

Cited as:
**NAV Canada and Canadian Air Traffic Control Assn.
(Doerksen
Grievance)**

IN THE MATTER OF an Arbitration
Between
NAV Canada (The Employer), and
Canadian Air Traffic Control Association (The Association)
Re: Doerksen Grievance - Article 13.01(b) Break Time

[1998] C.L.A.D. No. 246

**Canada
Labour Arbitration
T. Jolliffe, Arbitrator**

Heard: Winnipeg, Manitoba, September 18, 19 and 20, 1997;
Ottawa, Ontario, October 21, 22, 23 and 24, and November 7 and
8, 1997

Decision: April 10, 1998
(84 pp.)

Appearances:

Patricia Brethour, for the Employer.
Peter Barnacle, for the Association.

AWARD

¶ 1 The Association's branch chairperson, David Doerksen, has grieved that the staffing in place at the Winnipeg Air Traffic Control Centre (ACC) calling for one controller to be scheduled in a control specialty during midnight shift does not allow for breaks, thereby creating an unsafe and unhealthy environment and also constituting a violation of the collective agreement. The Association seeks corrective action in terms of my directing the Employer to staff various described specialities with two controllers each for any midnight shift.

¶ 2 The matter proceeded to arbitration pursuant to the new grievance and arbitration procedure replacing article 5 of the collective agreement by operation of a memorandum of understanding whereby the parties have agreed that arbitrators taking jurisdiction over disputes

subsequent to privatization of the Employer's national air traffic control operation shall have all the powers described in part 1 of the Canada Labour Code. Evidence and argument in this matter were presented over nine days of hearing held between September 18 and November 8, 1997 in Winnipeg and Ottawa as recorded in 696 foolscap pages of arbitrator's notes, together with 88 exhibited materials. At outset the parties agreed that the matter should be considered in the nature of a policy grievance specific to the Winnipeg ACC. Having regard to the great amount of testimony and materials submitted at hearing, all of which I have reviewed for purposes of drafting this award, it is appropriate for me to recapitulate the main points of evidence as I understand them to be, and the parties' positions based thereon.

¶ 3 The Association's complaint speaks to the Employer's ongoing management of the break time entitlement under the collective agreement. It centres on some employees' long time belief that the job requirements of working on their individual control specialties as single controllers during the midnight shift effectively preclude any reasonable or realistic breaks away from their assigned stations. They view it as a matter of deficient workplace organization and not resulting from of any unusual operational conditions which might make some or other planned breaks impractical on a case by case basis. The Association cites article 13.01(b) of the collective agreement as compelling the Employer to properly organize break time on any shift. It reads as follows:

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

¶ 4 While the Association asserts that its bargaining unit members working as single controllers in various specialties at the Winnipeg ACC have no opportunity to take meaningful meal and relief breaks at any time during their midnight shifts, the Employer says that its managers allow for appropriate breaks by applying a procedure whereby an adjacent controller in another specialty can be called upon to "monitor" a co-worker's position during slow periods, which are bound to occur at times throughout the shift, in order to allow for some time away from his video display terminal. The Employer views the procedure in place at the Winnipeg ACC as satisfying its acknowledged primary priority of safely fulfilling its air traffic control responsibilities. It also asserts that staffing levels and scheduling decisions implemented by managers to satisfactorily meet operational/performance requirements should be seen to fall within its exclusive domain as a management rights issue. It cannot be expected to make long term staffing decisions based on some employees' perception that break time during the midnight single controller shifts has been difficult to co-ordinate amongst the various specialties who are asked to share the monitoring load. The Association disputes the suitability of expecting controllers to monitor their co-workers' positions in specialties where they are not also fully qualified to make control decisions.

¶ 5 A viewing of the Winnipeg ACC was carried out during the first day of hearing. It included a floor plan walk-through of the control centre operations room which is organized into six distinct specialty areas in addition to the operational support specialty (OSS) area. Winnipeg Specialty (en route) consists of four radar/data sectors which include Dryden and Gimble for en route traffic travelling at 35,000 feet and above while Winnipeg West and Winnipeg East sectors exercise en route radar control at 33,000 and below. The Winnipeg Terminal Specialty governs

control operations for airport approaches, landings and take-offs at Winnipeg consisting of five positions: arrival, data, departure, Southport terminal and Thunder Bay terminal. The Saskatchewan Specialty comprises three en route sectors (Lumsden, Prince Albert, Broadview) each having a radar and data position. In the Tri-Terminal specialty there are three positions to cover the airport areas: Regina, Saskatoon and Thunder Bay. The Ontario Specialty consists of three sectors Superior, Marathon and Kenora, with six associated radar and data positions for en route traffic. The North Specialty has three sectors, being Thompson low, Thompson high and Trout Lake, with six operating positions to utilize Thompson and Trout Lake radar systems as well as the N.A.D.S. system for tracking aircraft procedurally which are without availability to radar.

¶ 6 There was no dispute presented over availability of meal and break time during the day and evening shifts, where generally each position of an area specialty is manned by a controller with another controller standing by for purposes of data recording and control. However, during midnight shift operations due to the significantly decreased number of flights, the various positions associated with a specialty are combined into one screen whenever possible with only one controller at the position, and without anyone else acting in a control/data capacity. Controllers are expected by managers to monitor their co-workers specialties, but not make control decisions, during breaks to be taken in slow traffic periods. The midnight shift set up applicable to the time frame of the grievance was described as follows:

Winnipeg Terminal Specialty - two controllers Tuesday to Saturday, one controller Sunday and Monday.

Winnipeg en route Specialty - two controllers Tuesday to Saturday, one controller Sunday and Monday.

Ontario Specialty - one controller Monday to Sunday

Saskatchewan Specialty - one controller Monday to Sunday

Tri-city Specialty - revert to Saskatchewan controlled air space during night shift.

North Specialty - two controllers Monday to Sunday

¶ 7 The Employer's written response to the grievance in observing the Association's position to be that controllers should not be monitoring other specialties during quiet periods and that staffing midnight shifts with one controller did not allow for breaks, was as follows:

With regards to the staffing midnight shifts, several reviews have been conducted by unit and ATS headquarters personnel. The following has been concluded:

- only one controller is required on the midnight shift in both the Saskatchewan and Ontario Specialties.
- two controllers are required on the midnight shift in the Winnipeg Terminal Specialty five nights a week with the provision that when traffic is reduced the requirement may be for one controller during certain periods of the year.

Keeping these parameters in mind, management on March 4, 1996 reduced coverage in the Saskatchewan Specialty from two controllers four nights a week

to a single controller for seven nights a week. Management will continue to monitor and meet the needs of fluctuations in traffic by adjusting the staffing on midnight shifts as required.

With regards to your concern for meal and relief breaks, the unit policy is clear and states that relief breaks are to be taken when operational requirements permit. All controllers have the option to have another controller monitor their position and is a control decision is required the Specialty controlled is available for immediate recall.

The responsibility to maintain the safety and security of the travelling public and the safety and health of its employees, remains a priority for NAV CANADA Management and was clearly demonstrated by appropriate adjustments to these staffing levels, during the summer of 1996.

¶ 8 The Association called five controllers currently working in the Winnipeg ACC to testify with respect to their day to day working activities in the specialties on which they have been trained and are fully qualified. They explained their air traffic control duties and responsibilities in considerable detail. Each of them expressed concerns over leaving their positions for meal or relief breaks during midnight shifts when working alone. Having regard to their being expected to fulfil their controller duties in a professional manner they fear incurring personal liability for any harm resulting from their being physically absent from their positions without arranging for a qualified replacement. They point to a NAV CANADA NEWS article responding to employee questions concerning legal liability of individual controllers acting in their professional capacity after privatization of the national air traffic control system. The article entered in evidence indicates:

An employer who acts in reckless disregard of the consequences of his/her actions is not fulfilling the primary job function of protecting and promoting the safety of air traffic.

For example, if an employee leaves a safety-sensitive position unattended without authority and an emergency occurs, NAV CANADA could be absolved of liability for the resulting harm. The employee would be held solely responsible and, therefore, liable.

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Q: When would I be liable?

You are liable when you have acted with gross negligence. For example, leaving a safety-sensitive post without due authority for any reason whatsoever (e.g. to eat, shop or meet someone) make you liable for gross negligence. Anything you do, in a professional capacity, where you recklessly and knowingly put customers at risk may be judged to be gross negligence.

¶ 9 The five currently assigned controllers who described their night shift experiences in the Winnipeg ACC are all familiar with the Air Traffic Control Manual of Operations (MANOPS) wherein the Employer sets out the following policy guidelines respecting position responsibility:

113 POSITION RESPONSIBILITY

113.1

Do not leave an assigned operating position unless:

- A.
 - 1. you are relieved by a person qualified to accept responsibility for that position; and (N)
 - 2. you follow unit directives for the transfer of position responsibility; or (R)
- B. you follow unit guidelines for temporarily vacating an operating position if you are the only qualified person in the unit. (R)

113.1A.1. Note:

A controller who relieves another at an operating position assumes full responsibility for the position.

113.1A.2. Reference:

Position Responsibility: 203.3, ATSAMM (TP 704).

113.1B. Reference:

Position Responsibility: 203.1, ATSAMM (TP 704).

113.2

Relieving controllers shall: (N)

- A.
 - 1. observe operational situations and equipment;
 - 2. listen to communications;
 - 3. observe current and pending aircraft and vehicular traffic;
 - 4. verify the position relief checklist; and
 - 5. correlate information.
- B. indicate to the controller being relieved that the position has been previewed and you are ready to begin the verbal briefing; (N)
- C. after the verbal briefing, make a statement, or otherwise indicate to the controller being relieved, that position responsibility has been transferred;
- D. when splitting a combined position, perform the procedures outlined in 113.2 A., B., and C.; and (N)
- E. when combining two or more positions, ensure that a complete exchange of pertinent data is effected by the controller being relieved.

113.2 Note:

The relieving controller does not have responsibility for the position during the pre-relief monitoring process.

113.2 B. Note:

During the verbal briefing controllers are expected to ask questions as appropriate, to ensure a complete understanding.

113.2 D. Note:

If this is impractical, the supervisor or another controller on duty may assist in order to accomplish the intent of the procedures.

113.3

The controller being relieved shall:

- A. provide a verbal briefing to the relieving controller when requested;
- B. remain for monitoring purposes jointly with the relieving controller. During this time, the relieved controller is to reinforce the position relief briefing and assist the relieving controller is becoming familiarized with the position; and (N)
- C. when combining a position, perform the post-relief overlap procedures at the position where the operation was combined.

113.B. Note:

The relieved controller does not have control responsibility for the position during the post-relief procedures.

¶ 10 These same controllers are also aware of the Air Traffic Services Administrative and Management Manual (ATSAMM) setting out the Employer's policy guidelines provided to its management personnel with respect to their giving direction to controllers. It reads as follows:

203 POSITION RESPONSIBILITY

203.1

The Regional Director, Air Traffic Services shall ensure that unit guidelines are developed which provide direction for controllers or specialists to follow in the event they must vacate an operating position for relief purposes. These guidelines shall:

- A. provide direction for operating personnel to follow; and
- B. conform with AN, Series V, No. 23, so that users are not denied access to the airspace by virtue of the controller being temporarily absent.

203.2

Unit managers shall develop unit guidelines for controllers or specialists to follow in the event they must vacate their operating position for relief purposes, and no other qualified person is available to assume responsibility for the position. (N)(R)

203.2 Note 1:

It is expected that a "lone" controller or specialist will only vacate a position of necessity and will use good judgment and foresight to limit the break to a few minutes, and during a period when there is no known or anticipated traffic. The controller or specialist should

inform appropriate units (e.g.; local FSS, Control Tower, IFR unit, etc.) and broadcast an appropriate frequency(ies) that the unit will not be in operation for (X) minutes

203.2 Note 2:

As soon as a tower controller broadcasts that the unit will be unattended, the control zone reverts to Class D airspace. The control zone automatically reverts to Class D airspace. The control zone automatically reverts back to Class C airspace with the broadcast of the return of the controller.

203.2 Note 3:

The FSS will provide the same services it normally provides when the control tower is closed.

203.2 Reference:

Position responsibility: 113, ATC MANOPS (TP 703),
Position responsibility: 312, FSS MANOPS (TP 2043),
Classification of Airspace Order: ANO, Series V, No. 23.

203.3

The Regional Director, Air Traffic Services shall ensure that unit guidelines are developed which provide direction for controllers to follow at the time of transfer of position responsibility.

¶ 11 It is generally understood that the ATSAMM doctrine requires management staff to develop unit guidelines. These controllers at some point have all become aware of the Winnipeg ACC operations manager's posted guidelines respecting position responsibility on midnight shifts. It was presented to shift managers and all control staff in August 1995 and reads as follows:

MANOPS 113.1 says that a controller should not leave an assigned operating position unless:

"A. 1 You are relieved by a person qualified to accept responsibility for that position..."

This may not be possible when there is only one qualified controller working a Specialty during the midnight shift. However, there is another part to MANOPS 113.1 which permits a controller to leave an assigned operating position, if:

"B. You follow unit guidelines for temporarily vacating an operating position if you are the qualified person in the unit."

The guidelines outlined in Operations Letter OL-93-001, paragraph 104-1 title "MIDNIGHT RELIEF BREAKS", permits you to ask a controller from another Specialty to monitor your position. The intent is to pick a relatively quiet period

to take the break so that the monitoring controller will not have to modify existing separation or apply specific control procedures. In other words, the qualified controller retains responsibility for separation during the period of his/her absence unless the monitoring controller finds it necessary to initiate control action. The monitoring controller will be responsible for whatever action, control or otherwise, that is taken related to calls received from aircraft or agencies until the qualified controller returns or is recalled. The decision to ask someone to monitor your position under the provisions of the guidelines remains each controller's option.

¶ 12 Reference also was made to policy guideline 104-1 respecting midnight relief breaks which reads as follows:

Midnight shift meal and relief breaks are to be taken when operational requirements permit. During quiet periods, a controller may ask a controller from another Specialty to monitor the position for calls, however immediate recall should be possible. The "monitoring" controller should not apply control procedures within that Specialty but rather accept calls from aircraft or agencies which do not involve the application of specific control procedures. If control procedures do become necessary, then the qualified controller for that Specialty is to be recalled. Should an emergency occur, good judgement should dictate the amount of assistance provided in any given situation.

¶ 13 Ronald Greenwood has worked as an air traffic controller at the Winnipeg ACC for 22 years and during all that time has been assigned to the Winnipeg Terminal Specialty including all the various sectors associated with it. In describing his duties relative to controlling air traffic within seven miles of the terminal, he testified that he is not qualified to make control decisions in any other specialty but his own. As with the other controllers, he has a five/four (days on/off), five/four, five/four, six/three work week cycle which includes an eight hour evening/evening/day/day/midnight shift schedule. He is aware that the Winnipeg Terminal Specialty requires a total 28 controllers when fully staffed albeit the current number is lower having regard to staffing shortages. These shortages are generally covered by overtime shifts. In Greenwood's estimation he has worked an average five overtime shifts per month over the last three years whether formalized through the posted shift scheduling or brought in from home. By his recollection in his busiest month he worked as many as thirteen days overtime, some of them inevitably on a consecutive midnight shift basis. He did not dispute the Employer's calculation that between September 1, 1996 and August 3, 1997 he worked 69 overtime shifts, refusing overtime offers on less than ten occasions. His shift scheduling is not dissimilar to what he has observed with his co-workers. By Greenwood's observation, from Monday to Thursday there are two scheduled controllers working in his specialty, whereas from Thursday to Sunday, only one. By his description, during day and evening shifts he issues control directions to a wide mix of aircraft coming within the Winnipeg Terminal Specialty, whereas during midnight shift the majority of the control decisions involve commercial air cargo or courier traffic on a national and international basis, and medical evacuation (medivac) traffic servicing the vast geographic area to the north of Winnipeg. He said that he has had as many as seventeen medivac flights leaving Winnipeg in one shift, the emphasis being on getting them airborne within five minutes of first

notification, often before their pilots have yet submitted a flight plan. The controller is left to complete the data tag while the aircraft is still taxiing down the runway. He explained that incoming flights whether visual flight rated (VFR) or instrument flight rated (IFR) are required to establish contact at 35 miles under 7,000 feet, 70 miles if over 7,000 feet. In his experience, weekend air traffic is somewhat less predictable with only about 80% providing 30 minutes warning of entry into his specialty area, the usual call from small aircraft being from about 50 miles out. Occasionally a low flying VFR aircraft will wait until 35 miles, even 22 miles, which is to say within about fifteen minutes of landing. He estimates that traffic volume through his specialty on midnights averages about 80 aircraft over the entirety of the shift, compared with 40-60 flights per hour during the day and evening shifts. The possibility continually exists, he said, for outbound medivac aircraft to provide less than 10 minutes warning of requiring a control decision, ie: takeoff.

¶ 14 Greenwood described, as did the other air traffic controllers, the physical difficulties encountered in working midnights. These included the need to find some extra sleep time on the evening prior to commencing the shift, and the effort expended to become mentally adjusted given that midnight shifts are usually not consecutive but rather inserted at the end of a week long schedule. At some point in the past Transport Canada had made manuals available entitled "Shift Wise: A Shiftworkers Guide to Good Health" meant to provide information and strategies to assist employees in minimizing the "negative effects" of shift work.

¶ 15 Greenwood recounted his usual break time pattern when working one or more of the Monday to Thursday midnight shifts where there are two controllers positioned in Winnipeg Terminal Specialty. Typically, they are able to identify a quiet period when one of them will take a 30 minute meal or rest break, with the other taking his break later on. He said that obviously there are no difficulties in taking washroom breaks with two controllers working the same specialty. However, when working on his own Friday to Sunday midnights, he said, he waits for a moment when there are no estimates for incoming traffic, no proposed departures, no air traffic within his specialty. He calls the tower to confirm that there is no traffic about to commence taxiing. He leaves off dealing with the six radio frequencies which are exclusive to the Winnipeg Terminal Specialty and advises the tower that he will be back at his position within a "couple of minutes". Although believing at that point he is still taking a chance over the possibility of traffic appearing on his screen, he heads off to the washroom. He related that he has had to wait as long as four to five hours without being able to take a washroom break. According to Greenwood he would never leave his station while an aircraft was moving through his specialty area of responsibility while acknowledging that a slow period during the night might last as long as one hour without any airplanes showing on his screen. Nevertheless, he said, he has rarely leaves his station during midnight shift for longer than 5 minutes for a washroom break or to bring back a cup of coffee and/or sandwich from the lunchroom, never wanting to be out of position to monitor various radio frequencies at his station. He said that he simply does not think in terms of ever trying to fit in a "real" meal break while working alone.

¶ 16 Greenwood is aware of the Employer's policy reflected in MANOPS 113 and ATSMM 203 respecting position responsibility, and as well is familiar with the posted memoranda making reference to a monitoring controller being required to cover one's specialty during break time on single controller midnight shifts which leaves the qualified controller somehow still retaining

responsibility for aircraft separation unless the monitoring controller initiates a control action himself. Greenwood testified that these references bear no resemblance to reality in that none of his co-workers who are working midnight shifts in the operations room as single controllers on other specialties are trained or qualified to make any decisions on Winnipeg Terminal traffic. He believes that for a qualified controller to ever leave his position while working alone, even to take a bathroom break, ultimately amounts to "sticking your neck out" in the event that a control decision arises in his absence, possibly even an emergency. He sees the policy dictum as vague and ultimately dumping the responsibility onto him and his co-workers as to whether a calculated risk for choice of break time is appropriate. He said that he recalls a particularly hectic night where during a span of some five hours there was no possibility of any break with seven or eight aircraft on vectors at a time along with continuous medivac and courier traffic. He does not see how, in reality, the Employer's policy could have any applicability to the Winnipeg situation where in his view monitoring controllers on midnight shift do not exist. His co-workers, themselves working as single midnight controllers, cannot adequately hear his counter top speaker, nor observe his screen in terms of performing any useful role. They are not trained in his specialty, nor any specialty except their own as far as he knows, sufficient to make any control decisions.

¶ 17 As dictated by the nature of his specialty, Greenwood acknowledged, he regularly interacts with the tower controller who requires clearance for takeoffs and who would not be about to release an aircraft for departure without someone physically manning the Winnipeg Terminal Specialty. He remarked that although he never leaves his station for more than about a five minute washroom break, it has happened occasionally or at least "very rarely" over the years that aircraft are left sitting on the tarmac for a few minutes while the tower controller awaits his return. The tower controller admittedly has the ability to telephone the operations room to request that the Winnipeg Terminal controller return to his station, which might well entail a co-worker leaving his own station to call him back from the washroom, or lunch room, or even look elsewhere for him.

¶ 18 Jerry Brodt has worked as an air traffic controller in the Ontario Specialty at the Winnipeg ACC for the last 14 months after spending the previous two years in the Saskatchewan Specialty. His change in specialty required that he spend a week in the classroom followed by ten days on floor training. He had moved into a specialty utilizing a single controller on all seven midnight shifts per week, albeit with the last evening shift ending at 2 a.m. so as to at least provide two hours overlap coverage with two controllers. By Brodt's recollection he works on average six overtime shifts per month, pretty much evenly divided between holdover/call-in situations and scheduled overtime shifts due to ongoing staffing shortages. According to Brodt, his holdover overtime following an evening shift has occasionally lasted through to 6 a.m. termed by the Employer as an "emergency", although a four hour shift extension was said not to be unusual. By his recollection he has never taken his full four days off in his continuous five/four, five/four, five/four, six/three ongoing work week cycle. He remarked that during the months leading up to the grievance, in fact, he rarely got even two days off in a row. The extra shifts were tacked on to what was already a "double quick change" shift schedule of evening/evening/day/day/midnight, meaning less than eight hours rest time between shift changes twice in the same work week. According to Brodt, his preparation for midnight shift

work has included trying to sleep for two or three hours on the evening prior to reporting for work, although he admitted noticing increased fatigue to be associated with midnight shift work.

¶ 19 Brodt described his Saskatchewan Specialty as having a broad mix of air traffic travelling to and from 32 small airports and five larger ones within the control area. He said that by his observation as many as 20% are being handled procedurally with some never appearing on radar. His duties include issuing en route control directions east of the Winnipeg (En Route) Specialty as far as Lake Superior, including Thunder Bay Terminal which has no midnight controller on duty along with Regina, Saskatoon, St. Alberta, Kenora, Superior and Marathon. During midnight shift, with a single screen, he manages a control area ranging from 420 to 450 nautical miles in width. He is aware, he said, that pilots are "supposed" to file their flight progress strips 55 minutes prior to takeoff, which he has observed generally to not occur with medivac flights. Their first call to a controller can be literally when they commence taxiing with takeoff occurring before the flight plan has been filed and with "strips to follow". With respect to flights crossing into his space from the United States he is aware that generally they are to provide 15 minutes warning of entry which, he has observed, does not always occur. Occasionally incoming aircraft from the United States will appear at the edge of his control specialty without prior warning. In reviewing the Employer's policy doctrine under ATSAMM 203.2 note 1 relative to position responsibility he remarked that in his experience he literally has never been in a situation during the midnight shift when there was no known or anticipated traffic. He is familiar with the Employer's position responsibility doctrine providing guidance for applications of MANOPS 113.1 with respect to seeking relief by a person qualified to accept responsibility for the position and also policy statement 104-4 respecting midnight relief breaks requiring him to ask a controller from another specialty to monitor his position while he is away on break. He testified that controllers working on other specialties are not about to willingly take on the risk of making any control decisions on his behalf while he is away on any break time. Brodt testified that during midnight shift he takes no meal break and that at some point when he is able to "see a gap" in air traffic moving through his specialty he asks another controller to watch over his station, usually one of the two North Specialty controllers. He "cranks up" his audio speaker, advises controllers working in adjacent specialties that he will be away from his station for a short period, and then leaves to take a washroom break for "a minute or two" while using that opportunity also to "load up" on refreshments from the lunchroom cooler.

¶ 20 There was entered in evidence through Brodt a series of memoranda between him and management staff from 1996 and 1997 detailing his concerns and management's responses over midnight shift single controller scheduling. He cited weather difficulties ("poor rides"), air traffic complexity, fatigue, difficulties in securing co-worker monitoring, all speaking to a perceived lack of any reasonable break time on an ongoing basis. He does not see the same difficulties arising during the two hour evening/midnight shift overlap when there are two controllers working the Saskatchewan Specialty. It is only thereafter when he is left working on his own until 6 a.m. with the arrival of the morning supervisor, that the problems occur. Brodt also recounted in these memoranda a particular emergency situation occurring in November 1996 with respect to a small private aircraft quickly losing altitude in severe icing conditions occurring over Lake Superior during a midnight shift. He made enough control decisions to assist the frantic pilot over more than a hour to get him over land where he crash landed for lack

of fuel on final approach to the Thunder Bay airport without sustaining injury. He acknowledged being assisted to some degree by another controller who acted as "cheerleader" but made no control decisions himself, leaving it up to the grievor to restrict some traffic flow in the sector where the emergency was occurring. Brodt received a written commendation for what management considered to be his outstanding effort on the midnight shift in assisting the aircraft distressed due to icing. Evidently, there was no opportunity for Brodt to be relieved after the emergency concluded as there was no other controller qualified to take over his station for any period, leaving the shaken Brodt to complete his midnight shift without any break.

¶ 21 By Brodt's description his worst difficulties encountered during midnight shifts are weather related with occasional emergencies occurring at any time. He remarked that in bad weather conditions he will never leave his screen on midnight shift believing that a difficult situation can arise at any time. For example, the Lake Superior emergency situation commenced with a call from the pilot that he was losing altitude due to clear icing conditions followed almost immediately by "help, help, help, I'm going down". The Employer's response to Brodt's repeatedly announced concern over his perceived inability to ever take any meaningful break time during the midnight shifts has gone unresolved. At one point he was advised through his shift manager that while his assessment of heavy traffic situations having occurred during midnight shift was confirmed, nevertheless the traffic flow through his specialty came within existing guidelines laid down by headquarters for a single controller midnight shift. His manager had suggested the possibility of holding over evening shift in some circumstances, possibly realigning resources in future. Brodt also complained that he had been forced to work almost an entire extended shift after a scheduled midnight single controller phoned in sick. He received a reply from his shift manager indicating that the situation was considered in the nature of an emergency although noting his concerns regarding fatigue for having had to work what amounted to a twelve hour shift.

¶ 22 Brodt acknowledged that typically jet aircraft on a transcontinental flight path were able to cross his specialty in about forty minutes, whereas a small single engine plane might take as long as three hours. He agreed that there is communication with the pilot at time of entry, the plane having been "handed off" to him from the previous controller, and that if it thereafter followed the filed flight plan without incident or difficulty and without need of any information or direction, he would eventually simply hand off the aircraft to the next controller at ten miles without any further communication with the pilot. However, he said, route and altitude changes are common enough while travelling through his specialty as is the appearance of medivac flights looking for immediate clearance. He agreed that when having only nine or ten aircraft moving through the "vast area" of his specialty at any one time, it is an easy enough situation for him to manage while at his station, leaving him enough time at least to take a washroom break, he thinks, but little else. He said that he supposes he could ask someone to monitor his position while taking a break, but does not expect that the other midnight single controllers in the operations room, all unqualified in his specialty, would actually sit at his screen. They would all be concerned with the continuing control responsibilities ongoing in their own specialties, as he would be. He does not perceive there to be any obligation resting with them to come over to his screen simply because he requests it in order to take a break. He related his observation that no controller wants to take responsibility for anything outside the responsibility connected to his own specialty and qualification.

¶ 23 The Employer's survey materials covering the period August 1-31, 1997 indicate that in Ontario Specialty, covered by one controller Monday to Sunday midnight, the air traffic flow varied from 30 to 85 aircraft passing through the specialty over the entirety of the seven hour shift with an overall average of approximately 55 per shift or 7.8 aircraft per hour. During the entire 217 hours surveyed over the month of midnight shifts there were 22 of those hours where three or fewer aircraft were recorded as flying within the Ontario Specialty. Brodt remarked that even though the Employer's survey materials indicate that there might well be as few as one or two aircraft per hour travelling through a specialty during the small hours of the morning, signalling a good time to take a break, nevertheless a controller's ongoing monitoring, listening to the frequencies, remains a big part of the job too. He said that there is never a time when there is no anticipated air traffic.

¶ 24 Glen Horoshok has worked as an IFR qualified air traffic controller in Winnipeg since 1979 and during the time-frame of the grievance was assigned to the Winnipeg En Route Specialty, having past experience working on both the North and Ontario Specialities as well as a data systems coordinator. He indicated that there was a time when his previous qualification in other specialties would have been helpful in making control decisions elsewhere but, he said, the ensuing years have brought increased traffic and the necessity for more knowledge specific to each specialty. He said that his current knowledge with respect to other specialties within the Winnipeg ACC is limited to recognizing when a control decision might have to be made, not the same as being qualified to make it.

¶ 25 Horoshok described an incident occurring in April 1994 which gave rise to an occurrence report and a follow up investigation. At the time he was working as a single controller, midnight shift, on the non-radar North Specialty when at about 5:30 a.m., after almost six hours on the job without a break, he was in need of a washroom break. He had already cleared up his board by removing the flight progress strips for aircraft which had departed his area. Knowing that he was only going to be away for a minute or two, Horoshok saw no difficulties arising. However, in his very brief absence, the monitoring co-worker Pascoe had responded affirmatively to a second aircraft's routine request for a route altitude change. With the other aircraft's flight progress strip having been removed, and seeing no conflict, Pascoe had matter-of-factly permitted the requested change without realizing there would be no required ten minute separation in place, albeit at that point their altitudes may not have been exactly the same. Upon Horoshok's return from the washroom, he observed a "look of horror" on his co-worker's face and on calling the aircraft learned that they had crossed each other's route path with about two minutes separation. His clearance of expired progress strips had inadvertently included the active strip of an aircraft still proceeding through his sector. The follow up investigation concluded that the improper issuance of the climb clearance was as a result of a control decision taken by the co-worker who was not certified in North Specialty with a contributing factor being the premature removal of the flight progress strip by Horoshok, which is to say human error. Horoshok immediately reported the situation to his supervisor. Neither he nor the other controller Pascoe were disciplined over the loss of separation. He testified that had he not gone off to the washroom the incident would not have occurred inasmuch as he would have taken the backup precaution of testing the altitude change request in his computer and would have observed the potential conflict developing. With respect to whether he could have been recalled from the washroom by his co-worker to make the control decision being requested,

he said that he does not believe that the public address system works in the washroom area. He was attempting to get away during what he described as the only slow period during the night. He agreed with a previous controller's testimony that it is an entirely different situation when there are two controllers working on a specialty during midnight shifts in that they are both able to take periodic relief breaks to get some exercise outside the operations room, in addition to a half hour meal break.

¶ 26 Horoshok also testified that at times when he has been asked to monitor a co-worker's specialty to cover a washroom break he has had situations develop with aircraft which have left him feeling uncomfortable. He recalled one incident in particular occurring in 1994 where the Ontario Specialty controller had gone off to the washroom when there were only two aircraft on his screen. During the 15 minutes the responsible controller was away from his screen one of the aircraft required deviation from his flight plan due to a building thunderstorm and the other's pilot advised that he it not going to be able to make Winnipeg, requiring arrangements to be made for a landing in the Lakehead. He testified that at the time he felt uncomfortable providing directions to aircraft positioned in another controller's specialty wherein he was not qualified to exercise any control function. According to Horoshok, he now only rarely complies with co-worker requests to monitor a screen in another specialty and then only literally when it is a matter of the other person being away from his position for the briefest of time.

¶ 27 Horoshok acknowledged observing some co-workers regularly bringing food and beverages to their stations during midnight shifts and during other shifts too, even on rare occasions bringing magazines or books to their positions.

¶ 28 Randal Hepner has been an air traffic controller at the Winnipeg ACC since 1991 and during all that time has worked in the Saskatchewan Specialty. Over the years he has taken many single controller midnight shifts. According to Hepner, he usually arrives at the Winnipeg ACC shortly after 11 p.m., although not required to be at his position until 11:45 p.m. He places some fruit and a sandwich in the lunchroom cooler taking a soft drink with him into the operations room. He has been made aware of the booklet handed out to controllers by the staff nurse "Shift Wise-A Shift Worker's Guide to Good Health", although he has never specifically resolved to follow any of the suggestions set out therein respecting mental or physical preparation for night shift work. He indicated that he has never had much of a problem falling asleep between shifts. He thinks he has always worked a "quick change" rotation while at the Winnipeg ACC without giving much thought to the scheduling logic involved therein.

¶ 29 Hepner related an incident occurring in April 1995 at about 2:30 a.m. during what he considered to be a slow period of the shift. He had just handed off one aircraft heading north out of his control area and another heading west into the Winnipeg En Route Specialty. He was aware of another aircraft which was still just an "estimate" approaching his Saskatchewan Specialty heading east, bound for Toronto. This second aircraft, having encountered turbulence, had already been directed to take a 35,000 feet flight path known as a "wrong way" altitude inasmuch as it was usually reserved for westbound traffic. Hepner testified that he took the hand off from the incoming eastbound aircraft, introduced himself to the pilot and advised that his station would be unmanned for the next few minutes due to "controller relief". His intention was to take a washroom break at that point, something which he felt confident enough doing given

that there was only the one aircraft still on his screen. He had no other active flight progress strips and none pending. As he was getting up out of his chair to leave his position he noticed a radar "target" approaching his specialty from North Dakota proceeding in a northwesterly direction and already within about two minutes of entering his controlled air space. Hepner sat back down to calculate a projected track line, quickly determining that these two aircraft were on a course which would intercept in nine minutes. He immediately telephoned Salt Lake City for information respecting the incoming aircraft while at the same time his printer started issuing a flight progress strip for its flight plan which was now in the system. It was a large commercial aircraft on a courier run from Memphis to Alaska at the same 35,000 feet altitude as the east bound Toronto aircraft. Having made all the necessary checks to confirm the situation Hepner issued the appropriate control direction to the incoming courier aircraft which was able to clear the other's path at approximately 11 miles distance. According to Hepner, in preparing to take his brief washroom break he had probably advised one of the other controllers working at the closest console across the room that he was about to take a brief washroom break. He described the few minutes when he thought it safe enough to leave his station as "extremely quiet". Nevertheless, in reflecting back he thinks that tragedy may have been averted only by the fact of his taking a last look at his screen before leaving for break. The aircrafts had been bearing down on each other at a combined speed of some 960 MPH and might never have been able to see each other given the flight conditions that night. At the time of the incident Hepner was working with the knowledge that incoming estimates from aircraft crossing into Winnipeg ACC control space from the United States were required well in advance to negate any possibility of a last minute surprise. By his understanding an aircraft flying into Canadian space from the United States is "supposed to" provide its flight plan an hour in advance, with the United States controller providing his estimate of entry at least 15 minutes prior to entry. He remarked that the failure of the U.S. controller to initiate the proper "hand off" might not even be known at that point to the pilot of the incoming aircraft who, he thinks would probably only start wondering about lack of communication at about the time of entry into Canadian air space when he would find himself hunting for a new frequency on which to call local air traffic control. Simply put, in Hepner's experience, the guideline is not always followed, with aircraft occasionally entering from U.S. controlled air space without having provided any estimate or "hand off" (done by computer in the United States), or the pilot having yet identified himself. Just such a situation apparently occurred on the night of the incident.

¶ 30 As with his co-workers who testified, Hepner has also had difficulties arising where he has been asked to monitor another screen while a co-worker took a washroom break. He referred specifically to one incident where an aircraft was confronted by turbulence requiring an altitude change. He found himself spending time considering control directions and attempting to determine weather forecasts in this other specialty while his own screen remain unattended. He also remarked, as with the other controllers, medivac flights will often seek clearance for takeoff without yet having filed their flight plans. His experience with working numerous overtime shifts has been the same as with the other controllers, often including extra midnight shifts and occasionally two shifts within the same 24 hour period, which he understands is all due to the short staff situation in his specialty.

¶ 31 Hepner testified that when required by internal necessity to take a brief washroom break he at least goes through the motion of asking someone to monitor his position during his

absence, remarking that "99%" of the time he receives a negative response causing him by necessity to abandon his position for at least a few minutes. Interestingly, he would rather have it that way knowing that he was on his own and had to get back to his screen in the quickest time possible as opposed to having a co-worker appearing to monitor his position while knowing he was not qualified to be sitting there. He remarked that earlier in his career when he had left his previous specialty and decided to cross-qualify in Saskatchewan Specialty he had taken a full six months of further training. He said that from a controller's perspective there is not much sense in sitting down at another controller's station when not qualified to assume any control function. Even a single aircraft flying within a control area can run into urgent problems requiring an immediate control decision. As with his co-workers who testified, Hepner has had no difficulty organizing his meal and relief breaks when working alongside at least one other controller at his position during midnight shifts.

¶ 32 The Association's local president, grievor David Doerksen, complained to management that full-time monitoring was being compromised by single controller midnight scheduling, which either left them running for washroom breaks or taking none at all, inasmuch as there was always at least some anticipated air traffic. Acting Regional Director Glen Clark answered occurrence reports (OCRs) with the assurance that management would continue to monitor the traffic levels closely and implement changes as required. However, where only a single midnight controller was required, Clark relied on the unit policy that breaks were to be taken when operational requirements permitted. He cited a controller's ability to have a co-worker from another specialty monitor his position, only to be recalled if a control decision was required. He presented in his replies what has become management's ongoing position:

"The normal midnight shift traffic indicates that there are periods of time to allow for breaks in accordance with the unit policy".

¶ 33 In further response to the OCRs submitted, the acting General Manager of Winnipeg ACC, Philip Gies, reported that the unit policy 104:

"...conforms to the spirit and intent of ATSAMM 203."

¶ 34 By Doerksen's observation, the controllers saw themselves as having moral and legal obligations preventing them from simply abandoning their positions, even for short periods of time, knowing from experience that aircraft can "pop up" at any time, that there is always at least anticipated traffic, and that any number of events can occur requiring immediate control directions. Mr. Doerksen also wonders aloud, "Who's filling in for the guy filling in for me?".

¶ 35 Doerksen has observed that the overlapping shift schedule, leaving both an evening controller and the single midnight shift controller working together for the first two hours, has been applied inconsistently, and was removed from the Saskatchewan Specialty after a few months. He said that the point has been driven home with him that management at the Winnipeg ACC will continue to staff midnight shifts with one controller per specialty unless traffic flow warrants two persons working at the same time, which is to say, two controllers being present and available to provide control directions as required by the amount of air traffic or performing required back-up duties in connection therewith. By his observation, management is not about to

organize its scheduling for ease of break time or even to make it reasonably available during midnight shift.

¶ 36 Doerksen testified that through fatigue, by about 5:00 a.m. of a midnight shift, he has experienced inattentiveness at his position, needing something at that point to serve as a "wake up" for his senses. He would expect that the fatigue factor could prove especially difficult in those occasional situations where due to an unexpected absence, an employee is required to work an entire midnight shift on a hold-over overtime basis, determined to be a "staffing emergency". He referred to a situation in July, 1997 involving controller Mike Nelson from Ontario Specialty who received just such instructions to cover for an ill co-worker which required that he work 16 hours straight through to completion of the midnight shift at 7:00 a.m. He also agreed that by 4:30 a.m., Nelson being unable to carry on any further, his supervisor restricted traffic flow in terms of increasing the spacing between aircraft, or rerouting some flights through United States airspace in order to provide him at least an hour's break time prior to completion of his second shift.

¶ 37 Doerksen indicated his awareness of 1997 operational staff reports generated by the Corporation indicating the "availability factor" of controllers in Winnipeg to be the lowest in its national system of ACCs at 78% of required complement, which in the context of scheduling requirements translates into a short-staffing situation of five or six controllers and leads to management requiring overtime as a means of dealing with any employee absenteeism situations which arise. He calculates his own overtime as averaging six extra shifts per month, some of them being extended shifts, and others scheduled a week or more ahead. He has, admittedly, worked numerous overtime shifts on a voluntary basis, and even switched shifts on occasion to voluntarily place himself in a "quick change" situation.

¶ 38 As with his co-workers who testified, Doerksen has experienced no difficulties taking his break time on shifts where he is not working as a single controller. On those midnight shifts in his Saskatchewan Specialty where there are two controllers scheduled, he says that he views the break time as a way of maintaining his concentration at his position for the rest of the shift. He takes no break time while working alone on the night shift, other than the briefest of time necessary for a washroom break, or as he described it, a matter of literally jogging down the hallway to the washroom and then back again, with the round trip generally completed in less than two minutes. According to Doerksen, on leaving for a washroom break he will turn up the volume of the speaker at his position so that it might be heard down the line at the adjacent terminal of Winnipeg Specialty. Inasmuch as his regular midnight shift scheduling comes eight hours after his last worked day shift, normally he finds that he is able to sleep for only two hours prior to going back to work, which on occasion leaves him fighting to stay awake during the slow time of the shift between 4:00 and 6:00 a.m. Doerksen considers it a matter of striving to maintain his attentiveness through to the end of the shift, a vigilance issue, which he believes is hindered by not being able to get away from his position for any break time of a duration available on other shifts.

¶ 39 Doerksen readily agreed that during the slow hours of the midnight shift he might well have only five airplanes per hour moving across his control area, or even less. He might have to communicate with an aircraft during entry and then again only at the time of exit from his area,

possibly issuing no control decisions at all for most of the aircraft moving across his screen during the midnight shift hours. He also acknowledged having the ability to hand over an aircraft early to the next control specialty, subject to transmission coverage limitations. He agreed that normally a pilot request for an altitude change is not an urgent matter, although he understands that an aircraft experiencing significant turbulence would normally and justifiably seek an immediate control decision on altitude change. While never having experienced a declared emergency situation on midnight shift, but has provided immediate control decisions many times to aircraft unexpectedly caught in turbulence. He remarked that from his perspective, the problem with emergencies in real life is the "unpredictability of it all" and that in the meantime, he and his co-workers have to remember that they are not just playing a video game. He believes that any commercial pilot expects there to be full time monitoring by a qualified person in the control specialty while moving through its airspace. He does not consider it to be appropriate for his position to be without a qualified controller while there are any aircraft within his area, on frequency, or any aircraft anticipated to be entering. His discomfort was obvious over what he fears to be the possibility of placing his professional standing in jeopardy by turning over his position, even briefly, to a co-worker not qualified to be working his screen or making control decisions in his specialty.

¶ 40 The placed in evidence the PACE level description materials, meant to measure the degree of busyness in air traffic which can vary from level 1 (minimal to nil control decisions) to level 7 (heavy demand through sustained or increased traffic flow). The Employer uses its traffic flow count conducted under this system to assist in determining staffing of the individual control specialties on midnights and on other shifts as well as showing availability of break time on single controller shifts. The PACE description is reproduced as follows:

Level

EFFICIENCY

1. Watch keeping only, minimal to nil control decisions. Volume typically very light (ie. 5 per hour), well spaced in time or geography. No complaints.
2. Occasional attention required, infrequent requirement for control decisions. Volume very light, occasional tactical action (vectors/restrictions) required for separation. No complexity.
3. Mostly inactive, however, frequent brief periods required for control decisions. Minimal to nil preplanning requirement. Volume light (ie. 8 per hour) some tactical action required for separation. Occasional complexity may be apparent.

CAPACITY

4. 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.
5. Operation of sector/position requires continuous attention. Traffic flow is orderly and expeditious (excluding external factors). Preplanning is

required and time is available to do so. Complexity is normal (ie. not causing undue concern). Coordination is timely and complete. Unusual situations such as an airfile would be accommodated but probably not immediately. Time available for full flight information services.

6. Traffic demands continuous and complete attention. Preplanning is an ongoing requirement. Full flight information services may not be provided due to workload, communications, congestion, etc. Airfile would probably not be accommodated during this period. Signs of periodic anxiety may be apparent. Communications and coordination may occasionally be untimely.

SAFETY

7. The frequency of control decisions, coordination and communication is demanding to the point of straining the position/sector beyond its capability and if this heavy demand is sustained or increased, a complex breakdown would occur. Flight information routinely not provided. Flow may be becoming probably not as complete or timely as would be normal. Flow control measure may be implemented. Extraordinary requests/situations would likely require assistance (i.e. supervisor). A sustained period of this level of activity would be approximately 20 - 30 minutes.

Note: Volume figures are for internal descriptive purposes only. Volume should not be used for rating purposes, rather the impact of the traffic equated to workload is to be assessed.

¶ 41 Doerksen produced in his testimony a copy of a co-worker's letter to ACC Operations Manager Gary Hollier at Winnipeg ACC as endorsed by 24 controllers all sharing his safety concerns over the issue of midnight single controllers. This letter, which captures the essence of the employees' concern over what they take to be management's haphazard approach for relief breaks on midnight shift is reproduced in its entirety.

On November 1, 1996 I was advised by my supervisor that the Saskatchewan specialty would be returning to single man midnights effective immediately. I must once again express my deep concern for safety as it appears this decision was based solely on the number of aircraft travelling through our sectors with no consideration given for the SAFETY of aircraft and its occupants travelling through our sectors. In a recent publication, that is attached to my letter, it states that "the success of NAV CANADA will be judged upon the safety of the system and the quality of service we provide to our customers". As I stated earlier I feel that this decision impacts greatly on the safety of the service we provide and I therefore need clarification on a couple of issues.

The first item is MIDNIGHT RELIEF BREAKS.

It states in the attached Ops Letter that "meal and relief breaks are to be taken when operational requirements permit. During quiet periods" Could you please define quiet periods? Is it 1 aircraft in our sectors? 2 aircraft, 3 aircraft?

If another controller, that is not qualified in our specialty, is not available to "monitor" the position what are we to do, particularly if Mother Nature makes an immediate call? A couple of months ago this very situation arose when I was working alone. There were several aircraft on frequency and moderate to severe turbulences was reported from FL250 to FL410. Every aircraft had asked for immediate altitude changes with one aircraft changing altitudes 7 times trying to get out of the turbulence. I have personally been at the controls of aircraft that have encountered this kind of turbulence. I can assure you that your main concern is the safety of the aircraft and its occupants and you request an immediate climb or descent to another altitude. Therefore, I could not in good conscience leave my position while I took a relief break. If I was to abandon the position for a relief break and an incident or accident should occur while I was not at my position, who is legally responsible should litigation occur?

- 1) Me, the only qualified controller for that position?
- 2) The "monitoring" controller who is not qualified, but did try to use his "good judgement when an emergency occurred"?
- 3) You, as the person who implements this policy?
- 4) NAV CANADA?

Another item I would like to bring to your attention is the effects of fatigue on the quality of service we provide. At the present time the only mechanism in place to deal with fatigue is having a second controller to relieve you. Since this has now been taken away I am not quite sure how we are to deal with this serious safety issue. I have attached a copy of an article that was in The Globe and Mail on August 14, 1996 which I believe is part of a comprehensive study done by Rhodes & Associates Inc. that was done specifically on air traffic controllers to study the effects of shift work and fatigue. As well, I have attached a few copies of fatigue related accidents that will hopefully make you aware that fatigue is a very serious problem, not only for pilots but for controllers as well. The difference is that Transport Canada and the Transportation Safety Board has recognized the problem and safety concerns associated with fatigue and has addressed this by making changes in pilot duty times and more stringent 2 crew operations. I don't understand how this safety issue can be ignored with air traffic controllers by forcing them to sit at their work station alone all right. In the March 1995 issue of REFLEXIONS magazine published by the Transportation Safety Board of Canada, it stated that "the CASB also stated that inattention or lack of vigilance appears to be contributory in approximately 50 per cent of all ATS occurrences and that these types of errors often happen during periods of LIGHT, NON-COMPLEX traffic. Complacency and boredom were considered to contribute to the frequency of attention-related occurrences." With the data available to support my safety concerns, I would like to offer a couple of solutions to rectify this serious safety issue.

- 1) Have 2 qualified controllers working on midnight shift to allow for relief breaks and to deal with the fatigue issue.

- 2) If this is not possible, it is my understanding that the Winnipeg ACC staffing allows for shift manager coverage on midnight shift. Have shift managers on midnight shift to cover relief breaks and allow controllers to take a break when feeling fatigued.
- 3) If neither of the above is an option, please explain the reason why?

My next midnight shift is on Monday, November 11, and I would appreciate acknowledgment of this letter and an answer to my questions in writing before then.

In closing, I cannot over emphasize my concern for safety and feel it is only a matter of time until a serious incident occurs because of the staffing situation on the midnight shift and would therefore like a copy of this letter placed on my personnel file.

¶ 42 In his written reply, Mr. Hollier answered that a "quiet period" during the midnight shift was a "subjective call" on the part of the individual being relieved and also the person providing the relief. In the event that the other controller was not in a position to provide assistance, "traffic permitting", then the Employer expected the controller responsible for the position to complete his shift without a break. Mr. Hollier stated that the Employer's policy was consistent with the collective agreement which allowed meal and relief breaks "where operational requirements permit..." and responded also that in recent months the Employer had increased staff as a matter of reacting to anticipated high activity traffic beyond the capability of one individual while reducing the staff where that requirement did not exist. It was a matter of responding to the criteria established during the 1995 RAP process. He pointed out that until any direction was provided, management would proceed in accordance with established practice, and stating:

"To this end, we expect you to continue to perform your duties in a similar manner as in the past when working a lone controller position during the midnight shift. We would also hope that you would have the cooperation of your peer controllers in assisting to create short break periods for yourself."

¶ 43 In light of the position taken by Hollier as Acting Operations Manager, Kissock responded by again writing to him and taking issue with the suggestion that where unable to secure the cooperation of a co-worker to monitor his position, he was expected to work his entire shift without taking any break. He asked for guidance on what he should do when he had to take a washroom break without the security of a co-worker in place to monitor his position. He wanted Hollier to provide some insight into legal responsibility in such a situation and also answer why the Employer had failed to address the fatigue issue which he had raised. Kissock also directed correspondence to the Employer's Chief Executive Officer, Ken Copeland, looking for some direction. Copeland provided written reply, acknowledging the sensitivity of the midnight shift staffing issues for all concerned. His return correspondence to Kissock reads as follows:

I have read your letter and the attached articles and correspondence. Other controllers have expressed similar concern through the Operational Condition

Report (OCR) process or the grievance process. We all share a common concern for safety, and as indicated in NAV CANADA's safety charter, it is a part of everyone's job.

The issue of staffing during the midnight shift is a very sensitive one for all concerned. A complete review of operational staffing requirements at all major facilities was completed this past year. In the case of Winnipeg Area Control Centre, and more, specifically the Saskatchewan Specialty, at management's request a special review of the midnight staffing requirements was conducted. As you are aware, it was recommended that only one controller was required in the Saskatchewan Specialty. This assessment was based on operational requirements and the ability of control personnel to absent themselves for a brief period of time for a relief break. This certainly requires some planning based on current and anticipated traffic situations but could not be accomplished without compromising the safety of the service provided. Notwithstanding the staffing review, regional and unit management have the responsibility to staff positions to ensure the provision of a safe and efficient service. I understand that this was done in the case of the Saskatchewan Specialty when management increased the staff during the midnight shift from June to November, 1996. The reduction in staff referred to in your letter was introduced following another review of operational requirements conducted by unit management.

From an operational perspective, a review of Operating Irregularity reports over the past 4 years indicates that very few (less than 1%) occur during the midnight shift.

We have become increasingly aware of the research literature indicating that shift work, especially midnight shifts, may interrupt circadian rhythms and may potentially impact a person's health and their ability to carry out their work in a safe and efficient manner. Other factors such as "quick changes" and 12 hour shifts may not be the most conducive to alertness and the prevention of sleep debt. We need further analysis to determine their impact and to develop an integrated approach based on all relevant factors. NAV CANADA recognizes the need to address these human factors issues.

We are continuing with the three phased project initiated by Transport Canada into the "Effects of Shift work and Overtime on Air traffic Controllers". This is being done in concur with the Canadian Air Traffic Control Association and we are ready to proceed with Phase Three.

In closing I would like to reiterate that safety applies to everything we do without exception, and that we will meet or exceed our safety targets and our customers' expectations.

¶ 44 The Association's vice president of labour relations, Fazal Bhimji, is now based in its national office in Ottawa. He testified at some length respecting the Report On A Special Investigation Into Air Traffic Control Services in Canada (report #90-SP001), prepared by the Canadian Aviation Safety Board in 1990 following its broad view investigation of the air traffic services system within Canada. Therein, as the parties are well aware, some recommendations

were made to assist in correcting some identified deficiencies, even suggesting some urgent ministerial attention be given to ensure the safe separation of aircraft.

¶ 45 The report identified staff shortages as a significant ongoing problem requiring redress, stating in the executive summary:

"The most serious shortcoming in the provision of air traffic services today concerns the availability of sufficient qualified air traffic controllers to meet the increasing operational demand..."

¶ 46 It is a shortcoming which the report acknowledged in 1990 could well take several years to correct and realistically invited innovative measures. Bhimji pointed out in his testimony that the report identified fatigue brought about by shiftwork as a difficulty encountered by controllers, leading to concerns over reduced attention span and inability to concentrate. It recommended that maximum hours be established for working at a particular control position without a break, together with setting a standard for minimum number of rest hours between shifts. The report noted inattention or "lack of vigilance" as a significant contributor in air traffic control errors. Reference was made to the significance of boredom which can occur during periods of relatively low workload/complexity during the shift. The report also acknowledged the disruptive nature of changing shift patterns to a person's natural body cycle (circadian rhythm) and recommended that research be conducted into the effects of regularly working overtime shifts. Transport Canada responded that it would cooperate in initiating such research determining where current practices were suitable and did not present any safety concerns. However, with respect to imposing guidelines on the maximum number of hours to be worked in a position without a relief break, it responded in the negative, in concluding:

"Clause 13.01(b) of the TC/CATCA Agreement specifies that:

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

These meal and relief breaks are included in a 33 hours work week averaged over 199 days. A recent review of all major units indicated that operational personnel were receiving two hours on average of paid breaks during a shift. One exception was noted and has since been corrected."

¶ 47 Mr. Bhimji remarked that Transport Canada, in responding as it did to the break time issue, must be referring to either evening or day shift where controllers are generally able to take two or three breaks during their shift depending on air traffic volume, inasmuch as qualified relief is readily available by virtue of each position being staffed by more than one controller. He does not see how its 1990 response could be taken to have considered the single controller midnights situation ongoing at the Winnipeg ACC.

¶ 48 There followed, in November 1994, the lengthy impact report commissioned by Transport Canada: "A Study of the Impact of Shiftwork and Overtime on Air Traffic Controllers - Phase I". The various human factors/ergonomics specialists and systems design engineers who

prepared the report were careful to declare at outset that the purpose of the Phase I study was solely to "define methodology and analysis techniques for generating a relevant base of information and implement the preliminary methodology for the conduct of future studies involving simulation, laboratory, and field study, all related to the effects of shiftwork and overtime on air traffic controllers, including physical, psychological and social impact."

¶ 49 Bhimji, as a member of the steering committee providing input to the experts, testified that at the time he presented the Association's concern that whatever methodology was developed in the multi-faceted study meant to include performance issues, individual controllers continued to arrange their own break time on single controller midnight shifts despite being at least tentative or even outright unwilling to leave their positions. He believes that they felt a moral and legal obligation not to let controllers, unqualified in their specialties to make control decisions, cover for them while on break. Bhimji, in his testimony, presented the Association's view that its members had insufficient protection under MANOPS 113.1 which contemplated there being unit guidelines for temporarily vacating an operating position while being the only qualified person in the unit, inasmuch as the 113.1A.1 note advised that the person relieving a co-worker "assumes full responsibility for the position". He presented further Association concerns with respect to possible civil or criminal liability, were an improperly controlled emergency to occur while the only qualified controller at the position was taking a washroom break. With respect to the ATSAMM 203 position responsibility guidelines, he reiterated the Association's concern that the directions contemplated thereunder in 203.2 Note 1 limited the breaks of single controllers on midnight shifts to situations "of necessity" being limited "to a few minutes" in any event, and then only during periods "when there is no known or anticipated traffic". They were viewed by the Association to effectively preclude any realistic break time contemplated by the collective agreement. Even one aircraft on frequency or passing through an en route speciality could present a problem. Bhimji sees the situation as being worsened by the fact of the Employer combining sectors onto one screen during midnight shift. Whatever the views held locally or the individual approaches utilized by single controllers requiring a break, according to Bhimji, the Association's national office takes the view that controllers may well be placing themselves in jeopardy while away from their positions on break time where they have not been relieved by a controller qualified in their specialty.

¶ 50 During the course of his testimony, Bhimji reviewed the 138 page impact study document, Phase I, pointing to numbers of paragraphs where the learned experts crafted and then remarked upon the likely methodology required to assess performance related issues, including adequacy of break time. It included surveying Ontario ACC controllers working in Toronto who complained that because of a "skeleton staff" working on midnight shifts with nobody available to relieve them, any relief break longer than five minutes was considered impossible. Roughly half of the controllers responding to the survey indicated that they never took breaks while working midnight shifts. At the same time the study accepted the significance of exercise as a coping strategy, which is to say suggesting a short walk during the course of a midnight shift to allow one to regain some level of alertness, being the controllers most frequently listed method for alleviating drowsiness at work. The impact study also revealed that many controllers had indicated a belief that their attention was poor during times of low activity. They expressed feelings of being worn down by their inability to get away from their positions during the shift, basically a wide-spread complaint of lack of breaks on midnight shifts. As expected, the

controllers surveyed claimed to be most sleepy during midnight shifts. Performance assessment testing administered to the surveyed controllers and meant to address the impact of fatigue on their abilities, showed significant reductions in their performance during midnight shifts. The Phase I study presented a potential research hypothesis that brief light exercise when tired served to improve or maintain performance levels, in addition to enhancing subsequent sleep at home. It contemplated a second phase of research calling for the expansion and integration of a number of components speaking to measuring and improving performance in the air traffic control environment.

¶ 51 The next report, entitled: "Impact on shiftwork and overtime on Air Traffic Controllers-Phase II", followed in October 1996, speaking to the effect of working specific shift cycles on air traffic controllers' sleep physiology, performance, health and off work activities. Controllers working at Toronto, Gander, and Moncton were measured for cognitive performance during their shift scheduling cycle, both in quality and quantity of sleep examined, sleepiness assessed, daily activities throughout shift cycle recorded, brain wave characteristics measured, along with melatonin fluctuations for determination of adaption occurring in their circadian rhythms. In short, they were studied within the context of their every day working and living environment. This second impact report related the results of performance tests conducted during midnight shifts showing some detriment in performance as the shift progressed, the point being that it was difficult for controllers to maintain alertness and mental clarity when their bodies desired sleep. It recommended a 30 minute break every two hours when working midnights as a way of maintaining alertness while handling sustained work and performing demanding cognitive tasks. It also recommended that napping strategies be investigated (20 to 40 minutes in length) as a way to improve performance and induce fewer micro-naps (nodding off) during the shift.

¶ 52 A confidential safety report presented by the Association to the internal investigator, Securitas, gave rise to its report to Transport Canada in 1997, advising that it had received numerous complaints over the previous three months alleging extended shifts consisting of 16 hours without relief breaks for single controllers. It pointed to the 1996-Phase II study, and referred to the information contained therein showing degradation in the ability to maintain alertness and in performing demanding cognitive tasks during lengthened shifts, with the accompanying recommendation set out in the study for a 30 minute break every two hours when working midnights "or some other schedule determined from testing in an operational environment". Securitas noted the possibility of creating a "potential safety hazard, and presented the information to Transport Canada "for whatever action you may deem appropriate" No action was taken by Transport Canada to alleviate the situation and at this point the Association would be prepared to support continuation of the research project.

¶ 53 Professor Kish Hahn, a systems design engineer at University of Waterloo, was called by the Association to give expert opinion evidence in the area of chrono-biological studies and more particularly with respect to the human effects of shiftwork. His area of expertise includes having studied cognitive performance on late night shifts as might be influenced by one's circadian rhythm, which is to say the body's natural daily cycle reflected in its temperature, heart rate and arousal levels. Simply put, Hahn is of the view from years of research that one is naturally prone to suffering performance decrements during midnights shifts, especially on those shifts following a double-quick change as part of the cycle. It is a matter of having one's circadian rhythms

disrupted by cycling through rotating shifts with likely consequential affects felt on one's alertness, level of efficiency and overall performance. He testified that in such circumstances one seeks release in a number of ways reflected in decreased vigilance in handling tasks, even to the point of experiencing unintended micro sleeps (nodding off). Improvement strategies include developing methods for keeping employees working at an optimum level where they are neither bored nor over worked during the shift. He continues to agree with past recommendations made to the air traffic control industry that there should be restrictions made and enforced with respect to minimum number of rest hours between shifts and maximum number of hours worked at a particular control position without a relief break, while at the same time initiating a program of research into the adverse effects of circadian dysrhythmia and sleep deficits on the controller's job performance levels.

¶ 54 Professor Hahn was a willing expert contributor to the Impact Study, Phase I, prepared for Transport Canada in 1994. In seeking to determine the significance of fatigue on a controller's ability, he has noted the difficulties encountered in developing any study methodology for controllers on midnight shifts. He found that they were unable to leave their work stations for many tests at any time during the beginning, middle or end of the shift due to job responsibilities. He recognized the need for further work to be carried out in the area of dedicated research trials to get around the problem that a single controller's midnight shift duties impeded their availability to be studied. They did not thereafter participate in the actual testing carried out in Phase II by other contributors as conducted in Gander and Moncton, although he has reviewed the materials resulting from the protocol developed and believes that every effort was made to create a workable format. It included investigating various shift change cycles, including the "difficult" double-quick change scenario represented by an evening/evening/day/day/midnight shift cycle. He stands by the conclusions emerging from the Impact Study, Phase II, which includes a study of EEG patterns showing that micro sleeps and periods of inattention may be of concern on midnight shift, a matter of controllers appearing to have difficulty remaining alert while working hard to overcome the urge to sleep. In his opinion it would be "most inadvisable" to have single midnight controllers working the entirety of their shifts without any break time, however inactive they might be for periods of time. He cited the following remarks contained in the discussion portion of the Impact Study, Phase II, dealing with nightshift effects and performance decrements due to disruption of circadian rhythm:

"Care should be taken when staffing a control centre during nighttime operations. Although traffic levels may be considered low, the working environment, as in the midnight shifts, will affect the ability of controllers to perform their tasks. Without breaks, controllers will be further affected, since sedentary inactivity during the time when the body wants to sleep will contribute to a greater urge to nod off. A nap, or taking a walk or getting away from the work station, particularly in bright light conditions, will help to suppress this drive to sleep. By not allowing such a break, controllers are put at risk since their cognitive abilities are reduced by a building fatigue and a lowered circadian rhythm. Their ability to offset these problems, because they must remain at their work station may lead to errors in judgment and other potential errors related to memory lapses or inattentiveness."

¶ 55 In Hahn's opinion, it is not enough for one to point to a low level of activity for dismissing the need for organized break time. Boredom on the midnight shift can be viewed as representing a stressor, affecting vigilance and presenting a concern for maintenance of performance levels when "all of a sudden" a controller has to make an immediate and perfect control decision. He referred to the problem in simple terms, that long periods without breaks on a midnight shift increases the potential for error. He agreed with the following remarks contained in the Impact Study, Phase II, addressing the need to look for available solutions to improve the situation:

"...allowing for naps and breaks during the midnight shift would improve performance, reduced fatigue caused by sustained work, decrease the number of days off taken for illness... (and further on) providing controllers with opportunity to rest, take a nap, go for a walk, even get away to eat their meals, would improve their ability to stay alert and reduce the risk of making errors. The danger of toughing it out is that cognitive resources will be seriously hindered if the controller were needed to respond to an emergency. Also, if the controller must switch gears and begin to handle building traffic, such as during small rushes and courier activity, or during the beginning of the early morning rush, he/she will be less able to perform critical cognitive tasks effectively. Taking a nap part-way through the midnight shift may reduce the effects of fatigue and circadian rhythm, leading to more reliable cognitive functioning."

¶ 56 Hahn sees a "best case scenario" of structuring two or three 10-15 minute breaks into a eight hour single controller midnight shift in addition to a 20-30 minute meal break indicating that he is "absolutely confident" that such an approach would enhance controller's performance level and morale. He appreciates that traffic levels can be very low at times during the midnight shift, making it difficult for management to financially justify assigning the "required redundancy". In his opinion, such a consideration should not be allowed to stand. He also acknowledged that shiftwork itself, due to disruption of circadian rhythm and associated fatigue problems always present some increased potential for catastrophic irrespective of the break time issue. However, he vehemently disagreed with any attempt by counsel in cross-examination to minimize the significance of restricted break time when discussing performance issues related to shift cycles. While acknowledging that assessment of performance decrements are always problematical to a degree, nevertheless one can confidently predict that adequate break time tends to ameliorate the problem and mitigate the seriousness of the situation. Admittedly it is difficult to measure the results from lack of vigilance or inattentiveness as near incidents can go unreported. He agreed that the next phase planned for the impact study format will directly study the significance of break time, there being as yet a shortage of data speaking directly to the impact of increased break time on cognitive performance. He applauds the continuing search for corroboration through the development of empirical data during the next phase of the Impact Study, which he anticipates will speak directly to issues of quality of life, health and safety.

¶ 57 During the course of his cross-examination, Hahn disagreed with a number of suggestions put to him by counsel, for example increasing the number of people working midnight shifts would only compound the boredom and inattentiveness by having more staff

available to do less. By his assessment, there should always be enough staff redundancy available to provide at least some relief to the midnight controllers. He also disagreed that it was an adequate approach to allow controllers to play cards or read a book for a time at their station as a means of finding relief, pointing out that some level of attentiveness must still be required, or else why not allow them to take meal and relief breaks away from their station in normal fashion. He said that eating at one's work station, even working on some exercise programme while monitoring the screen was simply not the same as stepping away from the task altogether, as would normally occur with a "real" relief break to be taken outside the control room environment.

¶ 58 The Association also called to testify Mike Tonner, its technical vice president at the time this grievance was filed. Tonner in his testimony related the Association's concerns over whether the previously developed Transport Canada ATSAMM and MANOPS guidelines adequately protected single controllers who left their positions unattended while on break time, now that Transport Canada was no longer their self regulated public sector employer. He made reference to the Canadian Aviation Regulations (CARs) citing the provisions therein stipulating monetary penalties for contravention of the Aeronautics Act. Suffice to say, Tonner expressed the Association's concern that for a single midnight controller, as the only individual on site qualified in his area specialty, to leave the operations room on a relief break could arguably lead to situations occurring which would contravene the Act. For example section 801.02 requires that air traffic control services resolve any conflicts between IFR and VFR aircraft, provide traffic information and ensure separations. He sees the possibility of bargaining unit members being caught up in future legalistic entanglements keeping in mind that the MANOPS 113.1 guidelines require a controller to be relieved by another qualified person in the position or follow guidelines for temporarily vacating, meaning enlisting a controller outside his specialty to monitor his position. Nevertheless, the qualified controller is said to retain responsibility for separation during the period of the absence unless the monitoring controller initiates a control action himself. Hence, the Association has concerns both for the vacating qualified controller and also the monitoring controller, who reluctant as he might be, could find himself faced with a control decision of an urgent nature where not qualified to act. A monitoring controller's apparent option to duck any control decisions while awaiting his co-worker's return from a relief break puts the qualified person in a situation of retaining responsibility for air craft separation while away from his position, without the wherewithal to remotely deal with any situations which might arise in his absence. Tonner also testified that he has some doubt whether under the Act a monitoring controller, while unqualified in his co-worker's specialty, can properly make any control decisions. He referred to section 402.04 requiring that anyone who would "exercise privileges of an air traffic controller" be properly licensed, including "a rating appropriate to the privileges being exercised and with the appropriate operational location". He has noted that under section 422.03(2), a controller's licence is endorsed for one or more specified operational locations which includes, inter alia, the control function. The Association acknowledges that there is an ongoing issue with respect to the requirements under CARs which might apply to specific qualifications in a specialty within a control area. The parties have in the past and continue to refer the issue to Transport Canada for some guidance. Nevertheless, the Association sees the possibility of liability/penalty exposure occurring for both the absent qualified controller and the monitoring controller should a meaningful loss of separation occur during a relief break taken on a single controller midnight shift.

¶ 59 The first witness called to testify by the Employer, Glenn Clark, at the time the grievance was filed was the acting regional director of air traffic services, central region. Prior to taking this position in April 1996, he had for the previous 18 months been the acting general manager of the Winnipeg ACC, with a lengthy history in management including operations, training and human resources areas. At one point earlier in his career, he had trained as was qualified to work as a controller in the Winnipeg ACC. As acting regional director, his management duties encompass the entirety of air traffic services within the region. In his testimony he confirmed the Employer's commitment to the safe operation of the air traffic control system, and more particularly with respect to using approved procedures, ensuring professional and standardized communications, and in providing full-time attentive flight monitoring. He explained the management system for monitoring safety issues through reviewing operating irregularities as reported in OCRs, seeking airline and airport authority feedback, examining performance evaluations of its employees and assessing their performance on a continual basis as well as conducting reviews of the training system. He said that whatever the staffing level difficulties to be encountered, safety always remains paramount even to the point of shift managers being able to make on site decisions to restrict air traffic flow where a difficult situation develops. The same holds true for individual controllers working midnights where no shift manager is available.

¶ 60 In his testimony Clark reviewed the PACE assessment documentation used for measuring busyness in one hour intervals on a 1-7 scale, the focus being on committing enough controllers to do the job effectively and efficiently. The Employer measures volume of aircraft across the system, assigning workload criteria to each activity required. He presented in evidence computer generated materials showing aircraft pace levels calculated periodically between May 1996 and July 1997 showing an hour by hour breakdown on those midnight shifts when the computer auditing procedure was carried out. As Clark pointed out in his testimony, one can observe that there is "considerably less traffic" on midnight shift across the entirety of the Winnipeg ACC area specialties. Periodically, essentially every two years, a head office resource alignment procedure (RAP) review team spends one week in Winnipeg reviewing the ACC staffing requirements on a shift by shift basis, ultimately determining the numbers of controllers required. As it presently stands, there is no relief shift scheduling, with the only controllers available to fill in for absent co-workers being those who are already scheduled into their own shift rotation. They take overtime shifts. The problem has become compounded, he acknowledged, by the fact of the Winnipeg ACC running at approximately 80% of assessed staffing requirements, even without any specific relief shift allocation. According to Clark, efforts have been made to relieve the staffing pressure by improving training methods, including compressing training time, for those seeking to become controllers in various specialties and by discouraging lateral transfers. He said that the Employer may even look at applying partial qualifications in Winnipeg, which would allow a controller to work in one or two sectors of a particular specialty while he worked at becoming qualified across the entire specialty. There have been times when he has allowed two controllers on four midnights per week in Saskatchewan Specialty, even leaving them in place for a period of time after the periodic RAP team review revealed a midnight shift pace level calculation requiring only one controller. Eventually, he directed that the situation revert to having an overlapping evening controller who could provide assistance during the first two hours of the midnight shift. By November 1986 the overlapping scheduling had been discontinued but was reinstated in

January 1997 after an automated "degree of busyness" analysis was carried out. The Ontario Specialty has had the same kind of evening shift overlap since July 1997, while Winnipeg En Route has maintained single controller midnights on only two shifts per week, and Winnipeg terminal on three shifts per week. All this time Clark has had continuing involvement in ongoing discussions with Association representatives.

¶ 61 During his testimony, Clark agreed that it is an easy matter for controllers to pick their relief time during a shift when there are two people working at a position. However, he also views MANOPS 113 and ATSAMM 203 respecting position responsibility as adequately outlining the workable expectation that single controllers working midnight shifts will identify a time when there is minimum/light air traffic and ask a controller from another specialty to monitor their position while they take a relief break. In reviewing the PACE levels description document alongside the computer generated traffic data materials, he notes substantial periods of time, often in excess of an hour, when air traffic can be seen to be at minimum or light levels. He considers that such a circumstance permits individual controllers to call upon their co-workers for monitoring duty according to the Employer's guidelines. Further, in his view, a controller should be able to plan his relief break in advance by being familiar with the general traffic flow, supplemented by flight progress strips as they become available. He has access to adjacent controllers respecting incoming traffic, and towers within his specialty. Routinely, the flight progress strips should be received a half hour in advance of an incoming flight. Any laxity observed to exist on the part of United States controllers or difficulty integrating with its system, with respect to aircraft leaving its air space for Canada, is currently being addressed with their air traffic administrators. Appropriate corrective action, he believes, is imminent.

¶ 62 Essentially, in dealing with the issue of requesting a co-worker to monitor one's position, Clark understands that single controllers should take what for him amounts to a common sense approach. He agreed with the suggestion of turning up one's position frequency, advising any aircraft within the specialty that the qualified controller is on break, the position being monitored by a controller working in another position. He sees it as a matter of coordination between co-workers, including recalling the single controller to his position in the event a control decision were required to be taken. The monitoring controller, by reason of his own training, should be able to identify whether separation standards are being met. He also testified that his is not concerned over monitoring controllers occasionally making control decisions in another specialty, some specialties at other times having been divided in different ways than currently. He said that there is little to differentiate some specialties from others, for example, Winnipeg En Route and Ontario Specialty with the exception of their local airport knowledge and frequencies. In the event a control decision were necessary, the monitoring controller even has the option of looking up the required information in the video display system while holding the enquiring aircraft at its present altitude which, by his understanding, can be accomplished relatively quickly. He could resort to bringing back the qualified controller from break, whether by calling to him verbally if still within the control room, or telephoning the lunch room, or using the public address system, which is operated from the vacant shift manager's desk. All the while he would have to keep the enquiring pilot standing by, albeit presumably in a non-emergency situation. Often, pilot requests are in the nature of asking for a weather report or seeking a more favourable altitude, neither of which in normal course should require an immediate response. The parties were able to agree at hearing that there are no public address

speakers currently placed in the workstation areas, although the Employer intends on correcting the situation.

¶ 63 Clark is aware that occasionally difficulties arise with controllers being called upon to work extended overtime shifts as a result of unexpected absences. He recalled a situation involving Mike Nelson where the shift manager had initially asked for volunteers before eventually having to extend his evening shift to include the entire single controller midnight shift of the ill employee. He understands that the shift manager, Westphal, stayed with him throughout the night, which allowed him to take him an eighty minute relief break. He is also aware that the current evening/evening/day/day/midnight weekly shift pattern constitutes a double-quick change cycle, again meaning two shift changes within the same work week with only eight hours rest time before commencing the next shift. He agrees with the Impact Study (Phase II) assessment that it may well represent the most difficult kind of shift pattern and ideally would like to see a midnight/day/day/evening/evening cycle implemented which would eliminate any short changes altogether. However, he understands from informal discussions that the majority of the controllers are against such changes. Further, he said, he is informed that of the 608 operating irregularities reported across the Employer's national air traffic control system between 1993 and 1996, only two of them occurred during a midnight shift. He is also aware of the reported Horoshok/Pascoe incident occurring in 1994 where the monitoring controller cleared an aircraft to a conflicting altitude due to a miscommunication stemming from an incorrectly deleted progress strip. He is also aware of an incident occurring in June 1995 while there were two controllers assigned to the Winnipeg Specialty and one of them, distracted by a personal telephone call cleared an aircraft to the wrong altitude.

¶ 64 Clark, who has himself over the years coped with working midnights would tend to dispute Professor Hahn's views on the significance of nightshift fatigue having regard to the minute number of operating irregularities reported nationally as occurring during that shift. Further, he believes that single midnight controllers take more than just washroom breaks, the recorded pace levels of busyness during the nighttime hours indicating that they should have ample opportunity to spend some time in the cafeteria or take some exercise. He said he disagrees with the Association's understanding that the only time the single controllers leave their positions is "of necessity". He believes that period ie : five to fifteen minute breaks during midnights are more likely. He was cross examined at some length on the MANOPS 113 and ATSAMM 203 position responsibility provisions and associated guidelines, not perceiving there to be any internal inconsistencies. He sees nothing inappropriate about single controllers choosing relatively quiet periods during their midnight shift to take break time with the assistance of a monitoring co-worker, a matter of employee cooperation. He was also cross-examined on the existence of a number of "failsafe" and back-up mechanisms providing redundancy in radar and other electronic communication systems as well as power supply. He described a three level back-up approach considered appropriate for safety reasons, despite the fact that there has been no failure in the updated Winnipeg ACC physical systems since installation in 1990. There is even an emergency evacuation centre located at the Winnipeg airport from where air traffic control could be carried on in the event of a catastrophe rendering the Winnipeg ACC unviable for a time.

¶ 65 The last witness to testify, Larry Boulet, is currently the Employer's acting chief of its air traffic services, monitoring and evaluation branch. He heads the team whose responsibility it is to assess operational staff requirements in all facilities and, in effect, to ensure proper utilization of available staff. Initially trained as an IFR controller in 1973, over the years, he has held a number of administrative positions including having been for a time the acting chief of the Employer's Quebec regional school responsible for developing and preparing all aspects of the air traffic control curriculum. He has, in years past, been an acting superintendent involved in the development and implementation of the ATSAMM and MANOPS guidelines and amendments. Boulet testified that the Employer, through his branch, continually strives to assess and monitor staffing requirements at the regional ACCs. This is carried out both through the periodic staffing review process (RAP) and through the continually computer generated seat count and pace level information system which recognizes the "peaks and lows" occurring within the three shift work day. He explained the RAP process at some length, which involves on-site observations made by a team of investigators, and assessment of ongoing and historical data (seat counts and pace levels), in order to periodically establish individual ACCs staffing requirements.

¶ 66 Suffice to say he has observed that the information either generated as a matter of the periodic involvement of his team, or through assessment of the computerized air traffic volume, data indicate low to almost nonexistence aircraft activity in some specialties for some hours during the midnight shift. The Winnipeg ACC situation was assessed by his branch as requiring no intervention with respect to the scheduling of single controller midnight shifts where implemented, albeit local management has always been allowed to bring in staff on a "tactical basis" where considered to be a "justifiable variance" from the norm. During some months of the year, he acknowledged, local traffic patterns require additional staff for some midnight shifts. However, visual observations and data calculations for Saskatchewan Specialty indicate to him that there was "absolutely no requirement" for a second midnight controller based on the ongoing low volume of traffic. Indeed, he understands that the single controller staffing on midnight shifts has been in place at various ACCs, including Winnipeg, for at least the last 27 years. His review of currently applicable air traffic flow documentation placed in evidence confirms for him that the single controller midnight scheduling falls in line with the Employer's own staffing guidelines. Principally, he said, it is a matter of determining whether the controller can handle the existing air traffic flow throughout the entirety of his shift, keeping in mind that he should be coordinating his break time with a monitoring co-worker. He said that in specialties where the control demands are such (degree of busyness) to make it impossible for one to leave his position at any time during the entirety of the shift, then the Employer will look to "other solutions". At the Winnipeg ACC, he views the real issue in terms of whether the employees are committed to cooperating with each other, not whether the Employer has embarked on a program of calculated risk taking.

¶ 67 Boulet assesses the Winnipeg ACC as currently managed to be a completely safe operation. There is no plan to increase staffing for purposes of further assisting single controllers on midnight shifts in taking their break time, that falling within the ambit of co-worker monitoring assistance. Controllers, leaving for break, are expected to brief the monitoring co-worker on the current air traffic situation. He acknowledged that for a single controller to exercise his prerogative to take midnight shift breaks could well entail some advance planning,

even some understanding of the traffic situation facing his nearby co-worker on whom he would call for monitoring assistance. Obviously "pop-ups" admittedly remain an unknown in some specialties. However, Boulet understands, given the low traffic volumes when breaks are to be taken, that there should be no need for control decisions to be taken by monitoring co-workers. Arrangements can be made to bring the qualified controller back to his position, cutting break time short if need be. He also remarked that if practical difficulties developed over accessing a single controller while on break time, if needed for an immediate control decision, corrective action would be applied. For example, he said, the issue of public address speakers was already being addressed as a result of testimony heard earlier in the hearing. They would be placed in the washrooms. Also, understanding there to be a general reluctance to monitor another controller's position outside one's own proximity, management will investigate the possibility of reconfiguring single controller positions during midnight shift to alleviate that problem.

¶ 68 Having reviewed the traffic flow reports disclosing the number of aircraft operating in each specialty every hour of the day, Boulet remains satisfied over the appropriateness of the single controller staffing. He has no difficulty with a monitoring controller in a non-emergency situation requesting a pilot to "stand by" in order for the co-worker on break time to be brought back to his specialty in-order to make the control decision. He considers that the work environment tends toward cooperation amongst controllers as a "give and take" to ensure each other's break time. In the event of an emergency occurring the video terminal is capable of displaying all relevant information respecting minimum altitude and approaches, with a true emergency happening "very, very rarely" in any event. He knows of no emergency in the last five years across the entire national system that was not responded to adequately, whether by the area specialist or a monitoring co-worker if need be. Nevertheless, Boulet said, he has taken steps to have a shift manager available during midnights in order to document and deal with problems as they arise, including the possibility of assigning someone to monitor a co-worker's position during break in the absence of any "volunteer". He produced in evidence memoranda from shift managers Fred Westfall and Dave Lethbridge through facility manager Phil Gies received by Boulet immediately prior to the last two days of hearing occurring in November 1997 providing their observations that controllers were co-operating with the monitoring procedure varying from "grudgingly to whole-hearted" at the Winnipeg ACC. They reported that single controllers were taking up to two or three short breaks (coffee and bathroom) during the midnight shift, lasting two or three minutes and up to five minutes in duration. One shift manager reported that in two cases he had to find a person to monitor a co-worker's position to allow a five minute break, but encountered no situation where a controller refused a request. The other shift manager reported good cooperation, in encountering no problems with controllers monitoring co-worker's positions to cover the coffee or washroom break, as many as two or three short breaks per shift.

¶ 69 Boulet, in his testimony, conveyed his understanding of the coordination ongoing between the provisions of MANOPS 113 and ATSAMM 203 accompanying notes. For example, he said, the concept of not vacating one's position when there is any "known or anticipated traffic" is not meant to outweigh the position responsibility dictum set down in ATSAMM 203.2 for managers to develop useful guidelines respecting vacating operating positions for relief purposes, leading to the development of monitoring guidelines. He sees no potential for conflict

within the Employer's operation manual dealing with position responsibility, and further understands there to be no requirement for any consultation with the Union respecting any amendments.

¶ 70 As with Clark, Boulet understands that over the last five years, nation wide, there have been only two operation irregularities reported on midnights, undoubtedly reflecting the low air traffic flow for many hours during this shift. He is also aware that both occurred at Winnipeg, the first being the Horoshok/Pascoe incident and the other occurring while a single controller was taking a personal telephone call while actively controlling aircraft. By his understanding there have been over 600 "occurrences" reported on other shifts within the same time frame, but none of them generating any fines or other penalties as a matter of regulatory enforcement by Transport Canada. He acknowledged that occasionally controllers are disciplined for their actions resulting in an irregularity having occurred, with some examples entered in evidence. He equates the disciplinable workplace offence in those instances with acts of negligence or carelessness and not with single controllers using their "best judgment" on when to leave for break time. He considers the possibility of a penalizing regulatory action ever being taken by Transport Canada as only a "potential" consequence of an employee's clearly wrongful act.

¶ 71 Boulet remarked that staffing midnight shifts bears no relation to the available controllers on strength, which is simply not a consideration of the calculations made by the RAP team. The Employer does not see itself as having to increase staffing solely to allow for breaks in any other fashion than currently applied. He also acknowledged that even special leave and other short term absences are not factored into the staffing process. Reference was made to the exhibited air traffic services manual board (ATSMB) RAP review process and mandate document exhibited in evidence, acknowledged by Boulet to contain guidelines used in his team's reviews. It reads as follows:

STAND-BACK SUPERVISION:

- Stand-back supervision will be provided during the core hours (normally 16 hours per day, excluding the midnight shift);
- A supervisor will always be available at each specialty during a given shift;
- The supervisor will not be expected, under normal circumstances, to provide meal and relief breaks for control personnel;
- If a supervisor has to work in a control position due to the traffic situation, the "last in-first out" principle will apply.

MEAL AND RELIEF BREAKS:

- Operating employees will be provided with meal and relief breaks, where operational requirements permit;
- Sufficient staff will be identified in the Unit requirements to permit each employee to receive two 20 minute relief breaks and one 45 minute meal break during a given shift;
- The length of a meal or relief break provided during an overtime shift will be determined by the supervisor based on the length of overtime shift in comparison to the length of a regular shift;
- Employee breaks will be managed by the supervisor and will be approved only when traffic volume levels permit.

TIME IN POSITION:

- A controller can be expected to work from 2 to 2 1/2 hours at a position with a moderate traffic level before being given a break;
- A controller working a heavy traffic level should normally be given a break or moved to a less busy position after 2 hours of work.

¶ 72 Boulet testified with respect to the above guidelines that supervisors are not expected to provide cover for meal and relief breaks themselves, pointing out that in years past supervisors had not even been working on midnights shifts. Having noted that the collective agreement provides for operational staff to receive meal and relief breaks "where operational requirements permit", he referred to the "dynamics of the environment" as dictating when they might occur. He said that the circumstance of having sufficient staff on the unit to permit two regular 20 minute relief breaks and one 45 minute meal break applied only to normal day/evening shifts. He described them as supporting "a different type of break situation altogether". He sees the midnight relief breaks as qualitatively different from those taken by employees during afternoons or days when there are sufficient covering staff available to allow, in his view, for more structured breaks. On midnights, the Employer applies no specific range limitations in the amount of time a person is required to be at his position before taking some break time. However, he continues to be of the view that the low traffic patterns on midnights provides opportunity for "adequate" and "appropriate" break time, which if not able to be taken within about three or four hours of commencement of shift, he would look at the situation more closely.

Argument:

¶ 73 On behalf of the Association, Mr. Barnacle asserted that the Employer had violated its contractual obligation under the collective agreement, namely the wording of article 13.01(b), which bears repeating at this point:

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

¶ 74 By the Association's interpretation of the voluminous evidence, the Employer has set about to establish a policy for usual and every day breaks on day and afternoon shifts on a quite different basis than those to be taken during midnights. In light of the differentiation between shifts applied day to day for the administration of meal and relief breaks one must consider the meaning of "operational requirements". Does this term more realistically contemplate exceptional circumstances or events as opposed to allowing the Employer to exclude one shift entirely on an ongoing basis from the same type of break time allocation provided on the two other shifts, apparently purely as a matter of inadequate relief staffing? The Association contends that the wording of article 13.01(b) should not be construed so as to allow the Employer, purely for staffing reasons, to avoid establishing a reasonable regimen for meal and relief breaks on midnights. Barnacle referred to the issue of safe operation of the system, said to have been developed through the evidence, as addressing the Employer's real operational requirements. Further, Barnacle said, there is nothing in the collective agreement respecting break time which should be interpreted as requiring employees to juggle/balance their professional obligations or rely on co-worker co-operation each and every day in order to take

their relief breaks. Employees should not be called upon to face the obvious possible serious implications for any break time miscalculations on their parts when it rests with the Employer to organize the workplace in order to reasonably provide a contractual entitlement. He asserted that in the labour relations context it should hardly be seen to comply with anyone's understanding of a workplace relief break meant for one to obtain the undeniable benefit of a period away from one's position for rest and relaxation at some point during the shift. He also submitted that there was no stretch involved for anyone in understanding that contractually obligated meal and relief breaks served different purposes. Notably, the Employer's policy does not provide realistically for any meal break at all, with relief breaks by all accounts structured around a monitoring co-worker providing enough coverage for a single controller to break for the bathroom over the shortest time possible, always subject to immediate recall for any control decision which might have to be made.

¶ 75 On behalf of the Association, Barnacle pointed out that the issue of providing adequate break time to single controllers has been adjudicated from time to time under the same longstanding wording as now contained in article 13.01(b), dating as far back as Deputy Chairman Mitchell's award in Lawes et al (PSSRB File 166-2-6437-6440 January 16, 1980). Not surprisingly, the issue has invariably centred on the meaning of the phrase "where operational requirements permit...". In Lawes, the employer Treasury Board (Transport Canada) took the position that as a matter of management rights it need only staff at the minimum required to operate a control tower with staff being able to fit in meal and relief breaks as reasonable under the operating conditions of minimum staff. It was refusing to assign an extra operating employee to ensure coverage for meal and relief breaks. Deputy Chairman Mitchell in that case, viewed the employer to be interpreting the contracted entitlement to meal and relief breaks as depending entirely on its decision regarding adequacy of staffing. Its approach was to make only minimum staff being available in some operating conditions, thereby significantly impacting the availability of meal and relief breaks. On his review of the employer's position, he observed: "the employer, by reason of (its) interpretation, makes staff available only for operational purposes on the ground that it has no obligation to provide meal and relief breaks". He remarked that he would have thought that it would have been in the best public interest for controllers to receive their meal and relief breaks "unless unusual circumstances make that impractical" having regard to their "grave responsibilities" and ongoing need for "mental alertness and concentration". He was of the view on the facts presented that the employer was avoiding his responsibility under the collective agreement and stated at page 18 as follows:

In summary, I am of the opinion that the employer is misinterpreting Article 13.02(d) [identical wording to current article 13.01(b)] I find there is an obligation on the employer to provide adequate staff to enable operating employees to take a meal and relief break except when by reason of unusual operational conditions that is not practical.

For all the above reasons my decision is that:

- (a) The employer does have an obligation pursuant to Article 13.02(d) to supply adequate staff to permit operating employees to take meal and relief breaks of reasonable duration except when unusual operational

- conditions make the taking of such breaks impractical.
- (b) The employer violated the requirement of Article 13.02(d)....

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I wish to emphasize that this decision is not to be interpreted as meaning that the employer must necessarily increase the number of staff on duty during the day and evening shift. The means by which the employer arranges to ensure that operating employees receive a "meal and relief break" during their shift is not an issue to be decided by adjudication but rather by the employer or through negotiation.

¶ 76 Deputy Chairman Mitchell's decision that the employer had an obligation to adequately staff in order to permit controllers to take reasonable meal and relief breaks, except when impracticable due to unusual operational conditions, was followed by Deputy Chairman Kates' award in Noakes (PSSRB File 166-2-9688, January 11, 1981) where a controller grieved that she had been working excessively long periods of time on her shift at the Vancouver Harbour Tower facility before being given meal and/or relief breaks. She wanted adequate staff provided to ensure that these breaks would be made available in some systematic fashion. In his award he indicated his acceptance of Lawes insofar as it and another case Randal (PSSRB File 166-2-9828-4831) "indicate that a positive obligation is imposed upon the employer to provide operating employees with meal and/or - relief breaks save in circumstances where operation requirements do not permit". For him, it became a matter of determining whether "practical exigencies" warranted the employer holding its contractual obligations in abeyance. The following discussion is of interest (pages 15-16):

What circumstances therefore do warrant the employer's noncompliance with the requirements to provide meal and/or relief breaks? What the parties seem to have recognized under article 13.02(d) is that situations may very well arise where it would be not only unreasonable but impractical for employees to have a normal break. I do not suggest that these occasions need necessarily be emergency situations where the taking of a relief break would clearly be imprudent. In a like fashion I do not view that the employer is bound to engage in superfluous staffing actions for the purpose of guaranteeing compliance with article 13.02(d). Rather implicit in the wording of the phrase "where operational requirements permit" the parties have mutually acknowledged that owing to the duties and responsibilities shared by each of them to the public's well being circumstances may arise that might require, notwithstanding potentially adverse mental and physical effects, the continued presence of operating personnel at their work station. I do not propose in this case to give an exhaustive definition of these circumstances that might constitute "operational requirements". The parties by virtue of their failure to provide such a definition, must be deemed to have purposely intended (as they should have) to allow the situation as it arises to dictate those occasions when the suspension of article 13.02(d) is warranted. Accordingly, I am the view that the task of pinpointing those circumstances where operational requirements do not permit a meal and/or relief break is a matter that is peculiarly a question of fact to be determined on a case by case

basis (see Tremblay, Board file 166-2-9742 1)

The parties' intentions as to the meaning of "operational requirements" may also be discerned from what article 13.02(d) does not include. Most collective agreements in both the public and private sector define both the nature and duration of a meal and/or relief break. In a like fashion I believe I am entitled to take some notice that the normal practice in such agreements are that meal breaks are on the employee's own time and relief breaks (coffee breaks) are usually on the employer's time. I am of the view that the parties' failure to define what they meant by meal and/or relief breaks must be deemed to have had a specific purpose. That is to say, it seems a tenable proposition that meal and/or relief breaks are lacking in definition because the practical exigencies of the air traffic control service simply do not allow for rigid and formalized procedures. In other words, where one hour for a meal break is practical the employer may be obliged to accord a one hour break. By the same token, where only five minutes is practical when the employee must recognize that in isolated instances operational requirements may not permit a normal meal break. In other words, implicit in the absence of definition is the clear inference that the parties have entrusted to each other the task of determining on an ad hoc basis those circumstances where a true meal and/or relief break may not be possible. That trust should not be compromised by recourse to artificial staffing strategies to circumvent otherwise legitimate obligations under the collective agreement (see Savage (supra), Hollier and Willis, Board files 166-2-10526 and 10527).

¶ 77 In Noakes, Kates went on to find that the operational requirements in the summer period dictated that the controller "endure a portion of her shift without a relief break". He was satisfied that there was no mala fides nor any attempt on the part of the employer to avoid its obligation. It was a matter of recognizing the "seasonal nature" of the traffic control services at VHT, which warranted suspension of the second break. He also went on to note that difficulties giving rise to a break complaint may well be peculiar to the facts described in the circumstances of a given case.

¶ 78 Thereafter in Randall and Yates (PSSRB File 116-2-13810, 13811, October 19, 1983) adjudicator Weiler dealt with the employer's alleged failure to have provided meal and relief breaks to two single controllers working the Vancouver ACC during two specific midnight shifts in June 1992. The aggrieved employees in that case sought a direction that the employer increase staffing to ensure a minimum of two controllers on midnight shifts. In reviewing the parties' positions the adjudicator sufficiently summarized the employer's submission in terms sounding familiar to the circumstances at hand (page 5):

The employer submits that there was ample opportunity for those employees to take their breaks.

¶ 79 In his award, Weiler noted that the employer's obligation to provide meal and relief breaks except where operational requirements did not permit had previously been reviewed in Lawes et al. He cited Deputy Chairman Mitchell's view that an obligation existed under the contract language "to supply adequate staff to permit operating employees to take meal and relief

breaks of reasonable duration except when unusual operational conditions make the taking of such breaks impractical". He also made reference to Deputy Chairman Kates reasoning in Noakes which he saw as identifying the following rules from the discussion hereinbefore set out (page 7):

1. The parties seem to have recognized under Article 13.02(d) that situations may arise where it would be unreasonable and impractical for employees to have a normal break.
2. These occasions need not be emergency situations.
3. The employer is not bound to engage in superfluous staffing actions for the purpose of guaranteeing compliance with Article 13.02(d).
4. Implicit in the phrase "where operational requirements permit", is the acknowledgement that owing to the duties and responsibilities shared by the parties to the well being of the public, circumstances may arise that might require the continued presence of operating personnel at their work station notwithstanding the potentially adverse mental and physical effects this might have on individual employees.
5. The parties have not defined what "operational requirements" means in Article 13.02(d). Rather they have left this term to be applied in concrete situations according to the dictates of reason. Accordingly, the task of pinpointing those circumstances where operational requirements do not permit a meal and/or relief break is a matter that is peculiarly a question of fact to be determined on a case by case basis. What appears to be the key test in this determination is whether practical exigencies warrant the employer in holding in abeyance the obligations it has assumed under Article 13.02(d).

¶ 80 For adjudicator Weiler on the basis of the factual circumstances presented, it became a matter of determining whether the grievors were provided with meal and relief breaks on the two midnight shifts in question and if not whether the circumstances which existed constituted an "operational requirement" which did not permit breaks. He also remarked that he was not able to make any "definitive judgment" over how long breaks should be although noting that in normal circumstances employees were getting two relief breaks of about 25 minutes and a meal break of 35 minutes. He made the following observations concerning the significance of break time and the manner of determining it (at page 9):

...It is agreed by the parties that the purpose of these breaks is to ensure that controllers can maintain their physical and mental alertness in the performance of their exacting tasks. The practical exigencies of the air traffic control service simply do not allow for rigid and formalized procedures concerning these breaks. Consequently, the parties themselves are entrusted to assume the task of determining on an ad hoc basis those circumstances when the breaks may be taken and the length of those breaks. There may be isolated, unanticipated circumstances when breaks as short as three to five minutes or even no breaks may be "practical". However, in the ordinary circumstances, relief breaks of 25 minutes and a meal break of 35 minutes are what the parties have treated as the

acceptable norm in order to ensure that the employees maintain physical and mental alertness necessary to perform their tasks in a manner that safeguards the public interest.

¶ 81 Adjudicator Weiler in his award did not distinguish between day/evening and midnight shifts in terms of there being any more or less need for break time as a matter of maintaining physical and mental alertness to perform whatever "exacting tasks" might be presented. He noted the employer's position that employees should use their "common sense" and take breaks on midnights during low traffic periods. The aggrieved employees had responded that their position was never "dead" for any sufficient period to allow a break and further they were not satisfied that their co-workers called upon to monitor their responsibilities had the requisite endorsement to be considered qualified to make any control decisions. The employer spoke of the same directive as now set out in MANOPS 113.1 as requiring exercise of discretion and professional judgment by the controllers taking their relief breaks on midnights, a matter of showing common sense as opposed to blind application. It required identifying periods when there were no aircraft in the same area, notifying any aircraft with which they were having contact that they would be absent for a while, informing whatever terminals were involved ie: by the employer's submission, a workable situation. The employer witnesses in that case spoke of the proper exercise of judgment, the need to assess safety risks, seek replacement help from co-workers to monitor positions, the best public interest. Weiler called the controllers highly trained specialists whose reluctance to leave their position on the nights in question for reasons of safety, he was hesitant to second guess. This reluctance he observed on the part of controllers to leave their positions on the nights in question is set out in page 12 and might be seen to have a familiar ring to it in terms of the voluminous evidence heard during the instant case(page 12):

What is clear on the evidence is that the shifts in question were not overly busy nor was the amount of actual traffic unanticipated. Yet in these circumstances the grievors were convinced, based on their interpretation of Article 113.1 of the "manops", that they could not leave their positions to be monitored by personnel who did not have a current endorsement on the West Complex. In my view this is a reasonable position of the grievors to take, based on the language of Article 113.1 of the "manops" as well as the past practice at Vancouver Air traffic Control Centre. As mentioned earlier, prior to June 1, 1982 there had always been a second qualified controller on the midnight shift available on the West Complex. It was reasonable for the grievors to assume at that time that the purpose for the second controller was, inter alia, to provide the necessary back up relief for the controller who would leave his position in order to take his relief or meal breaks. Consequently it is not surprising that the grievors would be worried about leaving their positions to be monitored by personnel who were not fully qualified on the West Complex. Nor were the grievors given any guidance from management about how they were to handle this situation. In my judgment, the grievors acted properly in these circumstances in remaining at their positions even during the periods when their board was relatively inactive.

¶ 82 In determining that the aggrieved single controllers could not be faulted for staying at their positions throughout the midnight shifts in question, but for very brief breaks taken on two

days, Weiler concluded that they had been denied meal and relief breaks of a reasonable duration in violation of the contract language. However, he declined to award the relief sought by the aggrieved employees that the employer increase the staffing requirements at the Vancouver ACC to a minimum of two controllers for midnight shifts. Firstly, he said, the evidence was directed almost exclusively to the circumstances occurring on only two shifts leaving him reluctant to make any declarations about the circumstances on other shifts where there might be substantially less traffic or possibly even qualified personal available to fill in during break time. Secondly, he was not inclined to transgress what he took to be a well recognized principle that an adjudicator should not make declarations that are prospective in nature, since the issue of operational requirements which might limit one's break time was a question of fact to be determined in each case. Adjudicator Weiler, in making his declaration that the employer had violated the contract language by refusing to have adequate staff available to provide meal and relief breaks on the two midnight shifts, also remarked that "the means by which the employer arranges in the future to ensure that operating employees receive these meal and relief breaks during their shifts is not an issue which should be decided by adjudication but rather should be determined on negotiation between the employer and the Union". It can be observed that Weiler's award in Randall and Yates received judicial review. The Federal Court of Appeal ruled that there was no basis shown upon which the Court could properly interfere with the decision of the adjudicator.

¶ 83 The years following the Lawes et al, Noakes, Randall and Yates trilogy brought a number of cases having to determine what amounted on a factual basis to the kind of circumstances necessary to constitute the "operational requirements" sufficient to limit break time. For example, in the Shield award (PSSRB File no. 166-2-16410, October 28, 1987) Vice-Chair Cantin determined that the absence of a scheduled controller where the employer did its best under the circumstances to replace him when absent, constituted a kind of "operational requirement" which had prevented the aggrieved employee from taking a break during the first four hours of his shift. In some other cases, Dooling (PSSRB File 116-2-16387, September 30, 1987, Nisbet) and Baker (PSSRB File 116-2-16090, December 29, 1986, Kwavnick), the adjudicators were asked to determine whether the number and duration of breaks taken during a particular shift amounted to the employer fulfilling its obligations under the language, an issue which can be seen to be complicated by whether or not management even knew that there was a problem at the time. In Drolet and Trembley (PSSRB File 166-2-17046, 17047, March 4, 1988, Turmel) the issue presented was whether the breaks taken were of long enough duration. In finding that the "operational requirements" on the day in question did not allow the employer to grant longer meal and relief breaks than it did, noting that both sides had admitted that on the day in question the volume of traffic was "exceptional", the adjudicator dismissed the grievance. Included in his reason, inter alia, were the following remarks (pages 8-9):

The expression "operational requirements" used in the collective agreement connotes a very precise factual situation at a given point in time. This factual situation is a function of two principal factors: workload and number of staff. The workload, for its part, does not depend solely on the employer because the number of aircraft that could enter the area controlled varies, depending in large measure on weather conditions. The employer, however, is responsible for evaluating this workload with a view to providing adequate and safe service and

ensuring the well-being of its employees.

The parties themselves, however, recognized in the collective agreement that the employer was responsible for deciding on the number of employees (clause 3.01(b)) and that without necessarily shirking its obligations, the employer could make a mistake and would have to meet the requirements of providing service (clause 13.01(b)), its forecasts notwithstanding.

Consequently, I do not believe that I have the right to substitute my judgment for that of the employer in determining the number of personnel who should have been assigned to air traffic control during the day, based on the forecasts.

¶ 84 In going on to note that he did not have jurisdiction to substitute his judgment for that of the employer in matters of staff requirements, he observed that management normally granted anywhere from two to four hours of breaks during an eight hour period of work, which no one claimed was insufficient as an ongoing normal approach. Adjudicator Turmel then remarked (page 10):

With regard to staff requirements, I also believe that, if the number of staff was consistently or frequently inadequate, I could then conclude that it was not "operational requirements", but the employer's own actions, that denied the employees the breaks provided for in the collective agreement. This, however, is not the case here because the evidence shows that this situation seldom arises.

¶ 85 On behalf of the Association, Barnacle acknowledges that subsequent to the Lawes et al, Noakes, Randall and Yates and subsequent line of cases, adjudicator Kwavnick authored his decision in Green et al (PSSRB File 166-2-16474 et al, December 11, 1987) wherein the Association perceives him to have moved off in a different direction respecting the issue of "operational requirements" and what constitutes reasonable meal and break times. In that case, the evidence presented on behalf of the aggrieved employees showed that it was possible for single controllers to take only short breaks of a few minutes duration for urgent reasons, ie: washroom use. The controllers worked alone for only four hours during the first half of the morning (day shift) and for four hours during the second half of the evening shift. They claimed that the unavailability of breaks was due to the fact that management had assigned only one controller to the tower during these times, which amounted to 50% of its operational hours. No one worked midnights. The adjudicator's reasons for his decision are reproduced in their entirety as follows (pages 8-10):

The meal and relief break provisions of Article 13.01(b) have been the subject of a considerable amount of litigation. Yet the meaning of that provision appears to remain obscure.

Article 13.01(b) does not mean that the employer is obliged to provide meal and relief breaks. Still less does it mean that the employer is obliged to arrange matters in such a way as to enable employees to have such breaks. It most certainly does not oblige the employer to grant any definite number of breaks of any particular duration at particular times during a shift. Finally, there is no obligation on the employer to increase manning levels beyond what is required to do the assigned work solely in order that employees may have the opportunity to

enjoy meal or relief breaks.

Article 13.01(b) reads: Where operational requirements permit, the employer will provide operating employees with meal and relief breaks. What do these words mean and under what circumstances do they come into force?

By virtue of Article 13.01(b) of the collective agreement the employer retains "the right to decide on the number of employees, to organize and assign work". Even in the absence of such a provision in the collective agreement, the employer would have that power by virtue of the provisions of section 7 of the Public Service Staff Relations Act and section 7 of the Financial Administration Act.

Thus, the employer assigns duties and determines manning levels. After the employer has done these things, it is possible that there will be opportunities for operating employees to take meal and relief breaks without disrupting, or interfering with, the work that is to be done. Where such opportunities exist, and only where such opportunities exist, the employer cannot refuse to give operating employees meal and relief breaks which are consistent with the proper discharge of their duties. This, in my view, is the plain meaning of the words of Article 13.01(b) of the collective agreement.

I turn now to the present reference to adjudication. Leaving aside the question of whether a grievance alleging under-manning may be referred to adjudication, the evidence before me does not indicate that the employer has under-manned the Sudbury control tower. The work to be done at certain times justifies the presence of only one controller. Furthermore, with the exception of certain very brief absences, the safe discharge of the duties of that controller require that he be continuously present in the control tower. These are the operational requirements. By the words of Article 13.01(b), meal and relief breaks are subject to them.

It is my finding that operational requirements at the Sudbury control tower - the fact that only one controller is needed on duty during certain times of the day and the fact that the tower must be manned at all times when it is open - have the effect of precluding meal and relief breaks away from the tower during the first four hours of the morning shift and the last four hours of the evening shift. That being the case, the present grievances must be dismissed.

¶ 86 Plainly, without wanting to embark on the niceties of attempting to distinguish Green et al from previous awards on the basis of some factual differences, the Association sees the approach taken by adjudicator Kwavnick to be at least "inconsistent" with the previously developed adjudicatory jurisprudence. He seems to be saying that the obligation rests with the employer only to arrange "opportunities" as might be available for meal and relief breaks after assignment of duties and manning levels have been separately determined based only on work to be done, as opposed to ensuring that reasonable meal and relief breaks will be provided barring unusual circumstances brought about through the immediacy of an operational requirement. Barnacle pointed out that in other areas of the collective agreement, for example article 10.09 dealing with granting leaves of absence without pay or article 17.06(b) dealing with scheduling vacation leave, adjudicators have indicated that the employer cannot use staffing insufficiencies to avoid meeting its obligations, whether brought about through lack of

recruitment and retraining or other reasons. See Graham (PSSRB File 116-2-21414, August 26, 1991), Lowden and Degaris (PSSRB File 166-2-22490 and 166-2-22491). Interestingly, in the Federal Court review of the Degaris (Court file no T-333-93, October 6, 1993) Cullen, J. remarked that adjudicator's interpretation was "not novel or unique", adding (page 12):

... Adjudicators have stated on several occasions that an employer cannot rely on "operational requirements" as an excuse "where it has failed to provide staffing personnel sufficient to meet its contractual obligations, particularly over a long period of time, and that to do so, constitutes a violation of the collective agreement". (quoting Court's Memorandum of Argument)

¶ 87 The point of it all, the Association contends here, is that the Employer must staff to meet its contractual obligations to the bargaining unit employees, which I am urged to find, it has not been doing on midnights where single controllers' dashes to the washroom in no way can be equated with the kind of meal and relief breaks contemplated under article 13.01(b) which one might observe does not distinguish between midnights and any other shift. Despite that reality, they are not treated even remotely the same, have no process for regularizing their breaks and obviously have no real availability at all to any meal time.

¶ 88 Further, Barnacle asserted, it is apparent that the Employer's failure to provide regular and adequate break time on midnights, stands out as inconsistent with the growing body of literature and expert opinion indicating the likelihood of decrement in performance, impairment of judgment, for a range of physiological reasons including circadian dysrhythmia where night shift workers are denied break time. The Employer would seem to have reached the understanding that the lower level of expected aircraft traffic during midnights suggests less need for break time, when in reality the opposite may be true inasmuch as low levels of activity normally increases the chance of inattention and lack of vigilance. Reference was made in some detail to the CASB impact studies and the expert opinion of professor Hahn, whose evidence I was invited to review as plainly revealing some insightful understanding of the problems. Surely, the Employer requires a broad strategy to be put in play to deal with the wide range of night shift issues, problematic as some of them might be without further detailed study, but not the least of which is the need to regularize break time on midnights.

¶ 89 Further, Barnacle asserted, it is not enough for the employer to offer up the controllers, unqualified in their co-worker's speciality to provide haphazard monitoring, nor should they be expected to dash about trying to recall a single controller from break in order to make a control decision. They effectively have to abandon their own stations in order to achieve that purpose. Obviously, he said, in reviewing the testimony from the various controllers one is struck by their level of professional concern as highly trained specialists over the unstructured approach toward breaks. They are told, effectively, to manage them on their own. By and large, they hold off taking breaks during single controller midnights and severely limit the ones they do take. Barnacle described it, all things considered, as "not workable..completely deficient". Realistically controllers are unable to ever take more than the briefest washroom breaks, and always keeping in mind that they are continuously subject to review in hind sight if an unmanageable situation were to arise in their absence. The inadequacy of the situation is highlighted by the evidence indicating the possibility of decreased attentiveness during the long

periods of sedentary work without any proper break time away from the ongoing stresses and responsibilities of the position. With concern for safety expressed by the Employer to be the touchstone of its industry, witness any number of redundancies incorporated into its physical systems, one must wonder why it is prepared to institute monitoring by co-workers unrated in their coworkers' specialties in order to avoid normalizing bargaining unit employees' break time on midnights.

¶ 90 In the event that the Employer seeks to denigrate the significance of formalized break time away from their stations for single controllers on midnights, Barnacle tabled some outside cases including British Columbia Ferry Corporation and B.C. Ferry and Marine Worker's Union (unreported February 2, 1996, MacIntyre) where there was some attempt to down play the significance of break time on the basis that the employee had little to do for much of the day. While the arbitrator agreed that for many hours of the shift the aggrieved ferry worker had not much to do but "stand around", nevertheless, he was still under the constant obligation to receive orders from the bridge, detect and report any problems with his machinery. He noted the employee's responsibility and requirement while on shift for "constant surveillance" as stipulated in the relevant standards for the job. The arbitrator considered it unpersuasive that the employee realistically could choose to eat lunch on his own time or interrupt it to deal with a problem. He noted that the grievor was being paid for his qualifications and responsibility as well as his hands on work and was entitled to his 30 minute off duty lunch break or over-time rate in lieu thereof as provided for the collective agreement. However, as with some other meal and relief break cases there was no mention of an "operational requirement" stipulation in the relevant language

¶ 91 On behalf of the Employer, Ms. Brethour said that there was not much dispute over the variety of difficulties encountered in working midnight shifts including the validity of the studies and professional opinion respecting the problem of disrupting circadian rhythms and discomfort over awkward shift cycles. She said that at least one might consider the Association's evidence to be deficient regarding any alleged connection between performance and break times in terms of their frequency and duration. The Employer sees the weight of various impact studies and professional opinions to center on performance issues arising from accumulated sleep debt related to shift cycles and overtime commitment. It perceives the need to exist for a "broad based strategy", including issues relating to break time, which presumably will be assisted by the next phase of the impact study program. Nevertheless, Brethour asserted, the issue presented for purposes of this arbitration proceeding can be narrowed to the Employer's alleged breach of article 13.01(b). One must be aware that the contractual language contained therein discloses no indication of frequency, duration, location or spacing of break time to be made available to controllers, all of which she referred to as common enough bargainable items. Accordingly, the only arbitral issue realistically is whether, operational requirements permitting, the Employer has met its obligation to provide breaks. Further, this obligation must be tested in the light of its exclusive right under the collective agreement to manage, direct and control its work force which includes the ability to set staffing levels as a matter of determining its operational needs. She said that unless management were perceived to act mala fides ie: staffing levels meant to preclude break time altogether, then there should be no interference with management's staffing prerogative. She said management should not be directed to provide "superfluous staffing" amounting to doubling up on the single controllers required for operational purposes simply to provide them with an undetermined number and length of break times. Effectively, such an

approach would mean staffing without due regard to traffic volumes or the ability of controllers to take their breaks while remaining at their work stations.

¶ 92 In reviewing the caselaw tabled at hearing, speaking to the same contractual language governing break time for controllers dating back to at least 1979 under the predecessor employer Transport Canada, Brethour remarked that adjudicators have repeatedly stated that the issue of adequacy and manner of breaks is a matter for negotiation between the parties, as are staffing levels, if the Association is intent on the restricting these management rights. She set about to distinguish the factual circumstances in a number of cases tabled by the Association. For example, she pointed out that in Noakes, the Vancouver Harbour Tower case, facts disclosed a situation where five and one half to six hours during afternoon shift was busy enough so as to prevent a single controller assigned for that time period to take any "true" break. She suffered fatigue and loss of concentration, finding her duties without any second relief break to have made her apathetic and fatigued. There was no one available to act in a monitoring role. Nevertheless, the employee had also indicated that during these hours when she worked alone without any second break, there were intervals of down time without any movement of aircraft when she was able to move around her work area and "make a cup of tea, go to the washroom, sit back and relax and walk around the cab". Adjudicator Kates in concluding, on balance, that the operational requirement dictated that the employee endure a period of her shift without a true relief break referred to the seasonal nature of the VHT control service, the fact that she was allowed to walk around during her shift and relax and attend to physical exigencies, was paid and worked a four day work week. Brethour pointed out also that in Kerr et al (PSSRB File 166-2-14395 et al, June 19, 1984) the parties had agreed that meal breaks for nurses working at a federal correctional institution could be taken away from "the place of duty" subject to "operational requirements". Adjudicator Hope noted (pages 11 and 12):

... It is a broad discretion and if it is to be whittled down, it should be whittled down in negotiations where the original bargain was struck - not an adjudication (and in agreeing with the test of bona fides noted further)... it is difficult to interpret that language as restricting the employer to operational requirements which arise out of emergencies or unanticipated or sporadic events. The least consequences of that interpretation would be to assign to the words and meaning other than their natural and ordinary meaning and to assign to them a particular meaning which does not arise from their context in the agreement or any extrinsic source which is appropriate for consideration.

¶ 93 In Viau et al (PSSRB File 166-2-16635 et al, January 14, 1988) the Association alleged denial of break time at the St-Honore, Quebec Airport in that management did not assign enough controllers to cover their breaks. It was apparent that at times during the "hectic" summer period, with single controllers scheduled from 4:30 p.m. to 8:30 p.m. operational requirements did not permit controllers to always take their meal and relief breaks. As with Kates, in Noakes adjudicator Galipeault remarked that the responsibility rested with management and not with adjudicators to decide how many controllers were to be on duty. In dismissing the grievances he said that he would have thought that one or other of the grievors could have approached management if feeling stressed, nervous or insecure as the day progressed to seek a meal or relief break, which would cause the employer to "then perhaps find time when operational

requirements (would) permit the controller in question to take the break that will give him the necessary rest that enable him to carry on with his duties in the most effective manner possible".

¶ 94 Brethour submitted that realistically the Association was making the same kind of argument here that had been rejected by adjudicator Kwavnick in Green et al being the last decision of the PSSRB to "broadly" consider the application of article 13.01(b) as applied to single controller situations. Obviously, there are practical realities involved that require coordination, but which can be accomplished through the monitoring procedure. In this regard, Green et al should not be viewed as completely contradictory to the Lawes et al line of reasoning having regard to Deputy Chairman Mitchell's remarks therein to the effect that the means chosen by management, under the same language, to arrange meal and relief breaks does not necessarily require an increase to staff, such means really being a negotiation issue as opposed to something to be decided at adjudication. Obviously, the Employer holds to the view that its policy and procedure directives provide sufficient guidelines for the controllers' self management of break time by the highly trained and professional controllers. This is so, whether or not that might mean in some operational circumstances having to take some break time at their positions, they should mostly be able to leave the area for at least short periods of time with the cooperation of their co-workers. Management should be able to assert its right to organize the midnight shift controller duties and staffing in such a way to properly deal with traffic flow which at the same time can be seen to adequately allow for some break time to be taken during the down time period.

¶ 95 In centering her remarks on the facts at hand, Bethour pointed to the language of "operational requirements" being in place since at least 1979 with varying interpretations presented since that time. Nevertheless, the various impact studies aside, which do not serve to secure entitlements, the evidence disclosed ample opportunity for single controllers on midnights to take breaks away from their positions with the assistance of monitoring co-workers as provided for by MANOPS and ATSAMM procedure. They obviously could take unassisted break time in the vicinity of their positions during any number of slow air traffic periods occurring throughout the night, Primarily, for the employer, it would amount to "superfluous staffing" to have other personnel available purely to cover break time in a workable, procedural alternative has been made available.

¶ 96 Brethour also said that in order for the staffing situation across its system to remain manageable, the Employer must be able to apply its automated PACE levels and RAP team approach for determining operational requirements. It has no structure in place to bring in staff purely to cover single controller break time, especially for those specialties where throughout many hours of the night there is an "extraordinary amount" of down time, which in itself allows controllers to take some rest at their positions even before evoking the monitoring procedure for break time taken outside the control room. She said that the Association's concerns over some lack of cooperation amongst co-workers, or monitoring controllers sometimes not understanding the traffic situation when requested to provide monitoring are matters requiring some fine tuning, but in themselves do not negate the Employer's right to assign and schedule manpower as it considers appropriate for its operational needs. Whatever the misgivings of the individual controllers who testified, the Employer can be taken to understand and accept that the controllers in all the various specialties within the Winnipeg ACC are "perfectly competent" to perform

monitoring duties to assist their co-workers in taking break time during midnights, Whether or not the Association wants to consider the practice as presenting a "risk factor", management continues to consider itself as best suited to assess safety issues, which as applied to monitoring single controller break time, it considers to be entirely within acceptable levels, Brethour cited the reports of only two "occurrences" on single controller night shifts, out of over 600 incidents reported nationally on all shifts over the last five years. In this regard, she remarked that the move toward specialization of controllers in specific specialties is a matter of increasing efficiency in dealing with high volume air traffic, but hardly should be viewed as rendering a highly trained professional controller somehow incompetent for the purposes of monitoring over a few minutes, one or two aircraft in an adjacent specialty which have already received their control directions and are adequately separated. The current ATSAMM and MANOPS positions have long-standing application and have never proven to present any difficulties for Transport Canada either during the time that it was the employer or since becoming purely a regulator. She remarked that it may well be that at some point Transport Canada will want to play a role in this "philosophical debate" over management of break time, but currently should be seen to remain within the employer's discretion, which it has determined to be "perfectly and adequately safe" as managed within its policy and procedure guidelines. She said that the Employer had never staffed single controller midnights with the intention that the air traffic numbers are so low that one need not take any break during the shift. There is no intention to excise break time. Rather the staffing is done in accordance with the PACE levels with the ability in mind to take breaks during the periodic and sometimes significant down time during the shift with the assistance of a monitoring co-workers. The reality in Winnipeg, she said is that being somewhat short staffed has no bearing on staffing midnights. It would not be handled any differently even if there were extra bodies to call upon. Witness the times when a second controller has been added to some specialties for some parts of the year, purely as a response to increased operational needs, and admittedly taking into account that traffic flow in some areas can be seen to have increased to a point where with only a single controller scheduled there would be no opportunity to take any break, seen as a reason to schedule a second controller on a staggered basis.

¶ 97 Brethour, having reviewed the anecdotal evidence received from the various single controllers who testified respecting their personal experiences with taking breaks on midnights, said that while one might acknowledge that some difficulties have occurred from time to time as they have elsewhere in the system, there is no real issue of break time mishaps. For example, one employee took a personal telephone call at his station when a control decision was to be made. Nevertheless, the Employer insists, as indicated in president Copeland's letter entered in evidence, safety remains its functional goal number one. At this point, management has no concern that co-worker monitoring represents an unsafe situation to the public, albeit it should be seen to rest with management to make that determination in the event that any evidence materializes pointing in that direction.

¶ 98 Conclusion: There can be no doubt that all the witnesses who testified in this matter did so truthfully and thoughtfully, even emotionally at times, in presenting enough factual information and comment to hopefully allow me to have some insight into the difficulties encountered by management and bargaining unit employees alike when confronting the issues surrounding meal and relief breaks on single controller midnight shifts. It is apparent, without belabouring this observation or having to embark on any further specific recapitulation of the

witnesses' testimony, that the parties are fundamentally at odds with respect to how they view the situation. The Employer sees it as a matter of management rights in staffing the Winnipeg ACC on a purely "operational requirements" basis sufficient to provide control directions as required to aircraft operating within the various specialty areas, a matter of organizing its staffing requirements around traffic flow. It understands that the single controllers with the aid of MANOPS and ATSAMM directives and their cooperative co-workers for monitoring purposes should be able to adequately organize their meal and relief break time, taken at their position or elsewhere during very low traffic flow periods occurring at various times throughout the shift. Such are the "operational requirements" of single controller night shift work. Whatever the expert opinions and reports generated respecting the physical and mental difficulties encountered by controllers working midnights with some degree of performance decrement at least possible, they do not change the Employer's outlook that "operational requirements" require that break time be taken within the current staffing parameters. Otherwise, the Employer faces the prospect of "superfluous staffing". Meanwhile, given controllers' professional responsibilities and their strongly expressed concerns over taking any realistic break time when working alone on a specialty during midnights, the Association sees the Employer under the guise of its "operational requirements" and its "superfluous staffing" arguments as having sought to write the break time provision out of the collective agreement as it should be seen to apply to single controllers. It does not view the situation as currently managed to provide them with the kind of rest and relaxation breaks during their shifts as contemplated within the collective agreement. Headlong dashes to the washroom for a minute or two where possible should not be seen to qualify. The Association relies on the observations and experiences of the single controllers who testified, which together with the impact study materials and the evidence of professor Kish, Hahn should be seen to speak volumes on just how dysfunctional is the current system.

¶ 99 Resolution of the issues is further complicated by the fact of the longstanding caselaw which is understandably viewed by the parties as not being completely consistent. The learned adjudicators have often reviewed "operational requirements" in the context of single controllers working all or a portion of a shift. They have hereinbefore been cited at length, having been repeatedly called upon to weigh management's rights respecting staffing against its obligation to provide employees with meal and relief breaks except where prevented from doing so by reason of an impracticality brought about by operational conditions. I would say that in my view, the adjudicators in Lawes et al, Noakes, and Randall and Yates went a good distance in providing the parties with some realistic initial guidance for considering how article 13.01(b) might be applied in particular situations.

¶ 100 The approach taken in these earlier cases while recognizing management's rights respecting staffing in accordance with its needs, made it apparent enough that the concept of "operational requirements" was attached to concrete, factual circumstances as they might occur. There was no indication that the Employer had room to sweepingly refashion break time availability in accordance with kind of shift, ie: midnight shifts - no real break time, on the basis that it staffs only for traffic flow. Otherwise, one might realistically expect that the parties would have expressly addressed the exception of single controller shifts in the language of 13.01(b). Further, the Employer would presumably never have had to argue in any of these cases, see Randall and Yates, that due to the monitoring by co-workers, there was still ample opportunity to take breaks. One can note that prior to Green et al adjudicators over the years in

dealing with situations where single controllers, for whatever reason, felt restricted on their shifts in taking any break time, have looked at the particular circumstances presented. They did not deal with them on the basis that having to work regularly scheduled single controller shifts on an ongoing rotational basis in itself significantly altered a person's negotiated rights under the collective agreement. Adjudicator Weiler in reasoning that breaks were meant to ensure maintenance of physical and mental alertness said that there might be "unanticipated circumstances" serving to significantly limit break time as distinguishable from "ordinary circumstances" without remarking that single controllers somehow should be considered in a different category altogether. He determined that limiting the single controllers to very brief breaks on the night shifts, where they would not leave their positions to the care of monitoring personnel, amounted to the Employer violating the contract language. Interestingly, thereafter in Drolet and Tremblay, adjudicator Turmel, while recognizing that "operational requirements" were a combination of workload and number of staff available, and while also recognizing the right of the Employer to determine the number of personnel to be assigned on the particular day in question, went on to remark that if staff was "consistently or frequently inadequate" it would not then be "operational requirements" but the employer's own actions which denied employees their breaks provided for in the collective agreement. By that time, adjudicator Kwavnick in Green et al had recently provided his opinion that the fact of one controller being needed on duty for certain hours during the day (four hours at a time in that case) necessarily precluded meal and relief breaks during that period of time and was a reasonable application of "operational requirements", thereby setting up what both counsel interpret as a strong inconsistency between Kwavnick's views and those presented by the adjudicators in some earlier decisions.

¶ 101 It might be observed, with all due respect to adjudicator Kwavnick's analysis that the meaning of article 13.01(b) (which is to say the application of "operational requirements") somehow remains obscure after mounds of litigation, that previous adjudicators had provided an interpretation which was consistent, even if necessarily dependant on individual circumstances. Mitchell saw the language as addressing "unusual operational conditions" while Kates referred to "some circumstances" or acknowledged that "circumstances may arise". Weiler remarked upon the possible emergence of "isolated unanticipated circumstances". Their awards do not allow for the possibility of "operational requirements" correctly being applied so that single controllers have to live within a system of stunted and/or denied break time over an entire shift on a usual ongoing rotationally scheduled basis, without any regard to possible adverse mental or physical effects of significantly reduced break time, in addition to the controllers' other professional concerns.

¶ 102 It would seem plausible that by the Green et al approach where break time cannot be taken in any fashion to disrupt or interfere with work, with management having the right to staff, organize and assign controllers, that no one need ever be given a real meal or relief break on any shift. Kwavnick speaks of the "safe discharge" of duties requiring an operator to be continuously present save for "very brief absences" on some shifts. One is left to ponder the safety issues raised by not adequately structuring break time for all employees who can all be called upon to perform a variety of exacting and highly technical duties at any time throughout their shifts.

¶ 103 In my view it is appropriate to take guidance in these circumstances from the formative body of case law which I referred to previously as the Lawes et al, Noakes, Randall and Yates,

trilogy, from which I have extensively quoted the adjudicators analyses culminating with Weiler's identification in Randall and Yates of a number of rules which he takes from Kates' decision in Noakes. Deputy Chairman Mitchell had already indicated his view, that the Employer has an obligation to have sufficient staff to permit relief breaks of reasonable duration "except when unusual operational conditions make the taking of such breaks impractical". Mitchell then went on to say that it was not a matter of necessarily increasing staff to ensure break time, that the means used by the Employer to ensure meal and relief break was a negotiations issue. It was left to Weiler in Randall and Yates to thereafter directly consider the factual circumstances of two single controller shifts where the Employer contended there was ample opportunity to take breaks by reason of monitoring co-workers providing coverage. The instant circumstances are materially different from those set out in Randall and Yates only insofar as the situation has moved from the determination of whether the aggrieved employees were provided with meal and relief breaks on two specific midnight shifts at the Vancouver ACC to one of considering the Employer's program for meal and relief breaks on all single controller midnight shifts in Winnipeg where the same kind of availability to monitoring co-workers, combined with low air traffic has been said by the Employer to provide ample opportunity for break time. I have already noted in the context of the Association's argument and review of cases that the single controller's reluctance to leave their positions on midnights has a familiar ring to it. Note the discussions set out in Randall and Yates concerning what adjudicator Weiler considered was a reasonable reluctance on the part of a controller to turn over his position to a co-worker who was not fully qualified on his specialty. It is also clear in the instant case, as it was in Randall and Yates, that despite positions manned by single controllers not being "overly busy" nor necessarily having any actual or anticipated traffic, they were not convinced they should be leaving their positions to be monitored by co-workers who did not have any current endorsement on the specialties involved. Weiler concluded on the whole that the aggrieved employees working as single controllers, had acted properly in remaining at their positions, consequently taking no break time, even when their positions were relatively inactive.

¶ 104 Adjudicator Kwavnick's subsequent approach in Green et al notwithstanding, my review of the contract language and the previous caselaw submitted does not allow me to reach the conclusion that management's rights respecting staffing are completely unfettered. They are subject to the reasonable application of various relevant provisions of the collective agreement. I accept that the Employer's actions with respect to staffing in accordance with its assessment of air traffic flow must be such to adequately fulfil its contractual obligations, not the least of which is to provide break time where "operational requirements" permit. Having said that, it is my view also that just as the argument does not wash that the Employer effectively can write out single controller breaks as a matter of "operational requirements" related to traffic flow management, the Association cannot expect that break time on the low traffic midnight shifts must be managed in exactly the same way as the significantly busier shifts where there is a traffic flow need for two operators working at each position so as to make break time an easy matter. It was accepted in Noakes and Randall and Yates, and the cases which followed them that the Employer need not embark on "superfluous staffing", whatever the correct interpretation on that rather difficult phrase might be in particular circumstances. Presumably, there is room for some balancing of perspectives here.

¶ 105 I conclude on the basis of factual circumstances provided at hearing that the co-worker monitoring process in place at the Winnipeg ACC does not adequately meet the Corporation's obligations under article 13.01(b) respecting meal and relief breaks on an ongoing every shift basis for single controllers. Indeed, it does not appear to provide for meal time at all and the relief breaks taken are at best haphazard and overly brief, even precarious at times in terms of what air traffic might "pop up". The personal experiences of the five single controllers who testified are frankly compelling. The evidence of management persons Clark and Boulet, as thoughtful and well articulated as it was concerning aircraft volumes and proper monitoring techniques pursuant to establish policy and directive does not offset the real world misgivings I am left to consider. The depth of the current unsuitability of severely restricted break time is perhaps highlighted by management's suggestion that it can look into installing a public address system in the washroom in order for controllers never to be out of reach of their position duties. In practice, even as described by policy, the monitoring program in Winnipeg ACC is deficient. There has been too little co-ordination and organization associated with the monitoring procedure. I do not hesitate in remarking that the MANOPS provisions and directives as sought to be applied in Winnipeg are unworkable, providing the single controllers with too much exposure and too little real assistance from co-workers who are asked to take over their positions while on break time. It cannot be said that these provisions even contemplate one ever taking any meal time. The system of monitoring as applied in Winnipeg also provides controllers with too little assurance that their positions are being adequately manned by qualified enough individuals to allow them to take any real breaks. Break time, to be meaningful in the context of controllers' high responsibilities and need for at least some periods of real rest and relaxation during their shifts, should be taken away from their work stations. This is apparent however quiet a night they might be having on the surface. Such is the situation on other shifts. The "operational requirements" provided in 13.01(b) does not contemplate an ongoing program whereby single controllers on midnight shifts are seriously hindered in their ability to take any relief breaks, virtually on every shift. I accept that a given factual situation occurring may well speak to unusual or unanticipated circumstances where one is operationally limited in taking any break time over the entirety of a shift, but not as a matter of any ongoing organized approach toward seriously limiting break time for lack of a qualified enough replacement. I would add that I see no realistic comparison here with evening and night nurses in an institutional setting being properly required to take meal and relief breaks at their place of duty as was the situation in Kerr et al. The two workplaces are fundamentally different in nature.

¶ 106 I am of the view that the current monitoring structure in place in the Winnipeg ACC for covering single controller positions at any time during the night shifts when controllers are required to briefly leave for reasons of personal exigencies or to seek some rest, constitutes an ongoing denial of the meal and relief break language under article 13.01(b) of the collective agreement. However, I am not satisfied that it is a case for simply directing the Employer to increase staffing in order to provide controllers with more comfort, by unalteringly having extra bodies brought into the building qualified in the various specialities to provide break relief, at least not yet. The Employer's staffing parameters, concerning which there was much evidence entered over the course of the hearing, should be respected as a management right, insofar as the Employer can bring the single controller night shift scenario within its article 13.01(b) break time obligations.

¶ 107 I conclude that acceptable methods must be put in place by the Employer, whether that be initially through re-aligning manpower, or combining work stations, or suitably cross-training some controllers in formalized realistic monitoring duties, or even by finding some other means, to ensure that single controllers on midnights are provided adequate meal and relief breaks during their shifts for the normal purpose of taking some rest and relaxation away from their duties. The means chosen by the Employer to ensure meal and relief breaks falls within its authority and is open to negotiation between the parties. Nevertheless, given the background of this matter, and the policy grievance format as agreed upon, it is appropriate for me to remain seized pending implementation in the event that any further directions or clarifications are required while options are explored and applied.