*IN THE MATTER OF AN ARBITRATION*

***B E T W E E N:***

***NAV CANADA***

***(The Corporation)***

***- and -***

***CANADIAN AIR TRAFFIC CONTROL ASSOCIATION***

***(The Association)***

***AND IN THE MATTER OF HOURS OF WORK - TORONTO ACC***

ARBITRATOR:
Kenneth P. Swan

APPEARANCES:

For the Corporation:
Mary Gleason, Counsel
Steve Cooper, Labour Relations Officer
Arlene Yakeley, G.M. IFR, Toronto/Edmonton
John Golden, Shift Manager

For the Association:
Peter Barnacle, Counsel
Richard Nye, Vice-President, Labour Relations
Jack Heitzner, Controller
Phil Robinson, Controller
Wayne Bell, Controller

***A W A R D***



A hearing in this matter

was held in Toronto, Ontario on August 5, 6 and 17, 1999. At the outset of the hearings, the parties were agreed that the arbitrator had been properly appointed pursuant to the collective agreement, and that I had jurisdiction to hear and determine the matter at issue between them.

The present dispute arises from a Union grievance filed on September 4, 1998. The grievance is in the form of a letter, the substance of which follows:

> This is a union grievance.
>
> Controllers at both [sic] Toronto Area Control Centre are now being regularly required to work more then [sic] twelve consecutive hours on a regular basis as a result of staffing shortages in all specialties. This is a violation of Article 15.04 of the Collective Agreement.
>
> The employer may require a controller to work more than twelve consecutive hours only in the case of an emergency. In turn, an emergency is a unique, urgent event for which the employer cannot reasonably anticipate or cannot reasonably deal with except by extending work hours for particular controllers. We maintain that management at Toronto ACC is claiming an "emergency" for know short-staffing situations and certainly situations they have more then [sic] adequate notice of shortfall. Further, that no other means to deal with such shortages have been applied by the employer.
>
> CATCA demands that the employer cease and desist from the practice of claiming emergencies arising from short-staffing situations at Toronto Area Control Centre, and comply with the terms of the collective agreement in the future.

The issue as presented in this grievance relates solely to Toronto ACC, but there are other grievances in at least one other location being held in abeyance which apparently raise similar issues. The collective agreement provision involved is as follows:

> 15.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

The Toronto ACC is one of seven area control centres across the country engaged in control of aircraft flying under Instrument Flight Rules (IFR). In general, the ACCs control aircraft outside of the specified air space around some 44 airports which have tower controllers. Tower

controllers are responsible for only a few miles of air space immediately surrounding those airports, and the ACCs are responsible for aircraft in transit through their geographical areas of responsibility. Toronto ACC covers all of Ontario except for Thunder Bay and west, which is covered by the Winnepeg ACC. In particular, it is responsible for the very high volume traffic over southern Ontario.

The air space for which Toronto ACC is responsible is subdivided into nine "specialties". Within a radius of about 30 nautical miles around Toronto, the Terminal specialty is responsible for the air space beyond the immediate Toronto tower coverage. The Airports specialty provides similar coverage beyond the immediate tower coverage for the other airports in Ontario. To the north, the North Bay specialty and the North specialty cover geographical areas as suggested by the names. To the east and west of Toronto, the air space is divided not only by geographical coverage, but also by altitude, with East Low and East High, and West Low and West High, separated at 23,000 feet. A ninth specialty, Flow Control, regulates traffic bound into Toronto.

As traffic volume requires, a specialty may be broken down into "sectors" to create a manageable workload for one controller. The sectors can be broken out or collapsed as volume fluctuates, and the number of controllers required to work a specialty varies with the number of sectors established at any particular time.

In general, Air Traffic Controllers are assigned to a single specialty, and are qualified to work in that specialty only. Controllers qualified for a specialty are able to control all of the sectors which may be created within that specialty.

The concerns which give rise to the present grievance arise entirely on the midnight shift. There is no midnight shift on the Flow Control specialty, but the other eight specialties are all staffed on a 24 hour basis. In the North and Airports specialties, there are two Air Traffic

Controllers assigned to midnights on Tuesday to Saturday; for other midnight shifts on those specialties, and for all midnights on the other specialties, only one Air Traffic Controller is assigned.

This describes the current arrangement at Toronto ACC, but it should be noted that there has been a certain amount of proliferation of specialties in recent years. In 1997, the creation of the high and low splits in East and West, coupled with a reconfiguration of the former South specialty, added one specialty to the list. In 1998, the Terminal specialty was carved out of the Airports specialty, thus adding another. Each addition of a specialty, of course, is accompanied by additional staffing pressures.

There are other sources of staffing pressures as well. In *Re NAV CANADA and Canadian Air Traffic Control Association; Doerksen Grievance,* unreported, April 10, 1998, supplementary award September 9, 1998 (Jolliffe), the arbitrator found that the collective agreement provisions in paragraph 13.01(b) for meal and relief breaks were breached by scheduling only one controller on a specialty for the full duration of a midnight shift. In essence, the arbitrator found that scheduling a single controller for a period of almost seven hours in circumstances where there was no one qualified to provide relief constituted "an ongoing denial of the meal and relief break language" of the collective agreement. In the supplementary award, the arbitrator found that working alone for a period of up to three hours would not in itself constitute a breach of the meal and relief break provision, and the result, at least at Toronto ACC, was the implementation of "shoulder shifts" which overlap the midnight shift to reduce to three hours the gap during which a single controller may be left in charge of a specialty.

Finally, the new collective agreement recently negotiated between the parties, and now ratified, will provide as of January 1, 2000 that single coverage on the midnight shift is not permitted. That will result in a requirement to schedule at least two controllers on every specialty

on every midnight shift, thus creating a need for additional staff if other staffing levels are to be maintained.

It is common ground between the parties that the Canadian Civil Air Navigation system is seriously understaffed, especially in Toronto. Since the devolution of air navigation responsibilities on NAV CANADA on November 1, 1996, the staffing at Toronto ACC has been at about 80% of the total number of Air Traffic Controllers required to fill all scheduled shifts without preplanned overtime. The Corporation has embarked on a concerted effort to hire and train new employees to reach a level of 105% by 2001, but at least during the time covered by the present grievance and arbitration process, increasing staffing demands have counteracted any recruitment which has taken place.

The circumstances from which the present grievance has arisen are caused when an Air Traffic Controller scheduled to work on a midnight shift alone calls in sick on short notice. In practical terms, short notice here means at any time after the day shift has departed. While day shift employees are still in the ACC, it is relatively easy to contact one of them to implement a shift change, although there is a premium payable in such circumstances.

Once the day shift has departed, however, the Corporation is required to cover the absence either by calling in an employee to work the midnight shift, or by holding over an afternoon shift employee to work the midnight shift on overtime. Using this second option results in an employee working on a double shift of almost 16 hours, well in excess of the limit specified in clause 15.04. Unless the circumstances amount to “an emergency”, therefore, implementing this second option will always result in a breach of clause 15.04.

The magnitude of the problem is demonstrated by evidence at the arbitration hearing, and a number of stipulations made between the parties. Depending on the month, there are about

300 to 310 midnight shifts to be manned at the Toronto ACC. In the period from September 1, 1998 to June 30, 1999, 10 months, between 287 and 301 (the parties have somewhat different counts, but are agreed that the difference is not material) Air Traffic Controllers were required to work double shifts. Thus, nearly10% of the midnight shifts scheduled during this period were covered in a way which exceeded the limits set out in clause 15.04.

As will be seen, the Union's position is that no event which occurs with such regularity can possibly constitute an emergency, and thus there have been multiple breaches of the collective agreement. The Corporation's position is that each occasion on which it has taken all reasonable steps to find an alternative solution to an absence on midnights, without success, constitutes an emergency, and it is thus justified in exceeding the 12 hour limit. An assessment of these competing positions requires a more detailed look at how these situations arise.

The Corporation agrees that, where it has ample notice of the impending absence, it cannot claim the emergency exemption under clause 15.04. It appears that at least some of the occasions complained of by the Union constitute admitted violations of the provision. Where the call comes after the day shift has left the premises, however, the Corporation argues that its options are severely limited.

The Corporation's position is that it cannot leave the midnight shift unstaffed. Without going into all of the details of the statutory and regulatory provisions affecting this conclusion, section 9 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20, requires the Corporation to provide all of the civil air navigation services that were provided, prior to November 1, 1996, by Transport Canada. The evidence is that Transport Canada had always provided air traffic control services for all controlled air space in Canada, and the Corporation is therefore required to do the same on a continuous basis. Moreover, the evidence is that controlled

air space cannot be left uncontrolled arbitrarily. Aircraft end up unexpectedly in particular air space because of meteorological conditions, mechanical problems, or human situations. Humanitarian and medical evacuation flights may be necessary at any time. Because such flights are not on established routes, air traffic control intervention is particularly important to ensure safety.

If the absence must be covered, therefore, it can only be covered by calling in an employee who is not then at work, or by holding over an employee working the evening shift. The Corporation accepts that it has an obligation to take all reasonable efforts to attempt to call in an employee, but the evidence is that it meets a great deal of resistance in doing so. For obvious reasons, there is considerable resistance to working midnights in any case. Not only is it an unsociable time of the day, but the scheduling practices that staff most midnight shifts with a single Air Traffic Controller means that Controller is severely restricted in back-up and relief, even with the shoulder shifts implemented to comply with the Joliffe award.

While overtime is mandatory under the collective agreement, local management in Toronto has always attempted first to cover any unexpected absence by seeking a volunteer to report in for duty. The evidence is that there is considerable reluctance to volunteering for overtime on the midnight shift, and these attempts are not particularly successful. It is possible, of course, to order an off-duty Air Traffic Controller to report to cover a midnight shift, but such a measure is even more unpopular. The Corporation's concern is that, if it made a regular practice of ordering in employees, canvassing for voluntary overtime would become virtually impossible as employees took steps to ensure that they could not be reached. The possibility of assigning overtime to employees on the shoulder shifts has also been considered, but the second shoulder shift, beginning at 5:00 a.m., is already very unpopular, and an order to begin work at 3:00 a.m. or earlier would be less popular still. As a result, when a sick call is received after the day shift has departed, local

management at the Toronto ACC has taken to requiring evening shift employees to stay on to work the midnight shift. To provide for some relief and back-up, two controllers are sometimes held over. On occasion, formal written orders have been necessary to produce this result, but an uneasy truce has now been achieved in which the employees qualified to work on the specialty where the absence has arisen, and present in the workplace when it is clear that it cannot be covered by any other means, work out among themselves which of them will do the required double shift. Neither party pretends that this is voluntary, and in any case clause 15.04 does not permit even consensual breaches of the 12 hour time limit.

Despite this uneasy truce, the evidence indicates that there has been no real improvement in the situation between the filing of the grievance and the hearings. There is very heavy use of overtime at the Toronto ACC, and a rising incidence of sick leave. Despite management efforts to control it, a substantial amount of that sick leave arises on the midnight shift, as can be seen by the stipulated frequency of controllers working in excess of 12 hours. Whether these two factors are inter-related or not, and precisely how, was a matter of considerable argument between the parties, but it is not something that is susceptible of being resolved in the arbitration process.

Obviously, increasing the number of available Air Traffic Controllers seems likely to result in an improvement in the situation. Even as the Toronto ACC was staffed in the summer of 1999, if total staff resources were increased there would be more controllers available, less overtime required of each individual controller, and more off-duty controllers qualified in each specialty to be canvassed for call-in overtime as necessary. At least theoretically, there would also be less resistance to coming in for a midnight overtime shift if the overall incidence of overtime were reduced.

The Union also argues that, if two controllers were scheduled in each specialty on all midnight shifts, as apparently will be the case after January 1, 2000, the availability of relief and back-up on those shifts would also reduce the current unwillingness of controllers to work on midnights. The Corporation does not accept this proposition, and argues that in any case the increased staffing requirements to put two controllers on every specialty on midnights would only increase the staffing pressures and delay the time when adequate staffing resources could be achieved.

Increasing the number of Air Traffic Controllers, moreover, is not easy. The training required for a new controller takes at least two years, and may take longer. Of 300 candidates entering the national training facility at Cornwall, Ontario, only about 80 eventually become licenced, while 70 to 75 experienced controllers are lost to attrition each year. For whatever reason, the Cornwall facility was closed by Transport Canada in the 1908s for some period, and was closed again after November 1, 1986 by the Corporation for some period. While the Corporation's evidence is that this had no real impact on the situation in Toronto, since the Regional Centre continued to produce new qualified controllers from those who had already completed the training in Cornwall, it is obvious that at some point interruptions in the process of training Air Traffic Controllers will affect the ability of the Corporation to staff to the required levels or beyond.

Clearly, the parties have joined issue as to the meaning of the word "emergency" in clause 15.04. That word is nowhere defined in the collective agreement, and although it is used in various contexts in Part V of the *Civil Air Navigation Commercialization Act*, there is no statutory definition provided.

Dictionary definitions are helpful, but also imprecise. The *Shorter Oxford English Dictionary, Third Edition,* defines an emergency as "the sudden or unexpected occurrence (of a state

of things, etc.)," " a juncture that arises or 'crops up'; a sudden occasion." The *Concise Oxford Dictionary, Ninth Edition,* uses the definition "a sudden state of danger, conflict, etc., requiring immediate action". *Webster's Ninth New Collegiate Dictionary* defines it as "an unforeseen combination of circumstances or the resulting state that calls for immediate action," " an urgent need for assistance or relief". *The Dictionary of Canadian Law* defines it as "a present or imminent event that is or could affect the health, safety or welfare of people or could cause damage to property".

The parties are in agreement that the definition of emergency includes both the characterizations "sudden" and "unexpected". The difference between them is whether these are conjunctive or disjunctive parts of the definition. The Union argues that an emergency must incorporate both of these elements; the Corporation argues that either element is sufficient to constitute an emergency.

Arbitrators seem to have dealt with the meaning of emergency in various collective agreement contexts without really coming to grips with this point. In *Re Sheet Metal Workers International Association, Local 537 and Riddell Sheet Metal and Roofing Ltd.* (1965), 16 L.A.C. 193 (Reville), the meaning chosen seems to encompass sudden happenings requiring immediate action, even if not entirely unforeseen. This approach is adopted more explicitly in *Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 43* (1973), 2 L.A.C. (2d) 199 (O'Shea) and *Re Felec Services Inc. and International Brotherhood of Electrical Workers, Local 2085* (1986), 27 L.A.C. (3d) 163 (Schulman). The *City of Toronto* award appears to suggest that an emergency need be neither sudden nor unforeseen; garbage which had accumulated during a strike was held to constitute an emergency sufficient to justify a change of shift without adequate notice. In *Re International Molders and Allied Workers' Union, Local 49 and Webster Manufacturing (London) Ltd.* (1971), 23 L.A.C. 37 (Weiler), suddenness and unexpectedness both appear to

have been treated as factors to be considered in deciding whether an emergency exists or not, although it was held that a degree of foreseeability is not fatal to a finding of emergency.

In *Re Canadian Forest Products Ltd. and Industrial, Wood and Allied Workers of Canada, Local 1-424* (1996), 54 L.A.C. (4th) 45 (Blasina) and *Re Beaver Wood Fibre Co. Ltd. and Canadian Paperworkers Union, Local 192* (1991), 22 L.A.C. (4th) 353 (Dissanayake), on the other hand, a degree of foreseeability was held to disqualify an event from constituting an emergency.

Finally, in *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1974), 7 L.A.C. (2d) 40 (Schiff), where there was a long-term shortage of nursing staff, the employer was held to be disentitled from relying on the concept of emergency to justify the use of persons from outside the bargaining unit to perform bargaining unit work.

Perhaps surprisingly, clause 15.04 has never been directly interpreted. In *Brown and Treasury Board (Transport Canada)* [1983] C.P.S.S.R.B. No. 33 (Pyle), the adjudicator observed in paragraph 32 that the absence of an Air Traffic Controller from the midnight shift "would leave a position in the control centre unmanned. Given the function of the Air Traffic Control group, i.e., the control of air traffic to ensure its safe and expeditious movement through controlled air space, it is apparent that a vacancy would create an emergency situation on the midnight shift." While this appears to be an interpretation of clause 15.04, it is also clear that it is *obiter*, since the grievance did not concern the interpretation of that provision.

In *Degaris and Treasury Board (Transport Canada)* (1992), P.S.S.R.B. File No. 166-2-22490 and -22491 (Burke), the employer was held to be dissentitled to rely on the proviso "operational requirements permitting" to deny a leave of absence under clause 10.09 because of a chronic shortage of staff. An application to quash and set aside the arbitrator's decision was rejected by the Federal Court - Trial Division at [1994] 1 F.C. 374 (Cullen J.). The Union also relies on the

*Dourksen* award of arbitrator Jolliffe referred to above, where the arbitrator rejected the notion that the proviso "where operational requirements permit" in Article 13.01(b) could justify scheduling practices that made meal and relief breaks impossible.

The Union observes that the language of clause 15.04 is mandatory and imperative in nature. The only exception permitted is for an emergency. Other provisions identified by the Union are discretionary, such as clause 10.07, or require best efforts, such as clause 13.06 or clause 15.03. Still others, such as clause 10.09, paragraph 13.01(b), paragraph 16.04(c) or clause 17.04 all permit an exception for operational requirements.

But the Union points out that an exception for operational requirements is a far broader exception than for an emergency, and that given the decisions of arbitrators in *Degaris* and *Dourksen* limiting the application of even this broader exception, the Employer here should not be able to rely on long-term staffing shortages and its own staffing patterns to justify a finding of emergency every time a controller calls in sick for a midnight shift on which he or she is scheduled to work alone. That, the Union says, may be unexpected in any one particular case, but an event which occurs week in and week out cannot be reasonably called either sudden or unexpected, and certainly not both.

There can be no doubt that the Employer is in a very difficult situation. It inherited a chronic staff shortage across the system from Transport Canada, a shortage which is even more extreme in Toronto than it is in other locations. For whatever reason, its ability to ameliorate this staffing shortage has been further hampered by limiting enrollments at the Cornwall facility at a time when staffing requirements have actually increased in Toronto because of increased volumes, necessitating the creation of more specialties.

When an Air Traffic Controller phones in sick for a midnight shift on which he or she

is scheduled to work alone, the Employer has no choice but to replace that controller by some mechanism or another. While the Union suggested that there may be ways of permitting the employer to reduce the level of service rather than require another controller to work more than 12 hours, the evidence and my perusal of the regulatory and statutory documents is to the contrary, and no concrete suggestions were made by the Union as to how this might be carried out. Clearly, unless the air space can be closed or severely restricted in some way, the absence of an Air Traffic Controller on midnights creates a potentially dangerous situation and, in a microcosmic view of the situation, each such situation is an emergency.

This grievance, however, illustrates both the power and the weakness of the policy grievance as a tool in the enforcement of the collective agreement. The policy grievance forces a macrocosmic view of the overall situation, and requires a systemic analysis. In my view, once the larger picture comes into focus, it is clear that the causes of each episodic "emergency" are not circumstantial, but are systemic, and can be attributed to the chronic staffing shortages and the scheduling practices which help to create the individual set of conditions that lead to a choice between exceeding the 12 hour limit specified in clause 15.04 or leaving holes in the civil air navigation system.

No doubt there are other contributing factors, not least the high level of sick leave on midnight shifts, but that tends to exacerbate the problem rather than to create it. There will always be sick leave on midnight shifts, and reducing sick leave usage can only improve the situation, not cure it.

On the other hand, this grievance also demonstrates the weakness of the policy grievance as a tool for collective agreement enforcement. I have no doubt that some of the incidents of exceeding the 12 hour limit are truly unavoidable; I am simply unable to accept that all of them

are, given the length of time over which the experience has continued, and the great number of the occasions on which the 12 hour limit is exceeded. It is equally impossible to tell which particular occasions fit within the exception in clause 15.04, and which do not. As a consequence, it becomes very difficult to offer any particular guidance to the parties.

Nevertheless, I have concluded on the basis of all of the considerations discussed above that there have been violations of clause 15.04 in many particular instances, and that as a systemic matter the Corporation's staffing policies are the root cause of those violations. I therefore have no hesitation in issuing a declaration that, in at least some of the circumstances identified by this grievance, the Corporation is in breach of clause 15.04.

The Union, however, wishes me to go further, and to issue a cease and desist order requiring the Corporation to refrain from further breaches in the future. This, of course, is a much more potent remedy than a declaration. Such an order may be filed in the Federal Court, and may be enforced as an order of that Court; this could have the result of forcing the Corporation in some cases to choose being in breach of its statutory and regulatory obligations under the *Civil Air Navigation System* and committing a contempt. At least at this stage, that is not a position I am prepared to force on the Corporation.

I do not know whether there is one solution, or a combination of solutions, which could ever eradicate the necessity to require controllers from time to time to exceed the 12 hour limit in the circumstances raised by this grievance. There may, however, be combinations of solutions which could significantly reduce the frequency with which this occurs.

Obviously, increases in staffing levels will, over time, begin to have an impact. It may also be that, as the Association argues, ceasing single coverage on midnights, effective January 1, 2000, coupled with the other staffing adjustments in the new collective agreement, may improve

the situation somewhat. There may be other short-term solutions, such as paying employees to be on stand-by on a voluntary basis to be called in should an absence develop on the midnight shift.

The best source of any such solutions, whether they be partial or complete, temporary or permanent, is from the efforts of the parties themselves. As a result, I have decided to issue a declaration that the Corporation has been in breach of clause 15.04 as described above, and to remit the matter of ameliorating or preventing the incidence of breaches of clause 15.04 to the parties for further discussion. In case, following good faith efforts to find some resolution to remedy the situation, they are still in dispute as to how to proceed, I shall retain jurisdiction over this matter to consider any submissions which they may have as to what further arbitral remedies would be appropriate and necessary.

DATED AT TORONTO this 8th day of October, 1999.

Kenneth P. Swan, Arbitrator