

File No.: 166-2-17722

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

BETWEEN:

GERALD B. LEAT,

Grievor,

- and -

TREASURY BOARD  
(Transport Canada),

Employer.

Before: Muriel Korngold Wexler, Deputy Chairman.

For the Grievor: Catherine H. MacLean, Counsel.

For the Employer: Stephen E. Barry, Counsel.

Heard at Montreal, Quebec, February 2 and March 30, 1989.

## DECISION

This decision concerns an important issue: can an air traffic controller be disciplined when, as a professional, he makes an error in judgment in the performance of his duties and having respected all the required procedures and directives; and, in particular having performed in a professional manner? In other words, can the employer discipline an employee who did his best, followed the employer's directives and professional requirements and nevertheless made an error in judgment which, in some circumstances, may have had disastrous consequences? Mr. Gerald B. Leat is an air traffic controller who on July 10, 1987, found himself in such a situation.

On August 5, 1987, Mr. Gerald B. Leat, an operational controller at Dorval Airport, received a letter from Mr. Donald Cameron, Unit Manager, informing him that he was suspended without pay for a period of one day on the grounds that he had been careless and exercised poor judgment in the performance of his duties. Mr. Leat presented a grievance against the one-day suspension, which is the subject of this decision, having been referred to adjudication pursuant to section 92 (formerly section 91) of the Public Service Staff Relations Act.

The issue in dispute is whether at 19:25 hours on July 10, 1987, Mr. Leat had been careless and used poor judgment when he was working the airport position and authorized American Airlines, Flight 116, to cross runway 10-28 after having cleared Pilgrim Airlines, Flight 679, to land on the same runway 10-28. This

case also raises questions of credibility among the various witnesses.

FACTS

At the time of the hearing, Mr. Gerald Leat had 20 years service as an operational controller of which 18 years he had worked as an air controller (AI-3) at Dorval Airport. At 19:25 hours (Dorval time), on July 10, 1987, Mr. Leat as the air controller, also called "Mike Controller", provided services and organized the flow of traffic on the ground and air, as quickly as possible and in a safe manner, by adjusting the timing of the flow of airplanes. He had to space out the departures and arrivals of the airplanes, change their altitude, speed and the direction of the flight. His duties required that he be familiar with the movement and the operations of various aircraft so as to judge the speed and the separation between aircraft.

Mr. Leat testified that he could judge, in a reasonable and accurate manner, the speed of an aircraft by knowing the characteristics of the type of aircraft and this would enable him to determine the amount of space (separation) the various aircraft required between them. Each type of aircraft had a recommended speed at each phase of the flight which varied according to whether the aircraft carried a full load or not. The controller had, therefore, only a second or even a fraction of a second to judge its speed when looking at the aircraft. In addition, the amount of separation required depended on the aircraft's situation in the air i.e., if it was in the clouds or not. As a result,

each situation had to be assessed on its own merits; and, according to all witnesses in this case, the separation between airplanes in a Visual Flight Rules (VFR) situation is an art. The controller develops a sixth sense in this regard through observation and experience. Furthermore, the employer had developed the Manual of Operations (MANOPS) to assist the controllers. This manual set out the procedures and the various separations required between aircraft in Instrument Flight Rules (IFR) situations. However, with respect to the incident in the case at bar, the manual was silent as to the amount of separation in VFR situations.

During normal circumstances and busy traffic, four controllers work the Dorval Airport tower. The air controller is the key of the operations and controls the landing and take-off of aircraft. He decides who lands and which runway is to be used. He has responsibility over 10 miles around the airport. The ground controller sits beside the air controller and gives the authorization of the flight plan, etc. The third controller is the clearance delivery and the fourth is the coordinator who coordinates between the arrivals and departures of the aircraft. However, when the airport is not busy, as it was the case at 19:25 hours on July 10, 1987, only one controller does the work of the air controller and coordinator.

On that day, Mr. Guy Bolduc, senior controller (AI-3), was working the ground control position at the Control Tower, Montreal International Airport (Dorval). He had 23 years as an air traffic controller of which

20 years had been worked at the Dorval Tower. He testified that on that day he had worked all four positions and did two hours in each position (eight hours). Finally at 19:25 hours, Mr. Leat was occupying the air controller and coordinator combined positions while Mr. Bolduc occupied the ground position. They were the only two witnesses who were directly involved in the incident and saw the landing and movement of the two aircraft in question. Thus, Messrs. Leat and Bolduc were the only two witnesses who had pertinent first-hand information on the incident in question.

The parties called four witnesses and filed 14 exhibits; but, since the incident had occurred in 1987 the witnesses were somewhat vague as to the most relevant facts. The parties submitted in evidence the original of the pertinent flight progress strip (Exhibit 11). However, Messrs. Leat and Tremblay (who on July 10 was the assistant controller on duty) could not recall exactly who had written in a change with respect to the PMT 679 aircraft which turned out to be of primordial importance in determining this grievance. But I will say more about this evidence later on in this decision.

I will begin the description of the facts by describing summarily the physical layout of the runways at Dorval Airport on July 10. The primary landing runway was 24R. The aircraft would taxi down this runway 24R towards the Tango taxiway and cross runway 10-28 to the Terminal.

Runway 10-28 is 200 feet wide and it is normally 7,000 feet long. However, on July 10 it was short 500 feet. Thus, the threshold of runway 10-28 had been displaced which meant that the landing distance available was shorter than normal. It was displaced to the Delta taxiway and therefore the first 500 feet were closed that day.

The normal point of touchdown of an aircraft is 1,000 feet from the threshold of the runway. On July 10 the aircraft would be landing on runway 10-28, 1,500 feet from the beginning of the runway 10-28.

The aircraft involved in the incident were a Boeing 727 (AA 116) and a SAAB 34 twin-engine turbo prop aircraft (12-18 passengers) (PMT 679).

Pilgrim Airlines normally operated a Beech King Air out of Dorval and only two or three weeks prior to the incident of July 10, Pilgrim Airlines had introduced the new aircraft SAAB 34. Both aircraft (Beech King Air and SAAB 34) have tricycle wheels, low wings, twin engines turbo props and, from a distance, they look the same. However, they are different. The SAAB-34 fuselage is taller, heavier and it has a larger capacity. In addition, the configuration of the tail is different. As a consequence, their performance is also different. The SAAB-34 has a cruising speed 20 knots faster than the Beech King Air. The speed in its final approach is therefore 10-15 nautical miles per hour faster. On the final approach, the SAAB-34 would arrive 20 seconds faster.

The grievance I have to decide involves the question whether Mr. Leat performed his duties properly and whether he used poor judgment in allowing PMT 679 to land on runway 10-28 at the time it did and having already ordered AA 116 to cross runway 10-28. As a consequence, when PMT 679 touched down on runway 10-28, AA 116 had not cleared the runway and it had 10% of its tail on runway 10-28.

At 2325:32 hours, PMT 679 had been cleared to land. It was six to eight miles east of the airport and entering Mr. Leat's air control space. Hence, from that point on, Mr. Leat was in control of PMT 679. At 2326:12, PMT 679 was given his landing clearance while at 2326:54, Mr. Leat ordered AA 116 to cross runway 10-28 and when this order was given, AA 116 was in motion.

The air and ground transcripts (Exhibits 2 and 3) concerning the incident in question reveal that at 2322:08 hours American Airlines 116 (AA 116) was announcing its intention to land on runway 24R which was the primary landing runway. At 2322:21 hours, the Tower cleared AA 116 to land. At 2322:29 hours, AA 116 announced it had been cleared to land. Then, AA 116 landed and taxied down runway 24R towards the Tango taxiway and runway 10-28. At 2326:54 hours, the Tower (Mr. Leat) ordered AA 116 to "taxi across runway 10-28 now". At 2326:58 hours, AA 116 replied "OK clear to cross ...". At 2327:20 hours, AA 116 talked to Mr. Bolduc and said it was just clear of the runway. At

2327:41 hours, Pilgrim 679 (PMT 679) called in and at 2327:43, Mr. Leat apologized to PMT 679 "about AA-116" (Exhibits 2 and 3).

When PMT 679 touched down it landed on runway 10-28 and proceeded to taxi down on Tango taxiway towards the terminal as AA 116 had done before it.

It is important to note that the witnesses agreed that the job of an air traffic controller is a question of timing and judgment. A VFR controller (as in the case of Mr. Leat on July 10) must have the ability to judge, he must have a sense of timing and he must be knowledgeable on separation standards and procedures. The MANOPS do not indicate when the air controller (Mr. Leat) must hold the ground traffic except in the case when the aircraft touches the runway because the moment an aircraft touches the runway, no other aircraft is allowed to cross the runway. Therefore, it is left to the air controller to estimate the speed of the aircraft by visual observation. He must be familiar with the movement and the operation of aircraft so as to be able to judge the speed and separation between aircraft. Knowing the characteristics of the various types of aircraft permits the controller to determine the speed and space required between aircraft. Hence, he must make an accurate judgment of speed and he must do so within a second or a fraction of a second. In addition, the amount of separation depends on whether the aircraft is "in cloud or clear of cloud". The separation in a IFR situation is different because it is highly technical. The MANOPS specify the required separation



for every IFR situation but in the case of the VFR situation, the separation question is left to the judgment of the controller. The controller develops a sixth sense by observation and experience and this determination is considered an art.

Mr. Bolduc testified as to what he saw at 19:25 hours on July 10, 1987. He explained that Mr. Leat advised him that he was landing PMT 679 on runway 10-28. Mr. Bolduc thought that the PMT 679, which was about to land, was a "Twin Beech" or a "Merlin Twin Engine" (a 20-passenger aircraft). At that moment, Mr. Bolduc saw AA 116 (a Boeing 727) taxiing slowly on Tango taxiway. Mr. Leat was on headsets so Mr. Bolduc could not hear the transmissions from AA 116. Mr. Bolduc saw AA 116 taxiing at a very low speed on Tango taxiway and it had not crossed as yet runway 10-28. Mr. Bolduc turned his head and saw PMT 679 landing on runway 10-28 when the AA 116 called him. Mr. Bolduc saw a very small portion of the AA 116's tail touching the edge of runway 10-28. Thus 90% of AA 116 had crossed the runway 10-28 when PMT 679 touched down somewhere between taxiways Echo and Delta. Mr. Bolduc estimated that the distance between the Tango intersection and where he saw PMT 679 was 3,500 feet (the distance between the taxiways Delta and Tango was 5,000 feet). In addition, he estimated that the distance between the threshold of runway 10-28 and where PMT 679 touched down was 6,000 feet.

Mr. Bolduc testified that he looked quickly and for a few seconds at AA 116 crossing runway 10-28

before he looked back at PMT 679. He saw AA 116's nose going straight towards the tower and he observed it taxiing very slowly. Mr. Bolduc could not give an estimate of the AA 116's speed. He judged it went slowly from his experience and the way a Boeing 727 moves but he could not provide a figure or a number of miles/hour. He estimated that a Boeing 727 would take less than one minute or a minute and a half to cross runway 10-28 (200 feet). He estimated 3,500 feet between where he saw PMT 679 and the intersection of Tango taxiway. He explained that runway 10-28 should have been cleared when PMT 679 touched down. However, MANOPS does not require a specific separation in miles or time.

Mr. Bolduc added that this incident was not a close call. It was not a common situation for an airplane to land while another still has his tail on the runway but this was not unusual. In Chicago, air traffic controllers run the aircraft tight to avoid delays. This type of separation depends on the air traffic controllers. During rush hours, the traffic must be run fast and airplanes therefore run tight. However, Mr. Bolduc questioned the propriety of running airplanes tight during other periods when there was no rush hour, such as in the case of 19:25 hours on July 10 and when only two aircraft were involved.

Mr. Bolduc declared that the incident could have been avoided by telling AA 116 to hold short of runway 10-28 and remain clear (i.e. not to cross runway 10-28). In addition, had PMT 679 landed 10 or 15 seconds later, AA 116 would have cleared runway 10-28.

Mr. Bolduc explained that he has worked for 20 years with Mr. Leat and Mr. Leat has always run the airplanes tight. This is the way he controlled aircraft. For other controllers, they would rather keep a two-mile separation from touchdown while others keep a one-mile separation from touchdown. Hence, no two air traffic controllers do the work the same way.

In July 1987, Mr. Donald Cameron was the Unit Manager at the Dorval Airport Control Tower. He was responsible for the operations, administration and budget and he had the authority to discipline the employees under his direction. Mr. Cameron was on annual leave during the period July 10 to 20, 1987. He was informed of the incident in question by Messrs. Patrick Tupper, a shift supervisor, and Richard Vigeault, the shift supervisor on duty when the incident occurred. In addition, he discussed the incident with Messrs. Bolduc and Leat. As a result, he concluded that the incident of July 10 was a dangerous situation because the threshold of runway 10-28 on which PMT 679 had been cleared had been displaced. In his view, Mr. Cameron decided that PMT 679 touched down 500 feet east of Echo Taxiway and 2,350 feet from the intersection with Tango Taxiway. According to Mr. Cameron, when PMT 679 landed on runway 10-28, it did not have enough distance to stop because of the displacement of the threshold and when it saw AA 116, it had to stop in an even shorter distance than the one it would have normally stopped. The weather was clear, hence PMT 679 must have seen AA 116 cross the runway. Mr. Cameron declared that it took 3,500 feet

for a SAAB 34 to stop on a bare and dry runway. PMT 679 did not require to take evasive action as long as AA 116 continued moving across the intersection.

Mr. Cameron explained that MANOPS does not provide when to hold the ground traffic. It only specifies where to hold it (Exhibit 6). He added that this incident could have been avoided by: instructing AA 116 to hold short of the runway, PMT 679 could have been brought in for landing on runway 24R, instruct AA 116 to cross without delay or order PMT to reduce its speed so as to increase the separation between the two aircraft. According to Mr. Cameron, Mr. Leat did not take any of these actions.

During the adjudication hearing on February 2, 1989, the parties introduced a photocopy of the flight progress strip concerning PMT 679 (Exhibit 10) and Mr. Leat's testimony on February 2 was based on this photocopy. However, at the hearing of March 30, 1989, the employer introduced the original of the flight progress strip (Exhibit 11) which contained notations in red and blue ink. In addition, it called Mr. Jean-Paul Tremblay to identify the various handwritten numbers in red and blue on it. Mr. Leat was recalled on March 30 and as a result a major contradiction ensued on who had made the notations. This is the crux of the case and the credibility of three witnesses is at issue because Messrs. Bolduc and Tremblay contradicted Leat's declarations.

Mr. Leat declared that when, on July 10, he received the flight progress strip, it was typewritten and indicated PMT 679, a Pilgrim flight which is an American based airline, and the type of aircraft BE02/A 220. The notation AJ on the flight progress strip indicated that the flight plan was "ad hoc" and it had been filed that day. In addition, this informed him that the scheduled flight of Pilgrim Airlines 679 (PMT 679) concerned a Beech King Air which was the normal aircraft operated out of Dorval. On the other hand, in a case where "CJ" is indicated, the information on the flight progress strip is the type that is stored in the Montreal Area Control Center computer which stores the scheduled flight plans submitted by the various airlines. In a CJ case, the airline company phones into the computer the flights and every three months this information is updated. Mr. Leat submitted that in the case of the pre-printed strip concerning PMT 679 (Exhibit 10), it had no handwritten notations until someone in the tower had noted in the changes. On February 2, Mr. Leat testified that when he had been shown the black and white photocopy of the flight progress strip (Exhibit 10), he thought the handwritten changes had been made by him. He explained that he had scratched twice the notation "BE02/A 220" and written in instead "SF 34". He believed that he was the one who wrote in the changes because he had the bad habit of striking twice and as far as he knew he was the only controller at Dorval with this bad habit.

During his testimony on February 2, he relied on Exhibit 10 (the black on white photocopy of the flight progress strip) to prove that he did not know prior to PMT 679's landing that the aircraft was a SAAB 34. Mr. Leat testified that until PMT 679's touchdown he could not have known that it was a SAAB 34 because the two aircraft looked alike. In addition, when PMT 679 was making its approach to land, Mr. Leat was looking at the navigation lights and the silhouette. PMT 679 landed on runway 10-28 facing towards him and it was hard for him to assess its speed.

In addition, AA 116 was in motion when he ordered it to cross "now" runway 10-28. He made his decision with respect to AA 116 and PMT 679 on the assumption that PMT 679 was a Beech King Air. Hence, he had no reason to ask PMT 679 for its speed. Therefore he did not ask PMT 679 for its speed and characteristics of the aircraft before telling AA 116 to cross runway 10-28. Mr. Leat answered in cross-examination that AA 116 could have slowed down but there was no reason for this. It had not been told to stop and it did not advise the controllers that it had stopped (Exhibits 2 and 3).

Mr. Leat described in detail the various transmissions concerning the incident and made detailed calculations as to the various speeds of the two aircraft based on the timing of the transmissions. It was also on this basis that he calculated the speed of the two aircraft in question. Mr. Leat concluded that the AA 116 was going 48 statutory m/h and AA 116 would not have

exceeded 70 m/h because it did not have problems stopping and it did not "float". He calculated that AA 116 would successfully cross runway 10-28 in 15 seconds but for some unknown reason it took more time.

Mr. Leat explained that had he known PMT 679 was a SAAB 34, he would have handled the situation differently. He would have asked the pilot for its speed and other pertinent information. Mr. Leat was treating the PMT 679 as a Beech King Air and based on his observations of this aircraft, he estimated a speed of 150 knots as of four miles out of the airport. The landing speed of a Beech King Air was 90 to 110 nautical m/h while for a SAAB 34 it was 110 to 120 nautical m/h. Thus, he made a judgment call but since it was a different type of aircraft (the SAAB was heavier and larger) it arrived 20 seconds faster than what he had anticipated.

Mr. Leat reviewed the transcript and explained that at 2325:32 hours, AA 116 had been cleared by the arrival controller in the radar unit for visual approach. At this point, AA 116 was six to eight miles East south East of Dorval Airport and it was entering Mr. Leat's air space. At the same time, Mr. Leat was working a GFNC which was going East to St. Hubert. At 2326:12 hours, PMT 679 was given its landing clearance some four to five miles east of the airport. At 2326:54, AA 116 was ordered to cross runway 10-28 "now". Mr. Leat testified that at that point AA 116 was exiting runway 24R and entering Tango taxiway towards runway 10-28. It had just completed the turn. Mr. Leat saw it entering

the Tango taxiway and he estimated it was going at 50 or 60 m/h. In his experience, he judged that AA 116, a Boeing 727, would maintain a "decent rate of speed". In Mr. Leat's opinion, 50 or 60 m/h was a "good speed" to taxi since there was no traffic or vehicles in the vicinity of the taxiways and runways. Hence, when he gave the instruction to AA 116 to cross runway 10-28, he was of the opinion that it would take 15 seconds to cross the intersection. Based on his experience, a Boeing 727 would have sufficient time to cross runway 10-28 and it would take less time than the time it would take a Beech King Air to land. But it took AA 116 26 seconds to complete the crossing instead of 15 seconds. AA 116 was not ordered to stop so it must have "zoomed" through. After having instructed AA 116 to cross now at 2327:08 hours, he dealt with Air Canada 636 which was sitting on runway 24L waiting to depart. PMT 679 had to overfly runway 24L in order to land. At that point in time, PMT 679 was in the air and gradually reducing its speed while Air Canada 636 was on the ground accelerating. Mr. Leat explained that both aircraft were changing speed and he had to attend to it because this situation created a serious point of conflict. Then, Mr. Leat watched the console and updated information on the various aircraft he was working.

Mr. Leat added that at 19:30 hours, he was working alone. He had a normal concentration on his tasks. He assessed his concentration at the 70 - 80% level and he was well aware of what was going on around him. He did not recall having any other thoughts than the ones required to do his work.



When Mr. Leat overheard AA 116 calling the ground controller at 2327:20 hours (Exhibit 3), the word "here" stuck out. Mr. Leat felt it was abnormal for AA 116 to say "here" and he looked down at AA 116 and back to PMT 679. The AA 116 was south on runway 10-28 and still on Tango taxiway. At 2327:20 hours, the tail of AA 116 was just crossing the southern edge of runway 10-28 and the wheels of PMT 679 were on the runway 10-28, 1,200 feet from the threshold of runway 10-28. PMT 679 had landed and it was at the level of the bomb shelter (500 - 600 feet after touchdown). Mr. Leat did not see PMT 679 land but he estimated that it had landed some 470 feet from the Echo taxiway intersection.

Mr. Leat explained that PMT 679 touched down on its two main wheels and it took about 500 feet for it to get on all three wheels because had PMT 679 landed on three wheels, it would have bounced and landed further than it did. Thus, when he looked at PMT 679 on the ground, it was stable on three wheels and the propeller of the engines were on reverse. The PMT 679 had to be on land before the pilot could apply the reverse pitch otherwise the landing gear would have gone up the fuselage through the engine.

Mr. Leat testified that the change in aircraft led him to an incorrect judgment. When he saw the SAAB 34, he realized that AA 116 could not have successfully crossed runway 10-28 when PMT 679 touched down. He had made a judgment call and he had run the two aircraft tighter than what he had anticipated, and would have liked.

On February 2, 1989, counsel for the grievor filed a photocopy of the flight progress strip concerning PMT 679. A crucial issue arose with respect to the authorship of various notations on this exhibit. As a result, on February 2, 1989, Mr. Leat declared that he had made all the notations on Exhibit 10. He could not recall who had worked the assistant controller position at the time of the incident and he could not remember how he had received the flight progress strip on July 10 (Exhibit 10). He testified that SF 34 and all the handwriting of other numbers in Exhibit 10 were his. He added that "he felt they were his". He gave as a possible explanation, of why the "three" of SF 34 was different from the other handwritten three's, that he was left-handed and that when he wrote on Exhibit 10, he must have touched the TV screen.

At the March 30, 1989, hearing, Mr. Stephen Barry, counsel for the employer, filed the original flight progress strip (Exhibit 11) and called Mr. Jean-Paul Tremblay to explain it. Mr. Tremblay has been an assistant controller since January 4, 1956. Mr. Tremblay testified that between 17:00 hours and 20:00 hours on July 10, 1987, he had worked as the assistant controller (AS-3). He could not remember very well the facts and events during that shift. He assumed that he had received the flight progress strip in question from the Terminal. He added that the handwriting concerning the notation SF-34 looked like his since the notation was in blue ink and not in red. He deduced that he had written SF-34. Mr. Tremblay explained that he had been shown Exhibit 11 only a few weeks prior to March 30, 1989. He added that MANOPS

(Exhibit 12) required that the note of a change of information by crossing must be done with a single line. He always crossed out the information with a single line. Thus the two strokes were not his and he concluded that they had been done by someone else. He added that in all likelihood the air position made the two strokes and that the inscriptions on Exhibit 11 were made by two different people. The assistant controller used blue ink while the air position used red ink to indicate all changes. Mr. Tremblay stated that in the normal course of the operation, he would have crossed out the erroneous information and at the same time also inscribed the new information.

Mr. Tremblay testified that he did not know the order of the inscriptions. He had no way of knowing whether SF-34 had been written first and before the two strikes. Mr. Tremblay explained that normally SF-34 would have been written in first if the changes had been received from the Terminal over the telephone by the Assistant Controller. However, if the changes had not come from the Terminal and the change of aircraft would only have been noticed at the time of landing, the air position would be the first one writing in the changes. Hence, the air position could have made the two strikes and passed on the flight progress strip to the assistant controller, who could have then written in SF-34.

When on March 30, 1989, Mr. Leat was confronted with the original flight progress strip, he explained that Exhibit 11 had not resulted from a scheduled flight plan stored in the memory banks of the Area Control

Center computer. This had been an ad hoc flight plan and no one could have noticed the change in aircraft once PMT 679 left Bradley Airport. Had the change in aircraft been noticed at Bradley Airport, the information would have been typed in. Looking at the original flight progress strip, he realized that someone else had written SF-34 because it was done in blue ink. March 30 was the first opportunity for him to examine the original since the incident. Mr. Leat explained that he could have made the two strikes, then passed Exhibit 11 to Mr. Tremblay for him to write SF-34 since this was a new identifier and Mr. Leat was not familiar with it. The SAAB 34 was a newly introduced aircraft by Pilgrim Airlines and the controllers had to research the official identifier. The pilot of PMT 679 would not have known the identifier for Air Traffic Services purposes.

Mr. Cameron declared that he investigated the incident and discussed the matter with Mr. Leat on August 3, 1987. Mr. Cameron informed Mr. Leat of the purpose of the meeting, that it was an administrative inquiry and he was looking into the possibility of imposing disciplinary action against Mr. Leat. Mr. Leat described the incident and explained that at the time of the incident he thought AA 116 would have had enough time to cross the runway 10-28. When on August 5, 1987, Mr. Cameron gave Mr. Leat the letter of discipline imposing a one-day suspension, Mr. Leat told him that he had personal, family and financial problems. He tried to explain that these problems may have affected his performance and that his mind may have been somewhere else and not on the job. As a result, Mr. Cameron offered

to approve leave but Mr. Leat declined the offer. Mr. Cameron referred to Mr. Leat's disciplinary record (June 1986 and May 1987).

At the February 2 hearing, Mr. Leat commented on his discussion with Mr. Cameron of August 1987. He recalled that the discussion took place on August 3 and that he presented Mr. Cameron with what he thought may have been contributing factors. Mr. Leat was suggesting that perhaps his personal problems may have interfered with his timing and that his judgment call may not have been as accurate as normally.

Mr. Leat had rarely been criticized for running the aircraft too tight. It is worthy of note that running aircraft tight is not a technical irregularity. There is nothing wrong with it.

#### ARGUMENTS

Mr. Stephen Barry, counsel for the employer, submitted that the evidence demonstrated that the alleged incident occurred on July 10 and that the grievor could have avoided it had he followed the required procedures. In addition, the grievor could not explain why the incident did occur. Mr. Barry referred to Mr. Leat's grievance and reviewed each of the six details of the grievance stated therein. Mr. Barry concluded that some of the details were irrelevant and others indicate an admission on his part that he had made an error in judgment.

Mr. Barry reviewed in detail Mr. Bolduc's testimony and pointed out that Mr. Bolduc had seen AA 727 taxiing slowly across runway 10-28. Mr. Bolduc indicated that AA 116 should have been advised to hold short of runway 10-28 and not to cross it until PMT 679 had landed. Mr. Bolduc added that Mr. Leat "runs his flights tight" and in his opinion, the aircraft should have two miles separation and at one mile no one should be crossing the runway. Mr. Bolduc stated that "if you are not busy, why rush things, tell AA 116 to wait on the other side of runway 10-28". Runway 10-28 should have been clear before PMT 679 touched down. Mr. Barry argued that Mr. Bolduc was an impartial and candid witness. He had no interest in this case and on this basis, his testimony on the contradicted points should be preferred to Mr. Leat's.

Mr. Barry highlighted the contradictions in the various testimonies of Mr. Leat as compared to the declarations of Messrs. Bolduc and Tremblay. Mr. Leat suggested that AA 116 was taxiing quickly and it took 26 seconds to cross at 45 to 50 m/h while Mr. Bolduc saw AA 116 going slowly. Mr. Leat added that when he told AA 116 to cross "now", AA 116 was turning from runway 24R into Tango taxiway. Mr. Leat calculated that it took 26 seconds according to the transcript (Exhibit 2) and since at 70 m/h, the Boeing 727 would have lifted and AA 116 did not, Mr. Leat concluded that it was going at approximately 50 m/h. Mr. Barry argued that this could not be so because Mr. Bolduc saw AA 116 going slowly. The transcripts note that at 2326:54,

Mr. Leat told AA 116 to cross and at 2327:20, AA 116 calls in "just clear of the runway here". Hence, 26 seconds had elapsed. According to Mr. Barry's interpretation of the evidence, at 2326:54, AA 116 must have had its nose at the tip of runway 10-28, and it had stopped. Mr. Leat then gave the command to cross and it took AA 116 26 seconds to cross the 200 feet (the width of runway 10-28). This interpretation, added Mr. Barry, would be in accordance with Mr. Bolduc's testimony that he saw AA 116 moving slowly across runway 10-28.

With respect to Mr. Cameron's declarations, Mr. Barry submitted that he had examined the facts, the transcripts, all relevant documents and the declarations of the various persons involved at the time of the incident. Mr. Cameron concluded that at the time of the incident, the traffic had been light, PMT 679 was a SAAB 34, the threshold of runway 10-28 had been displaced 500 feet, PMT 679 had landed on runway 10-28, 500 feet East of the Echo taxiway intersection with runway 10-28 and that the normal distance for a SAAB 34 to land was 3,500 feet. Hence, PMT 679 had 2,300 feet to stop and it had to break so as to be able to turn on Tango taxiway. Mr. Cameron referred to the transcript where at 2327:43 Mr. Leat apologized to PMT 679 about AA 116 (Exhibit 2).

Mr. Cameron referred to MANOPS (Exhibit 6) to explain how the incident could have been avoided. Mr. Leat should have kept AA 116 150 feet from the edge of runway 10-28, he could have directed PMT 679 to land

on another runway, order AA 116 to cross without delay or given PMT 679 a speed reduction. Mr. Cameron concluded that Mr. Leat had been distracted when the incident occurred. Mr. Barry submitted that Mr. Cameron was a credible and consistent witness and I should prefer his interpretation of the facts.

Mr. Barry, then, reviewed Mr. Leat's testimony. Mr. Leat submitted that when he ordered AA 116 to cross, he did not know PMT 679 was a SAAB 34. It was only when the SAAB 34 had landed, that he realized it was not a Beech King Air. Mr. Leat's primary function was to estimate the speed of the aircraft. He did not contact the pilot of PMT 679 to get the speed or the pay load and he did not really know its speed. He estimated it on the assumption that it was a King Beech Air. Mr. Leat relied on Exhibit 10 to prove that he did not know it was a SAAB 34 until it had landed. Thus, he concluded that he was led into error by the flight progress strip where PMT 679 was identified as a King Beech Air. Mr. Barry, however, compared this version against Mr. Tremblay's declarations. Mr. Tremblay testified that the handwriting concerning SF 34 "looked" like his and as a result, Mr. Leat modified his story. He then declared that it was possible that he did not write SF-34 and that another controller may have written it after the landing when Mr. Leat noticed the SAAB 34, and because Mr. Leat may not have known the identifier. However, Mr. Tremblay explained that had the change in aircraft been noticed at landing time, Mr. Leat would have been the one writing the changes. Mr. Tremblay



added that his normal practice was to write the changes on the strip before giving it to the air position but if it is the air position who notices the changes, then that controller writes all the changes. Mr. Barry argued that I should prefer Mr. Tremblay's testimony because Mr. Leat's was self-serving.

Mr. Barry submitted that the issue is one of credibility and one of the witnesses was not telling the truth. As a result, I should prefer the version of the unbiased witnesses. Mr. Barry added that there was not a serious difference in the characteristics between the Beech King Air and the SAAB 34 and the only real fact I should retain is that Mr. Leat runs the airplanes tight. In support of his position, Mr. Barry quoted the Seguin decision (Board File 166-2-15190) and Professor E.E. Palmer in Collective Agreement Arbitration in Canada, second edition, at pages 361 to 366.

Ms. Catherine MacLean, counsel for the grievor, submitted that the separation question is difficult to answer because there are various comfort levels and the amount of separation is a judgment call. The only clear rule is that when an aircraft touches down, there shall be no crossing of the runway. Ms. MacLean reviewed the evidence. She pointed out that the speed of the aircraft was not constant, both aircraft were moving and this would explain the discrepancy in the declarations of Messrs. Bolduc and Leat. When Mr. Bolduc looked at AA 116, it was going slowly. It is possible that

it had slowed down but when Mr. Leat looked at it, it was going 45 to 50 m/h. AA 116 was not moving at a constant speed. The fact remains, however, that AA 116 could not have stopped or braked because the transcripts (Exhibits 2 and 3) prove that AA 116 was never instructed to hold short. No such command was given.

Ms. MacLean argued that the employer had no grounds to discipline Mr. Leat. In support of this argument, Ms. MacLean cited Choquette and Hodgson (Board Files 166-2-8945 and 8946), Cormier and Seguin (Board Files 166-2-15135 and 15190) and Chase, Reid and Nixon (Board Files 166-2-17500, 17501 and 17551).

Ms. MacLean submitted that Mr. Leat may have erred in his judgment when it allowed PMT 679 to land and AA 116 to cross the runway. However, this error does not constitute grounds for discipline. It is recognized that Air Traffic Controllers have to work within high standards but when they exercise their professional judgment within the ambit of the acceptable, there will be times when things will not go right as long as they have worked within the line. Ms. MacLean stated that the employer cannot demand perfection from its employees. Mr. Leat submitted in his grievance that he did not contravene any directives and that he had followed all the procedures. He did his best and for these reasons he cannot be punished. There was nothing to correct. Mr. Leat followed the procedures and the incident of July 10 was not a dangerous situation. Runway 10-28 was 200 feet wide and in the worst scenario, PMT 679 would have gone around the tail of AA 116 had

it not been able to stop in time. Thus, this was not a close call but a mere tight situation. The two aircraft would have never hit. Mr. Leat did apologize to PMT 679 because he felt badly about the tightness and this was a lower standard than what he expected and desired.

Ms. MacLean stated that it is imperative to the determination of this case that I look at the reasons why the incident occurred. Mr. Leat declared that he made a judgmental assessment. Separation is a question of timing. Mr. Leat estimated the speed of both aircraft and he had to decide in a split second. Ms. MacLean submitted that three reasons could have caused Mr. Leat's judgment to be wrong which brings us to the examination of three scenarios.

- The first reason could have been his negligence or carelessness, which are disciplinable. This is the position presented by the employer.
- His judgment was accurate, good and well-founded but it was based on the wrong information. This is the case presented by Mr. Leat and if his position is supported by the evidence, he made no error and he is blameless.
- He made a judgment based on accurate and correct information. He was merely doing his job and concentrating, however, his timing was off and he made the wrong judgment call.

Ms. MacLean examined the above three possibilities. With respect to the carelessness or negligence, Ms. MacLean argued that no evidence was submitted in support of this possibility. Mr. Leat declared he was working on his job with an 80% concentration and his only thought was his job. He was paying attention. Concerning his conversation with Mr. Cameron, Mr. Leat explained that he was merely analyzing what could have caused his timing to be off. Furthermore, at no time was Mr. Leat ever advised that he should not run his aircraft tight. The employer issued no instructions or directives forbidding the tight running of aircraft. There are no instructions indicating when to hold short and MANOPS stipulates only where to hold short.

Ms. MacLean added that until PMT 679 landed, Mr. Leat believed it was a Beech King Air and he made all his estimates and calculations on the basis of that type of aircraft. Mr. Leat declared that he did not know that it was a SAAB 34. In addition, the flight progress strip he received did not indicate a change in aircraft. It is only when it landed that he realized that PMT 679 was a SAAB 34. Mr. Leat explained how both types of aircraft look alike. Mr. Leat recognized that he was the one who made the double strikes on Exhibit 10 and he assumed that he also wrote SF 34. This was an understandable error in view that when he made this declaration, he was shown a black and white photocopy of the flight progress strip. The difference in the characteristics of both aircraft account for the 20 seconds which affected the separation between

both aircraft. Had PMT 679 been a Beech King Air, it would have flown 20 seconds slower and AA 116 would have been clear of the runway.

Ms. MacLean relied on the following grounds in support to her argument that Mr. Leat is a very credible witness and I should prefer his version of the facts explaining the incident. The transcripts (Exhibits 2 and 3) provide the exact times of the transmissions. The original flight progress strip (Exhibit 11) demonstrates that two different persons wrote on it. Probably someone other than the grievor wrote SF 34 in blue ink but it was Mr. Leat who, on April 10, was writing in red and who had the habit to strike twice. Mr. Tremblay testified that he strikes only once and he was using blue ink. Thus, only the air position could have made the two strikes in blue (i.e. Mr. Leat). On the balance of probabilities and on the rule of the best evidence, it was Mr. Leat who made the two strikes.

Ms. MacLean explained that on the basis of the evidence, there are two possibilities: Mr. Tremblay was the controller who got the call informing the change of type of aircraft and who wrote the SAAB 34 in red on Exhibit 11 and he forgot to strike out the incorrect typewritten identifier. Thus, it was Mr. Leat who struck twice in blue. The second possibility is that Mr. Leat was not informed of the change in aircraft. He only noticed it when PMT 679 had landed and he struck twice

in blue the typewritten identifier, leaving another controller to complete the change at a later date by writing SF 34 in red. Ms. MacLean submitted that I must prefer the second possibility. She argued that the second possibility is consistent with the evidence. Mr. Tremblay never struck twice and he would not have written SF 34 in blue first and then give Mr. Leat the flight progress strip for him to strike twice in blue. This scenario is simply not possible. Exhibit 11 was an ad hoc strip. No one had had the opportunity to observe the change of aircraft. PMT 679 had left Bradley and flew non-stop directly to Dorval. It was logical for Mr. Leat not to have written SF 34 because the SAAB 34 was a newly introduced aircraft by Pilgrim Airlines and the controllers would have had to look up the correct identifier. Mr. Leat had to remain at his post, hence another controller would have to look up the identifier and write it in on Exhibit 11. Ms. MacLean concluded that the incident of July 10 was not Mr. Leat's fault.

As an alternate argument, Ms. MacLean argued that Mr. Leat had all the required information to assess the separation of the aircraft but he made a wrong judgment call. Ms. MacLean referred to Dery (Board File 166-2-9773) and submitted that we must review the air controller's duties and VFR air traffic control to understand the profession and what it entails. The controllers had less than a minute to judge the timing. This judgment is an art and there are no set levels of separation. It is a judgment call. It is on this basis that Ms. MacLean raised the issue whether Mr. Leat's

judgment was so far out as to conclude that it warranted discipline. Ms. MacLean replied that this split second decision did not warrant discipline because he was doing his job properly.

Mr. Barry replied that even if the issue is a question of judgment, the ground for discipline was the inattention or distraction. Mr. Barry submitted that the problem is how Mr. Leat assessed the speed of the aircraft. Mr. Leat did consider the incident serious enough to apologize to PMT 679 for AA 116's tail on runway 10-28. Mr. Barry admitted that the timing is what the air control profession is all about and Mr. Leat did warrant discipline for his wrongdoing: his error in judgment. Mr. Barry gave the employer's version of the incident. In Mr. Barry's submission, Mr. Tremblay wrote SF 34 on Exhibit 11 before giving the strip to Mr. Leat. Mr. Tremblay wrote the correction SF 34 first but he did not strike the erroneous identifier. He then passed the strip to Mr. Leat who struck twice the erroneous information BE 02/A 220. In this case, Mr. Leat would have known that PMT 679 was a SAAB 34 and he should have called the pilot to obtain its speed. Mr. Barry admitted that there is nothing wrong or disciplinable in running aircraft tightly but the fact that PMT 679 landed while the tail of AA 116 was on runway 10-28 is gross negligence and disciplinable.

Mr. Barry explained the reasons why the employer disciplined Mr. Leat: he ran the aircraft tight when there was no reason for it, he miscalculated the speed

of the aircraft, he knew in advance of landing that PMT 679 was a SAAB 34, he should have checked with the pilot of PMT 679 on the type of aircraft and its speed, and, the miscalculation was a serious one and Mr. Leat realized it was not a mere error in judgment since he apologized to PMT 679. Mr. Barry concluded that the case rests on an issue of credibility and Mr. Leat had a disciplinary record for inattentiveness.

#### REASONS FOR DECISION

As I stated at the outset of this decision, the issue I have to decide here is an important one. It goes further than a case of simple discipline where an employee has not followed directives and procedures. To start with, I have to determine whether the employer, who has the onus of proof, has demonstrated that when Mr. Leat ordered AA 116 to cross runway 10-28 and PMT 679 to land, he knew or ought to have known that PMT 679 was a SAAB 34, its speed and other relevant characteristics so as to assess properly the required separation. The second issue is even if Mr. Leat did not know PMT 679 was a SAAB 34, and he erred in his judgment when he allowed PMT 679 to land when he did, was discipline warranted nonetheless and, is a one-day suspension a reasonable penalty in the circumstances?

The employer had the burden of proof. The parties admitted that an incident did occur on July 10, 1987. Thus, the controversy is whether Mr. Leat is at fault and discipline is warranted.



The employer, Messrs. Cameron and Bolduc (the ground controller at the time of the incident) admitted that there are no set rules and procedures with respect to the required separation in this case and in VFR situations. In addition, there is nothing wrong in running aircraft tight. These two matters are not disciplinable. The evidence also disclosed that air traffic control in this case is an art and the separation is left to the judgment of the responsible air traffic controller. Air traffic controllers judge the separation using their experience, observation and sixth sense. This leads us to conclude that only one rule is clear. When an aircraft touches down, the runway it is landing on it must be kept unobstructed.

I heard contradictory evidence. Mr. Bolduc saw AA 116 taxiing slowly whereas Mr. Leat saw it going at a good speed. It is obvious that AA 116 was moving all along since it had landed on runway 24R and taxied on Tango taxiway towards the Terminal. Thus, AA 116's speed was not constant. Mr. Barry argued that AA 116 had "almost stopped" or was moving at a very slow speed when Mr. Bolduc looked at it for a few seconds. However, this argument is not supported by the evidence because the transcripts (Exhibits 2 and 3) prove that at no time was AA 116 ordered or permitted to stop. Aircraft do not stop (as cars do) before crossing an intersection so as to look left and right and decide whether it is safe to cross. AA 116 was a Boeing 727. It cannot stop quickly or permit itself to operate as a car does. Moreover, AA 116 was getting its instructions in such

a manner and at such a time that it could not have stopped at the intersection as Mr. Barry wants us to believe.

It is also realistic and logical to conclude that the two aircraft in question were constantly in motion and their speed could vary depending at what time each of the two witnesses looked at them. Hence, both testimonies are compatible. When Mr. Bolduc looked at AA 116 it was obviously going slower than when Mr. Leat looked at it. Mr. Leat testified that it took AA 116 26 seconds to cross runway 10-28. Mr. Bolduc testified that it would take one minute or a minute and a half to cross it. On the basis of the transcript (Exhibit 2), the undisputed fact is that it took AA 116 26 seconds to cross and based on simple arithmetic calculations, it is quite safe to conclude that AA 116's speed was 48 or 50 m/h. With respect to the second major contradiction raised by Mr. Barry, i.e. whether Mr. Leat knew PMT 679 was a SAAB 34, here again the employer had the onus of proof and it failed. When Mr. Leat testified on February 2, 1989, that he was the one who wrote SF 34, he was presented a black/white photocopy of the flight progress strip (Exhibit 10). It was only on March 30, 1989, that he again saw the original strip (Exhibit 11) since the July 10, 1987, incident. It is on that second hearing day that he realized that SF 34 was not his handwriting because it was written in blue ink when he knew that on July 10 he was writing in red ink. He declared that the two red strikes over BE 02/A were his because he is the only controller who has the habit to strike twice. The employer called Mr. Tremblay to

refute Mr. Leat's allegation that he did not know at the time of the instructions to AA 116 and PMT 679 that it was a SAAB 34. Mr. Tremblay candidly testified that he could not swear that "SF 34 in blue ink" was his handwriting. It "looked" like his. He could not remember very well the facts and events during the incident. He assumed that he had received the flight progress strip from the terminal. However, he was adamant that he was not the one who made the two red strikes and that in all likelihood the air position (Mr. Leat) had made them.

Mr. Tremblay stated that under normal conditions he would have been the one making one blue strike and writing SF 34 in one operation. But in this case, two different controllers had been involved. Mr. Tremblay clearly testified that he did not know whether he or the air position (Mr. Leat) was the first person writing or noting on the strip. He added that had the change in aircraft been noticed by the air position, the controller in that position (Mr. Leat) would have been the first one writing in the changes. Mr. Tremblay concluded that the air position (Mr. Leat) could have made the two red strikes and passed on the flight progress strip to Mr. Tremblay who then could have written SF 34 in blue ink. Hence, Mr. Tremblay's testimony does support Mr. Leat's version of the incident. Mr. Leat testified that he first saw or learned about the change of aircraft and that PMT 679 was a SAAB 34 when it had already landed. He declared that the flight progress strip was an ad hoc flight plan and there was no indication on it of a change in aircraft. Mr. Leat stated

that he was the first one who saw the change of aircraft and made the two red strikes. He then passed the strip to Mr. Tremblay for him to write the identifier. This declaration is consistent with Mr. Tremblay's testimony. Furthermore, Mr. Leat's explanations with respect to the reasons why he estimated AA 116's speed at 45 to 50 m/h (it did not have problems stopping and it did not float) and the different characteristics of a SAAB 34 compared to the Beech King Air remained unchallenged. These accounts explain Mr. Leat's honest error in judgment. Mr. Leat was not at fault in his erred judgment. No one informed him of the change in aircraft and the evidence has shown that he could not have guessed it. Thus, there was no reason for Mr. Leat to ask PMT 679 for its speed and other relevant information. Mr. Leat knew the characteristics of both aircraft. What he did not know is that there had been a change in aircraft. Since Mr. Leat could not have guessed it, the blame for the incident should be found elsewhere. No evidence was submitted with respect to who was responsible to inform the air controller of the change. Mr. Tremblay stated that the Tower provided the updates but in this case, no one informed Messrs. Leat or Tremblay. I reached this conclusion on the basis of the declarations that Mr. Leat was the first one to make the two red strikes which confirm his testimony that he did not know PMT 679 was a SAAB 34 when he instructed AA 116 to cross and PMT 679 to land.

Having reached the conclusion that Mr. Leat's version is to be preferred to Mr. Cameron's and the

employer's, I have now to turn my mind to the issue of whether discipline is warranted nonetheless.

The employer had the onus of proof that discipline was warranted. To warrant discipline there must be a disciplinable action on the part of the grievor. There is none in this case. The grievor followed rules and procedures. He made a decision on the basis of information provided to him by the employer: the flight progress strip. His error was caused by the erroneous information on the flight progress strip. He cannot be blamed or disciplined for it. Thus, since there are no grounds for discipline, Mr. Leat's grievance must succeed.

For these reasons, I allow the grievance of Mr. Gerald B. Leat. Mr. Leat is entitled to the following corrective actions: the withdrawal and destruction of the letter of discipline of August 5, 1987, from all employer's files on the grievor and the reimbursement of the one-day suspension which was served on August 14, 1987, and all the benefits Mr. Leat lost as a consequence of this disciplinary action.

Muriel Korngold Wexler,  
Deputy Chairman.

OTTAWA, May 3, 1989.