

OCT 8 1987

No. 271

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

BETWEEN:

MICHAEL T. DOOLING,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

Before: Walter L. Nisbet, Q.C., Deputy Chairman.

For the Grievor: John Pottinger, Canadian Air Traffic
Control Association.

For the employer: Robert Lee, counsel.

ARTICLE 13
CODE 402/85
MIAZ + RELIEF
BREAKS

Heard at Vancouver, B.C. September 17, 1987.

DECISION

The grievor is employed by Transport Canada at its air traffic control centre at Vancouver as an operational air traffic controller classified AI-4. He has performed the duties of his position for the past six and one-half years after completing a period of training for six months. He grieves the employer's interpretation and application in respect of him of the provisions of article 13.01(b) of the collective agreement between the employer and the Canadian Air Traffic Control Association (Code 402/85). That provision reads as follows:

Where operational requirements permit, the employer will provide operating employees with meal and relief breaks.

The circumstances giving rise to the grievance occurred during the grievor's evening shift on May 28, 1986 the hours of which were from three to eleven-fifteen p.m. He alleges that because of a shortage of staff during what he described as a predictably busy shift he was not provided with adequate meal and relief breaks, contrary to paragraph 13.01(b) of the collective agreement. The corrective action he requests is:

A declaration that the employer has contravened the collective agreement; and

The employer be directed to ensure sufficient staff are available to provide adequate relief breaks.

At the end of his argument, Mr. Pottinger withdrew the grievor's request for a direction that the employer ensure sufficient staff are available to provide adequate relief breaks.

The grievor is employed in the sector of the Vancouver air traffic control area known as the terminal complex. That sector comprises an area within a 60 mile radius of the Vancouver airport in which air traffic control by the use of radar is provided for aircraft using the airports at Vancouver, Victoria, Nanaimo, Bellingham, Washington, Abbotsford and, to a lesser degree, the airports at Boundary Bay, Pitt Meadows and Langley. The air traffic control provided is primarily concerned with aircraft that must comply with Instrument Flight Rules, i.e., the rules that govern the flight of aircraft the pilots of which need not maintain visual contact with the ground. Air traffic information is also provided by the use of radar to aircraft subject to Visual Flight Rules, i.e., aircraft the pilots of which must maintain visual contact with the ground, that are flying above 2500 feet within the terminal complex sector. Generally, the terminal complex air traffic controllers use radar to provide guidance and instructions to bring aircraft to their destinations, to provide their separation from each other and to furnish them with air traffic information of concern to them. Lighter, slower aircraft are kept separate from the heavier jet aircraft by lateral distance and altitude.

There may be as many as eight air traffic controllers employed in the terminal complex during each shift. Their functions may be summarized as follows:

1. Terminal data position in which the air traffic controller passes estimates of the progress of incoming and outgoing aircraft, issues clearances to the air traffic control tower at the destination airport within the sector, ensures the arrival air traffic controller is provided with current information on the progress of aircraft they will be controlling within the next 30 minutes, and ensures the timely processing of flight information on aircraft entering or exiting the terminal complex to air traffic control units or sectors outside the terminal complex. These functions do not involve the use of radar.

2. Departure controller who uses radar to provide appropriate instructions to the pilots of aircraft leaving the airports at Vancouver, Boundary Bay, Pitt Meadows and Langley for the purpose of putting them on their flight plan routes in a way that ensures their safe separation from other air traffic in the sector. This controller is also responsible for controlling air traffic arriving at the Boundary Bay airport.

3. The arrival controller some of whose functions may be performed by a second controller when one of them is designated "high" and the other "low". The "high" controller accepts the control of arriving aircraft that are 50 to 60 miles from the Vancouver airport for the purpose of establishing a flow of aircraft in the order in which they will land. He resolves any conflict among them and others in the terminal complex sector prior to releasing his control of them to the "low" controller when they are somewhere between 20 and 40 miles from the Vancouver airport. The "low" controller establishes the final sequence of aircraft for landing after which he relinquishes control of them to the air traffic control tower.

4. Terminal radar service area controller or "TRSA" ensures that air traffic governed by visual flight rules and aircraft governed by instrument flight rules are safely separated from each other by providing them with routes, altitudes and speeds.

5. Victoria radar controller is responsible for controlling air traffic subject to instrument flight rules that are arriving at or departing from the airports at Victoria, Nanaimo, Bellingham and Abbotsford. This controller also provides air traffic information to aircraft subject

to visual flight rules operating between Victoria and Vancouver harbours.

6. The Victoria data controller has the same responsibilities as those described in paragraph 1 in respect of aircraft using the airports mentioned in paragraph 5.

7. The Abbotsford radar controller performs the same functions as those performed by the Victoria data controller but only in respect of aircraft using the airports at Abbotsford and Bellingham. This function is performed infrequently.

On May 28, 1986 the grievor performed the functions of the terminal radar service area controller ("TRSA") from 3:10 p.m. to 6:10 p.m. at which time he took a break until 6:30 p.m. to have his dinner. At 6:30 p.m. the grievor commenced the performance of the terminal data function and the departure controller function. He commenced these combined functions at 6:30 in order to relieve an air traffic controller who had not had a relief break for the previous three hours and whose shift was scheduled to end at 7:00 p.m. The grievor continued to perform the combined functions until 9:20 p.m. when he took a ten minute relief break. At 9:30 p.m. the grievor commenced the functions of the arrival "high" controller and at 9:55 p.m. he commenced the functions of both the arrival "high" controller and the arrival "low" controller because the controller performing the "low" function was on

overtime and was sent home. The grievor performed these functions until 11:00 p.m., the end of his shift.

The grievor normally takes two relief breaks of 20 minutes each and one meal break of 45 minutes during his shift. He usually takes his relief breaks after two hours of work.

The grievor testified on his own behalf. He said that he could not recall discussing his complaint about the lack of relief breaks during his shift on May 28 with his supervisor, Mr. James Arthur Paxton. He said on May 28 the weather was good and the traffic volume was average. During Expo 86 there were usually five air traffic controllers performing the functions in the terminal complex during the evening shift and that prior to the commencement of Expo 86 there were four air traffic controllers performing those functions. The increase in the number of air traffic controllers was the result of a decision made by the employer in anticipation of an increase in air traffic volume during the summer months and because of Expo 86.

Mr. Paxton testified for the grievor. He has been employed as an air traffic control supervisor in the terminal complex at the Vancouver area control centre for the past 13 years. He has been employed as an air traffic controller for 31 years. He said his primary responsibility as a supervisor is to function as an air traffic controller. He also provides general supervision and is responsible for ensuring the quality of the air traffic control service during his shift.

On May 28, 1986 Mr. Paxton worked the evening shift which for him commenced at 2:00 p.m. and ended at 10:45 p.m. He identified a daily staffing report for the terminal complex for May 28, 1986 (Exhibit G-1) which shows that at 5:00 p.m. one of the air traffic controllers in the terminal complex was removed from his duties because of an incident that occurred 24 hours earlier. Initially the incident was not regarded as an "operational irregularity" and no steps were taken to remove the controller from the performance of his duties. Subsequently, on the basis of further information about the incident obtained after the commencement of the evening shift on May 28, it was determined that an "operational irregularity" had occurred. As a result, the air traffic controller involved in the irregularity was removed from the performance of his duties. The manager of the evening shift, Mr. Wayne Douglas McCuaig, did not know about the "operational irregularity" and did not anticipate the removal from duty of one of the controllers on the evening shift in the terminal complex on May 28.

Mr. Paxton performed the functions of an air traffic controller throughout most of the evening shift. He said he could not recall anything unusual about the traffic volume during that shift.

Mr. Paxton said that Mr. Glen Gray, an air traffic controller, was on duty in the terminal complex from 11:00 a.m. to 7:00 p.m. on May 28, 1986 in addition to those controllers whose shifts commenced at 3:00 p.m. His presence provided an extra controller during a period when air traffic volume is usually higher than it is at other times. Mr. Paxton said he had received complaints about relief breaks, but was not certain he had received one from the grievor on May 28.

Mr. Wayne Douglas McCuaig testified for the employer. He said he was the shift manager on May 28, 1986. He identified the monthly traffic summary for the Vancouver area control centre for each of the months from January to June, 1986. The traffic volume for May averaged 812 flights per day. There were 817 on May 28, close to the daily average for that month (Exhibit E-2).

Mr. McCuaig said that he could have extended the hours of duty of Mr. Gray, the air traffic controller who worked the shift from 11:00 a.m. to 7:00 p.m. on May 28, or he could have arranged the timing of the grievor's relief breaks to take advantage of low traffic volume during the shift if he had been aware of the grievor's problem. Mr. McCuaig had not spoken to Mr. Paxton about the problem at the time. Mr. McCuaig said the practice is to deal with any problem concerning relief breaks that may arise at the time it arises because it is not possible to do anything about it after the shift is worked.

Mr. McCuaig said that it was not his decision to remove from duty the air traffic controller who had been involved in the incident the day before. He said he knew nothing about that incident and the removal of that controller from duty was unexpected. Mr. McCuaig said he telephoned another air traffic controller (Mr. Armour) some time after 5:00 p.m. on May 28 and requested him to come into work and to participate in the investigation of the "operational irregularity" that had occurred the previous day. At the time he

was called by Mr. McCuaig, Mr. Armour had consumed some alcohol and was therefore unable to perform the functions of an air traffic controller during the evening shift. No one else was available to perform the functions of an air traffic controller in the terminal complex at that time on May 28. Mr. McCuaig said that an additional reason for attempting to call into work an additional air traffic controller was that the volume of air traffic that might be generated by Expo 86 was unknown and he wanted to have an additional controller available in the event the volume increased. He said he did not attempt to call in an additional controller because of the grievor's problem concerning relief breaks.

Mr. McCuaig said that if circumstances develop that appear to interfere with the taking of relief breaks, any air traffic controller concerned should bring those circumstances to the supervisor's attention. He said that he had the following choices of actions he could have taken to provide the grievor with his relief breaks:

(a) combine functions in the terminal complex provided the air traffic volume was such that it would not generate an excessive workload;

(b) meter the air traffic to reduce the workload, i.e., delay the progress of some of the arriving and departing aircraft to increase the time interval between them;

(c) extend the hours of duty of the air traffic controller on the shift worked from 11:00 a.m. to 7:00 p.m. to cover the unexpected workload;

(d) adjust the timing of relief breaks to take advantage of reductions in air traffic volume.

None of these choices was made because Mr. McCuaig was unaware of the grievor's problem concerning his relief breaks.

ARGUMENT FOR THE GRIEVOR

Mr. Pottinger said the issue in this case is whether or not the employer contravened paragraph 13.01(b). In order to determine this issue the meaning of the words "where operational requirements permit" must be ascertained in relation to the context in which they appear in the collective agreement. He referred to Lawes et al (Board files 166-2-6437-6440, 6666, 6473/4, 7026-7029) in which decision the adjudicator stated that the employer's interpretation was that where "staffing" rather than "operational requirements" makes it possible, it will provide employees with meal and relief breaks. In rejecting that interpretation the adjudicator stated that the clause imposes an obligation on the employer to provide such staff as is needed to enable an operating employee to obtain a meal and relief break at such times and for such lengths of time as is reasonable, unless "operational requirements" and not "staffing" makes it impractical to do so.

Mr. Pottinger stated that there is nothing in the evidence in this case to show what "operational requirements" means. He asked the question whether or not an employee is responsible for soliciting his own breaks. Neither Mr. Paxton nor the grievor were in a position to determine the timing and length of the grievor's breaks. Mr. Pottinger submitted that Mr. McCuaig had the responsibility to make those determinations and he had a number of choices he could have made in making those determinations. Mr. McCuaig represented the employer on the evening shift of May 28, 1986 and only the employer could provide the meal and relief breaks for the grievor.

Mr. Pottinger submitted that, assuming Mr. Gray's departure from duty was unusual and unexpected, that event could have precluded the provision of the breaks for the grievor. However, the traffic volume during the evening shift on May 28, 1986 was not unusual.

Mr. Pottinger stated that the determination of the issue in this case turns on the question as to whether or not the grievor made his plight known at all, or adequately, to Mr. Paxton. He referred to the latter's testimony on this point.

Mr. Pottinger submitted that Mr. McCuaig had some responsibility to ensure that the employer's obligation to provide the grievor with meal and relief breaks was met after Mr. Gray's departure from duty. He failed to meet that responsibility.

Mr. Pottinger stated that the grievor received two relief breaks, one of 20 minutes and one of 10 minutes during his eight and one-quarter hour shift. Mr. Pottinger referred to the following words used by the adjudicator at page 9 of his decision in Randall and Yates (Board files 166-2-13810 and 13811):

The practical exigencies of the air traffic control service simply do not allow for rigid and formalized procedures concerning these breaks. Consequently the parties themselves are entrusted to assume the task of determining on an ad hoc basis those circumstances when the breaks may be taken and the length of those breaks. There may be isolated, unanticipated circumstances when breaks as short as three to five minutes or even no breaks may be 'practical'. However, in the ordinary circumstances, relief breaks of 25 minutes and a meal break of 35 minutes are what the parties have treated as the acceptable norm in order to ensure that the employees maintain physical and mental alertness necessary to perform their tasks in a manner that safe guards the public interest.

Mr. Pottinger submitted that the breaks the grievor was able to take during his shift on May 28, 1986 were not reasonable and that the employer, by failing to provide breaks of a reasonable duration, contravened

paragraph 13.01(b) of the collective agreement. He requested a declaration to that effect. He stated that he wished to withdraw the second request for corrective action, i.e., that the employer be directed to ensure that in future the employer comply with paragraph 13.01(b).

ARGUMENT FOR THE EMPLOYER

Counsel for the employer stated that the word "adequate" does not appear in paragraph 13.01(b), nor is any specific number of breaks mentioned. He submitted that an employee does not have to take the breaks. Their occurrence and duration vary from one employee to another.

Counsel referred to the figures showing air traffic volume on May 28, 1986 and to the average of the daily volume during the month of May contained in Exhibit E-2. He stated that Mr. McCuaig could reasonably conclude that he had enough staff on duty on May 28 to provide air traffic control service. The volume of work was not unusual.

Counsel stated that the grievor did not mention his desire to have a break and that it was the grievor's responsibility to bring his desire for a break to the attention of Mr. Paxton. The employer had options it could have adopted in order to provide the requisite breaks to the grievor. The employer cannot be found to have denied a break when none was requested. The evidence in this case shows that breaks are taken in accordance with an informal arrangement.

Counsel referred to Noakes (Board file 166-2-9688) where the adjudicator states that, on the basis of the evidence before him, the employer had not in a mal fides manner sought to evade its obligations under the provision in the collective agreement that is the equivalent of 13.01(b) by virtue of its control over the staffing at the Vancouver harbour tower. Counsel submitted that, to be entitled to the declaration sought, the grievor must show that the employer took deliberate steps to avoid its obligation under paragraph 13.01(b). He submitted that no finding to that effect can properly be made in this case.

Counsel referred to Randall and Yates, supra, where, at page 7, the adjudicator sets out the rules enunciated by the adjudicator in Noakes, supra, number three of which states:

3. The employer is not bound to engage in superfluous staffing actions for the purpose of guaranteeing compliance with article 13.02(d).

Paragraph 13.02(d) is the equivalent of paragraph 13.02(b) of the collective agreement applicable to the grievor.

Counsel submitted that the circumstances prevailing on May 28, 1986 were not normal because of the unexpected departure from duty of Mr. Gray. The employer attempted to replace Mr. Gray.

Counsel submitted that the grievor cannot sit back and do nothing and then complain about the failure of the employer to provide him with relief breaks after his shift ends and it is too late to provide them.

REASONS FOR DECISION

The only obligation the employer has assumed under the collective agreement with respect to meal and relief breaks is set out in paragraph 13.01(b) which has already been quoted. The evidence with respect to the meal and relief breaks accorded the grievor during his shift on May 28, 1986 is that he took a 20 minute break between 6:10 and 6:30 p.m. and a ten minute break between 9:20 and 9:30 p.m. This was a departure from the normal breaks taken by the grievor who usually takes two 20 minute breaks and one 45 minute break. The evidence also discloses that an air traffic controller, Mr. Glen Gray, was unexpectedly removed from duty at 5:00 p.m. on May 28, 1986, two hours after the commencement of the grievor's shift on that date. Mr. McCuaig attempted to replace Mr. Gray but did not succeed in doing so. The evidence also shows that during the period from 5:00 to 11:15 p.m. arrangements could have been made by Mr. McCuaig to provide the grievor with additional breaks had he been made aware of the grievor's need for such breaks. Although the grievor was obliged to work for approximately three hours before he took his first break and for nearly another three hours before he took the second 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.

The grievor complained that he had not been provided with "adequate" breaks during his shift on May 28, 1986. I refer in this regard to the statement made by the adjudicator in Randall and Yates, supra, at page 9 of his decision quoted on page 12 of this decision.

The unanticipated departure from duty of Mr. Gray at 5:00 p.m. on May 28, 1986 constituted a circumstance that made the breaks actually taken by the grievor the only practical ones that could be provided as a result of the prevailing "operational requirements".

In any event, the evidence is that Mr. McCuaig could have provided the grievor with additional relief breaks by the adoption of one of the options to which he referred in his testimony had he been made aware of the grievor's wish to take them. I am not satisfied, on the evidence, that either Mr. Paxton or Mr. McCuaig was made aware of the grievor's wish to take additional breaks at a time when they might have been able to make arrangements for them to be taken.

In summary, while the grievor did not take the usual number of breaks of normal duration for him, he did take two breaks of a total duration of 30 minutes

during the portion of his shift that followed the removal from duty of Mr. Gray whose removal made those breaks the only practical ones he could take. 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". For all these reasons, this grievance is denied.

Walter L. Nisbet, Q.C.,
Deputy Chairman.

OTTAWA, September 30, 1987.