File No. - 98323

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN AIR TRAFFIC ASSOCIATION

(The Union)

AND:

NAV CANADA

(The Employer)

Re: Grievance on behalf of David Kelly alleging that on July 31, 1998, he was dismissed from employment as an Air Traffic Controller without just cause. The requested redress was reinstatement to his position with full compensation including interest and to be otherwise made whole.

Before: W. Wayne Thistle, Q.C., C.Arb.

At: Gander, Newfoundland

Hearing Dates:
October 27 and 28; December 15 and 16, 1998; January 5, 6, 7, 26 and 27; February 15, 16, 17 and 18; March 31; April 20, 1999

Appearances:

For the Union:

Peter J. Barnacle, Legal Counsel
Fazal Bhimji, Vice President, Labour Relations
Dean Baker, Newfoundland Regional Director

For the Employer:

Mary Gleason, Counsel
Brian Kinney, Labour Relations Advisor
Brian Bowers, Manager, Area Control Centre Operations

Date of Decision: August 10, 1999

Witnesses:

Called by the Employer:

Brian Bowers, Manager, Area Control Centre Operations
Wayne Lyon, Manager, Air Traffic Control Operational Requirements
Jacques Chamberland, Regional Director
Tom Fudakowski, Director of Air Traffic Services
Dave Dekker (Agreed Statement of Facts, February 18, 1999)
Ronald Chafe, Consultant

Called by the Union:

Captain David Benton, Air Canada Pilot
Paul Prall, Air Traffic Controller, Gander Tower
Dean Baker, High Level Supervisor & Regional Director for the Union
Fazal Bhimji, Vice President, Labour Relations
Paul Hansen, Air Traffic Controller, Gander Tower
Ed Downton, DSC, Gander
David Kelly, the Grievor

At the hearing, the parties agreed as follows:

1. The Arbitrator was acceptable.

2. There were no preliminary objections going to jurisdiction to hear the grievance.

3. The grievance procedure had been followed or requirements had been waived.

4. The Arbitrator would remain seized of the matter in the event the parties could not agree on the interpretation of the award or in the event there is a question of compensation arising from the award.

5. Witnesses would be permitted to remain throughout the hearing.

The Background

The Union filed a grievance on September 2, 1998, on behalf of the Grievor, David Kelly, alleging that his dismissal from employment as an Air Traffic Controller was without cause. It suggested the Grievor should not have been disciplined in the circumstances. It should have been a nondisciplinary matter, yet he had no warning that his performance was substandard so as to put his job in jeopardy. Further, the Grievor was not provided an opportunity to improve his performance through such programs as remedial training or other assistance.

The redress sought was immediate reinstatement to his position with full compensation, including interest, and to otherwise be made whole. Given the discussions between the Union and the Employer to date, the Grievor requested the grievance be immediately referred to arbitration.

The memorandum informing the Grievor of the termination of his employment was dated July 31, 1998, and was issued as follows:

(See Appendix "A" in PDF format)

The Prior Incidents

1. March 6, 1995

An internal investigation report was prepared of the operating irregularities which occurred between AFR 047 and UAL 946 approximately 80 mi. northeast of Stephenville, Newfoundland,

on March 6, 1995. In this synopsis, it was noted that AFR 047, an eastbound B 747 F, and UAL 946, an eastbound B 767, were operating en route through the Gander domestic FIR following flight paths which crossed. The Gander controller, the Grievor, being aware of the impending conflict, elected to achieve greater separation through the use of radar vectors, however, in doing so, allowed the radar separation to erode below the required 5 mi. Both aircraft were operating at the same flight level. During the time of the occurrence, training was in progress.

In the findings of the report, it was noted that the Grievor and a trainee were originally working the High Level Domestic sector at position 11. There was a manual reconfiguration of Position 08 when the west radar sector was divided and both the Grievor and the trainee accepted control of the new position responsible for the control of AFR 047 and UAL 946.

In an interview with the Grievor, it was confirmed that the traffic confliction between AFR 047 and UAL 946 was detected when both aircraft were still in the Moncton FIR. In fact, range and bearing lines were drawn for each aircraft to the point of convergence. During the time that the High Level sectors were being reconfigured, both the Grievor and the trainee realized that the first priority upon assuming control of position 08 was to resolve the traffic confliction between AFR 047 and UAL 946.

In the conclusion section of the report, it was determined that a loss of separation occurred when AFR 047 was vectored

behind UAL 946 at FL 370. The radar spacing achieved was approximately 3.5 mi. where 5 mi. was required. The cause of the incident was the failure of the controller (training monitor) to intercede in sufficient time to resolve a previously identified confliction between AFR 047 and UAL 946. In addition, the course of action taken to resolve the crossing situation, given the proximity of each aircraft to one another, demonstrated an error in judgment on the part of the controller.

2. June 14, 1995

On July 16, 1995, the Grievor was given a letter of reprimand for substandard performance during the course of his duties on June 14, 1995. In the letter, it was stated that a unit investigation into an incident in High Level Domestic air space revealed the following:

1. An operating irregularity occurred resulting in less than required separation between VIR 004 and CMM 2317. This irregularity occurred because the Grievor failed to take appropriate measures in a timely manner to maintain required separation, even though he was fully aware of the pending problem.

2. This is the second time in less than four months that this had happened to aircraft under the Grievor's control. On March 6, 1995, a similar situation occurred between AFR 047 and UAL 946 while he was responsible for these flights being controlled by a controller in

training under his supervision. The Grievor was informed that this discipline was intended to correct his performance and impress upon him his responsibilities as an air traffic controller. He was told that failure to correct his performance would result in further disciplinary measures ranging from financial penalty up to, and including, discharge.

The internal investigation report had concluded that the loss of separation occurred when CMM 2317 was vectored behind VIR 004 at FL 350. The radar spacing was approximately 4.2 mi. with vertical separation of 700 ft. --required separation was 5 mi. or 2,000 ft. vertically. It was determined that the cause of the incident was the failure of the controller to intercede in sufficient time to resolve unidentified confliction between CMM 2317 and VIR 004. When a course of action was taken to resolve the crossing situation, it was untimely.

3. <u>July 27, 1996</u>

The Grievor was informed by memorandum dated September 3, 1996, that he had been suspended from duty without pay for a period of one working day, September 11, 1996, for his continued failure to fulfill the duties and responsibilities required of him in his job. In the memorandum, it was noted that the suspension was necessitated by his involvement in the risk of collision between AFR 055 and MPH 806 which occurred on July 27, 1996. The Grievor was informed that evasive action was taken by both aircraft in response to resolution

advisories provided by the airborne collision avoidance systems when the paths of both aircraft crossed while under his control.

On March 6, 1995, the Grievor had been counseled for his involvement in a loss of separation between AFR 047 and UAL 946. On July 16, 1995, he was given a written reprimand for his involvement in the loss of separation between VIR 004 and CMM 2317 which occurred on June 14, 1995. Unit investigations conducted into both these occurrences had found the Grievor to be solely responsible.

The Grievor was advised that the disciplinary action was intended to impress upon him the importance of vigilance and the close scrutiny of data that is required in the discharge of his duties. The duties and responsibilities of his position demand a very high standard. He was required to follow standard procedures, maintain continuous concentration and process flight data confidently and correctly. The discipline was also intended to impress upon him the serious nature of this and past occurrences. The Grievor was reminded that substandard performance and careless attention to detail could not be tolerated. Future occurrences would be subject to further disciplinary action up to, and including, discharge.

The Transportation Safety Board of Canada had investigated this occurrence and, in its report, had determined that the Grievor had been involved in two other incidents during the previous 17 months. These two incidents were losses of

separation which were investigated internally by management staff at Gander ACC. The internal investigation reports were reviewed during the Board's investigations and it was concluded that the deficiencies seen in this instance were not similar to those seen in the previous two instances and did not reflect a trend.

A performance review of the Grievor's proficiency was conducted by a Gander ACC supervisor after the incident. The review mentioned that the Grievor was regarded by his peers and supervisors to be a good controller. It also determined that his overall performance was at, or above, the Gander ACC unit standard and that he was ready to continue his duties without the requirement of further training.

In its analysis, the Safety Board found that the Grievor had been considered to be a proficient and good controller, well-regarded in the Gander ACC, even though this was his third incident in 17 months. Considering his abilities and the traffic situation, the Grievor should have detected and resolved the conflict between AFR 055 and MPH 806 well before the risk of collision occurred. Had the Grievor been aware of a possible conflict because of the converging tracks, he probably would have placed a range bearing line (RBL) between the two aircraft to determine the exact distance between them.

The Safety Board further found that despite the frequency of incidents involving the Grievor (3 in 17 months), the Grievor's reputation and demonstrated ability during performance reviews suggested that the incidents do not

reflect a problem of ability. Rather, the incidents stemmed from human error that could be corrected by a controller awareness program. The Gander ACC management put a disciplinary letter in the Grievor's file as a corrective action and to make him more aware of his job responsibilities in the future.

The Grievor had marked the AFR 055 flight progress strip to indicate that it would be crossing other traffic. If the Grievor had heard the Moncton controller's warning, he would have been alerted to the crossing traffic situation. In this case, important information in a hot line conversation was missed because the Grievor did not listen completely. He was inattentive to the radar display and the traffic situation or he would have detected the conflict between MPH 806 and AFR 055 earlier and resolved it. When he rerouted AFR 055 direct to St. John's, he should have looked at the radar display where he could have detected the conflict with MPH 806 at that time. The minute and forty-two seconds of radio silence prior to his detection of the conflict suggested that the Grievor was not scanning the radar display during this time.

In its conclusion as to the causes and contributing factors behind the incident in question, the Safety Board found that a risk of collision between the two aircraft occurred because the Grievor was inattentive to the radar display and the traffic situation and did not detect and resolve the developing conflict.

4. July 20, 1998

The parties did not present into evidence a unit investigation report describing the incident which occurred on July 20, 1998. Several of the witnesses related their understanding of what had happened which led to the incident. Two aircraft, AC 870 and AFR 033, were heading from North America to Europe on prescribed routes. AC 870 was originally booked over COLOR but was rerouted over RAFIN which caused it to cross the tracks of AFR 033.

The Grievor was working in Low Level for the first part of the shift. He went to High Level in Position 13 at 1:50 a.m. and was there until 2:15 a.m. when the incident occurred. He had handed off AC 870 to the Gander International Flight Service Station about a minute and one half to two minutes before the incident occurred. This would indicate he believed he had no potential conflict for AC 870. In order to accomplish this trade-off, he assigned the frequency for the International Flight Service Station and advised AC 870 that radar service was terminated.

A few minutes later, AC 870 returned on their frequency calling the Grievor and "PAN PAN PAN," the urgent signal requiring all to get off the frequency. The Grievor cleared AC 870 to flight level 360 (it was traveling at flight level 370). The AC 870 pilot replied saying he was climbing up in response to a TCAS resolution advisory. The AC 870 pilot stated he was on a direct collision course for the other aircraft. Seconds later, the AFR 033 flight came onto the

frequency and also called "PAN PAN PAN" noting he was descending in response to a TCAS resolution. AC 870 then advised that he passed directly on top of AFR 033. There were 32 seconds from the time the aircraft started to move until they were co-located over each other. At that stage, the 1,000 feet vertical separation was achieved. Shortly thereafter, both aircraft resumed their altitudes after crossing one over the other and the Grievor was relieved from his duties. Both AC 870 and an AFR 033 asked for their traffic in order to file reports with the Transportation Safety Board which would be investigating the incident. The two aircraft had been visible on the Grievor's radar scope between 10 and 15 minutes before the incident occurred.

The evidence suggests that with respect to this incident, separation was not ensured, planned or executed. Whenever separation happened, it was a result of the TCAS resolution advisory and it was only because of the TCAS resolution that a collision was avoided. When the aircraft were directly above each other, they were separated by 1,200 ft. and got as close to each other as 0.6 nautical miles. If separation was being monitored, there would have needed to be 1,000 ft. vertically and 5 mi. laterally.

The evidence of Mr. Bowers on behalf of the Employer was that, in this case, the Grievor totally failed to provide separation. He ought to have used range and bearing lines and predicted track lines to determine the track of the aircraft in question. Mr. Bowers stated that convergence was readily apparent by looking at the data strips for the two aircraft.

He could see this by the routings on the strips, the estimates for times and the fact that both aircraft were flying at flight level 370. The Grievor did not draw range bearing lines for these aircraft which would have been a normal thing to do in these circumstances. This would allow him to see the potential convergence and the separation that they would have had thereby allowing him to plan for the resolution. The aircraft altitude and history trails were available and displayed on the radar and what was readily apparent from the radar was that the two flights were on a collision course. The Grievor acknowledged that on the night in question, he had probably used the predicted track line function a couple of times in Position 13 but did not use the range bearing line for AC 870.

The Grievor was relieved from his duties at 2:15 a.m. on July 20, 1998.

Argument of the Employer

The Employer presented the outline of its argument by first reviewing the general background and the facts. It noted that the Grievor had been involved in four serious operating irregularities over a period of a little in excess of three years. Three irregularities were similar in that they involved large aircraft whose tracks were crossing or converging. In three of the four situations, the TCAS equipment on board the aircraft gave resolution advisories meaning collision was imminent. TCAS is not 100 percent accurate. Had the aircraft collided, in any of the circumstances, it is likely that all on board would have been

killed. The aircraft in question in the four circumstances each held approximately 300 people.

The Employer noted that the presence of crossing or converging aircraft is not unusual and occurs in all air traffic control environments, including the airspace in the Gander IFR and the air space within the jurisdiction of control towers.

The primary duty of an air traffic controller in an IFR unit is to maintain a safe, orderly and expeditious flow of air traffic under the control of the unit. The most fundamental way is by accurately applying separation standards. A loss of separation occurs when a controller fails to ensure that the relevant minimum separation is maintained between aircraft or fails to ensure (or adequately plan for) separation. IFR controller's (particularly in the Gander High Level Domestic sector) control mainly by use of radar. Information about flights (including the aircraft, route of flight, altitude and estimates) is also contained on flight data strips, which are another tool for control. It is part of the controller's job to be aware of the geography within the FIR and to know the location of the fixes over which aircraft pass. A controller must be aware of the location of all aircraft under his jurisdiction to ensure separation of the aircraft. Prior to 1997, the relevant separation standards were 5 mi. horizontally or 2,000 ft. vertically. With the introduction of RVSM in 1996, the vertical separation standard in oceanic and transition airspace was reduced to 1,000 ft. This followed extensive studies by ICAO and NATSPG, international organizations of which Canada is a party.

The Employer reviewed the operating irregularity of March 6, 1995. It observed that both aircraft were operating at the same flight level. There was crossing or converging traffic. The Grievor was in the process of training a trainee but was responsible for all control decisions made. Aircraft passed within 3.5 mi. of each other horizontally and eight hundred feet vertically, a significant loss of separation. The cause of the incident was poor judgment on the Grievor's part by failing to intervene soon enough. The Employer noted that the Grievor, however, is not willing to accept responsibility for this occurrence. The Employer issued a written warning for this occurrence and this was not grieved.

With respect to the operating irregularity of June 14, 1995, the Employer commented that both aircraft were operating at the same flight level. There was crossing or converging traffic. The controller in Moncton FIR pointed out the conflict. The aircraft passed within 4.2 mi. of each other horizontally and 700 ft. vertically. The Grievor neglected to report the incident in contravention of the law. The aircraft received a TCAS resolution advisory and, as a result, the matter came to light. The cause of the incident was determined to be poor judgment on the part of the Grievor. He had spotted the situation too late and waited too long to initiate vectors. A written warning was received for the occurrence and it was not grieved.

Another operating irregularity occurred on July 24, 1996. Again two aircraft were operating at the same flight level and there was crossing or converging traffic. In the Employer's view, the Moncton controller tried to warn the Grievor of the conflict but the Grievor cut him off. He completely missed the situation,

despite the fact that the aircraft were on his radar for some period of time and strips were also present. The situation was identical to that which occurred on July 20, 1998. The cause of the occurrence was the Grievor's inattention to the radar screen and to the traffic situation. He was suspended for this irregularity and the grievance was dropped, so this suspension remains on his file.

As with all such occurrences, the Grievor was given a "check ride." He passed the check ride with there being no identifiable problems. A trusted and well-respected supervisor, Mr. Paul Vokey, conducted the check ride. Mr. Vokey also reviewed the Grievor's performance on a quarterly basis over the following 14 months; each time the Grievor was rated as performing to the unit standard. The Grievor did not request training nor was there any identifiable problem that could be corrected through training. He appeared to be operating correctly and successfully as a controller. Despite his apparent ability to do the job, the Grievor had another severe operating irregularity on July 20, 1998.

One of the Employer witnesses described the situation of July 20, 1998, involving near collision of two aircraft, as "very serious" and "frightening." Mr. Fudakowski, with over 30 years' experience in the industry, qualified this (and the July 24, 1996, incident) as one of the two or three most serious he had ever seen. (The others were not attributable to controller error.) The Employer contended that once again the Grievor totally failed to notice two jumbo jets on a collision course for each other. A crash was avoided only by seconds and then by the reactions of the pilots with the use of onboard equipment. The cause of the incident

according to the Employer was the Grievor's inattention to his primary duty--to separate aircraft. Instead of paying attention to radar, the Grievor was doing less vital things, such as giving clearances to aircraft (which in some instances were unnecessary) and issuing direct clearances. The conflict was clearly visible on the radar scope--for at least 10-15 minutes. All the information necessary to spot the conflict is contained on the D1 (Air France) and the D2 (Air Canada) strip. As the Grievor himself admitted, the second strip showed that there had been a reroute and also clearly showed the aircraft's route of flight and that would involve it crossing and merging into other streams of traffic. The Grievor had all the tools to separate the aircraft and all information required to do so. This is precisely the kind of situation controllers are to look out for on a priority basis and the circumstances he faced are the essence of a controller's job. The presence of crossing or converging aircraft occurs in all the ATC environment. The Grievor took the handoff on the Air Canada flight and had to move the PED on the radar screen to the target and press it. To do this, he had to have been aware of the flight. He also took estimates on the flight and wrote on a D2 strip that contains all the information to show that there was crossing traffic. The strips are a backup--a fail-safe method to avoid loss of separation.

As far as the Employer is concerned, the excuses suggested by the Union in its testimony hold no weight. The Grievor was not too busy, which he admitted twice in the presence of the CATCA Regional Director in meetings with management held after the incident. He did not ask for a board split, which it was his obligation to do if he was too busy. The converging aircraft was the only situation of

any complexity he had to deal with while in the position on the night in question. The Grievor's tone or pace of communication was not hurried; he had time for pleasantries. The traffic volume for July 20 was average at best, and during the time the Grievor was seated in his position where the incident occurred, the traffic was lighter than at the peak hour on July 20. The traffic was moderate and not complex and involved nose to tail aircraft already set up to proceed out across the ocean. The number of aircraft shown on the transcript was not under his control all at once. The only situation of significance was that between Air France and Air Canada, which the Grievor missed.

The Employer also maintained that the Grievor was not required to deliver the clearances he did deliver or to offer the clearance delivery frequencies. This contravened unit procedure and made the Grievor busier than he needed to be. The manner of clearance delivery in no way contributed to the operating irregularity. It was not until the hearing that the issue of clearance delivery had been raised. The Grievor had been given two opportunities to explain his conduct but had not made any reference to any problems with clearance delivery. The Employer suggested the best evidence is what is said closest to when the incident occurred. The Grievor himself admitted the D2 strip for the Air Canada flight contained all the information necessary for him to detect that the aircraft would cross and merge into a second line of traffic. The issue of information not being on the route box was not raised until the hearing.

The Employer reviewed the communications handoff procedure. It noted that the practice which has consistently been followed is for

the controller to not initiate handoff to the IFSS until he is certain that there is no possible conflict for the aircraft. The Grievor failed to follow this practice and handed off Air Canada 870 earlier than usual at a time when it was headed for a collision with another aircraft. The fact that the Air Canada pilot was in communication with the IFSS is irrelevant to what transpired; he would have followed his TCAS regardless of the Grievor's direction. The Grievor did not spot the conflict; the TCAS is what alerted the pilots to the situation and they followed their own resolution advisories. When aircraft are that close, the controller is largely superfluous.

As far as conflict alert is concerned, the Employer and its predecessor have spent millions over the last several years trying to get conflict alert to work but there are significant technical problems with the systems. The U.S. system does not have conflict probe, except on an experimental basis in one or two centres. The current system is the one in which controllers must operate and most do, without incident. As far as the Employer is concerned, what is at issue in this grievance is not the adequacy of NAV CANADA's system but rather the appropriateness and adequacy of the Grievor's actions and performance, which were woefully inadequate. He failed to perform his job properly in a system used by all controllers in Canada.

In arriving at its decision to terminate the Grievor, the Employer addressed a number of issues and reviewed the evidence in some considerable detail. First it pointed out that there is no need for an employer to characterize termination as "disciplinary" or "administrative"; this is a matter for argument and may be argued

in the alternative. It suggested that the letter of termination bears either interpretation. No job search was necessary if the discharge is characterized as being disciplinary. However, a job search was made prior to termination and the Employer determined there were no vacant bargaining unit positions available for which the Grievor was qualified. Nor have any such positions become available or been staffed from July 20 to the close of the evidence in the hearing. Prior to the date of oral argument, the Employer had posted for Instructor positions at NCTI. There is no evidence of any position having been staffed. The Employer reviewed the positions in the bargaining unit some on a generic basis and other possibilities on a specific basis (i.e., potential head office opportunities). There were no positions available to which the Grievor was entitled under the Collective Agreement or in respect of which it was appropriate to place the Grievor. The Employer noted that the Grievor lacks the seniority to utilize the downbid agreement and cannot use the seniority bid agreement, since he occupied an A1-5 position in an ACC. The other jobs he could claim are staffed by deployment--a purely discretionary process in respect of which no one can claim "entitlement." Provided a move does not constitute a promotion, there is no recourse to complain about a deployment. Nobody has a right to deployment. A deployment occurs prior to there being a vacancy or a need for a staffing action. The Employer was within its rights to deploy the Grievor to a PSAC GT job and it was not necessary to consult PSAC. The offer made to him was a real offer. The Employer suggested that the Collective Agreement here is unique and distinguishable from private sector agreements.

The Employer reviewed whether there were other controller positions in which the Grievor could be placed. It stated that for obvious reasons, it would not be appropriate to deploy the Grievor to another controller position--either in an ACC or a tower. It suggested that the most eloquent demonstration of the correctness of this decision came from the Grievor himself who testified that he would not want to control again--neither in an ACC or a lower density unit (i.e., a tower) because he had lost his confidence. The Employer suggested that there was an acknowledgment that the Grievor was incompetent as an ATC in Gander because he could not control traffic in High Level. The concerns about the Grievor's ability to safely control in an ACC apply equally to a tower; unpredictable, untestable and potentially catastrophic lapses in attention cannot be tolerated in either environment. In both environments, attention and concentration are required, and a controller must maintain a mental picture of the traffic. Many of the tools used are the same. Indeed, in some instances, VFR control may be more complex. In IFR, the complexity arises from volume, whereas in a tower complexity comes from surprise. VFR aircraft can pop out of nowhere. As far as the Employer is concerned, the Grievor's situation is different from that of trainees--who were judged to have the potential but needed to mature. Moreover, many of them were placed in towers pursuant to an agreement with CATCA (that was in force for at least a portion of the relevant time). The entitlement to be so placed in towers was also recognized in letters of offer given to trainees. The Grievor's situation is also different from that of other controllers where there had been a demonstrated inability to control in an IFR environment for clearly identifiable reasons and they were placed in a tower. The Employer maintained that given

the unpredictable nature of the Grievor's errors and the number and severity of his operating irregularities, it is clear he cannot and should not control aircraft. The Employer suggested the arbitrator should not substitute his judgement on this issue for that of the Employer.

As far as the DSC positions are concerned, the Employer noted that to be considered as a DSC, an employee must have extensive experience as an Area or Terminal Controller, have reached the endorsement level in the unit, be certified as a DSC on the equipment in the unit and have an expressed interest in being a DSC. The training for a DSC is significant--up to two years. A major portion of the DSC job involves configuration of on-line systems used to handle live traffic. Updates to the system are also significant and, if done incorrectly, may compromise safety. An example on point was the GAATS crash in December 1998. There was a professional but tense atmosphere when this occurred. An operating irregularity could have occurred when the system went down. Given the sensitivity of the DSC role, its connection to live traffic and potential safety implications of an inattentive DSC, management determined that it could not deploy the Grievor to a DSC position. The arbitrator should not interfere with this decision. The Employer maintained that there is no hint of bad faith in this decision; quite the contrary, those who made this decision spoke of how they struggled to come to this conclusion. In any event, the Employer noted that there is no vacancy in Gander for a DSC. Management determined that the workload did not justify the staffing of a DSC job, particularly in light of the planned reduction in DSCs. That Grievor lacks the knowledge of the unit in Winnipeg and could not claim entitlement to a DSC position there.

Aside from Winnipeg, the Union has not suggested (nor could it, based on the evidence) that there are DSC positions available elsewhere.

The Employer maintained there is no UOO position vacant anywhere in the country; nor has one been staffed since the Grievor's termination. On a generic basis, management had considered the Grievor would not be suitable as a UOO, since the job is essentially one of separation specialist--a task which the Grievor had demonstrated he cannot do. The UOO positions are staffed by deployment. For safety reasons, the arbitrator should not replace the Company's decision on this issue by his own.

With respect to Instructor positions, the Employer contended there are no full-time regional Instructor positions and there is no evidence that positions at NCTI were staffed during the period from the date of the Grievor's termination to the date of the close of evidence at the hearing. Instructor positions are staffed by deployment or, occasionally, by way of competition. The Employer had determined that the Grievor lacked the ability to instruct, part of which involves evaluation of employees on simulators. The Employer argued that the last person who should be teaching air traffic control is someone who very nearly caused two (if not four) midair collisions.

Finally, the Employer contended there is no evidence of any other position in the bargaining unit being open or available for which the Grievor might have been qualified. Although not obligated to do so, the Employer offered to deploy the Grievor to a GT-TSS position in Moncton in settlement of the grievance. The offer was

re-extended by Mr. Chamberland during the hearing. Under the PSAC Collective Agreement, if the Grievor were to have accepted employment as a GT, his service would have been counted for vacation, leave and pension purposes. The Employer argued that the present arbitrator sitting under the agreement between NAV CANADA and CATCA cannot make any award as concerns a position in the PSAC bargaining unit.

The Employer reviewed various aspects of the law as they apply to the instant case. It first noted that it is open to characterize the termination as being either administrative or disciplinary. Acts of carelessness or inadvertence that create potentially dangerous situations have been found sufficient to afford cause for termination in a disciplinary sense. This is particularly true where, as here, there is a potential for loss of life. As far as the Employer is concerned, given the Grievor's lack of attention to his duties and failure to detect an obvious conflict, it may be concluded that he was careless and, thus, that discipline was warranted. A lack of attention to duties can be found to be the basis for discipline and this is especially so in the transportation area. The Grievor was paying attention to less important parts of his job and ignoring the radar screen.

The Employer's position is that in light of the severity of the situation and the Grievor's previous record, discharge is appropriate. Progressive discipline had been applied. In its view, an important factor is also the Grievor's attitude during the hearing, which was belligerent in the extreme, the first day he testified. He failed to show any remorse, characterizing the Employer's evaluations as ridiculous.

The Employer's alternative position is that if the Grievor's conduct is not found to be blameworthy, the discharge may nonetheless be upheld on an administrative basis. Reference was made to the seminal case setting out the test for an administrative discharge. As far as the Employer is concerned, the criteria established by this test have been met in this case. The required standard of performance is clearly set out and the Grievor was extensively trained as to the required separation standards and methods of controlling aircraft. There has been no suggestion that the Grievor did not know what was expected of him. The Employer had defined the level of job performance required. The Grievor was given a reasonable opportunity to meet the standard. In addition to the lengthy training he received when he became a controller, the Grievor also had the benefit of refresher training when HLG-1 was introduced and was evaluated and tested after his third operating irregularity. Neither the Union nor he requested further training. The Grievor's inability to function in his position of High/Low Level Domestic Controller was admitted and it was acknowledged that the Grievor should not return to active control duties "unless the company is comfortable with it." Clearly, management is not comfortable with this notion. Also, the Grievor stated he did not wish to control aircraft any longer.

As far as efforts to find alternate positions are concerned, the Employer argued these positions are confined within the bargaining unit and, in the case of incompetence, an employee can have no greater rights than in other situations. The Grievor has no seniority rights that would allow him to claim any position on an outright basis and there is no entitlement to jobs he would not

otherwise have. The UOO, DSC, head office and most other positions in the bargaining unit are staffed on a discretionary basis via deployment. If ever a competition were held, the Collective Agreement staffing provision is a "competition clause" whereby seniority comes into play only where two or more candidates are relatively equal. As far as the Employer is concerned, it made adequate efforts to find the Grievor alternate work. The Employer acknowledged that the only area where an argument can be made in the application of the appropriate tests relates to the efforts made to find alternate employment.

The Employer argued that an arbitrator has very limited jurisdiction to review an Employer's discretionary exercise of a management right--such as the decision to offer to deploy or not. Many cases hold that there is no basis at all to review such a decision. Other cases have held that there may be a review but the test to be applied is merely whether the Employer acted in good faith and there is authority to support a conclusion that not even that standard needs to be applied. To establish that an employer acted in bad faith, the union must show that malice or ill will actuated the employer. The Employer contended there is no evidence whatsoever to indicate that it was acting in anything but the utmost good faith when it decided not to deploy the Grievor. The Employer maintained there was no vacancy in any position in the bargaining unit which the Grievor could argue he was capable of performing. The fact that there is one less DSC in Gander than there has been in the past does not mean that there is a vacancy in this position. No positions in the bargaining unit were posted in the period following the Grievor's termination. In any event, the Employer maintains that in light of the competition-type clause in

the Collective Agreement, an arbitrator could not substitute his judgment for that of management and place the Grievor in a position to be staffed by way of competition. This is particularly true in the case with the instant grievance where there are no positions that have been posted. The Employer also suggested that the Grievor is not entitled to be trained for any position as a matter of right. An analogy may be drawn to the cases on promotion which have long held that absent a provision in the collective agreement stating otherwise, an employee is not entitled to training on promotion. As far as the Employer is concerned, if the termination is characterized as an administrative one, the grievance should be dismissed.

In the final alternative, the Employer argued that if the termination is characterized as an administrative one and if the termination is not to be upheld (which is not admitted), the only potential remedy is a bare order of reinstatement to a quasi lay-off status for up to July 31, 2000 (or earlier). The Grievor cannot be placed in any position for the reasons detailed above because in so doing it involves an excess of jurisdiction. Nor has any suitable position been shown to be available. Likewise, no order of compensation is possible, since there is no position the Grievor has a right to claim. If placed on recall status, deployments would occur prior to any rights to recall or promotion arising. It would be a matter for another arbitrator, seized with the particular facts to determine any grievance regarding deployment, recall or staffing claims made by the Grievor. Such claims are now, at best, hypothetical. The Employer argued that a controller who fails to perform adequately and on several occasions

nearly causes crashes cannot expect lifetime employment in a "make work" position somewhere.

The Employer reviewed a number of prior awards to demonstrate that there are precedents that support its position on the argument that had been advanced.

In conclusion, the Employer contended the grievance should be dismissed. If the decision to terminate was a disciplinary one, just cause existed. If it was an administrative one, cause also existed and the Employer has demonstrated that the Grievor cannot work as a controller and there are no positions in the bargaining unit open, or likely to be open, for which he is suitable. In the interest of safety, the Employer maintained its decision should be upheld. The Employer also noted that it may be possible on a consensual basis for it and the Grievor to agree to have the Grievor resume employment in the PSAC job but this possibility is outside the jurisdiction of the arbitrator to order.

Argument of the Union

In its outline of argument, the Union first noted that there is no dispute that an operating irregularity involving AC 870 and AFR 033 took place in the Gander airspace during the night of July 20, 1998, or that the Grievor was the High Level Domestic Controller working the relevant control position (#13, Area "F"). The evidence also establishes that the Grievor always accepted his responsibility for what could have been a terrible tragedy.

The Union contended that the evidence establishes a linkage between a number of events, actions and procedures and the incident itself. It is likely that only an aircraft fail-safe mechanism (TCAS) available to the pilots ultimately prevented a collision. This last "link" was not an air traffic control tool. Unlike in the United States where conflict alert is incorporated into the radar system, there is no comparable fail-safe protective system for controllers in Canada.

The Union also suggested that the evidence establishes that the Employer refused to recognize any linkage at all between the changes in airspace, workload, procedures, separation standards and practices in the unit and the event itself. Instead, the Employer relied on the maxim "controllers cannot make a mistake." It rejects any role for these factors in either assessing the circumstances of the operating irregularities or in determining what should be done with the Grievor as a result of his mistake. The Employer refuses any responsibility in setting up a situation that increased the chances that such an incident could occur.

The Union pointed out neither it nor the Grievor sought reinstatement to High Level Domestic control. As far as the Union is concerned, the evidence does not establish the Grievor's incompetence per se to perform such role, but both the Union and the Grievor agreed that it would be inappropriate to put him back into such a position, given the previous incident in July 1996 and the resulting effect on his confidence to be a controller in that speciality.

The Union maintained that the first two High Level incidents were qualitatively different than last two. Further, that the July 1996 and 1998 incidents both arose while the Grievor was focussed on other aspects of his job. Safety backups were either not in place or not in practice in the unit to catch the errors prior to reaching a critical point.

The Union maintained that the Employer had failed to subsequently make any meaningful assessment of the Grievor's abilities to perform other bargaining unit work despite the encouragement and options provided by the Union. The Employer rejected doing a formal assessment. The time frame for the decision to terminate was impossibly short to have done so and the Employer did not even make a serious attempt. As far as the Union is concerned, it is not open for the Employer to terminate an employee in these circumstances without a thorough, open and objective assessment of the Grievor's ability to perform other positions. There has been a long practice of doing just that. There are bargaining unit position available in the Gander Area Control Centre and other units in the country that the Grievor could prima facie fill. These include a Data Systems Coordinator position in the Gander ACC

and other area control centres, a tower position at Gander Tower and other towers in the region and instructor positions at the NAV CANADA training institute.

As far as the Union is concerned, the Employer wished to place all the blame for what happened that night on the Grievor and leave him to accept all the consequences. There is a long-standing practice of the Employer accommodating controllers who have had operating irregularities or otherwise been found incapable of performing IFR control duties and responsibilities with alternate AI positions. The Employer is now seeking to break that practice in this case.

The Union reviewed how the law should be applied to the facts of this case. In its opinion, discipline is only an appropriate response to employees' actions that are culpable. It can have no application in a nonculpable environment other than as purely punitive action. The Grievor made an error, a mistake, but it was not culpable. This is not a case of wilful, reckless misconduct. Even if the arbitrator were to find the Grievor's conduct culpable and if just cause for discipline did exist, the Union maintained the mitigating factors should be considered so as to prevent the sanction of discharge.

Discipline in a safety-oriented environment is most often inappropriate in any event. It must be applied carefully where it is appropriate and with conscientious recognition of the needs of the safety system. As far as the Union is concerned, the Employer is acting in a manner completely contrary to the safety-based principles where the system must learn from the event.

The application of just cause for a nondisciplinary termination includes the requirement that the incompetence be established, that the opportunity to meet the appropriate standard be provided and that the employee be assessed against other positions with the Employer. The Grievor was not afforded a training opportunity, let alone a proper assessment of his capabilities. There was no interview with him for the purpose of assessing capabilities. There was no attempt to determine whether he had a problem with attention. The Union claimed that the various requirements to establish a basis for nondisciplinary termination have not been satisfied.

The Union maintained that the availability of alternative positions must be considered in the context first of the bargaining unit and then outside of the bargaining unit. This is a national bargaining unit and, while it makes sense to start the search locally, that must be expanded to the regional and national level if required. The Employer conducted a vague, generic search in the absence of any proper assessment.

The Union noted that the means by which an employee may fill an alternate position may become an issue if the rights of others could be affected. It is conceivable that the Grievor could be denied a promotion through the competitive process for a particular position, such as instructor at NCTI. In such case, relative ability might become an issue in any subsequent grievance. That does not, however, mean the Employer can deny him the right to compete and that right requires his reinstatement as an employee. The Union also suggested this does not preclude an alternative action such as nondisciplinary demotion to a tower. Further, the

filling of other positions at the Grievor's level through "deployment" is outside the Collective Agreement and the Employer cannot claim such an order would constitute any amendment or variation of the Collective Agreement's provisions.

In this proceeding, the Union urged the arbitrator to keep in mind the context in which the case arises, i.e., involvement in an occupation which is a safety-sensitive one and subject to a significant history as to how the system operates as well as the practices that are used. In this case, the Union suggested that there is an attempt by the Employer to change the course after many years as to how the safety system in air traffic control operates. The Union asked whether the Grievor should be the individual to bear the consequences of those changes. It is important to consider the interests of the parties. The Employer has an interest in maintaining and operating a safe ATC system with the employees filling roles which they are both able and suitable to perform. There are both operational and nonoperational positions but there is not a clear separation. Some positions are operational with respect to benefits entitlement but they do not control traffic, e.g., Data Systems Coordinator. The Union emphasized the difference between the two environments, IFR and VFR. Very few controllers are not able to switch from IFR to VFR. Also, the Employer has allowed those with difficulty controlling in an IFR environment to go to different units. The Employer has moved people between regions and centres without them having experience as active controllers in that centre. There are different strengths for different positions and a problem in one area is not a predictor of problems in another.

The Union interest is also focused on safety. It wants to maintain a professional operation and to insure that individuals have the opportunity to carry out productive and rewarding jobs in a professional manner. None of the identified interests would be compromised by the Grievor retaining employment with the Employer. There are productive and rewarding jobs which he is qualified to do and, with the full and proper assessment, the Union suggested these would be found. There is nothing which requires that the Grievor be made an example. His job interests can be protected and the well-established practice of mutual concern for safety on the part of the Employer and the Union can be maintained. The approach taken by the Employer ignores the need to insure the integrity of the system through self reporting. It invites a punitive and retributive approach in a given case. The Union maintained there should be a broader focus where there is no wilful action or misconduct. It is important in a safety context to take into account the "situational awareness" issue. The Union stressed that in aviation events, there is a need to learn from the experience. There is also a danger in this case of creating an injustice to the Grievor.

The arbitrator must also understand that neither CATCA nor the controllers take a position inconsistent with safety. They focus on safety enhancements and there is a need to be preventative. All parties must be proactive in assessing an ATC event. The Union maintained it does not seek to keep the Grievor in the position he occupied at the time of the operational irregularity in July 1998. The Employer has chosen to interpret this as an admission of incompetence but the Union does not acknowledge that this is the case. It accepted that the Grievor lost confidence. He is haunted

by what happened and this makes it impossible for him to return to that position. It is not usual for a union to take such a position by not insisting the Grievor return to the position he had occupied. The Union is doing what is best for the system and what is best for the Grievor.

The Union suggested that if the approach now being taken by the Employer is permitted, this will have significant ramifications on a system that has run safely over a number of years. It would be seen to be changing the rules in midstream and raise the spectre that the air traffic controller is considered no different from the assembly line worker. That cannot be the case. Here we are dealing with professionals operating independently in an environment with complex procedures and rules. The approach now being taken by the Employer does not help ensure the integrity of the system or help in staffing positions in the organization. The Employer must work with the Union to fulfill the objectives of the system; the Union is not an impediment. It has acknowledged that the Grievor should be taken off the boards in High Level and also in Low Level, even though the Grievor had no problems in Low Level.

As far as the Union is concerned, the Employer never turned its mind to the potential impact of changes in the environment and how they could have affected the incident. There had been no safety review after the change in the Gander airspace. The Employer has minimized the effect of the change in the Gander airspace on safety issues. There is nothing to indicate that the Employer's own safety procedure was reviewed after the problem with the strips had been identified in Fall 1997 when a UCR had been filed addressing one of the deficiencies that arose in the Grievor's case. The

fixed posting box had been determined to be inadequate for the posting on a reroute. The Union reviewed the issues surrounding clearance delivery, the volume of traffic, the staffing levels, procedural issues and other related matters which it suggested made up the work environment and may have impacted on the operational irregularities.

The Union reviewed a number of prior arbitration awards which distinguished disciplinary from nondisciplinary terminations. A number of these cases dealt with the transportation industry where drivers were involved in accidents. In some cases, serious injuries were sustained. Where it was found that the cause was carelessness rather than wilful misconduct, the response was in most cases to take the nondisciplinary route.

Detailed reference was made to the provisions of the Collective Agreement, particularly the job security and grievance and arbitration provisions. An arbitrator has the authority to modify a penalty imposed by the Employer but he cannot alter or amend the Collective Agreement. If an arbitrator were to make an order impacting on others covered by the Collective Agreement, this would impact the staffing process pursuant to Appendix A. There is no right under the Collective Agreement to a lateral transfer. It would not be a violation of the Agreement if the Grievor were to be demoted. The Union suggested that if the arbitrator were to accept there is an obligation in a nondisciplinary termination to make a reasonable job search and there was a failure to do so, then the question is how can the Employer be allowed to dismiss the Grievor if he can be accommodated without affecting the rights of others provided this is consistent with the Employer’s deployment rights.

The Union concluded that the grievance should be allowed. The Employer has not discharged its burden of proof to terminate the Grievor for just cause, either as a disciplinary or nondisciplinary termination. It has failed to consider the Grievor's length of service and other mitigating factors, particularly the lack of options for other employment in the ATC field. By way of remedy, the Union asked that the Grievor be reinstated with full compensation, seniority and benefits and otherwise made whole. The Employer should be directed to carry out a full and proper assessment of his capabilities in order to carry out its obligation to conduct a reasonable job search for alternative positions first in the bargaining unit and then, if necessary, outside the unit. The Union also suggested the Employer should be ordered to hold open any position that the Grievor could fill by "deployment" until that assessment is complete. Finally, the Employer should be required to delay filling vacancies that the Grievor decides to compete for under the terms of the Collective Agreement while that assessment is being completed. In the event that no vacancy is available at the time of reinstatement that ultimately matches the Grievor's properly assessed capabilities inside or outside of the bargaining unit, then the Grievor should have the benefit of the job security provisions of the Collective Agreement. If the Employer determines the Grievor is not qualified for a certain position, then this may be the subject of another grievance.

The Union requested that the arbitrator retain jurisdiction with respect to any dispute over the nature and scope of the Employer's assessment of the Grievor's capabilities and with respect to the amount of compensation payable on reinstatement. The Union also

asked that the arbitrator consider an interim award with reasons to follow ordering the Grievor be reinstated and that the assessment of the Grievor be commenced.

The Business of the Employer

The Employer provides a critically important service to the airline industry. It is involved in a highly technical and complex operation which depends to a significant degree on the effective use of modern technology. This technology is managed by a dedicated and competent team of individuals who fill the role of Air Traffic Controllers. They perform duties of the utmost importance to public safety and, at times, operate under stressful conditions which demand absolute attention to the procedures and requirements integral to the safe operation of the controlling function of the airline industry.

There is no dispute that the Union is fully supportive of the responsibilities of the Employer. It is committed to playing its part to insure nothing will interfere with the fulfillment of these responsibilities. The integrity and safety of the operation is fundamental to all parties.

The Parties are in Agreement--The Grievor Will Not Return to the Position He Occupied as Controller

The Union is seeking the Grievor's reinstatement in employment with NAV CANADA but has acknowledged that he should not be returned to High Level Domestic Control. The Union and the Grievor agree that it would be inappropriate to put him back into such a position given the incident in July 1996 and the July 20, 1998, incident and

the resulting effect on his confidence to be a controller in that speciality.

The Issues

The Employer terminated the Grievor for "for cause" referring in the termination letter to a number of incidents involving loss of separation between aircraft over the last several years culminating in an incident on July 20, 1998, in which Air Canada 870 and Air France 033 were required to take evasive action to avoid collision and possible disastrous consequences. The Employer had determined through investigation that this incident was attributable to the Grievor's failure to identify and resolve a conflict between the two aircraft. The Employer also made reference to similar incidents, two in 1995 for which the Grievor had received written reprimands and another in 1996 for which he had been suspended without pay.

I have to determine whether the termination should be upheld and have to consider the alternate arguments advanced by the Employer in support of the action it took. In the first instance, the issue is whether the Grievor's conduct was such as to expose him to a disciplinary sanction and, if so, was termination an appropriate disciplinary response by the Employer. This would involve an assessment of whether there are mitigating circumstances which should be considered in determining the penalty.

The second issue is whether the termination can be considered "administrative" or nondisciplinary in that the Grievor's conduct is found not to be blameworthy and, yet, termination may still be an appropriate measure to have taken. In the analysis of this

approach, it would be necessary to determine whether the Employer has met certain criteria before the termination can be imposed.

The Response to Human Errors in an Environment Where Safety is Imperative

The Union expressed concern that individuals who are employed in positions such as air traffic controller will hide problems to avoid being fired. This is not the way to ensure safety. The Union's point was that the nature of the operation is such that employees should not feel their job is in jeopardy if they identify irregularities that are caused by errors of the kind the Grievor was responsible for. Reference was made to the U.S. Aviation Safety Reporting System and the national Air Traffic Controllers/FAA Agreement on Mishap Reporting which defines an Immunity Program as presented in the Course Manual, *Human Factors Investigation and the "Just" Culture: Improving Aviation Safety through Systems Design* (David Marx), October 1997. The introduction to the Program referred to the need to carry out a more complete investigation of human error when an event occurs. The observation was that in such investigation, authorities are faced with technicians, pilots, ground crew agents and cabin attendants who are still concerned about what disciplinary action will be taken against them if they report their own error or participate in its investigation. As an incentive, both regulators and airlines have resorted to "immunity" or less punitive disciplinary programs to facilitate human error reporting. The Program is described as follows:

> *The Employer, with union input, has established a policy for operational errors which limits the circumstances*

> *under which discipline is imposed. Disciplinary action shall not be imposed when the employee's action was inadvertent; did not involve gross negligence or a criminal offense; the employee files a NASA report on the error within the time limits prescribed in applicable regulations; and does not otherwise cover up the error.*

The Program then refers to situations when administrative action may be taken in lieu of legal enforcement. Certain elements must be present including the fact that lack of qualification or competency must not be involved, the violation must be inadvertent and not deliberate, the violation must not be the result of a substantial disregard for safety and security and the circumstances of the violation are not aggravated, the alleged violator has not been involved previously in similar violations and a determination must be made that administrative action will serve as an adequate deterrent.

A difficult aspect of applying this Program is determining what is covered by "inadvertent" actions. Ballentine's Law Dictionary defines "inadvertence" in the following manner: "The word includes the effect of inattention. The result of carelessness, oversight, mistake, or fault of negligence and the condition or character of being inadvertent, inattentive or heedless. Gross negligence is not inadvertence in any degree." The common view is that an inadvertent act is one that is not the result of a purposeful choice. In *Lowell Ferguson v. NTSB* (United States Court of Appeals, Ninth Circuit, 1982), the court suggested that as an example, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are

not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude. The court also concluded that the terms "inadvertent" and "not deliberate" are used in the conjunctive sense (rather than disjunctive) in the Advisory Circular. Therefore, for immunity from discipline to apply, not only must a violation be not deliberate, it must also be inadvertent. It was suggested that "reckless" connotes a substantially greater degree of lack of care than "inadvertence," as exemplified by the difference between simple negligence and gross negligence, and approaches deliberate or intentional conduct in the sense of reflecting a wanton disregard for the safety of others. The court concluded that in respect of the pilot's conduct in that case when he landed at the wrong airport, the phrase "inadvertent and not deliberate" cannot encompass reckless conduct. It upheld the 60-day suspension of his Airline Transport Pilot Certificate.

In light of this background analysis, it is necessary to assess the Grievor's conduct and determine whether it constituted inadvertence, recklessness or went beyond that into the category of gross negligence. There is no doubt he made a mistake and was inattentive to his duties. The Grievor's conduct was careless and constituted inattention to his duties. He made a mistake and his conduct was on the borderline between inadvertence and recklessness. Using the definitions just described, I would not go so far as to say he was grossly negligent. I would conclude that his behaviour was not the kind that an immunity program was intended to cover.

Disciplinary Discharge

In a review of an employer's decision to discharge an employee for disciplinary reasons, the first issue to be decided is whether the grievor's conduct gave just and reasonable cause for some form of discipline. If there is cause for discipline, the next issue to be decided is whether the discipline imposed by the employer--dismissal--was excessive in the circumstances. An arbitration board is required to conduct a searching inquiry into all of circumstances of any particular case. The extent of the arbitrator's review was discussed by arbitrator Hope in *Re Alcan Smelters and Chemicals Ltd. and C.A.S.A.W., Loc. 1*, unreported, September 23, 1992. At page 23 of that decision, arbitrator Hope sets out three possible patterns which may emerge when conducting a review of dismissal cases:

> *An arbitrator can find that a particular employee lacked just cause for any form of discipline. In those circumstances, reinstatement follows as of right. Secondly, the arbitrator may find that there was conduct on its face that constituted just cause for discipline, but that the conduct on its face did not constitute just cause for discipline. That potential arises on the basis of the legal principle that it is not sufficient for an employer to prove just cause for dismissal, the employer must go on to prove just cause for the particular penalty selected... The third pattern arises when the arbitrator concludes that the conduct, on its face, constituted just cause for dismissal but that the circumstances, when weighed in their totality in the context of a statutory right of review vested in employees, mitigate in favor of restoring the employee to his employment.*

The Grievor's conduct in failing to ensure the required separation between aircraft is a serious breach of the standard required in the performance of his duties. There is no suggestion that he was wilful in his failure to properly perform his responsibilities. His conduct can be classified as careless and on the borderline between inadvertence and reckless. The nature of the conduct is an important consideration. In *British Columbia Railway and C.U.T.E., Loc. 1* (Cunningham arbitration), unreported, arbitrator Hope noted at pp. 29-30:

> *The law makes a distinction between recklessness and negligence. Both involve a departure from the acceptable level of care, but recklessness involves conduct that the perpetrator new or ought to know involves an immediate risk...*
>
> *But arbitral jurisprudence does recognize that the particular facts in any breach of safety rules can mitigate the act in an application of the rationale similar to that which distinguishes between recklessness and negligence. That is, the extent to which the facts imply that particular grievors knew or ought to have known that the actions involved risk to the lives or safety of persons or damage to property will determine the gravity with which their misconduct is to be assessed in terms of their reliability in the future.*

There is authority to support the conclusion that acts of carelessness or inadvertence that create potentially dangerous situations have been found sufficient to afford cause for termination in a disciplinary sense.

In *Re Oshawa General Hospital and Ontario Nurses' Assoc.* (1976), 12 L.A.C. (2d), 182, a registered nurse had been discharged because of a series of errors involving professional misconduct culminating in the grievor giving one patient a blood transfusion intended for another patient. The patient did not suffer any adverse effect. During the grievor's eight years of employment, this type of failure had given rise to nine incident reports, one of which had resulted in her suspension.

In describing the wrong blood incident, the arbitration board noted the grievor had offered no excuse for her error and it could not imagine what possible excuse there could be for such a dereliction of duty in view of the very serious consequences which might have flowed from her neglect of duty. The board stated that her dereliction of duty in these circumstances can only be described as gross negligence. At p. 189, the board concluded:

> *... the extremely sensitive area in which she failed to follow basic nursing procedures on July 12th was one which did not lend itself to careless neglect.*
>
> *We therefore find that because of the hospital's duty to protect the public, it has satisfied the onus on it and has proved that it had good and just cause to discharge the grievor. The grievor's eight years seniority, marred as it is by related incidents does not offset the seriousness of her offence.*
>
> *Even though we find that the grievor did not act maliciously and may have been otherwise a hard worker, the evidence established that the hospital could not rely on her to exercise her professional responsibility to*

carry out simple, yet important basic nursing procedure. The grievance must fail.

There are a number of cases which deal with the issue of work performance and carelessness in the transportation industry. In *Re British Columbia Ferry Corporation and B.C. Ferry Marine Workers' Union* (1993), 37 L.A.C. ((4th) 332 (Korbin)), two employees had been dismissed because of their involvement in a tragic incident which resulted in the deaths of three passengers on August 13, 1992. A grievance was filed and the arbitrator identified the three issues that had to be addressed. First of all, had the grievor given just and reasonable cause for some form of discipline by the employer? If so, was the discipline imposed an excessive response in all the circumstances? If the answer to that question is yes, what alternative disciplinary measure should be substituted as just and reasonable?

After reviewing the evidence, the arbitrator found that the conduct of both grievors gave cause for discipline. He then went on to decide whether the discipline that was imposed--dismissal-- was excessive in the circumstances. He stated that an arbitration board is required to conduct a searching inquiry into all the circumstances in a particular case. The purpose of such an inquiry is to determine whether the employment relationship can be restored.

The arbitrator concluded that a disregard for safety procedures by one of the employees and momentary carelessness on the part of the other was the basis for the dismissal. He stated that there is no question that the breach of a rule which has been put in place in

order to protect the safety of employees and the public is an extremely serious offense. The public has every right to believe that the operation of common carriers is conducted in a manner that complies to the letter with such rules. He referred to a previous award dealing with the role of discipline as a means of achieving deterrence against repetitions of the conduct by the particular employee involved and deterrence against its imitation by other employees. He noted that in some circumstances, an employer's interest in general deterrence should properly override the aforementioned principle that discipline should be corrective. He agreed with the view that it would be difficult to find an offense which more particularly invites that reasoning than a circumstance where an employee is careless or negligent in a manner which exposes himself or other employees to the risk of death and this is especially true where the public is exposed to risk of injury or loss of life. He stated that nevertheless, regardless of the seriousness of the offense or of the consequences of the breach, it cannot be viewed automatically as cause for dismissal.

In respect of one of the employees, the conclusion was that he blatantly disregarded the applicable safety procedures and, at the very least, he ought to have known that such disregard placed the lives or safety of passengers and fellow employees at risk. This was not a case of mere inadvertence and the ultimate question of whether or not the employment relationship could be restored had to be assessed in that light.

The breach by the first grievor was found to be extremely serious and, more importantly, the nature of the breach extended beyond mere carelessness. There was a blatant disregard of procedures

implemented by the employer which were designed to protect public safety and the first grievor was aware of the procedures but did not comply with them. Also, he had failed to accept responsibility for the accident and the improper placement of responsibility on the shoulders of others by a responsible party was found to be especially damaging to the relationship between a grievor and the employer. The arbitrator found it difficult to envision a continuing relationship between the parties in such circumstances. Also, there simply did not exist mitigating circumstances which might work in the grievor's favor sufficient to overturn dismissal. In all the circumstances and having regard to the importance of the public trust, the arbitrator was not persuaded that a lesser form of discipline should be substituted in respect to the first grievor.

The second grievor failed to make a visual check of the loading ramp and did not satisfy himself that the ramp was being raised. The arbitrator found that his assumption that the ramp was raised was not without some reasonable foundation, although it proved to be a critical error. The question that had to be addressed was whether or not the actions of the second grievor could be found to be deliberately careless or negligent in all the circumstances. The conclusion was reached at pp. 345-346:

> *I am of the view that the breach of safety procedures in Mr. Anderson's case was one more akin to momentary carelessness. He made an error in judgement that he will have to live with for the rest of his life.*
>
> *Nevertheless, grievor Anderson's error in judgement was a critical one which resulted in drastic consequences. On its face, Mr. Anderson's conduct may well have constituted just cause for dismissal, but, pursuant to*

> *Wm. Scott which was adopted in Alcan Smelters, supra, I have a statutory obligation to the grievor to weigh all the circumstances in totality, and to consider those circumstances which might mitigate in favor of restoring the employment relationship.*
>
> .....
>
> *In determining whether the employment relationship can be restored, the question becomes whether Mr. Anderson will ever make a mistake similar to the one made on August 13, 1992. First, I do not think that the error was wilful in any way. .....I have no reason to doubt his sincerity. In short, I do not believe he would repeat the same error.*

The decision was to substitute for the dismissal a suspension without pay for the period of time elapsed from the dismissal.

The Employer introduced a number of other awards involving breaches of safety requirements leading to property damage or personal injury. In *Re Lafarge Canada Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local Lodge D331* (Tennant), unreported, May 25, 1994, an employee was operating a locomotive shunting rail cars from one track to another. The lead car rode up on hard packed snow causing it to derail. Damages to a roof structure and to the rail car resulted. The employee was terminated for his failure to determine the state of the track by not ensuring the locomotive could be operated safely on the track and for generally disregarding the need for a safe workplace.

The arbitrator reviewed all the circumstances and came to the conclusion the grievor had acted carelessly and failed in his duty to operate the locomotive safely. He accepted that there is a generally held view that carelessness resulting in loss to an employer is just cause for discipline. There are arbitral awards which uphold termination of employment following careless or negligent behaviour.

The arbitrator concluded that if the grievor had no prior disciplinary record, he would be inclined to substitute another penalty in place of termination in view of the Company's failure to establish how it had met its responsibilities in respect of keeping the track clean of snow. There had been past incidents and a prior warning. There was also no indication of remorse on the part of the grievor. The arbitrator was not prepared to interfere with the Company's decision to terminate the grievor.

In *Re Canadian Pacific Limited and United Transportation Union* (Canadian Railway Office of Arbitration, Case No. 1941, Picher), unreported, September 1, 1989, there was a review of an incident which resulted in two fatalities. A train was travelling at an excessive rate of speed and collided with the rear of another engine in a yard. It was concluded that the conductor had violated his responsibility for the overall safety of his train and the observance of the operating rules. The union did not dispute that some measure of discipline was appropriate. The only question to be resolved was the measure of discipline. The arbitrator referred to a comment found in CROA 690:

> *The extent of the damage is not in itself an element to be considered in assessing the grievor's conduct - just as, in Case No. 494, the fact that a fatality occurred was not such a factor. Rather, it is a question of the employee's compliance or otherwise with the rules and the general seriousness, or degree of risk, of their conduct.*

The seriousness of the conduct combined with a prior disciplinary record was such as to lead the arbitrator to the conclusion there was no basis to reverse the decision of the Company to terminate the grievor's employment.

A case involving the termination of an air traffic controller was heard before the Public Service Staff Relations Board and a decision rendered on April 6, 1998, *Green v. Treasury Board (Transport Canada)* (Board file 166-2-26720). The termination occurred effective May 29, 1995, and a grievance was filed. An adjudication occurred over a nine-day period and in a decision dated June 14, 1996, the grievance was denied. The adjudicator for the Public Service Staff Relations Board found that the grievor had left the tower unmanned during advertised hours while aircraft were actively using it and this was a grave misdemeanour warranting discharge. The long service of the grievor and the fact this was an isolated incident in a 23-year career was not a mitigating circumstance sufficient to set aside the discharge. The adjudicator also could not find any sign of remorse or appreciation of the implication of his actions. Even at the hearing, he had not understood the gravity of his actions. The final conclusion was that the adjudicator accepted the employer's position that the bond of trust between it and the grievor had been irretrievably broken

and the employer's decision to discharge the grievor was not unreasonable.

An application for review was made and in a decision dated July 8, 1997, the Federal Court (Trial Division) ordered that the matter be referred back to a different adjudicator to determine the appropriate penalty, taking into consideration the principles of corrective and progressive discipline. This decision has been appealed to the Federal Court of Appeal.

The adjudicator was Mr. P. Chodos, Vice-Chairperson of the Public Service Staff Relations Board. He referred at length to the decision of the Federal Court reported as *Green v. Canada (Treasury Board)* (1998), 134 F.T.R. 108. The relevant portions of that decision are as follows:

> *The facts in this case are not in dispute, and, save for the relevant contents of the adjudicator's decision, need not be repeated here in detail.*
>
> *After 23 years as an air traffic controller, the applicant was terminated from his employment for disciplinary reasons on May 29, 1995. His discharge letter indicated that his actions had "demonstrated a gross disregard for the responsibilities of [his] position," potentially jeopardizing the safety of the flying public.*
>
> *The applicant grieved his discharge to the Public Service Staff Relations Board. The adjudicator denied his grievance on the basis of the gravity of the misdemeanour; the adjudicator's disbelief that such an incident would not be repeated; and the conclusion that the employer's decision to terminate the applicant's position was not unreasonable because the bond of trust between it and the applicant had been irretrievably broken.*

THE ISSUES

The applicant submits that although there is cause for discipline in this case, the adjudicator erred in failing to reinstate the applicant with a reduced disciplinary record. The applicant further submits that the Adjudicator erred in denying the grievance.

(page 110)

...

However, although I am not prepared to interfere with the adjudicator's finding regarding remorse, I do feel compelled to examine this finding in relation to the adjudicator's assessment of an appropriate penalty. In my view, the finding of a lack of remorse is part and parcel of a finding of an inability or unwillingness to rehabilitate oneself. In this regard, the adjudicator specifically reasoned:

> *The grievor's counsel urged me to find that this isolated incident in Mr. Green's long 23 to 24-year career as a controller was unlikely to ever occur again. I wish I could believe that that would be the case.*
>
> *Considering the grievor's good record and long service I searched the evidence for signs of remorse or appreciation of the implication of his actions.*

The adjudicator then went on to conclude that there were no signs of remorse. This finding is at the bottom of the conclusion of a lack of rehabilitative potential, evinced by the statement "I wish I could believe that that [the likelihood of repetition of a similar grave misdemeanour] would be case." Clearly, on the basis of the applicant's perceived lack of remorse, the adjudicator felt that the applicant could not be rehabilitated.

The Ontario Court of Appeal in College of Physicians and Surgeons of Ontario v. Gillen (1993), 13 O.R.(3d) 385,

upheld the Divisional Court on the issue of the relationship of remorse to appropriate penalty. In that case, the Disciplinary Committee found that the applicant had denied his conduct and not faced up to the problem. The Ontario Court of Appeal, at page 386, found that under no circumstance should denial serve to increase what would otherwise be an appropriate penalty. Compare this to the case at Bar, and the finding that the present applicant lacked remorse and the conclusion of a lack of rehabilitative potential. I agree with the reasoning of the Ontario Court of Appeal, and apply it to the present case.

It is not clear from the adjudicator's reasons that she was "punishing" the applicant for his attitude, or if the adjudicator had concluded that the only way to protect the flying public was to uphold the applicant's dismissal from his job. However, in the context of the applicant's 23 unblemished years of service as an air traffic controller, I believe that concern for the flying public was not foremost in the adjudicator's mind when she made her decision.

Issue 3: Assessment of mitigating factors

The applicant submits that the adjudicator failed to consider a number of matters in her assessment of mitigating factors. The core of the applicant's submissions concern the adjudicator's findings that I have already canvassed, above. The applicant submits the additional point that the adjudicator failed to consider corrective discipline principles of the application of progressive discipline in consideration of the good record and long service of the applicant.

Analysis: It is increasingly the trend, in labour arbitration decisions, for adjudicators to apply the theory of progressive or corrective discipline when considering the appropriate penalty to impose. Although such trends are by no means binding on labour relations tribunals, I believe that, in the circumstances of this case, the adjudicator was obligated to look at corrective discipline for the applicant, and clearly state in her reasons why she would reject corrective discipline for the applicant. She was obligated to look at corrective

discipline because of the applicant's long career of good service that the adjudicator acknowledged the applicant had with the employer.

However, in her lengthy, 24-page decision, the adjudicator makes not one mention of corrective discipline as it would apply to the matter before her. I cannot even infer that the adjudicator considered corrective discipline as a substitution for the penalty of discharge. There is no language to that effect in the adjudicator's decision. There should have been.

Another problem with the adjudicator's assessment of mitigating factors, and her non-assessment of corrective discipline, is that there is no indication that the adjudicator considered the ramifications of dismissal for the applicant. The ramifications constitute an important mitigating factor in this case. The dismissal of the applicant in this case does not amount to the same thing as an employer's dismissal of a plumber, electrician, or even lawyer for that matter. A plumber, electrician, or lawyer could each find work elsewhere within their profession. However, the dismissal of the applicant, in this case, means that, for the rest of his life, the applicant cannot work at a professional level as an air traffic controller, despite the fact that he had done so in a commendable manner for the past 23 years. Surely, this is an important mitigating factor to be considered when determining the appropriate penalty in this case.

It should be pointed out that counsel for the respondent, in written and oral arguments, dealt in a comprehensive fashion with most of the applicant's allegations concerning mitigating factors. However, the two most important factors in the circumstances of the applicant; i.e., his acknowledged long and untarnished work record and the ramifications of dismissal, were not addressed by the adjudicator. In the context of these two mitigating factors, it was incumbent on the adjudicator to seriously consider the possibility of corrective discipline as a substitution for the penalty of dismissal. This, she did not do. The adjudicator's decision is thus not supportable by the evidence that was before her. Curial deference, as set out by this Court, cannot be accorded to such a decision.

CONCLUSION

Air traffic controllers perform duties of the utmost importance to public safety. They operate under stressful conditions, and sometimes workplace demands are made of them which may seem to be very heavy or unreasonable to the average working person. However, air traffic controllers are professionals, and presumably are well-trained in their professions. That they operate under stressful conditions and are sometimes subject to heavy work demands comes as no surprise to them.

The applicant was working alone when he left his post unattended for about half an hour. This was at a time when, in his own words, planes were "flying all over the place." Although he notified Sault Ste. Marie and Toronto that he was leaving, he did not announce when he would be back. He neglected to change the ATIS broadcast message to reflect his absence. Those needing to use the airport would have assumed that he would be back in a few minutes, as is usual when, for example, an air traffic controller leaves to use the washroom facilities.

But, the applicant did not return in a few minutes. Instead, after performing some necessary toiletries, he went to the airport restaurant and had lunch there. He did not check back in to his post before he went to lunch. He did not bring his lunch back to his post to eat there. He did not even rush back to his post upon his return, but instead lingered for a few minutes at the Administrative Secretary's desk.

A lot of confusion ensued at the airport and in the airspace as a result of the applicant's actions. A potentially hazardous situation was thus created. (my emphasis)

There is no indication that the applicant had ever done such a thing in the past.

There is no issue as to the necessity of disciplinary action in this case. The issue is the severity of the penalty imposed. In my view, the adjudicator erred in her assessment of the mitigating factors by ignoring relevant evidence before her. The factors that she

> *ignored are so significant that I conclude that the adjudicator's decision is based on an error in law, and is patently unreasonable.*
>
> *(pages 114 to 116)*

After a thorough review of the submissions of the parties, the adjudicator noted that the circumstances of the case posed something of a dilemma for him. He did not have the advantage of the *viva voce* testimony of the various witnesses that appeared before the first adjudicator and could not listen to such testimony first hand nor observe the demeanour of the witnesses. His observations and conclusions were constrained by these limitations.

It was acknowledged by the parties that there was indeed misconduct on the part of the grievor and the union recognized that the misconduct warranted a sanction of some significance. Mr. Chodos noted there is arbitral acceptance of the view that there are some employment offences, some acts of misconduct, which are so egregious that the only appropriate response is to terminate the employment relationship regardless of the consequences for the grievor. He also acknowledged that the principles of progressive discipline are equally important and also universally recognized as requiring consideration on the part of an arbitrator or adjudicator.

At p. 11, Mr. Chodos set out the fundamental question he had to answer:

> *The fundamental question I have to address is whether Mr. Green's conduct on May 9, 1995, in leaving his post for a 30 minute lunch break is so serious as to override*

> *any mitigating factors applicable to the grievor, in particular his 23 years of discipline-free service, and the undisputed fact that, should his termination be upheld, Mr. Green will never be able to work in his chosen career again.*

Mr. Chodos reviewed a number of circumstances surrounding Mr. Green's conduct on the evening in question and, although they did not excuse his actions, they did explain why an experienced controller with 23 years of unblemished service would engage in apparently uncharacteristic behaviour and manifest such a lapse of judgement. The employer had not suggested some ulterior, nefarious motive for his conduct.

In reaching his conclusion, Mr. Chodos stated at p. 12:

> *Undoubtedly, the employer acted in good faith when it considered that in light of the very onerous responsibility which the Air Traffic Control System must bear it had to err on the side of caution when considering the appropriate penalty to impose on the grievor. Nevertheless, I am not persuaded that a lesser penalty would not have achieved the desired result.*

The adjudicator considered the grievor's 23 years of service to weigh heavily in the balance and decided that discharge was too harsh a penalty in these circumstances. A three-month suspension without pay along with a further period of three months deemed to be leave without pay was substituted for the discharge.

A recent award, *Re NAV Canada and Canadian Air Traffic Control Association* (Rousseau), unreported, March, 8, 1998, involved the termination of an air traffic controller on two specific grounds, reporting for work while under the influence of alcohol as evidenced by the strong smell of alcohol from the grievor's breath and, secondly, performing control duties in contravention of an order given by the two supervisors on duty at the time.

The evidence of employer witnesses was such as to convince the arbitrator that the grievor had shown signs of alcohol intoxication on January 1, 1997. The grievor had not taken any steps to contradict the assessment of the two supervisors. He was aware of his condition, despite the fact that he did not pay proper heed to the instructions of the supervisors not to assume a control position. The grievor had been given a formal and clear order by one of the supervisors not to assume a control position. He offered no explanation of what led him not to comply with the instruction. The arbitrator concluded that the grievor had not heeded the instructions sufficiently and took the initiative of assuming a control position without requesting express authorization from either of the supervisors who had ordered him not to do so. The ground of insubordination had been proven.

The case was found not to be about the grievor's ability to perform his job adequately nor did it involve an administrative decision whereby the employer concluded that the employee was no longer fit to perform his job competently on a regular basis. The dismissal notice cited two specific grounds, reporting for work while under the influence of alcohol, as evidenced by the strong smell of alcohol coming from the grievor's breath, and performing duties in

contravention of an order given by the two supervisors on duty at the time. The arbitrator found the evidence supported these grounds and concluded the employer had shown just cause for dismissal.

The analysis of prior awards and adjudications is helpful in assessing how disciplinary penalties have been applied where there have been deficiencies in work performance. In the context of a disciplinary termination, I have first to consider whether the Grievor's conduct in the several incidents described gave just and reasonable cause for the imposition of discipline. If the answer is in the affirmative, I have next to review whether discharge was within the range of reasonable responses for such conduct.

My review of arbitral precedent has led me to the conclusion that an employee who has been guilty of substandard work performance cannot avoid the possibility of disciplinary action on the ground that the conduct was not wanton, wilful or in any way deliberate. Making a "mistake" does not create an immunity from discipline and whether the individual was reckless, inadvertent or merely careless in his behaviour, there may be the basis for discipline.

In the instant case, it is accepted that the primary duty of an air traffic controller in an IFR unit is to maintain a safe, orderly and expeditious flow of air traffic under the control of the unit. On four occasions over a period of a little in excess of three years, the Grievor was involved in operating irregularities which saw a breach of that duty. The facts of each incident have been reviewed earlier in this award. The first two incidents resulted in written warnings which were not grieved. The Grievor's conduct

was not at the standard required and it is reasonable to conclude poor judgement was the primary cause of the failure to perform at the required standard. The irregularity on July 24, 1996, was attributed to the Grievor's failure to pay attention to the radar screen and to ensure that crossing aircraft were at the required separation standard. A suspension was issued and remains on his file.

The operating irregularity on July 20, 1998, was the incident that led to the Grievor's termination. The Grievor failed to notice two aircraft were converging and a crash was averted only by seconds and as a result of the onboard TCAS. The cause of the incident was the Grievor's inattention, since he had the necessary information to spot the conflict. This conduct was an example of extremely careless behaviour which could have had tragic consequences.

An air traffic controller plays a very important role in the safety of air travel. An essential requirement of the job is the ability to pay attention to the tools that are available to ensure the separation of aircraft. If a controller fails to pay the requisite attention, dangerous situations can occur as is evident from the incidents that have been described. The failure to pay attention in the circumstances as described can be categorized as careless behaviour including what is described as being on the borderline between inadvertence and recklessness. It is certainly behaviour which gives the Employer cause to impose discipline on the Grievor.

In reaching this conclusion, I have considered the various reasons advanced by the Union as to why the Grievor failed to observe and correct the separation problem. I am not convinced that the

traffic situation on July 24, 1998, was such that the Grievor was "too busy." The records that were produced do not support that conclusion. The Union argued that the change in the Gander airspace was a contributing factor to the Grievor's failure to identify and deal with the converging situation. There was no evidence to sustain that conclusion. The information on the D2 strips was the subject of much testimony. These strips did contain sufficient information to allow the convergence to be easily identified. The reroute was shown and the cross could be detected. As far as clearance deliveries are concerned, I am not satisfied that the Grievor's involvement in that process on the night in question prevented him from discharging his obligation to ensure adequate separation of aircraft occurred. In essence then, I do not accept that the operating issues emphasized by the Union are such as to have been in whole or in part the reason for the Grievor's substandard behaviour.

Is Discharge the Appropriate Disciplinary Sanction?

The remaining question is whether termination was the disciplinary sanction that was within the range of reasonable sanctions for the Grievor's violation of his responsibility in the performance of his duties. To make this assessment, I have to weigh all the circumstances in their totality and determine whether there are grounds which should ameliorate the discipline initially invoked by the Employer and lead to a conclusion that the employment relationship should be restored. In this assessment, I do not have to decide whether the Grievor should be returned to his position as an IFR controller, since the Union is not seeking such an order. The question is whether termination is the appropriate penalty or

whether there is some other measure which is more appropriate in all the circumstances.

On this issue, I have to recognize that on past occasions when errors have occurred because of inadvertent or careless behaviour, the Employer has generally taken steps to place the employee in some other position. Examples were provided where IFR controllers were placed in towers after having operating irregularities. Mr. Paul Hansen had an operating irregularity in High Level in 1986 when a loss of separation occurred in radar control. He would have had a resolution advisory if there had been TCAS at the time. He subsequently had an incident in Low Level and was moved to a nonoperational position while the Employer decided what to do. After a three- or four-month period, he was told he would be terminated unless he requested a bid down to a tower. He did so and has not had any problems since. Mr. Paul Prall had an operating irregularity in 1985 while a trainee. In 1986, as a qualified controller, he had another operating irregularity involving a procedural loss of separation. He was aware of the loss but had not given directions in a timely manner. The impression he had was that he would be "on the street" but he asked for and was given the tower. He has worked in the Gander Tower ever since and has had no incidents. Mr. Fudakowski, Director of Air Traffic Services, confirmed that he is aware of qualified controllers at Gander ACC going to towers as the result of incidents. The Union gave a number of examples where individuals had been ceased trained in High Level and went on to qualify in a tower. Some have since returned and qualified in two areas in the ACC. Because these individuals were not qualified controllers at the time, they did not have operating irregularities during the

training period. The Union suggested that the evidence confirms the treatment of the Grievor does not accord with that shown other employees who have caused separation incidents. My assessment is the record does support that conclusion. Mr. Bhimji, Vice President, Labour Relations, for the Union, stated that from his eighteen years as a union official, his assessment is that the Employer's actions in this case are something new. It has always accommodated people in the past. The Employer did not challenge that position. My review of the examples provided is that the Grievor was treated in a manner differently than others and, although two of his incidents were quite extreme, there remains a concern that this case involves discriminatory treatment.

Arbitrators have generally been sensitive to the basic principle that similar cases must be treated in a like fashion. Thus, when an employee is able to prove that other employees who engaged in the same conduct for which he was disciplined were either not disciplined at all or suffered much less severe disciplinary sanctions, arbitrators generally will find the employer to have discriminated against that employee even though it may be established that the employer did not act in bad faith or did not intend to discriminate against him personally. In the instant case, there are no past circumstances on all fours with the conduct that has been found by the Employer to warrant the Grievor's termination. However, there has been an established pattern of accommodation where separation errors have occurred through controller inattention and failure to discharge his responsibility. This has to be considered as a mitigating factor in the assessment of the discipline that is appropriate.

Where discharge has been imposed by the Employer in respect of air traffic controllers, there has usually been culpable behaviour such as where the employee has absented himself from his duties to take a lunch break and at the same time creating potentially dangerous situations or where an employee reported for work while his faculties were influenced and impaired by alcohol and at the same time the employee refused to obey clear instructions of supervisors.

My assessment is that except where culpable behaviour has been shown, the Employer has made arrangements to accommodate those controllers who have been involved in loss of separation incidents. There was an effort made to offer the Grievor alternate employment, but it was subject to a condition that he not proceed with a grievance. This suggests that the Grievor's conduct was not such as to have so undermined the employment relationship that discharge is the only alternative. I have concluded that the discharge should be substituted by a demotion to a nonoperational position with a suspension without pay for a period of time more precisely described in the Summary of Findings section of this award where other issues of redress will be dealt with.

Administrative Action--Nondisciplinary Discharge

The Employer argued in the alternative that if the Grievor's conduct is not found to be blameworthy, the discharge may nonetheless be upheld on an administrative basis. This is otherwise referred to as a nondisciplinary discharge. Where an employee has been careless or negligent in the performance of his work or where he has disregarded safety procedures and such behaviour has been attributed to factors beyond the employee's

control (involuntary misfeasance) rather than to some factor within his control (voluntary misfeasance), for example, inattentiveness, carelessness, disregard for safety procedures, etc., then discipline in any form will not usually be a valid response. The tests for an administrative discharge are set out in an earlier part of this award.

In view of my finding in respect of the appropriateness of disciplinary action, I will not deal in great detail with the Employer's alternative argument. Even though the criteria which an employer must meet in order to dismiss an employee from a particular position on an administrative basis for a nonculpable deficiency in job performance are present in this case, it is clear from the evidence that the Employer was prepared to offer the Grievor a position in a nonoperational area. Thus, even though the criteria for dismissal from one position on a nondisciplinary basis is satisfied, the obligation to find an alternate position within the competence of the Grievor on a nonconditional basis had not been met.

As stated earlier, the acion of offering alternate employment suggests the Employer did not view the employment relationship as irreparably breached. Thus, even on a nondisciplinary basis, I am not prepared to conclude that termination should be upheld. The same terms would apply to the reinstatement as described in the analysis of the disciplinary discharge and are more fully presented in the Summary of Findings section.

Summary of Findings

1. The Grievor had been involved in four operating irregularities between March 1995 and July 1998, the last two being quite similar in nature. The Grievor as an Air Traffic Controller had a responsibility to ensure attention to all operating procedures so that aircraft within his control maintained appropriate separation standards. The Grievor failed to do this and, except for onboard systems, all indications are that midair collisions would have occurred.

2. The cause of the March 6, 1995, incident was determined in the internal investigation report to be the failure of the Grievor (training monitor) to intercede in sufficient time to resolve a previously identified confliction between two aircraft. In addition, the course of action taken to resolve the crossing situation given the proximity of each aircraft to one another demonstrated an error in judgement on the part of the Grievor.

3. The cause of the June 14, 1995, incident was determined in the internal investigation report to be the failure of the Grievor to intercede in sufficient time to resolve an identified confliction between the two aircraft. When a course of action was taken to resolve the crossing situation, it was found to be untimely.

4. The Grievor received a letter of reprimand for his involvement in the March 6, 1995, and June 14, 1995, incidents. These letters of reprimand were not grieved.
5. The finding by the Transportation Safety Board in respect of the July 27, 1996, incident was that the Grievor was

inattentive to the radar display and the traffic situation and did not detect and resolve the developing conflict.

6. The Grievor received a one day disciplinary suspension without pay for his involvement in the July 27, 1996, incident. This suspension was not grieved.

7. In respect of the July 28, 1998, incident, I find the Grievor was inattentive to the radar display and the traffic situation. He did not detect and resolve the developing conflict.

8. The Grievor's involvement in the four incidents did not involve deliberate conduct. It did, however, constitute careless and inattentive behaviour. He committed a mistake. His conduct was on the borderline between inadvertence and recklessness.

9. The fact of the repeated incidents is a compelling reason why the Grievor cannot seek immunity from disciplinary sanctions. This conclusion is consistent with the treatment pursuant to the FAA Aviation Safety Program. Furthermore, an immunity from disciplinary sanctions would not properly recognize the Grievor's substandard performance and the overall consequences of his behaviour.

10. The Union argued that operational issues such as the information on the D2 strip, the change in airspace, the level of traffic and the method and timing of handing off aircraft were factors that contributed to the Grievor's failure to ensure separation in the July 28 incident. These were not raised at the time of the incidents nor meetings held

immediately thereafter. I am not convinced that they are direct contributors to the error nor that they should be used as a basis for mitigating the disciplinary action that was taken.

11. The Employer did have just cause to impose a disciplinary sanction.

12. The imposition of a termination of employment cannot be upheld for the following reasons:

(a) The Employer has had a pattern of accommodating employees who have been involved in operating irregularities. While they are not identical to those in which the grievor was involved, there have been accommodations by allowing individuals to transfer to a tower or do training to prepare them for other operating positions.

(b) The Grievor was treated in a manner inconsistent with the normal approach taken where operating irregularities involving separation standards have occurred.

(c) The Grievor's conduct was not culpable in the sense of the type of conduct which has lead to discharge action against controllers in the past.

(d) The Employer was prepared to accommodate the Grievor by offering him a position as a Technical Support Specialist (TSS) position in the PSAC bargaining unit. This is a position where the incumbent operates the equipment used to provide simulation exercises for controllers and trainees and has no impact on live traffic and the

evaluation of trainees. This offer was made as part of a settlement offer and, had the Grievor accepted it, the Employer would have paid the full cost of his relocation. He would have been entitled to maintain his seniority credits for purposes of vacation and pension. I have to assume that by making such an offer, the Employer could have made such a placement without offending the provisions of another collective agreement.

(e) According to the Employer, "the offer was made out of a sense of loyalty to an employee who had provided a number of years of service, who was felt generally to be a good employee but who could not be allowed to continue to work in an operational environment due to NAV CANADA's primary responsibility to the travelling public." The offer indicates the Grievor's conduct had not been such as to destroy the employer/employee relationship such as to make termination the only reasonable option.

(f) Neither the Union nor the Grievor expected or requested that the Grievor would be reinstated to his position as a controller and they were seeking his placement in a position such as the DSC, the UOO, an instructor position or relocation to a tower.

13. Under all the circumstances of this case, I find that discipline was warranted, a discharge cannot be upheld and, instead, the appropriate disciplinary sanction is to be a demotion to a nonoperational position and a suspension without pay for a period of time to be stipulated in paragraph 17 of this Summary. The Employer should not be ordered to place him in a position where it might be said that since he was not

able to pay sufficient attention to properly control aircraft, such inattention could have adverse consequences in the operating environment. The position that clearly, and as acknowledged by the Employer, does not have that impact is the Technical Support Specialist. It is, therefore, ordered that he be reinstated to that position with the undertakings the Employer had offered in its settlement offer.

14. Alternatively, if there is another position that the parties can agree the Grievor can be reinstated to, then such a position can be substituted for the Technical Support Position.

15. If I had found that this is not an appropriate case for discipline, then I would have concluded that the Employer was within its rights to have taken administrative action to remove the Grievor for his demonstrated inability to function as a controller. The Employer would have been compelled to ascertain which alternate positions the Grievor should be considered for and whether he had the competency to perform the duties of such position. The Employer did consider the grievor for a DSC position, a UOO position, an instructor position, a radio operator position and a nonoperational position in head office. Its assessment was there were no nonoperational positions that he could have applied for and operational positions were ruled out for reasons of safety. I can find no basis to challenge the position taken by the Employer in respect of the action it took to consider the Grievor for alternate employment. However, the Employer had offered the Grievor a nonoperational position, not at head office but in Moncton, confirming its view that the employment relationship had not been irreparably breached. In the

result, a reinstatement to such a position is the appropriate conclusion even if this case were to be solely judged on the basis of a nondisciplinary discharge.

16. The grievor was terminated as of July 31, 1998. I am ordering his reinstatement to the TSS position or such other position that might be mutually agreeable to the parties effective one week from the date of receipt of this award by the parties. The Union has requested that there be compensation for lost wages and benefits from the date of termination to the date of reinstatement. Had the offer of alternate employment not been subject to the condition that the Grievor not file a grievance, it could be possible that there would have been continued employment in that alternate position for the period since the termination. This is a consideration in the decision on appropriate redress.

17. The period from the date of termination, July 31, 1998, to the date of commencement of the arbitration hearings, October 27, 1998, shall be considered to be a period of suspension without pay. The period from October 28, 1998, to one week from date of receipt of this award shall be considered to be a period of leave during which the Grievor shall be entitled to receive pay for one half the period. This order is in recognition of the conditions attached to the offer of alternate employment and respects the fact that because of the complexity of the case, a considerable time period was required to complete it. The parties are to share jointly in the economic impact of this time period. The Grievor is subject to the requirement that he have attempted to mitigate his losses and his entitlement is, therefore, subject to an adjustment for any income he did receive or could reasonably have been expected

to receive during the period in question. This is not a case where any order in respect of payment of interest is appropriate.

18. The Grievor is entitled to accrue seniority and other benefits on the same one-half basis for the period from October 28, 1998, to one week from the date of receipt of this award. Pay and benefits are to be at the rate applicable to the TSS position.

Conclusion

The Grievor is to be reinstated in a position as a TSS or such other position that might be mutually agreeable to the parties effective one week from the date of receipt of this award by the parties under the terms and conditions as outlined in the Summary section of this award. To the extent that reinstatement is ordered, the grievance is upheld. To the extent reinstatement is not to one of the positions identified by the Union, the grievance is denied.

Respectfully submitted as the award of the Arbitrator.

St. John's, NF
98323
August 10, 1999

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W. Wayne Thistle, Q.C., C.Arb.