the TCU who would have advised him of any impending departures. Further to this, (a) "pre-prints" of departure information were available, (b) a strip-printer was located in the control cab on a trial basis and was functioning and, (c), a controller was expected to keep and to review his own

records of regular traffic in his area and this should have alerted Whittley to VAL 525, a regular outgoing flight.

Cunningham conceded that on 14 April 1986 he had reissued instructions to controllers concerning their washroom relief breaks. In this latest memorandum, Exhibit 18, Cunningham had ordered that controllers were not to leave the tower building during such breaks. He had never before assumed that controllers would leave the tower or that such explicit instructions were necessary. FSS personnel were also ordered not to provide any further advisories in the absence of a tower controller but merely to advise pilots that the tower was out and would return shortly.

Cunningham testified further that the TCU was under instructions not to issue Standard Instrument Departures, SID's, during the hours between 2300 and 0700, i.e. when the tower normally was closed. He then stated that clearances were no different when the tower was in operation and when it was not. He could not recall a specific directive concerning the non-use of SID's when the tower was closed. Cunningham was asked if he was aware of Exhibit 19, a page from the Unit Log for 23 March 1986 in which Whittley had signed for a washroom relief break between 1335 and 1345 GMT (0835 and 0845 local time) and again between 1730 and 1745 GMT (1230 and 1245 local time). Cunningham stated that even ten minutes was too long to be away but that he would have simply spoken to Whittley about the length of such a break rather than disciplining him for it.

In any event, Whittley would not have been allowed to leave the tower for a lunch break at any time.

Cunningham was asked whether there was any reason to believe Whittley would again fail to follow the MANOPS were he to be reinstated. Cunningham was unsure of his feelings in that regard. The tower was supervised only two hours per day. The job of an air traffic controller required persons who were responsible and who could be counted on to do a complete job. Whittley had been very irresponsible. The situation he had created had been extremely dangerous. An air traffic controller's responsibilities to the flying public were of a tremendous magnitude. In the past Whittley had often debated with Cunningham the significance of air traffic regulations and whether or how they ought to be applied. Cunningham had often had to tell Whittley what had to be done.

Mahendra "Moe" Vyas is the Ontario Regional Manager of the Air Traffic Services Branch of Transport Canada. He described the job of the Air Traffic Services Branch and the air traffic controllers within it as "ensuring the safe, orderly, efficient flow of air traffic and the prevention of collisions through visual and instrument surveillance". Vyas had recommended the dismissal of the grievor because he had shown a gross disregard for his responsibilities in leaving his post for 20 minutes while allowing two aircraft to operate in the same general vicinity of one another without proper control.

Vyas maintained that there were no mitigating factors. Furthermore, all other indications only corroborated Whittley's irresponsibility. It was obvious from the beginning that Whittley had planned to leave his post before his shift was fully up. He damaged equipment belonging to the employer when he became upset at being delayed. He falsified the work log. He violated the relief break instructions and, later on, violated the hand-over provisions. In fact, Whittley had never been properly relieved. There was no other option open to the employer but discharge.

On cross-examination Vyas said that Exhibit 20, a memorandum concerning "One Person Control Tower Operation" dated 9 August 1985 had never been put into effect. In any event, it had never been intended for use at North Bay. He expressed the same concerns as did Cunningham over the proximity of Bandit 28 and VAL 525 and the confusion which was apparent between the pilots, the FSS and the TCU in the absence of the tower controller. No one had been carrying out the expected visual control from the tower. The take off instructions given to VAL 525 had been incorrect and unsafe.

Vyas stated that it was not realistic to operate an airport control system which switched back and forth throughout the day from the standard daily level of service to the nightly level. There was a published level of service; that was what pilots could reasonably expect. When a controller left the cab of the tower the level of service was unexpectedly diminished. Vyas

felt that Whittley should have known better. Even after 15 years of service he had shown great disregard for the safety of others. It was not possible to again place faith and reliance on Whittley's judgment. Therefore discharge was the only answer.

Trevor Whittley, the grievor, testified that, with regard to the incident in question, he now realized his mistake and was very remorseful. However, he said it had generally been the pattern when two controllers were on duty in the tower at the same time that they would arrange between themselves for a coffee break if the traffic was light. There was no such thing as a "normal" day, but if no planes were in the area it was not unusual for one controller to slip out to the military snack bar for some refreshments.

Whittley stated that no instructions had ever been given to him, other than those in Exhibit 13, as to how his washroom relief breaks were to be taken. Normally he would only be away from the tower for from five to ten minutes to go to the washroom. There were actually three washrooms in the nine floor control tower building. The closest was just two floors below the cab. He always followed the proper procedure in alerting the FSS to his absences, and also advised the TCU. Whittley stated that there was no procedure for meal breaks since the only time there was ever just one controller on duty was over the normal breakfast period. At lunch and dinner two controllers were scheduled.

Whittley maintained that management was aware of the past practices of the tower controllers. The times of all absences were recorded and the Unit Chief checked the logs on a daily basis. Whittley stated that he had never been advised that any of these practices was improper.

With regard to the trip to Florida, Whittley said that this had been planned a few days prior to leaving. On checking with United States Customs and Immigration in Pittsburgh, Whittley had ascertained that an inspecting officer would be available on a regular shift basis up to 1600 hours. After that, a special officer would have to be called out to the airport on the Sunday evening of 23 March 1986, at a cost of \$25.00 U.S. The flight from North Bay to Pittsburgh would take three hours. Thus, he would have to leave shortly after noon to be able to make it on time. This persuaded Whittley to consider leaving work early. There was no way to pre-plan for such an eventuality; he would just have to wait and see how heavy the local traffic was on Sunday.

Whittley stated that it was not unusual for one controller to do "double coverage" in the tower when it was necessary for the first one to make an urgent visit to the bank, a doctor's appointment or for some quick shopping. Whittley intended to ask the overlapping controller on the Sunday shift to "cover" for him in the same fashion while he left early for his Florida vacation. Ideally, Whittley would have asked for the day off, but he knew that this was not possible; he would not have been granted another day's leave.

Whittley arrived for work at 0645 on 23 March 1986. He personally signed the attendance register, Exhibit 15, which recorded his work performance for the whole of that month. On the actual date in question he had entered the times "0645" and "1500" along with his initials "WT". He testified that it was standard practice to log in both the starting and finishing times of one's shift upon arrival. He did this even though he knew he intended to get away early if he could. He also did it because he knew that otherwise the total of his working hours and paid hours would not reconcile.

Whittley stated that Sunday, 23 March 1986 was a good IFR day. Traffic was light, only about one plane an hour. The overlapping controller, Savage, was due in at 1045. During the morning Whittley said he had gone to the lunch room to make toast and coffee. He had become upset at finding there was no bread in the refrigerator and had slammed the door. When it did not close properly he kicked it, breaking it further along a previous crack and making it worse. Savage failed to report in at 1045 and by 1200 hours still had not shown up.

Whittley said he telephoned Savage whose wife suggested that Savage must have forgotten that he and Burton had traded shifts. In the meantime, Whittley felt he needed another washroom break and, since he had not eaten, some food. If ten minutes was normally allowable for a relief break, Whittley felt that 15 minutes to do both would not be out of the question.

Therefore, he went down to the washroom and over to the CANEX at 1230. On the way to buy a sandwich, Whittley says he remembered that his wife did not have a key to his aircraft and would need it in order to open the baggage compartment to load the plane prior to take off. Whittley stated he was anticipating that his wife would arrive at the airport at 1500 hours.

Whittley testified that his wife was not at their aircraft when he got there so he opened the luggage compartment and decided to do a radio check to ensure that his equipment was functioning properly. Whittley maintained that he had only decided to go to his plane while on the way to the CANEX. He conceded, however, that had Savage answered his radio call to the tower at 1743 GMT, it would have been an indication that he Whittley need not necessarily return to the tower at 1747 GMT since Savage had obviously arrived.

Whittley stated that he had no knowledge before leaving the tower at 1729 GMT of any impending departures. The strip printer had only been installed in the tower a month or so earlier; it was on trial and was not considered to be approved equipment. It had malfunctioned during this period and Whittley did not recall that it was working on 23 March 1986. VAL 525 had not yet called the tower for clearance when Whittley absented himself; therefore, no other strip information would have been recorded about an upcoming departure. As to knowing about the schedule of this flight from experience, Whittley said that VAL 525 was a fairly recent schedule development, not one of long standing.

Whittley testified that when Savage parked his car in the lot and headed for the tower, Whittley observed him from the tower. Savage was moving very slowly. Whittley gathered his belongings together and headed down to the lunch room where he expected to encounter Savage. After a few moments Savage still had not appeared. Whittley went back up to the cab. There had been no calls and no traffic so he again went down to the lunch room. When Savage still had not appeared Whittley went to the base of the tower.

Whittley eventually passed Savage just outside the tower door. He gave Savage a "briefing"; this consisted of advising Savage there were no in-bound and no outbound aircraft. This briefing would have been the same in a normal course of events. Whittley told Savage he was "on [his] way to Florida". Whittley estimated that it would have taken Savage no more than two minutes to reach the tower cab from this point. There was no notification given to the FSS by Whittley when leaving the tower because he had expected to meet Savage in the lunch room just below when he first went down.

Whittley testified that he had been annoyed at Savage's tardiness. He stated that "Savage picked a bad day to be late out of all the days in the year". Whittley then drove his car back over to his aircraft where he found his wife and family waiting for him. He got clearance and took off for Pittsburgh. Whittley said that things happened very quickly in those last

few minutes. He had been hurrying, trying to save money, impatient and worriedly waiting for his family. Only after he was airborne and about ten miles out did he begin to reflect upon what he had just done.

At that point, Whittley stated, he began to feel very remorseful. He realized that it had been wrong to leave work two hours early and to leave Savage all alone in the tower. But he put these feelings aside; he knew Savage was a competent controller and could handle all there was to do that day. On his return from Florida, Whittley had first been asked about these events by Mr. Cherry, his supervisor. Then Cunningham had asked to speak to him. Whittley knew he was wrong and had readily admitted his error. He fully understood the seriousness of his actions but felt they were forgivable. He had allowed his concern about saving \$25.00 U.S. to affect his judgment. The lesson had turned out to be a much more expensive one, in fact, since he had been discharged and was now pleading for reinstatement.

Whittley allowed that, possibly, he had become a bit lax over the years and was inclined to feel procedures could be relaxed when things were slow. He realized now that he still very much wanted to be an air traffic controller, that his job was a serious one with heavy responsibilities and that he hoped to return to his position at the North Bay control tower.

On cross-examination Whittley testified that he had left the tower early on other occasions without

any reprimand from the employer. This had happened only rarely and usually only when properly allowed. When pressed for an example he said he had left before the normal end of his shift when his supervisor had been present, the visibility had been zero-zero with fog and he had been instructed to go home. He conceded that it was not proper to absent himself from the tower without permission. He maintained that he had never left the tower during any previous washroom relief breaks although he had never been told that he could not do so.

Whittley further maintained that it was not unusual for controllers to leave early if their relief arrived early and operations had been handed over to the incoming controller. Again, when pressed for examples he was unable to give names, dates or occasions. Whittley agreed that controllers have no right to come and go as they pleased. He stated that he would not have left the tower the first time if he had known VAL 525 was about to depart. Whittley testified he could not recall having been present at meetings held on 29 January and 14 March 1983 to discuss the matter of washroom relief breaks. He then stated that such breaks were a rare occurrence in any event; a controller on a 1-1-1 shift would probably only ever take a washroom relief break twice in the course of a whole winter. Whittley agreed that it was an uncommon occurrence for a controller to have to close the tower down twice in the same shift.

Rick Bradley, an AI-3, IFR controller in the North Bay TCU testified on behalf of the grievor. He

described the differing responsibilities of the IFR and VFR controllers. From 2300 to 0700 hours there was no VFR controller on duty at North Bay and the TCU and FSS would handle everything between them. There were quite a few IFR arrivals and departures during the midnight hours, mostly med-evac flights and then some regularly scheduled departures closer to dawn. Many of these flights came and went at the same time or else they often met within 20 miles of the airport. The gist of Bradley's evidence was to the effect that what had occurred on 23 March 1986 when the tower was closed between 1227 and 1247 GMT was no less a level of service than on any midnight shift.

Bradley testified as to the use of Standard Instrument Departures or SID's. A controller could use either SID or an individual, detailed, departure clearance at his discretion. Bradley preferred to use SID's night or day with no change in application. It was not uncommon in relaying such information for the FSS to ask if it was also necessary to give an altitude when using a SID. There were three SID's in use at North Bay.

Bradley agreed that both VFR and IFR controllers were needed to properly operate most airports. VFR was used to control the busier zones and to control aircraft that could not fly IFR. He agreed that, at North Bay, a pilot would expect to receive VFR control during the day and no VFR during midnights from 2300 to 0700 hours. He also agreed that if the VFR controller was out, a pilot would not receive the standard level

of normal daytime service. He agreed, in reference to the transcript, that there seemed to have been some confusion between the FSS and TCU while Whittley had been absent on 23 March 1986.

On behalf of the employer Ms. Ray reviewed the evidence and suggested in argument that it would speak for itself. Whittley had been discharged for failing to fulfil his responsibilities as an air traffic controller and for potentially jeopardizing the safety of the public. There was no doubt that he had placed Bandit 28 and VAL 525 in a position of danger. His actions had led to confusion between the FSS and TCU who were called upon to handle aircraft in Whittley's absence.

Ms. Ray stated that Whittley had disregarded the regulations concerning washroom relief breaks. He had violated the regulations concerning the proper hand-over of control tower operations to an incoming controller. He had falsified his work records and had damaged government property. Whittley had thought only of himself and had completely disregarded his loyalties to his employer and his obligations to the air travelling public. It was fortunate that nothing disastrous had occurred.

Ms. Ray argued that the whole point in having an air traffic control system with VFR controllers on duty was to ensure the safety of the flying public. The whole of the air industry, both commercial and private, required high standards of safety. Here

Bandit 28 switched from an IFR to a VFR approach with no VFR controller present. Later VAL 525 was given a departure by the FSS, in the absence of the VFR controller, which led to confusion over whether he was to climb to an altitude of 6000 feet or 20000 feet.

The employer, here, could come to only one conclusion: Whittley had to be discharged. The employer was not convinced that Whittley truly regretted his error. It only seemed that he had belatedly begun to realize that he had lost what was a pretty good job. This was not the same as appreciating the fact that he had created a situation of grave danger. The falsification of documents alone was serious enough to call for Whittley's discharge. This paled in comparison to the safety aspects of his totally irresponsible behavior. Ms. Ray referred to the case of Higgins (Board File 166-2-3578).

On behalf of the grievor, Ms. McLean suggested that the real issue here was one of a question of appropriate punishment. How much should Whittley have to pay for his mistake? He had readily admitted that he had done things he should not have. He had no good or sufficient reason. Trying to save \$25.00 U.S. had been very foolish. However, it was only human to err occasionally. Though there was no justification for Whittley's actions he now was penitent and remorseful. Ms. McLean suggested that a suspension ought to be substituted for the discharge.

Ms. McLean argued that Whittley now realized he should not have taken a washroom relief break for anything other than the limited purposes allowed. He should not have been away as long as he was, he should not have gone to eat nor should he have gone to his aircraft. Whittley should not have signed himself in for his full shift. He should not have lost his temper and kicked the refrigerator. Having said all that, Ms. McLean argued that Whittley had not endangered anyone; he had not jeopardized the safety of any aircraft handled in his absence.

Ms. McLean contended that, even though the tower had been closed momentarily, the procedures used in Whittley's absence were those which were accepted or authorized at the time. They were the same procedures as were used every night from 2300 to 0700 hours the next day. How could the employer maintain that this was unsafe? Whittley did not deny management's right to determine the appropriate level of service, nor did he deny that it was preferable to have the tower open rather than closed. However, nothing he had done had caused operations to become anything less than they would have been had he actually been absent on a valid washroom relief break. The alleged jeopardizing of the safety of others had not been established.

As to the mitigation of the penalty imposed Ms. McLean argued that Whittley had not tried to hide his errors. He had not demonstrated that he was untrustworthy. He had displayed poor judgment but not a lack of care. A controller's strength was normally

seen as his ability to make sound, quick decisions under pressure. Here Whittley had relied on his abilities to make decisions but had come up with the wrong answers. There had been a lack of clear guidelines to follow. No one had ever said a controller could not leave the tower. It was simply not enough for the employer to assume employees would operate in a certain way.

Ms. McLean also referred to Whittley's lengthy career, 15 years of good service with satisfactory appraisals. She maintained that this had been an isolated incident. Whittley's disciplinary record was clear but for one very minor, unrelated occurrence. That had only happened because a staff truck driver had failed repeatedly to follow proper radio procedures and Whittley had cursed at him.

Ms. McLean's strongest plea for mitigation was based on the argument that a discharged air traffic controller had virtually nowhere else to go in order to find replacement employment. There were only two users of air traffic controllers in Canada, both within the federal government: Transport Canada and the Department of National Defence. Having been discharged by one department Whittley was unlikely to be hired by the other.

Ms. McLean further argued that it was necessary to assess Whittley's attitude and possibility of rehabilitation. He had demonstrated his candor and remorse. He was truly sorry for his misdeeds. He had even felt like turning around and coming back shortly

after taking off. There was hope for him yet; he could even provide the employer with another ten or 15 years of good service. If the employer were allowed to go through with this discharge it would deprive itself of a capable, trained employee. No real proof had been established that Whittley could never again be trusted.

Ms. Ray replied that Whittley's plans had been premeditated as evidenced by his filing of his flight plan and his falsification of the attendance records. Only because his prearranged plans came undone had Whittley become frustrated and upset. He had been unable to substantiate his claim that he had only done what others also had done. As to his potential for rehabilitation, it was obvious that Whittley still did not recognize that what he had done was extremely unsafe. As to the lack of explicit guidelines, she argued that some things are so clear as to require no explanation; the need for air traffic controllers to stay on duty in the control tower was one of these. Ms. Ray referred, in addition, to the cases of Re Flewwelling and Public Service Staff Relations Board et al (1985) 24 D.L.R. (4th) 274, and Chapron (Board Files 166-2-15385 to 15387 and 15642). The employer was concerned about the continued ability of the grievor to uphold the high standards necessary in air traffic controllers. He had been a satisfactory employee but certainly not an outstanding one. He had also displayed previous attitudinal problems.

REASONS FOR DECISION

As has been stated earlier, this is not a case where there is any real dispute as to the facts. My decision, therefore, does not require findings to be made between differing versions of evidence. The grievor has admitted that he was absent from the control tower for some 20 minutes just after noon on 23 March 1986. He further admitted that he left his post approximately two hours before the end of his shift and departed in his own aircraft for a vacation in Florida. For his misconduct the grievor was subsequently suspended from operational duty and eventually discharged. What he now seeks, essentially, is a diminution of the disciplinary penalty which would see him reinstated to his position subject to a period of suspension.

I am inclined to agree with counsel for the employer, however, that the circumstances of this case are such as would normally warrant discharge. I am of the further opinion that the facts speak adequately for themselves that this is not a case which merits mitigation of the penalty imposed. However, in view of the strong arguments for mitigation put forward by counsel for the grievor the following comments will serve to explain my conclusions.

To begin with, while the grievor did not dispute his absence from the control tower between 1227 and 1247 local time on 23 March 1986, he did maintain that his absence did not place in jeopardy the safety of the flying public because the level of service which continued in effect at the North Bay airport was no less than it would have been on any night between

2300 hours and 0700 hours the following morning. That is to say, the airport control system was still being handled by an FSS and a TCU controller.

This line of argument somewhat overlooks the full extent of the charge on which the employer disciplined the grievor. The essence of that charge was described as the "failure to fulfill [his] responsibilities as an Air Traffic Controller" which is said to have "potentially jeopardized the safety of the flying public". The facts are that the grievor left the control tower while Bandit 28, a military jet trainer arriving from Trenton, was on an IFR approach. The grievor knew of this. At the same time VAL 525, a civilian passenger aircraft belonging to Voyageur Airways, was preparing to depart. The grievor said he did not know of this. The two planes then, respectively, landed and took off from the same runway within the same minute.

I have concluded, on the basis of the evidence before me, that Whittley could have or should have known of the impending departure of VAL 525. This information was available from several sources easily accessible to Whittley. At the very least, Whittley could also have asked the TCU controller for information concerning upcoming departures when advising that person about his desire to take a washroom relief break. Common sense suggests that a prudent controller would have done so; Whittley did not.

I have concluded, further, that it was imprudent for Whittley, the only VFR tower controller present, to have absented himself from his post in the knowledge that the military jet trainer was in-bound and due, shortly, to land. True, the military jet was then flying IFR and Whittley was the VFR controller. However, it is not an unknown thing for alterations to be made by pilots to their original plans thus requiring a change in control procedures. Again, a prudent controller truly in need of a relief break at that very moment could have directly advised the pilot of the military jet that he would be away from the tower for a brief spell. Whittley did not.

In any event, Whittley, even if he absolutely had to leave, should not have been away for anywhere near as long as he was. The proper use of a washroom relief break should still have put him back in the cab on the control tower well before Bandit 28 landed.

I find that Whittley's extended and improper absence from his post created confusion in the operation of the North Bay airport that day. Both the FSS and the TCU controller were unaware that Whittley was still out on a break when Bandit 28 changed from an IFR to a VFR approach. I am of the opinion that the military pilot was unaware that he was not receiving the full extent of air traffic control to which he was entitled and which he would have expected. In view of this, and even while the air traffic control service did not

at any point drop below night-time levels, I am prepared to find that Whittley's actions did potentially jeopardize the safety of the flying public. That the two aircraft managed, by themselves, to use the same runway one minute or so apart and that, fortunately, there was no accident is something for which all of use can be thankful. Things might have been otherwise.

It will be apparent by this point that I am somewhat skeptical of Whittley's need for a washroom relief break at 1227 hours, in any event. During his own testimony, he stated that any one controller would take, perhaps, only two such washroom relief breaks during the course of a whole winter while working in the control tower alone. He further suggested that two such tower closures in a month would be the likely maximum experience for all ten VFR controllers in his unit. However, on 23 March 1986, Whittley took, by his own admission, two washroom relief breaks during that same shift: one of 10 minutes between 0835 and 0845 hours; a second of 15 minutes, between 1230 and 1245 hours (Exhibit 19). The time noted in the log by Whittley is at variance with what is suggested by Exhibit 3, i.e. 20 minutes.

Whittley gave no other reason for his need to take a second washroom relief break that day. Admittedly, had the overlapping controller, Savage, arrived on schedule at 1045 hours, Whittley would have been able to take this second relief break without the need of recording it because of having to close the tower. Whittley stated that, around noon, he felt both the call of nature and the need to get some food. Thus, he decided to visit the CANEX to purchase a sandwich.

To do so, he had to leave the tower and, since he was already outside, Whittley stated he then decided to drive around by his aircraft in order to open the luggage compartment. While Whittley maintained that the guidelines on relief breaks were unclear about whether he could properly leave the tower I agree with the employer that some obligations are so readily apparent they need no further clarification. I am skeptical of Whittley's story when this is contrasted with the rest of the evidence, a review of which follows.

At 1013 hours local time on 23 March 1986, Whittley filed a flight plan for the first leg of his vacation journey from North Bay to Florida, via Pittsburgh. The proposed time of departure was 1245 hours, local time, with an estimated elapsed flying time of three hours and ten minutes. In order to save the \$25.00 U.S. Customs charge, Whittley had to arrive in Pittsburgh before 1600 hours. A 1245 departure would have left him approximately five minutes to spare. This would also mean that, when he left the tower for the second "washroom relief break", as he alleges, Whittley had just over 15 minutes in order to get to his plan, load up and depart. I am more inclined to the view, on the balance of probabilities, that his actual departure for Florida rather than the need for a washroom relief break and a sandwich was Whittley's true intent when he left the control tower at 1227, or thereabouts, on 23 March 1986.

This conclusion is confirmed by two other matters of evidence. The first is the radio equipment check made by Whittley. The transcript of all voice communications with the tower shows that just before Whittley asked the FSS to give him a radio check he asked for the tower controller. There was no response. What other purpose was there in doing so other than to determine whether Savage had arrived? Whittley even conceded that, had Savage answered it might have meant that he, Whittley, would not have had to return to the tower at 1247. Indeed, the transcript (Exhibit 3) even records Whittley as telling the TCU controller at 1749.27 GMT, when he got back: "Gee I's hoping I wouldn't have to come back", to which the TCU controller responds, "Yea". Further to this, Whittley stated that his wife was not expected to arrive until 1500 hours when his shift was completed. But, he also testified that she was waiting for him and took off with him when he finally did leave at 1310 hours. His evidence, here, was unreliable and there is reason to suspect his wife may have been awaiting him at 1230 hours when he first went to his aircraft.

On the basis of all the evidence, I believe that when he left the tower at 1227 local time on 23 March 1986, Whittley did so, not for washroom relief and a sandwich but in hopes of leaving for the day. That is more likely the situation which prevailed with Bandit 28 due to land momentarily and VAL 525 preparing to depart. It was not simply a case of stepping out for a few minutes to relieve himself. A totally false impression concerning his absence was created in the

minds of his colleagues, the FSS and the TCU controller. The fact that there was also no attempt to hand over operations to a relieving controller at that point need not be dwelt upon because Whittley has admitted that that was exactly what happened a few moments later in any event.

Since Savage had not yet arrived at work, Whittley had to return from his aircraft to the tower. No sooner had he gotten back than he saw Savage slowly making his way, so Whittley says, from the parking lot to the tower. Hoping to save a few minutes because he had fallen behind schedule, Whittley quickly gathered his things and headed back down the nine floors of the control tower hoping to meet Savage on the way up. They met only at the base of the tower meaning, once again, that no VFR controller was actually present for several minutes. However, this time, no one but Whittley (and Savage) was aware of the true situation. The FSS and the TCU controller were totally ignorant and oblivious to the lack of a VFR controller. Fortunately, no traffic appears to have been in the area or to have required VFR services. I find, though, that Whittley's actions constituted a further potential jeopardizing of the safety of the flying public.

Whittley therefore left his post without ever being properly relieved. Savage was not his relief controller; that person was Burton, who was not due in to work until 1445 hours. The absence of Whittley for the balance of just over two hours remaining on his normal shift diminished the ability of the VFR

control tower to function at those safe operating levels as had been determined by management. No longer was it 1-1-1 operational standard; services had been reduced to a simple one man operation. Whittley was clearly in breach of section 113.1 of the MANOPS.

Whittley now says that he has realized his mistake and is truly remorseful for his misconduct. I have great difficulty in placing much reliance upon this claim. I was not impressed with either the content of his explanations or his demeanor while presenting them. I am of the opinion that he still has not recognized the seriousness of his misconduct or that such lapses must never happen again. Whittley testified that, some few moments after taking off for Pittsburgh, his conscience began to trouble him. He thought of turning back; he did not do so because he felt secure in the knowledge that Savage was a capable controller.

If he had truly felt conscientious about his position, Whittley ought to have turned back then and there. It is easy, in retrospect, to say that he "thought" about doing it. If this were really the case, why did he not call Savage on his radio to ensure things were all right? In fact, there is no evidence from the very beginning that Whittley ever asked Savage how the latter felt about being left alone in the tower. The only evidence is that Whittley forced the situation upon Savage before Savage ever got anywhere near the control tower cab.

I have given much consideration to the major argument raised by Ms. McLean that, in this case particularly, a discharge amounts to "capital punishment" in labour relations terms. Certainly, the grievor, once discharged, will be unlikely to again find work in Canada within his chosen field of the past 15 years. There are but two users of air traffic controllers; both are within the federal government. This is, however, something which ought to have been more at the forefront of the grievor's mind before he acted in such a cavalier fashion on 23 March 1986. While the effect upon the grievor compels me to consider the possibility of mitigation, in view of all the evidence presented and my findings based thereon, I am not persuaded that I should alter the employer's disposition of the matter.

The statute under which this adjudication proceeding arises does not permit the adjudicator to appoint a grievor to any position within the Public Service of Canada. There is no opportunity available to me to suggest that the grievor be given some other, and perhaps lesser, duties so that the whole of his 15 years experience in air traffic control matters need not entirely go to waste. Discharge, it seems, will mean both a change of occupation for the grievor as well as a change of employer.

The employer has given testimony of its inability to once again feel it can place full confidence in the good judgment and reliability of the grievor. I choose not to attempt to second guess the employer in this regard, nor to substitute any other opinion. The duties of an air traffic controller are highly important, as is the need for them to be fully and competently performed. The confidence, not only of the employer, but of the whole of the flying public is at stake. Upon the maintenance of that confidence rests much of the economic viability of the air travel industry and the peace of mind of all those who are involved with flying.

For all of the above reasons this grievance must be and is hereby dismissed.

Roger Young,
Board Member.

OTTAWA, February 10, 1987.