

File: 149-2-82
166-2-17500
166-2-17501
166-2-17551

SEP 12 1988

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

BETWEEN:

RONALD N. CHASE,
JOHN M. REID,
JOHN NIXON,

grievors,

AND:

TREASURY BOARD
(Transport Canada),

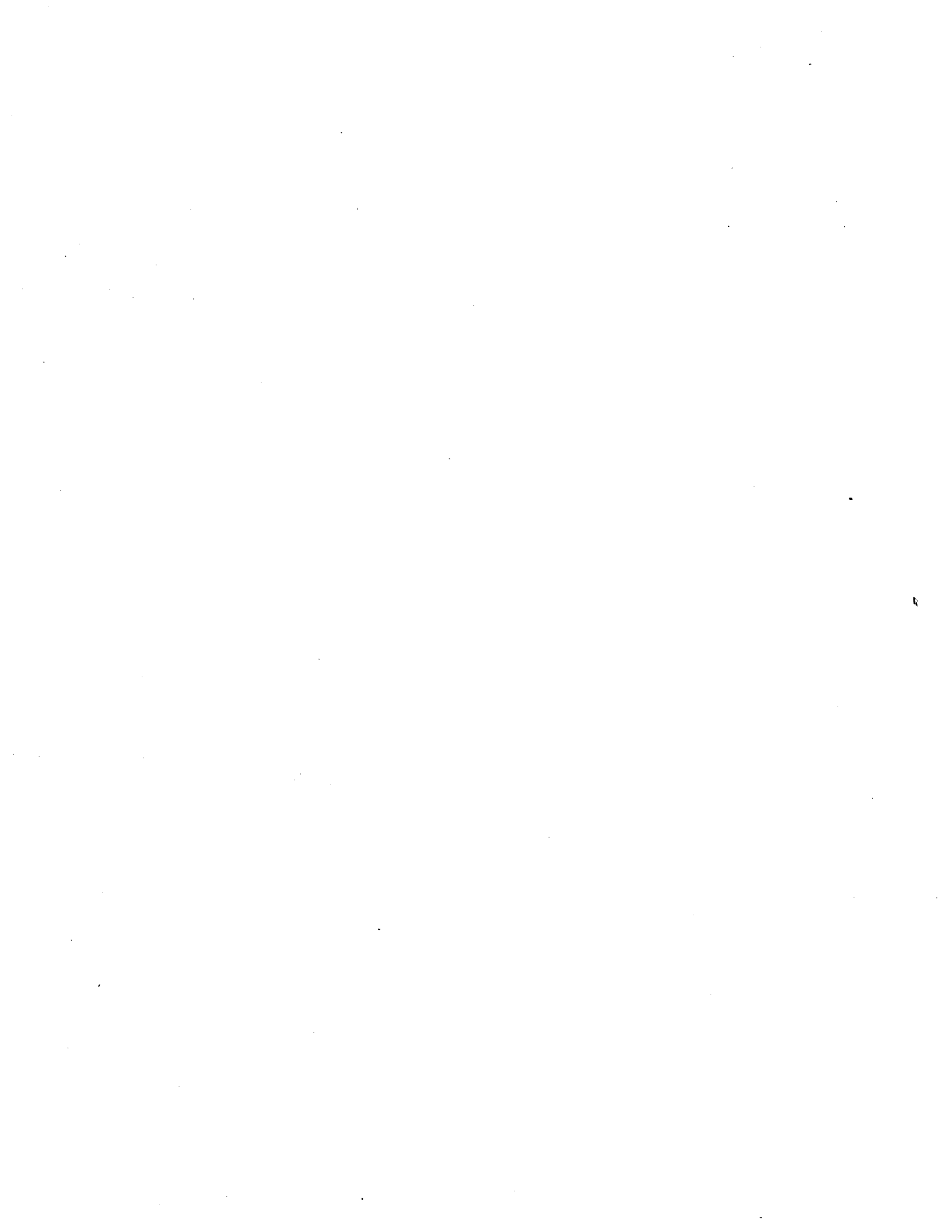
employer.

Before: Roger Young, Board Member.

For the grievors: Ms. Catherine McLean, Counsel

For the employer: Roger Lafrenière, Department of Justice,
Winnipeg.

Heard at Winnipeg, Manitoba, June 15 to 17, 1988.



DECISION

The March lion was roaring and the weather that day in 1987, the fifth of the month, was not at all unusual for mid-winter along the north shore of Lake Superior. Adverse conditions had caused missed approaches as well as several cancelled arrivals of scheduled flights into Thunder Bay, Ontario. Three of the air traffic controllers responsible for handling traffic in the area between Winnipeg and Sault Ste. Marie, particularly that portion known as "Sector 10" in the "North Specialty", felt that the work load demands upon them that day created by the weather and the traffic conditions had been moderate to heavy. All three, John Nixon, Ronald Chase and John Reid, work at the Winnipeg Air Traffic Control Centre and all filed grievances against suspensions administered to them as the result of their alleged involvement in an "abnormal situation" or "operating irregularity", to use the less emotion-filled euphemisms of the Air Traffic Control Operations Manual (MANOPS).

What was unusual and ought not to have occurred was that a situation had been allowed to develop whereby a cargo-carrying Boeing 747 belonging to Japan Air (JL81) was proceeding westbound over Sault Ste. Marie along a designated airway known as "HL 500". At the same time, a Canadian Forces Tutor jet trainer, (COBRA 52) was proceeding eastbound from Winnipeg towards Toronto along the same airway, HL 500. Both aircraft were flying at 37,000 feet. While still several hundred kilometers apart, they were closing on one another at a combined speed of approximately 1440 kilometers per hour or 15 miles per minute. On a collision course!

What was alarming about this is that for some period of time, roughly one half-hour, none of these three controllers who were responsible for air safety in this area was aware of the catastrophe-in-the-making in the skies overhead. Only when the aircraft had closed to within approximately 50 miles of one another (that is to say, with about three and one-half minutes to spare) did those responsible for the safe positioning and control of these aircraft become aware of the dangerous situation and take steps to avert it. The aircraft were diverted - one to the north, one to the south - and managed to pass each other, still at the same altitude but with some 12 to 15 miles of lateral separation.

These circumstances were determined by management to amount to an operating irregularity. This finding caused an internal inquiry to be held following which discipline was imposed. Subsequently grievances were lodged, leading eventually to these references to adjudication. Two of the controllers involved were originally assessed three day suspensions; the third was given a two day suspension. During the grievance resolution process all three cases were reduced by management to one day suspensions. The grievors, however, maintain that they ought not to have been disciplined at all.

PRELIMINARY OBJECTION

Before continuing with a more detailed account of the relevant evidence and argumentation involved,

I should note that the employer raised a preliminary objection to the Board's jurisdiction to hear Nixon's grievance on the basis that the grievance was untimely. The original letter of discipline was hand delivered by the employer to Nixon on 18 March 1987. Nixon, along with Chase and Reid, then discussed the matter with their union representative and all decided to file grievances. Reid and Chase signed forms on 3 April and appear to have promptly submitted them. Nixon signed his grievance form on 5 April and thought that it, too, had gone forward.

Only later, on 21 May 1987, did Nixon find the grievance form mixed in with some other papers in the bottom of his locker, at work. It had not been processed and, when finally forwarded was, according to the collective agreement, some 19 or 20 days late. The employer responded throughout the three stage grievance resolution process denying the grievance on alternate grounds - procedurally, that it was untimely, and substantively, that the discipline imposed was justified.

In response to the objection raised by the employer, counsel for the grievor sought relief pursuant to s. 89(1) of the Regulations and Rules of Procedure made by the Board under the authority of the Public Service Staff Relations Act. These Regulations provide for the power to extend time limits for the filing or processing of grievances, be those limits specified by the Board itself or as set out in collective agreements.

The grievor testified that he had had a number of serious personal matters on his mind at the same time as he had been considering his grievance. He was trying to cope with the breakup of his marriage and the threat by his spouse to remove his three young children, who were at the time four, seven and ten years of age, from the province of Manitoba. In the weeks preceding 5 April 1987, Nixon had been on sick leave due to stress. That day was his first day back at work and he recalled signing his grievance and believed that he had left it with the CATCA representative for processing. Nixon went on sick leave again the following day, but managed to return on 7 April. He felt that a denial of an impartial hearing of his grievance on procedural grounds alone would be unfair. He felt that the grievance resolution process itself had not afforded him a fair and full hearing. He maintained that the penalty imposed was equivalent to a \$500 loss in income and was too severe. Nixon conceded that he was aware of the terms of the collective agreement which regulated the conditions of his employment.

Counsel for the grievor relied as well on the previous decisions in Demercado (Board file 149-2-55); Chambers (Board file 149-2-63) and Dunham (Board file 149-2-39). It was suggested that there was no possible prejudice or disadvantage to the employer should the Board proceed to entertain Nixon's grievance. There was, on the other hand, a serious affect upon the grievor should his request be denied. The plea for an extension of time was reasonable, there was evidence of extenuating

circumstances and the delay involved had been very short and had not prevented the employer from making a substantive response.

Counsel for the employer relied upon a strict interpretation of the collective agreement and challenged the Board's authority to grant relief from the contractual obligations which bound the parties. He argued that the union could not be permitted to go back upon procedural limits which it had agreed to during the collective bargaining process. The employee had been aware of his rights and had failed to follow up on them. By failing to file a grievance within 25 working days of receipt of the letter of discipline he was deemed to have abandoned his grievance. The employer requested a strict application of clause 5.19 of the collective agreement insisting that this acted as a bar to any further proceedings.

RULING ON PRELIMINARY OBJECTION

At the hearing itself, I made the ruling that I was prepared to set aside the employer's objection and to grant the application for an extension of time thereby permitting the Board to properly entertain the reference of Nixon's grievance to adjudication. The following are the reasons given at that time.

In the first place, s. 89(1) of the Board's Regulations and Rules of Procedure with respect to proceedings states:

Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level or the service or filing of any notice, reply or document may be extended either before or after the expiration of those times

(a) by agreement of the parties;
or

(b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms or conditions as the Board thinks fit.

From this, it is quite clear that the Board takes the position that it has the power to grant the form of relief as has been sought here. There is, however, a "balancing process" which is applied in deciding whether or not such relief ought to be granted. The cases cited by counsel for the grievor set out those factors which ought to be taken into account. In general, the disadvantage to the employer, should such relief be allowed, must be weighed against the prejudice to the grievor, should his application be refused.

While in the broad spectrum of disciplinary sanctions the issue of a one day suspension may not be viewed as a matter of great severity, the allegations by the employer of "inattentiveness" on the part of

the grievor with the potential for "catastrophic consequences", in relation to his career as an air traffic controller, certainly have their impact. The matter is sufficiently serious in itself that I feel it would be unfair not to permit him an impartial hearing of his grievance before this tribunal. There is, as well, the evidence of extenuating circumstances which adequately explains the oversight and failure to follow through once the grievance form was signed. The actual signing took place well within the permitted time limits; the filing did not. However, the lapse was of short duration and was sought to be rectified immediately upon discovery by the grievor.

It should not be overlooked that two similar grievances arising out of the exact same fact situation (i.e. those of Chase and Reid) will be proceeding in any event. The employer, it appears, is prepared to proceed with its evidence in relation to these other two. In the circumstances, I do not see how it can be said to be at any disadvantage in being asked to establish its reasons for the discipline imposed in Nixon's case as well. Indeed, were I to deny Nixon's request to be heard and proceed to hear only the grievances of Chase and Reid, and were I then to find on evidence applicable to all three that the grievances of Chase and Reid ought to be upheld for whatever reason, I would be in the most uncomfortable position of having upheld the other two on substantive grounds while denying the opportunity to Nixon for a similar result for merely procedural reasons. Alternatively, if I permit Nixon

to proceed and then find against all three grievances none are in any worse position as a result than when they began and all will have had an equal opportunity to be heard.

For all these reasons the request for an extension of time to permit the adjudication of Nixon's grievance was granted. Subsequent to this ruling, the hearings of the three grievors were then consolidated at the request of the parties and an order for the exclusion of witnesses was likewise granted.

ADDITIONAL EVIDENCE OF NOTE

An explanation of the reasons for which discipline was felt to be warranted in the case of each of the three grievors involved was provided on behalf of the employer by Frank Kratt, Acting Centre Shift Manager on the day in question, and David Stirling, also a Shift Manager, supplemented by information provided by Stephen Denike, a Team Leader.

"Sector 10", in terms of the Winnipeg Air Traffic Control Centre's responsibilities for radar coverage and control procedures, covers an area roughly equating that territory to the north of the Canada - United States border bounded on its easterly side by a line running north-easterly, half-way between Thunder Bay and Sault Ste. Marie, and on its westerly side by a line running northerly about half-way between Thunder Bay and Dryden (Exhibit 5). The controlled air space immediately to

the east of this is the Canadian Sault area, managed out of the Toronto Air Traffic Control Centre, while that immediately to the west is known as "Sector 6" of the Winnipeg Centre's responsibilities. Aircraft are passed from one control sector to another by various means of communication between controllers who are expected to follow a series of standardized procedures and MANOPS.

Sector 10, at the time in question, was a two man operation. That is, two controllers worked side by side, one responsible for keeping relevant information posted on a data board while the other monitored the radar screen and issued instructions to aircraft under his control. The alleged operating irregularity took place shortly after 2000 hours Zulu or 2:00 p.m. local time, the time differential between Greenwich and Winnipeg being six hours. The aircraft had reached a point of "confliction" just west of the dividing line between the Canadian Sault area under the jurisdiction of the Toronto ACC and Sector 10 under the jurisdiction of the Winnipeg ACC. That is, both aircraft were just inside Sector 10 (Winnipeg - controlled) air space when the problem came to the notice of all concerned. The matter was also drawn to the attention of the Toronto Centre manager just after it happened; he then contacted Winnipeg at approximately 2030 hours to inquire whether Kratt had become aware of it. Kratt had no personal knowledge so he asked Denike, the team leader, whether anything had come to his attention. It had not. Both then went to the Sector 10 area of the control room

and sequestered the "data strips" pertaining to the two aircraft. Since the two planes had, by then, exited that air space, the strips were in the storage bin.

It might be helpful to say here that the air traffic controller's job seems to be a reasonably complex task requiring a good deal of mental acuity and stamina. The actual control task in Sector 10 was split between the two controllers; one was responsible for receiving data which was pre-recorded on flight strips which were delivered on a regular basis by support personnel or would be made up by the data controller as information was received, regarding incoming aircraft, from controllers working the adjacent air space. At least 15 minutes advance notice is required to be given in relation to any aircraft before it passes a specific point. These data strips are slotted into plastic slides which are then placed upon a vertical control board which has a series of vertical "bays". Aircraft are kept track of by a combination of features - whether the data strip is "cocked" or lying flat in a bay; by the position in the vertical column or bay (those nearest the bottom requiring more urgent attention, those nearest the top less); and, perhaps most importantly, by the actual information written on the data strip itself. This information is amended and up-dated, as necessary.

The second controller, in this case the radar controller, works both from the radar screen (which displays a "triangle" symbol, representing an aircraft, next to which will be displayed the code number which

has been assigned to that flight by the computer) and from the data strips arranged and compiled by his colleague who sits immediately to his right.

The Sector 10 control operation, while it was a two person function at the time of this incident, has since become a three person operation. More will be said of this later. Also, it should be pointed out that the method used to ensure that the two aircraft in question (JL 81 and COBRA 52) were diverted so as to miss one another on that day, was not the normal type of diversionary tactic employed. While, technically speaking, there was no "loss of separation", since the aircraft were at all times at least 10 miles apart laterally while flying at the same altitude, it was accepted that the means employed to accomplish this were not those which would normally have been expected to be used in relation to aircraft subject to positive control. It was agreed that some formal, diversionary plan, known well in advance, would have been in place rather than the hastily organized, last minute by-pass which took place.

In essence, what transpired to bring about the incident which gave rise to the discipline is explained as follows (all times are Greenwich Mean Time). At 1932.50 hours (i.e. approximately 1:30 p.m. local time) Ronald Chase, the Sector 10 data controller, was advised by the data controller in Toronto responsible for the territory immediately to the east of Chase's responsibility, that Chase could soon expect the arrival of JL 81

in his territory. Details were passed advising Chase of the point of departure (JFK airport, New York City), destination (Anchorage, Alaska), courses to be flown (HL 500, as well as others further west), altitude (37000 ft.), type of aircraft (Boeing 747) and that JL 81 could be expected overhead Sault Ste. Marie at 1948 hours, i.e. some 15 minutes later.

Of critical importance in this message was that the Toronto controller gave Chase the specific information "three seven zero wrong way", meaning that JL 81 was flying at 37000 feet, and that this was "an altitude inappropriate for direction of flight". Normally, the altitude level of 37000 feet is reserved for planes flying eastbound while 35000 feet is reserved for those flying west. Such a system means that aircraft flying in opposite directions, if they adhere to the normal altitude levels, will have 2000 feet of vertical separation as an aid to safe operation. While there is a standard system of altitude separation in place, this does not mean, however, that aircraft can never use an altitude normally reserved for those flying in the opposite direction. Weather conditions and other reasons often make such changes necessary.

Chase, having received this information, then took a red pen and circled the number "37" which he had written on the data strip in front of him. This is a standard procedure and signifies to himself and any other controller looking at the board that JL 81 was flying at an "altitude inappropriate for its direction

of flight" or, as the controllers say amongst themselves, a "wrong way" altitude.

While Chase made note of the "wrong way" altitude by circling it in red on the data strip in front of him, he failed, it seems, to make any mental connection between this information and the fact that he had also been advised some 20 minutes earlier that COBRA 52 was on an opposite heading, also at 37000 feet. Chase had been contacted at 1912.04 with information that COBRA 52 would be overhead Sioux Narrows at 1920 hours. Chase did not inscribe a "W" in red ink on either of the two data strips, which would have signified that JL 81 was on a conflicting course and altitude with another aircraft on the same board (i.e. COBRA 52).

Some eight to twelve minutes after receiving the information relating to JL 81, Chase was relieved from his position as data controller by John Nixon, in order that he might have a coffee break. The handover process was fairly brief; Nixon studied the board for a half-minute or so before assuming Chase's seat. Chase's comments were equally brief; he simply informed Nixon "what's cocked has to be passed".

Flight information strips, when placed on the data board, are put in either of two positions - "cocked" or "flat". A "cocked" strip (i.e. with one end raised from the surface of the board) means that the available information including possible up-dates or amendments has yet to be passed on to the controller next in the

sequence of the aircraft's journey. A "flat" strip (i.e. lying completely flat on the board) means that the available information to that point in time has been passed along.

Nixon thought that he was taking over a relatively straightforward board without any significant problems or complexities. He worked under this illusion for about five minutes but began to find strips that had not been passed even though he had thought that everything was caught up. Information on a number of aircraft was handled by Nixon including data relating to COBRA 52. Nixon informed the Toronto data controller that COBRA 52 was passing overhead Thunder Bay at 1950, at a ground speed of 400 knots, flying level at 37000 feet. This conversation took place at 1950:25. Several more aircraft were handled; however, Nixon remained unaware of the impending "confliction" with the oncoming flight of JL 81 until 2001:25, some eleven minutes later. Nixon, like Chase, had failed to make any mental connection between the two opposing flight data strips in front of him.

It was at this point that Nixon began to pass the data on JL 81 forward to the data controller in the adjoining Sector 6 air space, immediately to the west. Nixon was in the process of alerting his colleague that JL 81 could be expected overhead Thunder Bay at 2020 hours at an altitude of 37000 feet "wrong way". The Sector 6 data controller requested information concerning JL 81's course - "is he on vectors or what?" - to which Nixon replied "No... not sure what he's (the radar controller) going to do with him".

Both Nixon and John Reid, the radar controller working Sector 10, seem to have become aware of the impending danger almost simultaneously at this point. Whether Reid first noticed two converging symbols on his radar screen or whether he was prompted to action by Nixon who was himself brought alive by the question posed by the data controller in Sector 6 is unimportant. Fast action by the two men acting in concert and relying on their years of experience and training managed to avert what otherwise might have been a tragedy.

Reid was extremely shaken by this incident and as soon as Chase returned from his coffee break, Nixon relieved Reid and Chase took over once again from Nixon. Reid went to a nearby washroom to recover his composure. Nixon stated that he shouted for Denike to come over but that Denike responded that he was busy supervising the adjoining Sector. Nixon turned around momentarily to look for Kratt who was not at his desk. This was not unusual. Nixon was preoccupied with his duties at the radar screen and unable to leave the position so he ordered Chase to recheck his board and to make sure everything was up-to-date with no errors. He did not discuss the "incident" which had just taken place with Chase.

Shortly after this Kratt and Denike arrived on the scene, gathered the used data strips from the storage bin and retired to a nearby room to try to piece together what had happened. Neither of them posed any questions directly to Chase or to Nixon, nor was anything

said to them about the incident by either Chase or Nixon. Reid had not yet returned to his position.

Kratt and Denike came to the conclusion that there had been a "confliction". They decided that the three controllers should be interviewed in order to attempt to determine what had gone wrong. There was a need to find out why the unusual evasive action had had to be taken. Reid was interviewed first, followed by Nixon. The meetings were brief, about five to ten minutes. Both men explained that Reid had accepted a hand-off of JL 81 from the Toronto radar controller only to find that COBRA 52 was rapidly closing on JL 81 and was only some 50 miles away. The planes had been diverted with some 12 to 15 miles of lateral separation. Kratt and Denike concluded that the situation amounted to an "operating irregularity". This required the removal of the controllers from operational status followed by the holding of an administrative inquiry. When Nixon's involvement was ascertained, he, too, was interviewed, removed from operational duties and subjected to the administrative inquiry.

Kratt and the Toronto area shift manager, Bill Glass, spoke together on three occasions concerning the incident. On the second of these, Glass told Kratt that he felt Toronto controllers were at fault. On the third, Kratt advised Glass that he felt the matter would be classed as an operating irregularity, thus necessitating an administrative inquiry. Kratt was concerned that Articles 432.3 and 1112.9(a) of the MANOPS

had not been complied with. The first requires an aircraft to be "offset" when flying on a designated airway at a "wrong way" altitude. (This will be elaborated upon later). The second requires that a red "W" be marked on the data strips of aircraft flying on conflicting courses.

Stephen Denike confirmed that the lack of an offsetting course rather than the evasive manoeuvres used by Reid and Nixon had been the concern. The controller who initiates the use of a "wrong way" altitude by an aircraft is also responsible for instituting the offset procedure. Normally, this controller passes along this information when he forwards the data to the next controller in the aircraft's flight sequence. It was Denike's opinion that, if this information was not offered by the originating controller, it ought to be solicited by the receiving controller.

Denike advised the hearing that the "North Specialty" section of the Winnipeg ACC was a very busy, noisy area in which to work. It was composed of Sector 10 and a related function known as the "North High". Since 1984, operational problems had been identified. Changes were required but were not always able to be met with the resources available. It was a very busy sector; new airways had been added in 1985 and air traffic had steadily increased owing to deregulation. By May 1987, a third position had to be added in Sector 10 to help handle the flow of data being received. Prior to this, numerous suggestions had been made by various controllers.

and study committees to alleviate what had become well-recognized as a significant overload on the ability of a single data controller to cope with the workload involved.

David Stirling testified that he conducted an Administrative Inquiry into this incident at the request of the Superintendent of Operations in Winnipeg. Stirling was assisted by M.T. Budrow, a fellow Shift Manager at the Winnipeg ACC. In general, the panel concluded that a "loss of separation" had occurred because the minimum separation required had not been assured at all times. At the very least, the incident represented a "hazardous situation". This was attributed to non-compliance with MANOPS and inattentiveness on the part of all three controllers.

It was determined that it had been the radar controller in the Wiarnton sector of the Toronto ACC who had originally granted permission for JL 81 to climb from its proper westbound altitude of 35000 feet to the normally-inappropriate level of 37000 feet. Permission to do so had been requested by the pilot of JL 81; no reasons were specified by him or required by the controller. No instructions regarding any offset from the flight path were given. JL 81 subsequently was handed off to the "Sault High" Radar Controller, also under the responsibility of the Toronto ACC.

The Administrative Inquiry panel felt that any original fault on the part of Toronto area controllers

had been compounded by Chase when he failed to ask for information concerning any offset from JL 81's established course and the reasons for its having requested a "wrong way" altitude. Additionally, Chase had failed to notice the potential "confliction" with COBRA 52. The panel determined that Nixon had been at fault for not taking more care to familiarize himself with Chase's data board before relieving Chase, for having accepted the positioning of JL 81 without asking for more information and for failing to detect the "confliction". Reid was similarly found to have failed to have noticed the "confliction" and to have accepted a hand-off of JL 81 from the Sault radar controller without asking for the missing information as to any offset course, duration of flight at the wrong altitude and time of return to a more appropriate level. In assessing the level of discipline to be recommended, the panel suggested that an extra day's suspension (i.e. three in all) be awarded to Nixon and Reid for failure to report the existence of an abnormal situation to their immediate supervisor.

It was the opinion of Stirling, based upon a review of the voice transcripts and the flight data strips which permitted him and Budrow to attempt a reconstruction of the day's events, that none of the controllers had been particularly overworked at the time in question. Contrary to the testimony of the controllers themselves who felt that they had been engaged in moderate to heavy work, Stirling assessed the data controller's workload as having approximated a very acceptable condition in which

...traffic requires frequent control decisions/actions (some periods of inactivity occur). Some preplanning required. Traffic warrants attention of controller majority of the time. Time available for lengthy coordination requirements, flight plan inputs, preparation of hand written strips, etc. (Exhibit 21)

With respect to the radar controller's (Reid's) workload, Stirling assessed this as approximating only a modest workload described as

...mostly inactive, however, frequent brief periods required for control decisions. Minimal to nil preplanning requirement. Volume light (i.e. 8 per hour) some tactical action required for separation. Occasional complexity may be apparent. (Exhibit 21)

While Stirling agreed that such "pace rating" studies were normally done "live" through observations of controllers in an actual work setting, and while he agreed that certain inferences had been drawn and that not all voice communication such as comments made directly between controllers within the room would have been captured on the transcript, he pointed to a number of periods of relative inactivity at least on the face of the transcripts (Exhibits 8 and 9). He conceded that another pace study of the same transcripts might

result in a finding that each of the control positions had been one full level busier than he had assessed it to be. The ratings were more of an art than an exact science.

Stirling and Budrow came to the conclusion, based upon what they were told during interviews with the three controllers, that all were deficient in their knowledge and application of the MANOPS as well as of recent informative and instructional memoranda which had been circulated. The key to Stirling's conclusion that discipline was warranted in the case of all three grievors was his interpretation of the MANOPS that when information which ought to have been passed along by a controller-in-charge to a receiving controller was not relayed by the former, then it became the duty of the latter to demand such information and not to accept responsibility for the aircraft until such information was provided. If the latter accepted incomplete information at the time of a data transfer or a hand-off, then the receiving controller, in Stirling's eyes, was just as guilty of breaking the MANOPS and control procedures as the controller originally at fault.

Stirling testified that this was the first time that he had been involved in recommending discipline as a result of the outcome of an administrative inquiry into an operating irregularity. While not totally unknown ever to have occurred at Winnipeg (sometimes there might be six or eight in a year, but usually less than at many other centres) this was the first time discipline had ever been recommended for involvement in an operating

irregularity at the Winnipeg ACC. Stirling was told not to consider in his report anything done in connection with this matter by the Toronto ACC.

It was clear to those at this hearing that since the "incident" involved the operation of the Toronto ACC as well as Winnipeg, it could not be comprehended in any rational, meaningful way without some indication from the employer of how the matter had begun and how it had been dealt with at that other centre as well since controllers there were, in fact, responsible for the creation of the situation by virtue of having originally cleared JL 81 to the altitude inappropriate for direction of flight. The employer advised that five individual controllers in Toronto had been dealt with in a disciplinary fashion as an outcome of this matter.

The Toronto ACC controller described as the "Second Sault High Data Controller" was found by management to have been involved in an "operating irregularity" in that he

...(a) failed to identify a confliction with an aircraft at an altitude inappropriate for direction of flight after receiving an estimate on an opposite direction aircraft...

...(b) failed to identify this confliction while manning this sector for some 10 to 15 minutes...

...(c) failed to identify this confliction while providing a briefing to a relieving controller...

The penalty assessed this person was a written reprimand against which no grievance was lodged.

The Toronto ACC controller known as the "Second Sault High Radar" was found to have been a participant in an operating irregularity in that he

...neglected to act after identifying a confliction between two opposite direction aircraft at flight level 370...

This person was advised that he was being assessed a one day suspension

...specifically because you failed to notify Winnipeg ACC of a confliction, failed to inform your relieving controller of a confliction and, furthermore, failed to take action to resolve the confliction.

No grievance against the suspension was ever filed.

In addition, three other persons, the Third Sault High Radar controller, the Wiarton Radar controller and the First Sault High data controller were each given

oral reprimands. No grievances resulted and the only discipline meted out having been oral counselling, no record exists of what was said to these persons or why. The disciplinary notices in respect of the Toronto ACC controllers were dated 11 March 1987 one week prior to the discipline assessed to Chase, Reid and Nixon.

For his part, Chase testified that he had been very busy at his duties throughout the day. About a half-hour prior to the incident, he had mentioned to the Thunder Bay tower controller how tired he was feeling. Chase was working a "short change" shift having worked until midnight the previous day while doubling back for work at 7:30 a.m. that morning. This left him with about five hours of sleep. He had also commented to his colleague "...its like a zoo around here today..." (Exhibit 8).

Chase did not deny his failure to note the potential "confliction" between the two aircraft. He claimed that he had had about two and one-half bays of data strips which required monitoring on his board at the time. His workload was aggravated by the adverse weather conditions; the demand for control services was accentuated. Chase stated that at times he felt "pressured" and "anxious" under the strain of his work that day. He added that the subsequent addition of a second data controller in this sector during May 1987 had significantly reduced the pressures previously endured by the single data controller.

Chase testified that when he received the data estimate concerning JL81 at 1932.50, he simply "red-circled" the figure "37" and did nothing further about the requirements according to MANOPS because it was common for Toronto controllers not to pass information relating to offset courses or the reasons for the use of an inappropriate altitude. When questioned, it was most often the case that the Toronto data controller did not have the information in any event. The usual practice was to wait until the aircraft arrived in Winnipeg controlled airspace and then to get it directly from the pilot via the radar controller. Only radar controllers speak directly to the pilots, either obtaining information or issuing orders.

Chase explained that, had he insisted on being given such information by the Toronto data controller, this would have meant the Toronto data controller having to go through his counterpart radar controller who would get the information from the pilot, relay it to the Toronto data controller who would then pass it on to Chase. This involved four people and took up time required to deal with other aircraft. It just added more work to an already crowded workload. To avoid this, the practice had developed of simply waiting until the aircraft got to one's own airspace. In Chase's opinion, the failure to obtain information as to a possible offset course etc., did not contribute to the incident occurring because this still would not have ensured that the "confliction" would have been identified even had he been given this information.

Chase's only explanation for his failure to notice the "confliction" between JL81 and COBRA 52 was that he was tired and that his workload that day was such that he "did not pick it up". He "was not functioning at [his] optimum level". Because he had failed to notice the "confliction", he then failed to mark a red "W" on the data strips for each aircraft. The failure to recognize the "confliction" continued throughout the eight and one-half minutes from the time he was notified about JL 81 until he was relieved by Nixon.

The hand-off of responsibilities between Chase and Nixon was brief; it lasted about 30 to 40 seconds. Chase did not feel that this was unusual because Nixon had worked the board for him just a couple of hours previously while Chase had gone to lunch. Nixon was, therefore, familiar with the general "flow" of events that day. The handover was "normal". Chase did concede that, if the positions of himself and Nixon had been reversed, and given that no red "W"'s were immediately apparent on either of the data strips, he would be prone to assume that no "conflictions" were likely to be in progress. Chase was not present during the actual incident and did not return to the board until after it had happened. Nixon did not say anything to him other than that Reid had required a break and that he should double check the board for accuracy and possible "conflictions". He stated that he only learned about the irregularity the following morning.

Chase grieved because he felt that the punishment he had received was unfair in relation to an understandable human error. He had worked to the best of his ability that day; he was as vigilant as he could be in the circumstances. He then conceded that possibly he should have been even more vigilant. JL81 was not the only aircraft using an inappropriate altitude at the time. Several other data strips indicated "wrong ways" as well as possible "conflictions" as noted by the red "W"'s on their respective data strips (Exhibit 20). Chase's interpretation of MANOPS is different from that of management, particularly as to the duty imposed upon a controller who is simply receiving information concerning a wrong way altitude as opposed to one who is assigning use of same to an aircraft. Chase has a total of 13 years experience as a controller, 11 years VFR in a tower unit and two as an IFR controller on the North Specialty at Winnipeg. His performance appraisals have all been satisfactory and he has had no previous discipline.

John Nixon has a total of 14 years experience with IFR qualification since 1974. The 12 years prior to this incident have all been spent at the Winnipeg ACC. All of his performance appraisals have described him as an above average employee. On 5 March 1987, he was working as the relief controller on the 10 a.m. to 7 p.m. shift (local times).

Nixon testified that the handover of the data board from Chase at approximately 1945 hours Zulu was

according to normal standards. He stood behind Chase and familiarized himself with the details on the board before assuming Chase's seat. Everything seemed pretty straightforward. The absence of red "W"'s in relation to JL81 and COBRA 52 signified no apparent "conflictions" pertaining to them. There were about 2 full bays of strips pertaining to other aircraft, four of which required his immediate attention. These were strips which ought to have been passed by Chase sometime earlier.

He began to find that the board was not as up-to-date as he had been led to believe when taking over. This is in relation to the necessity to provide the next controller with at least 15 minutes of advance notice of arriving aircraft. Usually, controllers attempt to give one another more than the bare minimum required.

Nixon said that he tried picking up the pace, trying to catch up. At 1950:25, he told the Toronto Data controller

"...I keep thinking I was finished giving you strips but I keep finding ones that haven't been passed here..."

At 1954:37, Reid was recorded as telling the Thunder Bay controller "...my data man's real busy on the Toronto line..." (Exhibit 9). This, says Nixon, establishes that the traffic volume at that point was quite heavy. For example, Reid was only able to pass a data estimate

on Pacific Western 100 at a point when the aircraft was only 10 minutes away from landing and only six minutes from entering Thunder Bay air space. There was, says Nixon, never a lull and no free time as was presumed by Stirling to have been the case.

Nixon says that the work load at that point made him agitated and anxious. There was no time for the proper relationship between the data controller and the radar controller. While both were expected to interact, the demands upon them were such that they were, in effect, "isolated" from one another and no longer functioning as a team. Nixon felt that he was pushed to the limit of his abilities in trying to cope with the demands upon him during that crucial half-hour. Every time he scanned the board it seemed that there was still something to be done. It was impossible to stop things and he just could not simply walk away from his responsibilities. During this period he did not recognize the "confliction" between JL81 and COBRA 52.

When the "confliction" suddenly became apparent at 2001:25, Nixon was in the process of passing information on JL81 to Sector 6. Reid had just accepted the hand-off of JL81 from the Sault radar controller. Nixon realized what was happening and shouted at Reid to turn the aircraft away from one another. On hearing Reid's initial course instructions, he suggested that the two aircraft be diverted even more sharply. He contacted Minneapolis because COBRA 52 would then be running close to the U.S. border.

Nixon pointed out that COBRA 52 was actually flying about four minutes behind his estimated time. If he had been on schedule the "confliction" would have occurred completely within Toronto ACC air space rather than on the Winnipeg side of the boundary. It seemed that Winnipeg was being blamed more because the incident occurred within its air space even though Toronto controllers had helped create the problem. Nixon stated that he was "frightened" by the incident while Reid was "very shaken" and required relief. Chase reappeared and resumed his data position while Nixon relieved Reid.

Nixon stated that he told Chase to double check everything and to make sure that there were "no mistakes". He testified that he told Chase "let's not have another one", and that he then called out to Denike to come over. Nixon said that Denike responded "I'm busy; I'll get back to you later". Nixon testified that he indicated to Denike a need to speak to him. He then looked for Kratt, who was not at his desk. Nixon maintained that he intended to report the incident but that Denike came and retrieved the data strips before he could do anything about it. Nixon conceded that "it was not a good situation; it was terrible, not a normal incident". It was his position, however, that he, personally, had done nothing wrong; he did not, in his opinion, fail to observe MANOPS. He was as vigilant as he could be in the circumstances. He had failed to notice the confliction but had not been negligent. He was fallible, susceptible to human error as was any controller. He conceded that he had been sarcastic during the

administrative inquiry but had felt that he was being badgered by Stirling.

Nixon agreed that, in hindsight, he probably assumed control of the board from Chase "too quickly". He could not recall Chase alerting him to anything unusual about JL81. He stated that he normally passes on all required information such as offset courses, expected time of return to normal altitude, etc., and that he would normally solicit such information if it were not offered to him by another controller when receiving information.

John Reid has been an air traffic controller since December 1954. He has worked in the Winnipeg area throughout with his last 29 years being spent on IFR duties. He has had no prior discipline and has had satisfactory appraisals throughout. Part of the duties of the radar controller involves scanning the strips prepared by the data controller. This helps to fill out the radar controller's knowledge in relation to the limited information displayed upon the radar screen itself. A red "W" would indicate to the controller a situation which would require attention at some point. The absence of same would lead one to believe that there was no immediate additional cause of danger.

Reid recalled a data board containing about three bays of strips. One of the problems for the radar controller, who sits to the left of the data controller, is that he must slide up against the data controller

to be able to scan the second bay while he must literally stand up and reach across the data man if he is to make any changes to a strip in the third bay. Proper coordination between the two positions is absolutely essential.

Reid testified that he had "crossing track traffic" to deal with at 1946:54. This involves calculations and the vectoring of aircraft to navigate them safely through intersecting courses. At no time on 5 March 1987 were there moments of inactivity. Reid felt that his work had reached pace level 5 (out of 7); in other words, the traffic flow was orderly but required continuous attention. The whole afternoon had been frustrating because he had been unable to have immediate and coordinated access to the data controller seated next to him. The recently added second data position in Sector 10 had resolved many of these problems and reduced the negative impact previously felt.

At 1955:00, Reid had had to relay information on two aircraft headed south-west as well as to handle two others. He then dealt with a number of other flights in the succeeding minutes until he was handed JL81 and realized a minute or so later that he had two aircraft rapidly approaching one another on opposing courses at the same altitude. The data strip concerning JL81 would have been furthest away from him at this point - i.e. to the right of the data board.

Reid pointed out that the Sault radar controller in Toronto had not identified JL81 as being at a "wrong

way" altitude when giving Reid the hand-off. In addition, the flight level information passed had been almost inaudible due to a poor radio transmission; this is confirmed by the transcript (Exhibit 9). Had the Toronto controller said the words "wrong way" or mentioned a course "offset", then Reid subsequently might not have had to react as he did. He could even have avoided the necessity of a last minute evasive maneuver by requiring the Toronto controller to divert JL81 earlier in its course or simply refused the hand-off knowing that he already had COBRA 52 in the same area at the same altitude. The Toronto controller would then have had to hold back JL81 or find some other means of handling him until Reid was ready.

Reid's contention was that he "had been handed a bag of crap". He felt that he had been let down. In the heat of the moment he had made a quick determination of what to do. He later wondered why JL81 had not been assigned a direct route or given an offset course. All other Asia-bound flights coming into his territory were normally assigned offsets to the north of the established airway or given direct routings on individually assigned courses.

After the incident Reid suffered an instantaneous tension headache. He went to the washroom and then to the lunchroom where he composed some notes which were intended for use in explaining the matter to Denike. While walking down the hall afterwards he met Kratt who asked Reid if anything had happened. To this he responded that "something sure had".

Reid maintained that he had done nothing wrong and had not sought to avoid informing his superiors. He was very unhappy that he had failed to pick up the "confliction" earlier but just as unhappy that he had been disciplined and had had to lodge a grievance. Considering his fast action and the instantaneous recovery which he had helped to bring about in averting a dangerous situation, Reid felt that his punishment was unjust. He felt that the blame had been misplaced and that the conclusions reached by the administrative inquiry were in error.

Reid conceded that management at the Winnipeg ACC had become increasingly concerned over the procedures being followed by controllers in relation to the use of "wrong way" altitudes. This was well known. Management had attempted to cope with the sort of problem which had arisen and had been stressing adherence to MANOPS as well as circulating notices and procedural guidelines. Still, there was nothing, in Reid's opinion, pursuant to MANOPS which placed an obligation directly upon a controller who was only receiving flight data as opposed to one who was assigning a "wrong way" altitude.

Carl Fisher, Administrative Vice-President of CATCA, was called by counsel to provide certain evidence relating to the number of operating irregularities experienced over the past few years as well as to the incidence of discipline assessed in relation thereto. Not all alleged operating irregularities result in

Administrative Inquiries conducted by Transport Canada or enquiries made under the auspices of the Canadian Aviation Safety Board. By far the greatest majority are dealt with by "Fact Finding Boards" which may review the events and reach conclusions as to what happened but which do not apportion any blame.

The evidence was that in the years 1985, 1986 and 1987 there was a total of 485 alleged operating irregularities. Of these, 399 were investigated by fact finding boards while the balance were subject to enquiry by the CASB. In only 11 cases was discipline meted out by the employer. (Five of these had arisen in Quebec; two had already been adjudicated and two more were awaiting scheduling. The remaining matter was being handled by the grievor without support from his union. One case arose in Toronto - i.e. the one day suspension referred to earlier. Three cases - the ones in question here - had arisen in the Central region. Finally, two cases had occurred in the Western Region). The point being made was obvious; only rarely - i.e. in only just over two percent of all such cases - was discipline ever administered.

ARGUMENT

Counsel for the employer argued that the great bulk of the evidence (which had taken three full days to present) was not in dispute. The documentary evidence, particularly the MANOPS and other instructional materials, was all important. It was the employer's position that

all three grievors had not only contravened the MANOPS but had failed in the performance of their professional duties. Reid had admitted that the "wrong way" altitude information ought to have been solicited by the receiving controllers when it was not first supplied by the passing controller. Chase and Nixon still did not seem to know what their duties were or how they had failed.

Counsel suggested that the whole issue, succinctly put, came down to choosing which interpretation of the MANOPS was the more preferable in the interest of safety, that of the employer or that of the employees. Additionally, he argued, Nixon and Reid had been guilty of failing to report the matter promptly. Reid was the only one who had said throughout that he intended to report it and had gone to make up notes to support his position. Nixon had claimed that he had not made up his mind whether the matter was even reportable and still seemed to be maintaining this posture. Chase, because he was not present at the actual incident, was not under the same obligation no matter what he later found out.

Counsel argued that all the grievors had been made aware of the concern of Winnipeg ACC management over the need to go strictly by the book when using "wrong way" altitudes. Offset procedures and information exchanges had been ignored. In addition, Nixon had accepted an improper, ill-prepared handover of the data board from Chase.

As to the quantum of discipline imposed all the grievors had had their penalties reduced to one day. This was the same as had been given to the Second Sault High Radar Operator in Toronto. Even though the Second Sault High Data controller had only received a written reprimand and the Wiarton radar operator an oral one, this was not the issue. Even if it were to be concluded that the Wiarton Radar operator had failed in his duties, that was up to management in Toronto to attend to as they saw fit. Management in Winnipeg was entitled to expect the highest standards of its employees and there was nothing to prevent the employer from assessing different penalties in different locales. Counsel referred to the previous cases of Choquette and Hodgson (Board files 166-2-8945 and 8946).

Counsel for the grievors began by noting that no discipline had been assessed against the grievors in Winnipeg until after the Toronto controllers had been dealt with and after the employer's National Director of Air Traffic Control Operations had been made knowledgeable and had made an input. The evidence clearly showed indisputable breaches of the MANOPS by the two Sault High controllers as well as the Wiarton radar controller, yet they had all been dealt with very differently from the three grievors in the instant matter.

Counsel also argued that not only was any alleged duty upon the grievors to solicit the missing "wrong way" altitude information unsupported by a plain reading of the MANOPS, but that the requirement to report

irregular incidents was expressed in a most bizarre, convoluted fashion. In any event, Reid and Nixon had simply not had a chance to inform Kratt or Denike before the latter got to them first. Surely the intent of the MANOPS was to "communicate" (which is what had happened) and not to establish a race (which is what the employer seemed to want). Nixon had called out to Denike who had been too busy to respond; Kratt had not even been at his desk at the time.

Counsel provided an analysis of the incident as she saw it. First, a Toronto controller assigned a "wrong way" altitude while failing to observe the requirements of the MANOPS to establish an offset course. This was the sine quae non of the whole sorry matter. Secondly, a Toronto data controller passed flight information to Chase, again failing to observe the requirements of the MANOPS. However, this failure probably had no affect upon the outcome because the important and most crucial factor was Chase's failure to notice the "confliction" from the information on the face of the data strips in front of him. That is to say, Chase could have been given all the requisite information but it still would not have meant anything unless he had made the mental connection between the positions of COBRA 52 and J1 81 by noting their opposing courses and similar altitudes. This was basic information which he had before him in any event.

Because of Chase's failure to recognize the "confliction" , he failed to inscribe a red "W" on each

of the two data strips - i.e. for COBRA 52 and JL81. This was the third factor in the chain of events. The fourth occurred when Nixon took over the data board and, in the absence of any red "W's" which would have drawn his immediate attention to the problem, Nixon went about his work giving priority to other aircraft in ignorance of the calamity-in-the-making in the skies above him.

Because of the successive failures of Chase and Nixon to pick up on the "confliction" , Reid, too, remained unaware of what was happening. Even in his own secondary scanning of the data board, which was made more difficult because of the physical positioning of the information far to his right, Reid failed to uncover the problem. All this time, the Sault data controller also failed to note the "confliction" while monitoring the same information on his own board. And, most importantly, the Second Sault High radar operator, having observed the "confliction" , failed to act or to warn anyone. In fact, when handing off JL 81 to Reid, that person had not even identified JL81 as being on a "wrong way" altitude.

Ms. McLean challenged the whole premise of the employer's case for discipline. The MANOPS could not be read or interpreted as placing any obligation upon the grievors such as was claimed by the employer. There was no culpability, no disobedience of instructions. The evidence was, on the other hand, that the employer had long tolerated the practices employed by the grievors

in performing their duties. In any case, it obviously applied its own MANOPS differently in different parts of the country.

Ms. McLean suggested that, at the most, there had been human error or fallability as opposed to careless, negligent or culpable behaviour. All three grievors had been under the strain of a busy job; all were working to near full capacity. How could the employer punish innocent behaviour? There was a limit to human endurance. The employer was not entitled to demand a complete absence of human error. Chase might have been able to be more vigilant had he not been so tired because of his short-change shift and his very busy workload that day. Nixon or Reid might have been able to catch the "confliction" earlier had the extra data controller, who was added in May 1987, been there two months earlier.

It was suggested by counsel that, on the basis of the evidence, there was no support for any discipline whatsoever. However, even if I were to find otherwise, there were ample reasons, as set out above, to mitigate the penalties imposed.

REASONS FOR DECISION

The circumstances surrounding what went amiss in the incident involving the two aircraft, JL 81 and COBRA 52, on the afternoon of 5 March 1987, are not in dispute. What is in question is simply whether the

grievors can and should be disciplined for their part in it. Counsel for the grievors put forward two broad arguments challenging the very grounds for any discipline. As something of a fallback to these, she argued for mitigation of the penalties imposed.

One branch of the broad-based argument was that the grievors ought not to be disciplined at all for what was, in the circumstances, human fallibility or error. This may be disposed of fairly briefly by saying that I was not persuaded by the testimony of the grievors themselves that what they were required to do in the course of their duties that day was beyond their abilities or capacities. I find that, while they were indeed kept busy in the performance of their control functions, they were not so overworked as to support a finding that it would have been humanly impossible for them to recognize the "confliction" between JL81 and COBRA 52, or that it was asking too much to expect a person of their training and skills to have done so.

Indeed, I was impressed by the forthrightness of all three grievors, each of whom testified in exclusion of or without knowledge of the evidence of his colleagues. Each quite openly stated that he probably ought to have done better that day even though each felt he had been working about as well as he could. Rather than making excuses, each seemed willing to acknowledge at least some responsibility. Their candor was refreshing. It leads me to conclude, however, that the exculpatory evidence presented by counsel on their behalf is not

as convincing as it needs to be to support such an argument for no blame whatsoever.

The second broad argument for complete exoneration, as put by counsel, was that the reasons relied upon by the employer for imposing discipline were not established and that it had failed to make out its case. That is, the grievors were not culpable of any wrongdoing because there had been no breach of the MANOPS or of the procedural guidelines.

I note here that the letters of discipline addressed to all three grievors refer to the conclusions drawn by the Administrative Inquiry as being in support of the discipline imposed. It is necessary, therefore, to look at the particular conclusions reached by that panel. The letters of discipline refer, in general terms, to inattentiveness and carelessness but adopt the detailed findings of the Inquiry.

It was the opinion of the Inquiry panel that Chase, Nixon and Reid all "contravened MANOPS 432 and Operations Letter 86-193-CP (Direction of Flight)".

- ... (a) by not ensuring that
JL 81 would be offset 5
miles from HL500
- (b) by not obtaining the
reason for the altitude
assignment
- (c) by not enquiring when
an appropriate altitude
could be achieved

(d) by not finding out whether it was pilot or controller initiated...

Article 432 entitled "Direction of Flight" is found under the overall heading "Altitude Assignment", Article 430. It reads as follows (Exhibit 19):

432 DIRECTION OF FLIGHT

432.1 Assign an altitude appropriate to the aircraft track as set out in the Cruising Altitudes Order EXCEPT as specified in this section.
(R)(N)

432.2 You may assign an altitude NOT appropriate to the direction of flight if:

- A. no alternative separation minima can be applied provided:
 - 1. the altitude has been approved by affected units/sectors; and
 - 2. the aircraft is cleared to an appropriate altitude as soon as possible;
- B. the airspace is structured for a one-way traffic flow;
- C. an aircraft requests it because of icing, turbulence, fuel considerations provided:
 - 1. the aircraft informs you of the time or location at which it can be cleared to an appropriate altitude; and (P)(N)
 - 2. the altitude has been approved by affected units/sectors; or

- D. an aircraft is:
1. holding, arriving, or departing;
 2. conducting a flight check of a NAVAID;
 3. operating within an airspace reservation; or;
 4. operating in accordance with a waiver to ANO, Series V, No.2.

432.3 Issue radar vectors or off-set tracks to establish an aircraft at least 5 miles from the centreline of the airway or published track otherwise authorized if:
(N)(R)(P)

- A. applying 432.2 A or 432.2 C in high level radar-controlled airspace; and
- B. the airway or published track is displayed on the radar.

432.4 If a cruising altitude inappropriate to the aircraft track is assigned: (N)

- A. in a RADAR environment:
1. do not apply MANOPS 514; and
 2. instruct aircraft to make position reports;
- B. identify an altitude as "Wrong Way" when: (E)
1. passing and receiving a control estimate;
 2. giving and receiving a radar hand-off; or (R)
 3. coordinating with an adjacent unit/sector; and

C. post warning indicators by circling the altitude in red on the appropriate flight progress strip.

432.5 Do not use the words "Wrong Way" in communication with an aircraft.

432.6 If an altitude inappropriate to direction of flight is assigned ensure that prior to transfer of control the receiving controller is advised whether the assignment was pilot or controller initiated and the reason for the assignment.

The evidence was that only radar controllers can actually assign an altitude to an aircraft and that the person who assigned the "wrong way" altitude to JL81 was the Warton radar controller in the Toronto ACC. It is clear to me that MANOPS 432.2 is directed primarily at those assigning an altitude inappropriate to direction of flight and not to those simply receiving information that such an assignment has been made. On the other hand, MANOPS 432.4.B.1 and 2., respectively, apply to both the passing and receiving data and radar controllers as well as do 432.4.B.3, and 432.4.C. MANOPS 432.6 clearly applies to the assigning controller.

Nothing in the MANOPS was drawn to my attention which would lead me to the conclusion that by "accepting" information on an approaching flight a controller was thereby "making an assignment". Nothing has been found to convince me that the act of receiving information

places one under the same obligations as a controller who initiates an assignment. I find, therefore, that none of the grievors was in breach of MANOPS 432 as claimed. Neither did any of them violate operations letter 86-193-CP which was a reinforcement of MANOPS 432.

On the other hand, it is clear from the evidence before me (Exhibits 8, 9 and 26) that the Wiaraton radar controller and the Sault High radar Controller were both in flagrant, almost total disregard of MANOPS 432.2, 432.3, 432.4 and 432.6. I do not believe I need to spell out in detail the reasons why since same should already be apparent from a review of the evidence given.

It was next found by the Inquiry panel that Chase, Nixon and Reid had all "contravened MANOPS 1112.9 (Flight Progress Strips)"

... by not posting red warning indicators [red "W's"] on the JL81 and COBRA 52 flight strips ...

MANOPS 1112.9 reads:

1112.9 Use warning indicators as follows:

- A. Post a red "W" on the appropriate flight progress strips if corrective action will be necessary:

1. due to a higher MEA;
or
 2. to prevent confliction
with other aircraft.
- B. Post the indicator in the box that most clearly indicates the reason for the warning, and if considered necessary, give some indication of the required action.
- C. Circle the altitude in red on the appropriate flight progress strips if an altitude not appropriate to the direction of flight is assigned.

Since no red "W's" were posted on the relevant flight data strips, obviously the controllers were in contravention of this procedural duty. Chase made the original failure. This took place when he failed to recognize the "confliction" between COBRA 52 and JL 81 after having been informed of JL 81's "wrong way" altitude of 37000 feet. This failure continued until Chase was relieved but was then continued by Nixon who failed, equally, to note the "confliction". These instructions appear, from the context of the MANOPS, to be directed at the data controllers primarily. Reid could not be expected to be as aware of the "confliction" as either Chase or Nixon because he was busy with his radar duties and had not yet even been alerted to JL 81's "wrong way" altitude.

Therefore, while I am of the opinion that the charge is quite valid in relation to Chase, particularly,

and only slightly less so in relation to Nixon, it seems to me to be stretching the point somewhat to thrust this complaint upon Reid.

The Inquiry panel then found that all three controllers had "contravened staff Memo 86-63-PD (Position Duties and Responsibilities)"

... by not monitoring [their]
sector information for
traffic conflicts ...

In the case of Chase, this charge is extended by the addition of the words "... before approving JL 81's altitude ..."

This memo makes the maintenance of flight data strips a shared duty of the radar controller in coordination with the data controller. Thus, it might be said to bring Reid back into the picture as far as his failure to notice the "confliction" is a ground for discipline. While the staff memo assigns duties to the various control posts it does not represent an instruction manual on how these duties are to be performed such as the MANOPS does. That is, it describes duties but does not set standards. The evidence was that the grievors were performing their assigned tasks. They may not have performed them as well as management wished. That they did not attain the level expected of them by management does not mean that they were contravening their assignments. This is a rather dubious ground upon which to base the discipline involved.

All three grievors were said to have "contravened mandatory Briefing Item (Focus on Safety)"

... by not applying consistent use of approved procedures...

It was not established before me that there was any inconsistency in the use of approved procedures. There was, as has been mentioned above, the suggestion that performance levels were not up to the desired expectations. "Focus on Safety", like Staff memo 86-63-PD, and like ATS Information Bulletin ATS-404 of 30 March 1984, all speak to the paramount need for vigilance, attentiveness, cooperation and adherence to established procedures if safety in the air traffic control network is to be maintained. I am not certain that the suggestions offered or examples outlined in informational material in themselves provide grounds for the administration of discipline when it is not clear that any particular work order or instruction has been disobeyed.

Nixon and Reid were found by the Inquiry panel to have "contravened MANOPS 125 (Operating Irregularity)"

... (a) by not reporting an abnormal situation to [their] immediate supervisor ...

MANOPS 125 reads as follows:

125 OPERATING IRREGULARITY

125.1 Report to your immediate supervisor any irregular occurrence which indicates that an operating irregularity may have taken place. (N)(R)

Several relevant definitions are also found in the MANOPS catalogue. They are:

OPERATING IRREGULARITY - A situation which occurs when air traffic control service is being provided and when a preliminary investigation indicates that safety may have been jeopardized, less than minimum separation may have existed, or both.

HAZARDOUS SITUATION - An occurrence in which flight safety was jeopardized, or was not assured for a period of time.

LOSS OF SEPARATION - An occurrence in which less than the authorized minimum existed or in which the minimum was not assured.

All these terms were referred to at one point or another during this hearing. It was argued that such incidents had, by definition, occurred and counter-argued that, by definition, they had not.

The duty required by MANOPS 125.1 is, to my way of reading, expressed in less than the most direct

and clear fashion. The duty is to report to one's "immediate supervisor" as opposed to a requirement to report immediately to one's supervisor. However, the explanatory note seems to suggest that it is, in fact, promptness which is desired more than the level of the actual position to which the report is made. Secondly, "irregular occurrence" is defined as an abnormal situation that is significant. This raises the question: "significant in whose eyes, the controller or his superior?"

To give full effect to MANOPS 125.1, the incident must be one in which the abnormal situation indicates or leads one to believe that an operating irregularity may have taken place. But an operating irregularity is something which can only be determined after a preliminary investigation has been held resulting in the conclusion that safety may have been jeopardized. A controller might be forgiven for asking himself, before dashing off to make his report to his immediate supervisor, whether he believed the incident was a serious one and whether he could reasonably conclude that a preliminary inquiry would conclude that safety may have been jeopardized. Certainly, there is room, because of the way in which the duty is described, to debate with oneself about the first and to speculate about the second. All of which no doubt could have some bearing upon the immediacy with which any such report might be made.

I am not convinced on the basis of the evidence placed before me that either Nixon or Reid intended

to avoid their responsibilities to report the incident. Nixon says he called out to Denike who responded that he was too busy to attend to him at that moment. Denike did not deny that this could have happened. Furthermore, he conceded that he could well have responded in such a fashion; it was not atypical of him.

I have asked myself why it would be that Reid would have prepared the notes that he did (Exhibit 28) to assist him in explaining the matter to management if he did not have in mind the need to report the matter. I have come to the conclusion that he must have intended to do so because he was aware of the requirement of MANOPS 125.1.

I am troubled, however, by the fact that Nixon did not say anything, even briefly, to either Kratt or Denike when they came to obtain the data strips. One might have expected a comment such as "we just had a close one" or some such remark. Perhaps he was waiting for the return of Reid or did not want to appear to be throwing blame upon Chase. I could not escape the feeling that Nixon felt somewhat peeved at Chase, and that Reid felt the same way towards both of them and especially towards the Second Sault High radar controller.

In addition to all the above, Nixon was found by the Inquiry panel to have "contravened MANOPS (Position Responsibility)"

... (a) by assuming full
responsibility of the data
position without observing
obvious conflictions...

The explanatory note to MANOPS 113.1A states:

... A controller that (sic)
relieves another at an operating
position assumes full
responsibility for the position
...

The only conclusion that can be drawn is that Nixon became responsible for whatever condition the data board was in when he accepted the handover from Chase and Chase left for his coffee break. There was no convincing argument that the conclusion could be otherwise even though Chase may not have pointed out the problems and "conflictions". Nixon accepted what was there, disclosed or not disclosed. It is somewhat odd, though, that the transgression is against the marginal note rather than against the actual MANOPS article itself. It might be better if the command were expressed directly in Article 113 itself.

It is my finding, therefore, that the conclusions reached by the Inquiry panel were not completely well-founded in fact or upon a proper interpretation of the MANOPS. Having said that, I hasten to add that I do not blame the panel members for feeling that it was desirable to place such an interpretation or emphasis upon the MANOPS. Air safety is of extreme importance and the need to pay strict attention to the rules, which ideal they were trying to reinforce, was most commendable. They were not entirely wrong in their conclusions. I accept their findings that, to some degree, Chase,

Nixon and Reid were all less attentive than they ought to have been or at least not as vigilant as they might have been or were expected to be. For that, the grievors can be faulted, but not, I suggest, on the basis of many of the interpretations of the MANOPS as were made.

If management wishes to give such interpretations to this instruction manual then, to my way of thinking, those duties can and probably ought to be more clearly expressed than they are at present. It would be of little difficulty to state expressly that where a receiving controller is not given the information which ought to be provided by a passing controller, then it is to be immediately requested by the former. Other Articles in the MANOPS could be expressed more clearly as well.

This brings me, then, to the matter of the quantum of discipline. Counsel for the grievors argued that there were many factors which called out for mitigation of the penalties assessed and I tend to agree.

I discard the factors of workload or that Chase was tired because of his short-change shift. Even though another controller position was added to this area some two months later, this is not conclusive of the fact that "staffing" was the cause of the problem which arose on 5 March 1987. It is simply suggestive of the fact that it could have been a contributing element.

All the grievors have previously good work records which is in their favour. All were remorseful and

concerned that such an incident should not happen again. All were cognizant of the fact that it was a bad situation to have allowed to come about. I am convinced that lesser penalties will serve the needs to be met in these cases. I would reduce the penalties assessed to Chase and Nixon to that of a written reprimand in each case. I would reduce that of Reid to an oral reprimand. Let me explain why.

One cannot escape noticing the great disparity of punishment initially rendered between Toronto and Winnipeg. The Toronto controllers were unquestionably in breach of the MANOPS according to the evidence before me, yet no mention of MANOPS was even made in those disciplinary charges as they were reported to me. It was commonly agreed evidence in the instant cases that Toronto controllers never issue offset courses as is clearly required. Why not? Had the Toronto controllers observed the MANOPS, the Winnipeg controllers might very well not have had an abnormal or hazardous situation to deal with.

In spite of these breaches only one Toronto controller received a one day suspension and that, apparently, because he had recognized the "confliction" but had failed to do anything about it. On the other hand, the Winnipeg controllers were originally assessed two and three day suspensions on the basis of their alleged failure to adhere to MANOPS in dealing with a situation which was only passed on to them not one which they created. Yet the MANOPS are a nation-wide

set of instructions issued to employees who are required to perform their individual duties as part of a national (more correctly an international) system of air traffic control. There should be no room for a differing interpretation of the stringent requirements of the safety rules from one region to another.

I do not fault Winnipeg ACC management for wanting to run the tightest ship possible. Indeed, as one witness commented, it may well be safer to travel through Winnipeg airspace than through the Toronto FIR. No one could quarrel with Winnipeg's aspiration to run the best and safest operation possible. The irony in all this was, of course, that the employer pressed its case here for the need to suspend these controllers on the basis that it needed to demonstrate the requirement for team work and cooperation and, most especially, on the need to adhere to the procedures set out in the MANOPS, the Staff Memos, the Focus on Safety and the Information Bulletin. But then it proceeded to suspend those whose breaches of the MANOPS were questionable while only mildly admonishing those whose breaches were beyond doubt. Whatever positive effects might have resulted from the efforts of Winnipeg management, certainly they were emasculated by the actions taken just a week previously in Toronto. If the Winnipeg controllers were being faulted for their lack of teamwork who could blame them for asking, as they did, "When is Toronto going to join the team?" "When is Toronto going to play by the rules?"

In making these comments I am mindful of the the decision of the Federal Court of Appeal in Barratt (Court file A 1208-83). However, I believe that case (in which the adjudicator was held to have exceeded his jurisdiction because he reduced the penalties of the grievors in order to bring them more in line with those assessed similar grievors in other areas) may be distinguished from the present for many reasons.

Here we are talking about a comparison between penalties assessed the instant grievors as against those which were assessed others just a week prior. In Barratt (supra) it was the other way around; the penalties being compared against came after the grievances arose. Secondly, we are dealing here with grievors who were involved in the exact same incident for which others were one week previously given a lighter penalty. All controllers were involved in handling the same two aircraft on the same day at virtually the same times. In Barratt different grievors were involved in somewhat similar incidents (illegal strikes) in different parts of the country about the same time.

In Barratt, the adjudicator first found the discipline to be supportable but felt that it ought to be reduced because the disparity was discriminatory. The Federal Court of Appeal found that there was no evidence to support the conclusion of discrimination and that this second step exceeded the jurisdiction of the adjudicator. Here, I have found that not all the bases for discipline relied upon by the employer

have been substantiated and, thus, the quantum imposed is not justified. Furthermore, there has been a disparity of treatment which may be regarded as unfair. Mitigation is thus called for on several accounts.

Mr. Justice Marceau in Barratt, refers to a passage cited in the book How Arbitration Works by Frank and Edna Elkouri, (30) p. 646, the statement being that of an arbitrator in an American case:

It is my opinion that management is not under an obligation to apply equal punishment to all transgressors, if to do so would cause injury to the operations. Discrimination may be validly charged only when there is either (a) a demonstrated inconsistency of posture towards the violations and the violators (such as is present when management tolerates, condones or ignores a series of mis-acts by some and then punishes others for committing the same improprieties; or (b) when the employer is responding to an improper motive or animus, using the alleged wrongdoing as a pretext or subterfuge.

Part (b) does not apply; management here had no such improper motive in mind. However, the conditions of part (a) are met; there is a demonstrated inconsistency of posture. It is my firm belief that not to apply some form of equal treatment would cause injury to the system because it is evident that there has already been some negative effect upon morale.

In spite of all the other sub-themes which were raised on behalf of the grievors and the union as to staffing, workload, fatigue levels, etc., I am fully of the opinion that the real issue behind these grievances, at least in the minds of the grievors themselves, was the disparateness of the penalties assessed and its effect upon their morale. Quite simply and shortly, they impressed me as being more upset about the quantum assessed compared to their Toronto colleagues than about being held somewhat blameworthy for the occurrence. Their response to management was obvious: "if you expect us to be part of a team then treat us all as part of the same team".

On that basis I have concluded that Chase's infraction which was, in a nutshell, failure to recognize the "confliction" and to post the warning indicators i.e. red "W's" on the data strips - was no greater than the infraction of the Second Sault High Data controller. It warrants no greater penalty. Thus, I reduce his one day suspension to a written reprimand.

Nixon's failure was that of not recognizing the "confliction"; although he should have noted it he did not. He also assumed control of the data board prematurely and without adequately informing himself of its complexity. His infraction is no greater than Chase's; therefore his one day suspension will similarly be reduced to a written reprimand.

Reid's penalty will be reduced from a one day suspension to an oral reprimand. His infraction warrants

nothing more than that received by the Wiarton radar controller. The latter created a bad situation; in the end result, Reid successfully resolved it with Nixon's help.

For all these reasons the grievances are allowed in part according to the terms above set out. In my opinion, nothing greater than the reduced penalties is necessary to reinforce in the minds of the grievors the importance of their jobs and that their full attention and best efforts are required at all times.

Roger Young,
Board Member.

OTTAWA, September 7, 1988.