IN THE MATTER OF AN ARBITRATION

BETWEEN

NAV CANADA

AND

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

GRIEVANCE OF MIKE SENYCK

Arbitrator: Richard Brown

For the Union:
Ainslie Benedict

For the Employer:
Mary Gleason

Hearing:
April 26 and 27, 1999
Sault Ste. Marie, Ontario

Mike Senyck has grieved a five-day suspension. At the time of the incident for which he was suspended, the grievor had been an air traffic controller for 29 years and had no record of discipline within the preceding two years. Mr. Senyck was Ontario Regional Director of CATCA. There is little dispute as to what occurred and the association concedes the grievor's conduct warranted some form of discipline. The only question is whether the penalty levied was appropriate in all of the circumstances. The answer turns largely upon the proper disciplinary response to safety infractions and the relevance of union office to discipline in this context.

I

The suspension resulted from Mr. Senyck's conduct while on duty in the Sault Ste. Marie tower on January 1, 1998, between 12:30 and 2:00 p.m. Throughout this period, he filled both the air and ground control positions. During the ninety-minute interval, Mr. Senyck made thirteen personal telephone calls on the fax line. The calls had a combined length of sixty-three minutes and none concerned urgent matters. Some produced a busy signal or reached only an answering machine. Eight conversations resulted. During these conversations, Mr. Senyck had thirteen exchanges with controlled vehicles and made errors in eight. There were no mistakes in his communications with an aircraft which arrived and departed. No injury to person or property occurred as a result of the errors that were made.

The disciplinary notice, dated February 16, 1998, was issued by the tower manager, Steve Spiers:

> An investigation into your conduct while performing operational duties on January 1, 1998 has been completed.

> I find that you were negligent in the performance of your duties in that you were engaged in making personal telephone calls to the detriment of your operational responsibilities as an airport controller. In the course of several vehicle contacts, you displayed inattention to duties, culminating in the issuance of inappropriate vehicle clearance instructions. I also find that you were insubordinate in your actions when you directly violated unit and regional direction which stipulates that personal telephone calls are not to be conducted while performing operational duties, and that company equipment was not to be used for other than operational purposes. The seriousness of these events is further amplified by the fact there was adequate staffing available to allow for personal breaks, yet you chose to ignore this opportunity by assuming both operational control positions and then make your personal telephone calls.
>
> These are very serious violations and for these reasons, you have been assessed a five (5) day suspension, to be served March 1, 1998 to March 5, 1998. In reaching this decision, I considered the fact that you admitted wrong doing, apologized for your actions to myself and to the user, and have indicated that this behavior will not be repeated. I also considered the fact that you have not been disciplined for any similar previous occurrence in the last two years.
>
> I expect this discipline will impress upon you how seriously the Company views your actions. I caution you that future instances of such misconduct will result in an escalation of discipline.
>
> Should you feel this decision is unwarranted, you have the opportunity of presenting a grievance in the normal manner.

The investigation of the grievor's conduct was launched by Mr. Spiers after he was told by the airport manager that vehicle operators had complained. All communications in the control tower are recorded. The tape was transcribed and a summary of the transcript was entered in evidence.

During the first twenty-two minutes, Mr. Senyck made four personal calls, the first two lasting only a minute or so each, the third seven minutes, and the fourth almost twelve minutes. During the last telephone call, the grievor responded to a ground call in a prompt and otherwise appropriate manner.

Five seconds after ending the fourth personal call, Mr. Senyck made a fifth, lasting seventeen minutes, during which he had several work-related communications. Errors occurred in three of these exchanges. When the driver of Truck 91 reported leaving the field, there was a delay of thirty-two seconds before the grievor responded without any call sign and asked for the message to be repeated. This response indicated he did not know who was calling or what the caller said. The second error involved Blower *140*. The operator reported off the field, the grievor replied four seconds later using the call sign for Blower *141,* and the operator pointed out the error. Mr. Senyck testified no confusion resulted from his use of the wrong call sign because there was only one blower working on the day in question.

The third error during call five involved the emergency response vehicle, known as Red 2, and caused the greatest concern for the employer. The driver of Red 2 reported he would be out of the fire hall for a few minutes and could be reached via the hand-held radio system. Seventeen seconds later, the grievor responded by giving authorization for Red 2 to proceed to the service road. This error was not corrected. The exchange occurred less than four minutes before Canadian Regional Flight 1883 landed and thirty seconds before the grievor terminated his personal call. His totally inappropriate response to Red 2 indicated he did not know that the operator was no longer using the ground frequency. If the landing aircraft had

crashed, and the operator had not yet returned to the fire hall, he would have heard the alarm, but he would have been unable to get further information from the tower until he had reached his vehicle, unless the grievor realized his error and switched on the hand-held frequency.

Six minutes after Mr. Senyck ended his fifth call, the fax received a weather report from the Flight Services Station. It was then sixteen minutes after the hour. According to the grievor, weather reports normally came ten to twelve minutes after the hour. He suggested his personal call had not delayed the weather report because it did not arrive until several minutes after he hung up and the sending fax automatically redials until the transmission is made.

A total of eight minutes elapsed between the termination of the fifth personal call and the initiation of the sixth. Calls six through twelve were short and took place in a span of fourteen minutes. There followed another interval of eight minutes with no personal calls.

During the final call, lasting nineteen minutes, Mr. Senyck conversed with Michel Bouffard, another controller. Once again, there were several work-related communications during the personal call. The employer takes issue with five of these exchanges.

There is some dispute as to what occurred during the first exchange. When the driver of Truck 27 reported leaving the field at the service road, there was a thirty-seven second delay before the grievor responded, without a call sign, by asking for the message to be repeated. The driver immediately repeated his call sign and message, and the grievor responded nine seconds

later with only the call sign. According to the grievor, his response indicated he was aware Truck 27 had left the field. The employer contends what transpired immediately after demonstrates the grievor did not know where the truck was. Ten seconds after responding with only the truck's call sign, having received no intervening call from any other vehicle, the grievor asked the "vehicle on the service road" to repeat its message. In my view, this request indicates the grievor did not know the driver of Truck 27 had reported off the field. His request to have the message repeated was made two minutes before Canadian Flight 1882 was given taxi clearance. The request elicited no reply, and the grievor did not attempt to communicate with Truck 27 again. Mr. Senyck testified he had placed Mr. Bouffard on hold while the plane was being cleared for take off.

In the space of six minutes, errors were made in four other exchanges which occurred after the departure of Canadian Flight 1882. The driver of *Truck 91* asked permission to go *on* the field, and the grievor responded six seconds later by acknowledging that *Red 2* was *off* the field. The driver of Red 2 had not requested permission to go on the field in the first place. The grievor failed to acknowledge a call from the driver of Mobile 8. A call from the operator of Blower *140* elicited a very prompt response to Blower *141*. The driver of *Truck 91* requested clearance to go on the field, and repeated his call sign ten seconds later. The grievor immediately terminated his telephone conversation and called *Loader 150*, rather than Truck 91, to find out what message had been transmitted.

As soon as he was confronted about this conduct, Mr. Senyck admitted it was inappropriate and apologized. In examination-in-chief, the grievor

described his behavior as “extremely unprofessional”. However, he noted the traffic on New Year’s Day had been very light. During his shift only two planes arrived and departed, compared with hundreds of arrivals and departures on an average day when the flight school was open.

II

As evidence of the standard of conduct expected of controllers, the employer relies upon the following extracts from Nav Canada’s ATSI-9702:

> Functional Goal # 1
>
> In the provision of air traffic control and flight information service, all Air Traffic Service units shall provide:
>
> A. uniform application of approved standards and procedures;
> B. professional communications; and
> C. *full-time attentive flight monitoring* and flight information services.
> ...
>
> ATC Fact Finding Boards and Operating Irregularity Investigations have determined that *many occurrences are primarily a result of “acts of omission” or “lack of attention”* rather than errors of judgement or lack of skills. These situations often arise because an individual’s attention is diverted by items having a much lower priority. ...
>
> All operational personnel are required and expected to exercise personal, professional self-discipline to ensure that *attention and awareness are focused on those aircraft or vehicles that are being provided control or advisory services*. Logical priorities for attentiveness must be honored. (emphasis added)

Functional goal #1 appears on a plaque posted in the Sault Ste. Marie tower.

The matter of personal phone calls is addressed in a regional management directive dated July 27, 1995 and issued over the signature of Frank Decarlo, then Transport Canada's regional director. The directive states that controllers shall not make personal calls, even "urgent" ones, when occupying an operational position. This is the general rule but there is an exception for "one-person operations" where another controller is not available to provide relief. In this context, "urgent calls" of "short duration, normally no more than one or two minutes" may be made "during a period of no known or anticipated traffic." On January 1, 1998, the exception relating to one-person operations did not apply because two other controllers worked the day shift with Mr. Senyck. One of these controllers could have provided relief to the grievor.

The rule prohibiting controllers from making personal calls from an operational position was in effect long before 1995 when it appeared in the regional directive quoted above. In cross-examination, the grievor conceded a CATCA phone line in the tower had been removed in 1993 because management felt it was being abused. Mr. Senyck and two other controllers grieved the removal of this line and the grievance was eventually dismissed by the Public Service Staff Relations Board in a decision dated March 13, 1995. That decision sets out a memo from the tower manager, dated June 22, 1989, stating that "employees are using this phone line at the operational position so that they may chat while working" and that "warnings to cease this practice also have not been heeded." The manager proposed to remove the line at that time but was persuaded otherwise. It was removed by a subsequent manager in June of 1993.

Personal phone calls were again addressed in a memo to staff first issued on July 30 of that year by the then tower manager, T.D. Lee:

> All staff are reminded that personal telephone calls are not to be conducted on Transport Canada equipment. These lines and equipment are for official government use only.
>
> However, I appreciate that on occasion urgent matters may arise that require the use of unit equipment to place / receive personal calls. It is expected that these calls will be kept to a minimum. ...

(This memo was reissued by Nav Canada on December 12, 1995, with all references to Transport Canada removed, but with no substantive changes.) The grievor was CATCA branch chair at the time the memo was first issued. In this capacity, he spoke to Mr. Lee about the controllers' concerns and was told they should use their common sense in making phone calls. In cross-examination, the grievor conceded the use of common sense had to do with determining which calls were urgent. In other words, he and Mr. Lee did not discuss making calls from an operational position when relief was available.

In another staff memo, dated August 9, 1993, Mr. Lee wrote:

> It has come to my attention that Tower Staff are placing telephone calls on the FAX line (779-3892). This practice is to cease immediately. This FAX line, the future TCAMS line, or any other line installed for a dedicated purpose is not to be used for other purposes except in an emergency.
>
> Voice communications are to be restricted to 779-3707 and the other lines terminating on the telephone sets.
>
> Staff not complying with this direction could face disciplinary action.

The fax is used for the transmission of weather reports and flights delays imposed for reasons of air traffic control.

Mr. Senyck admits he was aware of these written directives concerning personal phone calls. He contended Mr. Lee's directive about the fax was canceled by the Nav-Canada directive issued in December of 1995. This contention is incorrect. As already noted, the Nav Canada directive merely replaced the substantively identical one previously issued by Transport Canada.

According to uncontradicted testimony, controllers at Sault Ste. Marie have not fully complied with management's instructions. Mr. Senyck estimated a controller makes or receives three or four calls per day on average. Denis Catania, a controller and team leader within the bargaining unit, estimated a controller has two or three personal calls per shift some of which are not urgent. Neither of these witnesses testified as to whether controllers were making personal calls from an operational position.

Mr. Senyck contends the employer was aware personal calls were being made from the tower. The grievor testified he twice walked into Mr. Lee's office while the tower manager was listening to a tape of Michel Bouffard engaged in such a call. These incidents must have occurred sometime after 1993 when Mr. Lee became tower manager. There is no evidence as to whether Mr. Bouffard made these calls from an operational position or as to whether they involved urgent matters. In cross-examination, the grievor conceded he does not know who initiated them, how long they lasted, or whether Mr. Bouffard made them while working alone. In short, the

evidence does not prove the facts known to Mr. Lee disclosed any violation of the rules.

The tapes of tower communications are regularly reviewed by a controller designated as the unit operations specialist who is also a member of the bargaining unit. Mr. Catania testified a conversation about dinner, between him and his wife, was reviewed by Mr. Hutt as operations specialist two years ago. In cross-examination, Mbr. Catania conceded he did not know whether Mr. Hutt discussed this matter with management.

Mr. Senyck testified the spare telephone sat most of the time on the counter in the Tower, plugged into the same line as the fax. Testifying before Mr. Senyck, Mr. Spiers said the spare phone was kept in storage, indicating he had not seen it on the counter. He was not cross-examined on this point.

III

Counsel for the employer contends the magnitude of the appropriate penalty is increased by Mr. Senyck's position as an officer of the association. The evidence indicates this factor did not enter into management's choice of a five-day suspension. In the event I decide this penalty is not warranted on other grounds, counsel urges me to sustain it because of the office held by the grievor.

Employer counsel provided copies of two awards dealing with union officials. In *Bell Canada and Communications Workers of Canada,* (1989), 5 L.A.C. (4th) 40 (Burkett), the grievor was vice-president of the local union. He had completed "twelve years of unblemished service" before sabotaging

company property, with a fellow union member, during a legal strike. Mr. Burkett began by reviewing the case law about union officers who participated in illegal strikes:

> These cases stand for the proposition that although a union official owes no special duty to the employer to act to prevent such unlawful activity a union official who engages in such *unlawful activity* is liable for a more severe disciplinary penalty than members of the rank and file who engage in the same unlawful activity *by reason of the position leadership position he enjoys*.(page 49; emphasis added)

As to the rationale behind this approach, Mr. Burkett quoted the following passage from one of his earlier awards, *Canadian Industries Ltd and U.S.W.*, dated January 7, 1977:

> In an unlawful strike this greater liability results from the fact that a union officer by actively engaging in the unlawful strike is encouraging the strike to a greater degree because of his recognized leadership.

Through a process of reasoning by analogy, Mr. Burkett in *Bell Canada* applied the jurisprudence about unlawful strikes to the conduct before him:

> The reasoning and conclusion in these cases has application to the matter at hand. The committing of an act of sabotage by a union official is compounded by the fact that the union official occupies a leadership role. (page 49)

The analogy between participating in an unlawful strike and engaging jointly in the destruction of property during a lawful strike is very close. In both scenarios, the activity is illegal and it is intended to further the objectives of the union, even if the illegality is not officially sanctioned by it. The union

official, although doing no more than any other participant, is likely to be perceived as a leader, because the conduct is meant to serve the ends of the organization of which the individual is an officer. As Mr. Burkett explained, such leadership increases the resulting harm by encouraging others to join in the misconduct. This is the rationale for a more severe penalty.

The second award provided by the employer is *Livingston Logistics Services Inc. and Industrial Wood and Allied Workers of Canada* (1997), 66 L.A.C. (4th) 300 (MacLean), where the union's chief steward was discharged for an act of pilfering. Upholding the dismissal, Arbitrator MacLean said about the grievor:

> He was in a position of influence over other employees who would probably to some extent at least look to him as a role model. His leadership in the bargaining unit is plainly a negative factor which serves to the seriousness of his act. (page 333)

In coming to this conclusion, Mr. MacLean cited the decision in *Bell Canada*. The facts in these two cases are similar insofar as stealing and destroying property are both crimes, but the facts are different in as much as the pilferage had no connection to the trade union, whereas the sabotage was done in the context of a concerted refusal to work. When an official engages in misconduct lacking any relationship to the bargaining agent, the holding of union office does not encourage others to join in common cause. At most, the misconduct may influence how others behave in the future. In purporting to follow *Bell Canada*, Mr. MacLean did not consider whether this distinction was relevant to the determination of the appropriate penalty.

Mr. MacLean also cited another theft case, *Livingston Distribution Centres Inc. and Teamsters Union* (1996), 58 L.A.C. 129 (MacDowell) where the arbitrator said:

> The grievor knew that what he was doing was wrong, and knew that he risked discharge if he were caught. Indeed, in his role as chief steward for the local union, he had warned other employees if they stole from their employer they would be fired. It is not clear the grievor should not now be held to the standard that he himself described; and there is much to said for Arbitrator Burkett's view that the grievor's misconduct is all the more serious because he was a senior employee and union official, who should have known better and whose example might be expected to influence other employees -- positively or negatively.(See *Re Bell Canada and Communications Workers of Canada* (1989), 5 L.A.C. (4th) 40 (Burkett).)
>
> I do not suggest that the grievor owed some special duty to his employer because of his seniority or union office But it does pose a deterrence problem if union officials steal, then do not face the consequences the consequences of which they have warned other employees. (page 141)

Two factors are addressed in this passage: the mere holding of union office; and the use of union office to communicate with other employees about the penalty for theft. In the last paragraph quoted, Mr. MacDowell suggested such communications are relevant in fashioning a penalty for theft. As to the relevance of union office alone, he merely said "there is much to be said" for following Mr. Burkett's lead. Like Mr. MacLean, Arbitrator MacDowell did not address the distinction between theft sabotage during a legal strike and theft.

The facts at hand are distinguishable not only from *Bell Canada* but also from *Livingston Logistics*. Unlike the sabotage in *Bell Canada*, a violation

of safety rules bears no relationship to the function of the bargaining agent, and therefore does not cast a union officer in the role of leader. Unlike the theft in *Livingstone Logistics*, Mr. Senyck's misconduct was not a crime or otherwise unlawful. The authorities cited do not stand for the proposition that a union officer should face a greater penalty than other employees for misconduct which is neither illegal nor done to achieve organizational goals.

Nor is this a proposition which I am inclined to embrace. If union officers were to be treated in this way, why not everyone who might be seen as a role model by others in the workplace, including senior members of the bargaining unit, or even employees with positions of leadership elsewhere like civic politicians. Speculation about the possible influence of role models on the future conduct of other employees does not warrant differential treatment in the assessment of penalties. Indeed, it could be argued that imposing a heavier penalty on union officials for all types of misconduct is tantamount to discrimination based upon union activity.

My reluctance to accept the employer's argument is buttressed by the words of Mr. Justice Estey in *Douglas Aircraft Co. of Canada* v. *McConnell* (1979), 99 D.L.R. (3d)385 (S.C.C.):

> The law has never recognized that a bargaining representative of a group of employees owed a duty in such a role to the employer. He may owe a duty to the community (but that we need not decide here), and he clearly owes a duty to his, but the total fabric and structure of labour relations is predicated upon the integrity in law and in fact of the representatives of both sides to the bargaining process. That integrity is not promoted, and in fact would be defeated, if the law were to place in the representative of the employees a duty

> enforceable by the company, or indeed, a duty the failure to which would expose the employee representative to punitive action of any kind by the company against the employee in his status as employee. (pages 410 and 411)

I conclude Mr. Senyck is not subject to heavier punishment by virtue of his union office.

IV

Counsel for the employer relies upon six cases dealing with penalties for the contravention of rules relating to safety. The first three involve air traffic controllers. In *Whittley and Treasury Board*, decision dated Feb. 10, 1997, the Public Service Staff Relations Board upheld the discharge of a air traffic controller with fifteen years of seniority and no previous discipline except a one-day suspension for profanity. Mr. Whittley twice left his operational post at the North Bay Tower unattended, for twenty minutes on one occasion and for several minutes on the other. During his first absence, while less than the normal level of service was provided by a flight service specialist, a military jet landed and a civilian passenger carrier took off on the same runway within one minute of each other. The grievor gave false testimony about the reason for his absence during this occurrence. Acting out a plan devised before reporting for duty, Mr. Whittley also left work two hours early, having falsified records to indicate he worked a full shift, and leaving one controller on duty when there should have been two. In upholding the discharge the adjudicator emphasized the important contribution made by a controller to air navigation safety:

> The duties of an air traffic controller are highly important, as is the need for them to be fully and competently performed. The confidence,

> not only of the employer, but of the whole flying public is at stake. Upon the maintenance of that confidence rests much of the economic viability of the air travel industry and the peace of mind of all those who are involved in flying.(page 21)

The second case cited by the employer is *Green and Treasury Board*, decision dated April 6, 1998, where the Public Service Staff Relations Board reinstated an air traffic controller with "twenty-three years of discipline-free service." Mr. Green had been fired for leaving the Sudbury Tower unattended for a thirty-minute lunch break while, in his own words, "planes were flying all over the place". He was worried by marital troubles, upset the other controller scheduled to work had called in sick, and had soiled himself when unable to get to the washroom. Characterizing the dereliction of duty as "an impulsive and spontaneous act", the adjudicator substituted a three-month suspension. Rather than forcing the employer to compensate the grievor for the remaining time between discharge and reinstatement, the adjudicator also awarded a three-month unpaid leave, intended not as an additional penalty but rather as recognition that "the grievor should share with the employer the burden of delay."

In *CATCA and Nav Canada*, decision dated Mar 8, 1999, Arbitrator Rousseau upheld the dismissal of an air traffic controller with twenty-three years seniority who had previously received a one-day suspension for failing to report an operational irregularity and a three-day suspension not notifying the employer of an absence. The grievor, Mr. Crompton, reporting to work on New Year's Day 1997 showing "signs of alcohol intoxication." In contravention of an instruction not to work in his impaired state, the grievor assumed a data position coordinating flight plan information.

The other safety cases upon which the employer relies involve a marine radio operator, a bus driver, and a ferry worker. In *Spears and Treasury Board*, decision dated April 21, 1987, the Public Service Staff Relations Board sustained the discharge of a Coast Guard radio operator with eighteen years of seniority and a disciplinary record including a one-day suspension and a written reprimand. Over the course of three consecutive days, Mr. Spears engaged in what the adjudicator characterized as the "almost complete non-performance of his duties." On the first day, he responded inadequately to a boat that had declared "Mayday" then ignored entirely four subsequent "Mayday" calls from the same vessel.

In *Corporation of the City of Brampton and Amalgamated Transit Union*, (1978)19 L.A.C. (2d) 237 (Shime), the majority of the board of arbitration upheld a fifteen-day suspension imposed on a bus driver with four years seniority. He failed to stop at a red light, before making a right hand turn at a speed of between five and ten miles per hour, in "fairly dark" conditions, onto a road with no traffic. One month earlier, he had received a warning for not coming to a complete halt at a stop sign. In sustaining the suspension, Mr. Shime attached a high priority to safety:

> In the case of bus drivers or persons driving large vehicles, it is our view that strict standards of safety should be observed not only to protect the employees, but to protect other drivers and pedestrians using public thoroughfares. (page 239)

In the following comment, the arbitrator suggested the suspension might have been upheld even in the absence of a prior warning:

> Thus, some boards of arbitration have unanimously held that in safety matters, even in the case of long service employees, it is not unreasonable to bypass the usual progressive discipline of giving warnings before suspensions and moving directly to suspension for a first offense. (page 239)

In *British Columbia Ferry Corporation and B.C. Ferry & Marine Workers' Union* (1993), 37 L.A.C. (4th) 332 (Korbin), two employees were fired for their role in the departure of a ferry while vehicles were being loaded. Three fatalities resulted. The first grievor, the lower ramp operator, had five years seniority and no disciplinary record. He gave an "all clear" signal without looking to see whether the upper loading ramp was still in use. At the hearing, he accepted no responsibility for the catastrophe and blamed others. As he had not read instructions posted at his work station, the arbitrator found he had "blatantly disregarded" safety procedures. The other grievor, the chief officer, had seventeen years seniority and no discipline on his record. Upon receiving the "all clear" signal from the ramp operator, he looked at the upper ramp and erroneously concluded it had been raised and was no longer in use. He then notified the master it was safe to depart. The arbitrator characterized this conduct as "momentary carelessness" and noted the grievor accepted responsibility for the tragedy and demonstrated remorse. This grievor was reinstated without back pay for the approximately ten months since dismissal.

Association counsel referred me to two cases involving an infraction of air safety rules. The first is *Boulianne and Treasury Board*, a decision of the Public Service Staff Relations Board, dated December 12, 1990. As a flight service specialist working at Robervale, Mr. Boulianne was responsible for

the airport at Chibougamau, but he could not see field there. He gave permission for two snow removal vehicles to enter a runway at Chibougamau. An hour after allowing the second vehicle onto the field, he cleared an aircraft to land on the same runway, without informing the vehicle operators of the aircraft's approach and without informing the pilot of the presence of the vehicles. Having recorded the presence of two vehicles on data slips on his work table, he had forgotten they were on the runway. In addition, he waited until the next day to report this operational irregularity, rather than doing so immediately as he should have. Fifteen months earlier, he had received an oral reprimand for a "similar incident". He had ten years of seniority. The adjudicator reduced the one-day suspension imposed by management to a written reprimand, the sanction initially recommended by the grievor's immediate supervisor.

In *Lefebvre and Treasury Board*, decision dated September 13, 1995, the Public Service Staff Relations Board sustained a one-day suspension for a controller with twenty-two years of seniority. The decision makes no mention of any disciplinary record. Having worked an afternoon shift at the Dorval tower, Mr. Lefebvre was ordered to stay for the night shift because no one volunteered to replace an employee absent due to sickness.
He was given a ninety-minute rest break between shifts, but used most of that time to bicycle home and return by car. Thirty-five minutes into the second shift, he fell asleep, causing a ten to fifteen minute delay in the landing of an Air Canada plane.

V

What general principles emerge from these safety cases? These awards demonstrate that the contravention of a safety code, at least by an employee whose primary function is to protect others, may attract a greater penalty than the violation of many other types of rules. This principle underlies cases like *Whittley*, *Green, Nav-Canada* (Crompton), *Spears and B.C. Ferries* where long-service employees, with little or no previous discipline, faced discharge or lengthy suspension for serious safety infractions committed deliberately or recklessly. The only case where the infraction actually caused injury or death is *B.C. Ferries*. In all of the other cases, a hefty penalty was imposed for a violation which created a substantial risk of serious harm, even though none resulted because good luck prevailed.

The relatively high priority attached to protecting life and limb is also evident in *City of Brampton* where Mr. Shime suggested a safety infraction may warrant the imposition of a suspension, even in the absence of a prior warning. Further authority for this proposition is found in *Lefebvre* upholding a one-day suspension in the absence of any record of prior discipline.

Boulianne is the only case cited which appears not to recognize that safety ranks higher than many other workplace objectives. There the adjudicator replaced a one-day suspension with a written warning for a flight service specialist who allowed a pilot and vehicle operator to use the same runway unaware it was being used by the other. This ruling was made despite an earlier oral warning for a similar infraction. In my view, the decision in *Boulianne* is inconsistent with the other cases reviewed above and should not be followed.

How do these authorities apply to the case at hand? *Lefebvre*, cited by association counsel, may be the case with facts most similar to those before me. Falling asleep is not a deliberate contravention of rules, whereas making thirteen phone calls is. On the other hand, being inattentive while talking on the phone poses less of a risk than does sleeping. Weighing both the extent of deliberation and the degree of risk, one might conclude the misconduct in these two cases is roughly comparable in severity. Both grievors had no disciplinary record and over twenty years of seniority. Despite the factual similarities, the ruling in *Lefebvre* offers only limited guidance in the case at hand. By upholding the one-day suspension imposed by management, the adjudicator indicated a lesser penalty was not appropriate. He was not asked to determine whether a penalty greater than a one-day suspension was appropriate. In other words, the ruling established a floor but not a ceiling. For this reason, *Lefebvre* is of no assistance to the association in seeking a penalty reduction.

As employer counsel acknowledged, most of the cases cited by her involve misconduct significantly more serious than that in the instant case--leaving a control tower unattended, working while intoxicated, not responding to repeated "Mayday" calls, and allowing a ferry to depart while vehicles were loading. The penalty in these cases--discharge or suspension measured in months--also was more severe than the suspension imposed upon Mr. Senyck. Applying the concept of proportionality, counsel contends these cases demonstrate the five-day suspension was appropriate for the grievor's misconduct. I agree the notion of proportionality ought to be applied. In my view, the differences between the cases cited and the one at hand, in terms of both misconduct and penalty, are large enough that reasonable people would

differ over whether the earlier cases support a suspension of precisely five days, rather than some lesser number, for Mr. Senyck.

Of the employer's cases, the one involving misconduct most comparable to the instant case is *City of Brampton,* where a bus driver made a right turn without stopping at a red light. Mr. Shime upheld a fifteen-day suspension. The magnitude of the penalty is partly explained by the very recent warning issued to the grievor for not obeying a stop sign. In comparison, Mr. Senyck had no record of prior discipline during the preceding two years. This is an important distinction.

Mr. Senyck concedes his conduct was "extremely unprofessional." By engaging in a lengthy series of personal telephone calls from an operational position, he neglected his central responsibility to provide attentive service, and he placed others at risk. Making the first call might have been a spontaneous act, done without thought of the operational impact, but Mr. Senyck continued to engage in personal calls after errors of which he must have been aware. He knew the rules concerning telephone use by a controller in an operational position, and he broke them time after time. In short, the grievor deliberately and repeatedly disregarded instructions concerning his primary obligation of ensuring the safety of others. This conduct merits a penalty more onerous than the one suggested by the association--a warning or at the very most a one-day suspension. As well as correcting the grievor's behavior, the employer has a legitimate interest in deterring others from engaging in similar misconduct. More than a one-day suspension is warranted to provide general deterrence. Bearing in mind the need for such a deterrent, the grievor's seniority and the fact he had not been disciplined in

the preceding two years, I conclude the appropriate penalty is a suspension of three days.

The grievance is allowed in part. The employer is directed to amend its records to show a suspension of three days and to compensate the grievor accordingly.

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Richard M. Brown

Ottawa, Ontario
May 12, 1999