IN THE MATTER OF THE *CANADA LABOUR CODE*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(the Employer)

AND:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

(the Union)

(LETTER OF UNDERSTANDING 4-91 GRIEVANCE)

AWARD

Arbitrator:	Mr. Richard B. Bird, Q.C.
Counsel:	Mr. Colin G.M. Gibson, for the Employer, and Mr. Steven H. Waller, for the Union.
Date and Place of Hearing:	September 29 and 30 and October 1, 1997, at Richmond, B.C.
Date Award Issued:	November 21, 1997.

Grievance

On December 10, 1996, the Union grieved that at the Vancouver and Victoria Air Traffic Control Towers the Employer is requiring air traffic controllers to perform duties normally performed by operational support specialists (OSSs). They are members of a different bargaining unit represented by the Public Service Alliance of

Canada. The Union asserts in the grievance that what the Employer is doing is contrary to provisions of their collective agreement including Letter of Understanding 4-91. The Union also asserts in the grievance that the current staffing levels at each tower are below the staffing standards set by the Employer's Air Traffic Administration and Management Manual. In addition to alleging violation of the Letter of Understanding the grievancee alleges violations of Articles 13 (hours of work), 16 (holidays) and 17 (vacations). In the grievance the Union asks that the Employer cease and desist from all such practices and the employees otherwise be made whole. At arbitration the Union asserted that the grievance is continuing.

Overview

The Federal Department of Transport operated Canada's air navigation system until November 1, 1996. On that date pursuant to federal legislation the Employer, a not-for-profit corporation, succeeded the Department as the operator of the system. On the same date the Employer succeeded the Department represented by Treasury Board as employer of those employed in the system. Before November 1, 1996, employees in the air navigation system were in bargaining units represented by various bargaining agents. They were the Canadian Air Traffic Control Association (the Union), the Public Service Alliance of Canada (P.S.A.C.), and eight other unions. By operation of law those unions continue to represent the bargaining unit employees in their new employment relationships. The Department of Transport, represented by Treasury Board, as the employer of air traffic controllers and air traffic control supervisors, and the Union were parties to a collective agreement for the period from January 1, 1991, to December 31, 1993, extended by the *Public Service Compensation Restraint Act* to October 31, 1997. A memorandum of understanding signed by representatives of the Employer and the various bargaining agents, including the Union, effective November 1, 1996, provides that each of the collective agreements previously in force between the Department of Transport represented by Treasury Board, and each union and now in force between the Employer and the respective unions are supplemented by a competitive staffing procedure, a grievance procedure and a seniority provision. The collective agreements in their original forms did not deal with those subjects. Legislation applicable to federal public service employees dealt with those subjects. When the Employer succeeded the Department of Transport as operator of the air navigation system public service legislation ceased to apply to employees in the system. The *Canada Labour Code* governs the relationships among the Employer, its bargaining unit employees and their various bargaining representatives. The *Public*

Service Staff Relations Act and other federal legislation applicable to public service employees do not apply to the current relationships among the Employer, the unions and the bargaining unit employees.

Arbitration

The Employer denies that it is in breach of the collective agreement in respect to assignment of OSSs' work to air traffic controllers at the Vancouver and Victoria Towers. The Union referred the unresolved grievance to arbitration pursuant to the new arbitration provisions of the collective agreement. Counsel for the Employer and counsel for the Union acknowledged on the first day of hearing that I am the properly appointed arbitrator of the grievance dated December 10, 1996, and have jurisdiction to make a binding award to resolve it.

Stephen Dunsmore representing the P.S.A.C. attended the arbitration hearing. He informed me that the P.S.A.C. had received a notice of the hearing that suggested the P.S.A.C. might wish to participate in the hearing. He told me that he would continue to attend the hearing on behalf of the P.S.A.C. but would limit his participation to answering any questions that might be put to him. He attended throughout the hearing but he did not have any questions to answer during the hearing.

Letter of Understanding

The Letter of Understanding 4-91 dated August 30, 1991, is part of the current collective agreement that I have described above. The substance is as follows:

> This is to confirm an understanding reached during the current negotiations in respect of assignment of controllers' duties.
>
> Functions which are now performed by members of other bargaining groups will not normally be assigned to members of the Air Traffic Control Group nor will functions which are presently only performed by members of the Air Traffic Control Group be assigned to members of other bargaining groups.

> Where because of operational requirements either party deems it desirable to deviate from this understanding, the parties agree to enter into discussion to consider such proposals of either party and may mutually agree to make exceptions to the foregoing.
>
> It is also agreed that this letter will in no way prejudice the position of either party, or interfere in any was with the commitments already made, in relation to the performance by ATC assistants of estimate copying, flight data posting and mission plotting.

Collective agreement

The present collective agreement is the latest in a long series of collective agreement concluded by the Treasury Board on behalf of the Department of Transport and the Union respecting air traffic controllers and their supervisors. The Letter of Understanding refers to them as the Air Traffic Control Group. The Department redesignated the ATC assistants as OSSs. The substance of Letter of Understanding 4-91 has appeared in letters of understanding attached to and forming part of previous successive collective agreements starting many years ago. Each letter of understanding bears a date that was current when the parties entered into the collective agreement to which it is attached.

Issue of Interpretation

The Employer and the Union disagree about the interpretation of the first part of the second paragraph of Letter of Understanding 4-91. I repeat the first part:

> Functions that are now performed by members of other bargaining groups will not normally be assigned to members of the Air Traffic Control Group... .

Air traffic controllers, their supervisors and OSSs routinely work in the Vancouver and Victoria Towers. Members of other bargaining units (groups) such as cleaners sometimes perform work in the towers. The OSSs perform only some of the air traffic controllers' functions.

The Union says that the Employer normally assigns to air traffic controllers and their supervisors work which was previously performed by OSSs in each tower. The evidence confirms this is so. The Union relies on a plain meaning interpretation of the letter of understanding. The Employer's position is that the first part of the second paragraph of the Letter of Understanding refers to work which belongs exclusively to employees in other bargaining units and not to work which they share with the Air Traffic Control Group. The evidence shows that the actual work of directing the movements of and otherwise assisting aircraft in the air and on the ground is exclusively the work of air traffic controllers and supervisors. They share most of the rest of their non-supervisory duties with OSSs. The Vancouver Tower operates continuously so there is always at least one air traffic controller or supervisor present. When no OSS is in a tower, for example, late at night and very early in the morning, air traffic controllers routinely perform the same kind of duties as OSSs except a statistical reporting function.

The Victoria Tower does operate from early morning until late at night. The controllers and supervisors control the operations. The Employer regularly schedules OSS to work in the Victoria Tower. However, the OSS do not cover the entire period of operations on any day. When the Victoria Tower operates without OSSs, controllers and supervisors perform what would otherwise OSSs' work.

Many towers in Canada function without any OSSs. Air traffic controllers perform all of the tower functions in those towers. One will see that Employer would be in breach of the letter of understanding if it normally required an air traffic controller to perform cleaning work. Cleaning is not part of a controller's duties and is exclusively the work of another bargaining unit.

ATSAMM and TP 1362

The Department of Transport originally developed and from time to time amended the Air Traffic Administration and Management Manual (ATSAMM). The

Employer adopted ATSAMM and recently amended it. The Union alleged in the written grievance that the Employer is not complying with its own ATSAMM staffing level standards at the Vancouver and Victoria Towers. The Union claims that the Employer does not schedule sufficient numbers of OSSs to work shifts in the towers in compliance with ATSAMM. It provides planning guidelines for staffing of control towers according to work loads. Management assigns workload ratings in accordance with Criteria for Measurement of Airport Control Tower Workload (TP 1362) revised August 4, 1995. The Employer adopted TP 1362 and it continues to be in effect. The workload measurements of Vancouver and Victoria Towers applicable to the periods in question resulted in the following ATSAMM recommended staffing levels expressed in shifts per day:

	Controllers	Supervisors	Assistants (OSSs)
Vancouver	12	2	3
Victoria	7	1	2

Evidence of Pye

John Pye is an air traffic controller. He works in the Victoria Tower. When he testified he was acting chairman of the Victoria Branch of the Union. He previously worked in towers at Prince George, B.C., and at St. Catherines and Ottawa, Ontario. He testified to the effect that air traffic controllers direct the movements of aircraft in the air near the airport and on the ground at the airport with a view to safety and efficiency. Negligent performance of duties by a controller can result in disciplinary action including fines and dismissal and damage awards against the controller. "Our motto is safe, orderly and expeditious," he testified. Controllers must give their full time and attention to their duties. Controllers and their supervisors do mostly "heads up" work in towers. This means that most of the time they direct their attention to aircraft movements on the ground or in the sky which they observe through the windows of the tower. On the other hand OSSs' usually direct their attention to things inside the tower so their work is

mostly "heads down." Safe movement of aircraft at and near the airport is a primary concern of air traffic controllers. Pye made the point that it can be risky for a controller to not pay attention to what is going on outside the tower.

In cross-examination Pye acknowledged that when he worked in the Prince George Tower there was no OSS so the controllers performed the functions that otherwise would have been performed by an OSS. The situation at St. Catherines was similar. There, controllers did everything, he said in evidence. There were OSSs in the Ottawa Tower which operated 24 hours per day. OSSs' shifts did not cover the entire period. When there was no OSS in the Ottawa Tower the controllers did everything. Currently Victoria Tower is not operating 24 hours per day. When it did there was no OSS on shift during the night. Now when two OSSs are on duty in a day, the second one stays until 10:00 p.m. and the controller stays until midnight. When an OSS is sick, a controller will combine the OSS function with his own . This has been going on since Pye has worked at the Victoria Tower. Pye has no personal knowledge of any comment about an excessive work load resulting from the combining of the OSS function with the controller function. When Pye is performing combined duties, if he finds it necessary for the proper performance of controller duties, he will leave low priority OSS work for the next shift.

Evidence of Campbell

David Campbell is the acting general manager of the Pacific Region of the Employer. Previously he was the manager of the Vancouver Tower. The Pacific Region includes Vancouver and Victoria. The Vancouver Tower operates 24 hours per day. On the midnight shift, which begins at 11:00 p.m., there is only one controller in the tower and no supervisor or OSS. In 1991 the Vancouver Tower had a complement of six OSS. The schedule called for eight hours shifts with one OSS starting in the morning, one in the afternoon and one on a swing shift straddling the other two shifts. If there was a surplus of OSSs two would start in the morning and two in the afternoon. If three were scheduled

and one got sick the supervisor would offer overtime to another OSS or to a controller. If an off-duty OSS were available the supervisor would call that OSS in. If an OSS was likely to be absent for more than one or two cycles (work weeks) then Campbell would try to find a temporary replacement. One source of OSSs was those who had failed the air traffic controllers' course. The failure rate was high and a failed candidate had training in all OSS functions. During the day and evening when an OSS was on duty the OSS took breaks. The supervisor would decide whether and how to cover the breaks. As tower manager Campbell issued memoranda setting staffing levels. He used ATSAMM as a guide. During a year there are ups and downs in traffic so he exercises his managerial discretion to increase and decrease staffing levels accordingly. In October 1995 Doris Hamel, an OSS assigned to the Vancouver Tower, was sick and unable to work. She was optimistic thinking that she would soon return to work in January 1996 but for some time she did not know what was wrong with her. Campbell granted her leave until January 31, 1996. At first he did nothing about a replacement. He was typically scheduling three OSS per day and her absence did not impact on the ability to staff to the level of three OSS per day. During the fall and winter fewer staff members take leave. She eventually returned to work at the beginning of May 1996 at first working short hours and retraining.

Campbell produced a list of dates from November 11, 1995, by which time Hamel had commenced her sick leave, to August 10, 1997. They were dates upon which the applicable schedule showed that management had scheduled an OSS to work but an OSS did not work. Typically management scheduled three OSS to work each day during the period. The Union presented a list covering the period showing days on which management did not staff at least one scheduled OSS position. I compared the two lists and prefer that offered in evidence by the Employer. The Employer based it's list on employees' signatures written when the employees signed in for work. On some of the dates listed, using three OSS positions as the norm, the actual staffing was one position not

staffed in a majority of cases, in some cases two not staffed and in a two cases not staffed at all by an OSS. The days upon which the OSS positions were understaffed or not staffed at all, according to the Employer's list, are as follows:

November 11, December 4, 1995, February 10, April 3, June 1 and 16, July 1 and 13, August 24, September 21, October 12 and 20, November 16, December 8, 19, 27, **29** and 30, 1996, January 5, 14, 25, 26, February 9, March 2, 3, **8** and 15, April 6, June 19 and 20, July 25, 1997. (The dates upon which no OSS worked are in bold type and the dates upon which only one OSS worked are underlined.)

Campbell testified that when he prepared monthly schedules for OSS he provided for a full staffing (at least three) per day. Events prompted changes, for example, illness. The supervisor of a shift exercised a discretion as to whether to fill an OSS vacancy in a shift schedule. The supervisor exercised the discretion on the basis of air traffic volume. Campbell did not replace Hamel because she kept predicting she would return to work in two months.

On November 1, 1994, Campbell continued the OSS staffing level of the Vancouver Tower as one on the day shift, one on the afternoon shift and one overlapping those two shifts. However, when an unscheduled OSS vacancy on a shift occurred and there were insufficient OSS personnel available to staff to the level of three, he directed that the staffing level would be one starting in the morning and one starting in the afternoon, "back to back," as he described it in his memorandum. Supervisors were not to assign controllers to OSS duties unless there was an emergency. If the Tower was down to a schedule of one OSS on shift per day and there was an unscheduled vacancy a supervisor could assign a controller to fill the vacancy. Effective December 1, 1996, Campbell issued another staffing memorandum cancelling previous staffing memoranda. In the new staffing memorandum, which is still in effect, he set the OSS staffing as one OSS 6:00 a.m. to 2:00 p.m. and one 2:00 p.m. to 10:00 p.m. To this schedule he added a note:

> Do not use AI personnel [controllers and controller supervisors] to fill OSS vacancies except in emergency situations. A swing shift (1100 - 1900) is provided for those occasions when there are more than two [OSSs] available.

Campbell set the new staffing levels, which he based on his observations, after consulting the supervisors. The changes made no impact on the performance of OSS duties. They are still getting done. In December 1996 the Vancouver tower staff moved to a new control tower.

In cross-examination Campbell agreed that the staffing level of OSSs at the Vancouver Tower did not drop to two until December 1996. Each year the volume of traffic at the Vancouver International Airport increases. The amount of OSS work did not fall and some of it controllers performed. Most of the OSS functions have to be done the same day. At the Vancouver Tower controllers commonly perform all OSS functions except data entry, which can wait. Most controllers cannot type so they cannot perform the data entry function. Campbell denied that he understaffed, contrary to ATSAMM. The thrust of his evidence was that ATSAMM is only a guide and as a manager he was expected to exercise his discretion in staffing. He did so and the work got done without incident.

In re-examination Campbell said that although the ATSAMM level of OSS staffing for the Vancouver Tower is six that is only a guide not a requirement. The main question in staffing is whether the OSS function is being accommodated.

Brassington's evidence

Barry Brassington, manager of the Victoria Tower, testified about OSS staffing there. He has worked in that tower as a controller, supervisor and manager since 1981. The tower operates from 6:00 a.m. until midnight. He does not schedule OSS to cover the entire period while the tower is operating. From 10:00 p.m. to midnight there is

no OSS in the tower. During unplanned absences of scheduled OSS and during OSS breaks a controller performs OSS functions. This has been so at least from 1981. He expects controllers performing OSS functions will perform the data entry function as well, subject to proper work priorities. When Brassington arrived at the tower in 1981 there were two scheduled OSS shifts daily, back to back, with one on each shift and a complement of four OSS. In the fall of 1982 the employer laid them all off due to Federal Government budget cut-backs. There was no grievance. In 1984 the employer provided a complement of two OSS for the tower again in order to staff one OSS shift per day. In 1986 the manager increased the OSS shifts to provide for one OSS on a day shift and one on an afternoon shift and authorized the use of overtime for OSSs. After 1986 while Brassington was a supervisor he had to get the manager's approval for overtime. Because of concerns expressed by controllers at the Victoria Tower persons from the Employer's head office conducted a staffing review controller and supervisor staffing from September 9 to 12, 1996. The principal finding in their report is as follows:

> The review team is of the opinion that the current staff allocation for Victoria Control Tower, 6 controllers and 2 supervisors, meets the operational requirements.

In the report the review team noted that there are two OSS shifts per day (back to back) Monday to Friday covering the period from 5:45 a.m. to 9:45 p.m. each shift staffed by one OSS. The review team made this observation:

> This schedule provides for an efficient use of personnel and was achieved through consultation with the OSS staff.

The team reviewed staffing levels of controllers and supervisors, not OSS staffing levels, Brassington pointed out. Counsel drew the witness' attention to the staffing table in ATSAMM and asked which staffing level would apply to the Victoria Tower, if the table was strictly applied. Brassington answered that it would be seven controllers, one supervisor and two OSSs. During the staffing review Brassington

scheduled two OSS shifts back to back Monday to Friday. He had a complement of two OSSs. The team made no recommendation concerning OSSs.

The Union put in evidence a list entitled "Instances Where OSS Not Fully Staffed (Victoria Tower)." It covers the period from July 16, 1996, to September 11, 1997. It records the times during which less than two full OSS shifts per day were staffed by OSS. The list shows that there were 51 days during that period in which the OSS staffing was short or non-existent. Brassington gave three explanations of the staffing problems he had with the OSS shifts during that period. There were several cases of lengthy illnesses with uncertain return dates and one case of pregnancy. One OSS eventually died. During most of the illnesses Brassington was uncertain about the return dates. Another problem he faced was that prior to and following the transfer of the air navigation system from a department of the Federal Government to the Employer he was unable to arrange for the hiring of any employees. I understand from his evidence that while the transfer was pending the Government was reluctant to hire and for a period after the transfer the Employer's hiring procedures were unclear. In anticipation of the day when he could arrange for hiring he established an eligibility list of person who were qualified and could be available for employment. In November and December 1996 Brassington scheduled many single OSS shifts per day. He did so in consultation with the supervisors. This was a slow time of the year for air traffic.

Brassington issued Victoria Control Tower Staff Memorandum No. 96-11 dated May 16, 1996. In it he provided one OSS for the day shift and one OSS for the evening shift. He refers in his memorandum to a shortage of supervisors and controllers and very limited availability of overtime funds requiring a further adjustment of overtime policy. He authorized the use of overtime "when necessary" to meet a shift staffing profile of one OSS working in the tower from 8:00 a.m. to 6:00 p.m. When the Union filed the grievance on December 10, 1996, Brassington's Staff Memorandum 96-15 dated

September 11, 1996, had been in effect since October 1, 1996. In it he provided for two OSS shifts per day and the continuance of the policy of permitting overtime "when necessary" to meet a shift staffing profile of one OSS in the tower from 8:00 a.m. to 6:00 p.m. Brassington corrected an error in No. 96-15 in his Staff Memorandum No. 96-24 dated December 13, 1996, which changed the normal staffing level of two OSS to one. The "when necessary" staffing level to be maintained by overtime remained the same for OSSs. Union representative Eric Pye told Brassington that this change in OSS staffing did not comply with ATSAMM and TP 1362. It is the criteria for measurement of airport control tower workload. Brassington explained that TP 1362 generates workload statistics. At Victoria the workload is lowest in December and highest in July. When deciding December 1996 staffing levels he looked at the statistics for the previous December. They suggested a staffing level of one OSS for that month. To his knowledge no problems arose out of that staffing level. The Union filed the grievance on December 10, 1996. In late March 1997 an OSS transferred from Kamloops to the Victoria Tower to cover for a sick OSS. In April an OSS went on maternity leave. In late May the Employer hired Ray Poole to work at the Victoria Tower as an OSS. When the tower was short an OSS a controller picked up the OSSs' duties. "No one ever raised the workload issue with me (before the Union filed the grievance)," Brassington testified. Air traffic levels dealt with by the Victoria Tower peaked in a one year period 1979-1980 then declined until 1983-1984 when they leveled off. Since then annual traffic levels have been within five percent plus or minus of that year. The budget dictated the layoff of all OSS in 1982. The volume of air traffic had nothing to do with it.

In cross-examination counsel for the Union asked Brassington if it is appropriate to apply a multiplier of two to a schedule of two OSS shifts of one each per day in 1996 to get a staffing complement of four. Brassington agreed this is so under the ATSAMM guidelines. Counsel pointed out that the Victoria Tower did not have a

complement of four OSS during that time. "I tried hard," he replied. He acknowledged that if he had been able to maintain a complement of four OSS he would have scheduled two shifts of one OSS each per day. Frequently an OSS got only one day off in a week.

Robertson's evidence

Douglas Robertson testified that he is an acting superintendent of the Employer's Air Traffic Control Monitoring and Evaluation Division. He has been in that division for more than six and a half years. He has been with the Employer and its predecessor for 26 years. The division conducts routine evaluations of all air traffic control units including the Vancouver Tower every two years and the Victoria Tower every three years. The division also investigates irregularities through a fact finding process. A member of the division chairs all investigations. The division will also review staffing levels. Employees in the division are not in the Union's bargaining unit. In his six and a half years as an officer of the division he has visited most control towers for unit evaluation and fact finding. Robertson produced a list of 44 air traffic control towers across Canada. It shows towers which are now or were eligible for OSS personnel, those which now have OSSs on staff and those which formerly had OSS. Nine of the 44 now have OSSs on staff. Eight others are or were eligible for OSS staffing under the current or a previous ATSAMM. Those which are or were eligible but do not or did not have OSS on staff because local management and regional management, mainly because of workload levels, decided the towers did not need OSSs. At 35 towers controllers perform OSS functions. Controllers are trained to perform OSS functions. In the nine towers with OSSs, controllers perform OSS work in the absence of OSSs, before and after OSS shifts and while OSSs are on work breaks. ATSAMM provides staffing guidelines for tower and division managers.

In cross-examination Robertson acknowledged that he was a co-author of the Staffing Review of the Victoria Control Tower for the period September 9 to 12, 1996.

While the focus was the controllers and supervisors, the authors did comment on OSS staffing. During that period tower management scheduled two OSS shifts of one OSS each, back to back covering the period from 5:45 a.m. to 9:45 p.m. The actual staffing was as set by management for that period.

Robertson agreed that a tower manager can schedule below ATSAMM staffing levels without approval from higher authority and for special occasions, such as an air show, can schedule above. However, to schedule above ATSAMM staffing levels beyond that a manager needs national approval.

Counsel for the Union showed Robertson an article entitled "Am I responsible? A guide to employee civil liability." Robertson recognized it as having appeared in the September 1997 edition of *Nav Canada News* published by the Employer. The article makes a number of points including the following:

1. The Employer is legally responsible for damages resulting from the misconduct of employees acting within the scope of their employment. The Employer and the employee are jointly liable.

2. In most circumstances of employee negligence the Employer will pay damages awarded against an employee. The exceptions are gross negligence and willful misconduct.

Tarte and Abbott decisions

In this arbitration the Employer relies upon a decision of Member R.D. Abbott of the Public Service Staff Relations Board, acting as an adjudicator, concerning the first part of the second paragraph of a previous letter of understanding. The text of that letter of understanding is identical to the text of the current Letter of Understanding 4-91 .

It supports the Employer's interpretation. *Mitchler and Treasury Board (Ministry of Transport)* File 166-2-6489 dated November 3, 1980 is the Abbott decision to which I refer.

The Union relies upon a decision of the Public Service Staff Relations Board concerning the first part of the second paragraph of the current Letter of Understanding 4-91. The decision is directly on point. It supports the Union's interpretation. I refer to the decision of Chairperson Tarte of the Public Service Staff Relations Board, acting as an adjudicator, in *Canadian Air Traffic Control Association and Treasury Board (Transport Canada)* File 169-2-583 dated February 26, 1997, as the Tarte decision.

Abbott decision

Air traffic controller Mitchler grieved on February 7, 1979, that the Employer assigned to him the functions of an air traffic control assistant (now called OSS) in a normal situation. He asserted in his grievance that this was a violation of Letter of Understanding No. 5 forming part of the collective agreement between the Union and his employer, then the Department of Transport (Transport Canada). The substantive provisions of that letter of understanding and the current Letter of Understanding 4-91 are identical. Controllers and assistants were in different bargaining units and were subject to different collective agreements. The Calgary tower chief's policy at the Calgary Terminal Control Group regarding the absence of an assistant from a scheduled shift was for the supervisor to call in on overtime an off-duty assistant. If this was not possible then the supervisor would assign the duties to an on-duty spare controller and if that was not possible the supervisor would call in on overtime an off-duty controller. In early 1979 the chief changed the policy so that to cover the absence of a scheduled assistant the supervisor would assign the duties to a spare on-duty controller if there was one. It was pursuant to the changed policy that the supervisor assigned assistant's duties to the grievor.

The chief changed the policy because of a temporary surplus of controllers. In June 1979 the surplus ceased to exist so the chief reinstituted the former policy.

Three issues emerged in the hearing. First, did the employer assign to the grievor the functions performed by members of another bargaining group? Second, did this assignment occur in a situation that was "normal" within the meaning of the first part of the second sentence of Letter of Understanding No. 5? Third, did adjudicator have jurisdiction to make a cease and desist order if the union was successful on the first and second issues? Because the adjudicator found for the employer on the first and second issues the adjudicator did not address the third.

The adjudicator found that by the very name "air traffic control assistant" confirmed by a reading of the relevant job description the assistant does what is necessary to support the work of the controllers. He also found that controllers can and do support themselves. The only difference between the two positions in the work they shared is that the assistant had to present controllers with certain information a format useful to controllers whereas the latter just accessed the information directly when they supported themselves. At pp. 7 and 8 of the decision the adjudicator says:

> . . . . .
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> ...[W]hen the letter of understanding precludes the employer from assigning to controllers the functions of another bargaining group, it must mean that controllers are not to be assigned the functions which are peculiarly, uniquely, the functions of the other bargaining groups and which are not at all the functions of controllers.
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> . . . . .
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> [C]ontrollers are trained to do, and do, all that assistants do, on many occasions, when they work the midnight shift (when no assistant is on duty) or when they have been called in to fill an absent assistant's position at overtime rates. This has been done without objection or grievance, reflecting an acceptance that controllers' functions overlap and include assistants' functions. It follows that what the employer is precluded from doing by the letter of understanding is the assignment to controllers of functions uniquely those of the assistants; i. e., functions which are not function of controllers.

The adjudicator addressed the issue of whether the situation was normal. At pp. 10 and 11 he rejects the notion that because there was a policy to deal with a situation, being the absence of a scheduled assistant, the situation was normal within the meaning of the letter of understanding. He found the availability of surplus controllers was not normal and this "conjoined" with another circumstance was not normal. It was the absence from work of an assistant scheduled to be at work that was not normal. It would have been normal had the assistant attended work

At pp. 13 and 14 the adjudicator found that the employer had not assigned the functions performed by another bargaining group to the grievor. The adjudicator also found the employer had not normally assigned the grievor to perform such functions. Accordingly, he found no violation of Letter of Understanding had occurred.

Tarte decision

At the hearing before Chairperson Tarte of the Public Service Staff Relations Board the Union contended that the employer has on several occasions assigned members of the air traffic controllers' bargaining group to perform OSS duties at Ottawa Tower thereby violating the first part of the second paragraph of Letter of Understanding 4-91. The Union sought a declaration that the employer is in violation, a cease and desist order and such other relief as may be requested or is necessary to make the Union and its members whole.

The agreed statement of facts presented by the parties to the adjudicator describe the circumstances that led to the Union's filing the grievance. They are similar in many respects to the circumstances in the Vancouver and Victoria Towers. The employer staffed the Ottawa Tower with members of two occupational groups, air traffic controllers and supervisors in one and OSSs in the other. The employer acknowledged that it assigned OSS functions during the material period to air traffic controllers and supervisors but

denied any violation of Letter of Understanding 4-91 referred to in the decision as LOU4. The employer further acknowledged that OSS functions were carried out during the two OSS shifts throughout the material period, regardless of whether an OSS person was scheduled to work those shifts, or if scheduled, was not present to perform the work during those shifts. The practice during the material period was that the controllers on shift were responsible for performance of the duties of a vacant OSS position (scheduled for but not filled by an OSS). There were instances when a controller covered an OSS shift even though the controllers were at the minimum staffing level for the Tower. The material period was from December 7, 1995, to March 16, 1996. During that period the normal complement of OSSs (set by the employer) was four but often there were only two or three available for work. Between June and December 1996 the Tower was often short one OSS. The need for OSS services was generally less during this later period.

The Union expressly stated that it did not argue that a controller can never perform OSS functions nor that the use of a controller in an overtime situation to perform OSS functions is improper. The Union argued that the practice showed that the employer had assigned controllers to OSS positions on a regular basis in contravention of the collective agreement. The Union was concerned with two circumstances during the periods of the violations. First, when the staffing level of controllers was normal the employer assigned controllers to OSS functions. Second, when the employer staffed the Tower with one extra controller the employer denied leave for a controller. Letter of Understanding prohibits the "normal" assignment of OSS functions to controllers. Normal implies regularity or policy. There were both here. During a shortage of OSS personnel over extended periods, the employer used controllers to carry out OSS functions without the agreement of the Union; see the third paragraph of Letter of Understanding 4-91. The Board can issue cease and desist orders; see *Rollins* (Board File 161-2-648) and *CATCA*

(Board File 169-2-525) as well as *Labour Relations Board Remedies in Canada* chapters 6 and 7 (Canada Law Book, October 1968).

The employer argued that because of greed and not by any honorable concern that controllers should not be performing OSS duties motivated the Union's reference to the adjudication. The duties of controllers and OSSs are not discretely different, the employer contended. Controllers routinely perform OSS duties, for example at night where no OSS is in the Tower. The employer relied upon the Abbott decision in asserting that the staffing situation was not normal. The employer asserted that there was no violation of Letter of Understanding 4-91. A cease and desist order would be inappropriate.

In his reasons for decision at p. 9 Chairperson Tarte found that the regular assignment of controllers to perform OSS functions during the periods under review were to functions normally performed in the Ottawa Tower by OSSs. The situation arose because of chronic shortages of OSS personnel that the employer seriously tried to correct in a timely manner. The parties did not enter into discussions contemplated by the third paragraph of the Letter of Understanding 4-91. They should do so when problems arise so both were remiss, according to the chairperson. He declared that the employer, during the period referred to in the union's reference to adjudication, failed to abide by the obligation in Letter of Understanding 4-91. He declined to make a cease and desist order without giving a specific reason. His reasons for decision are brief and contain no reference to the *Abbott* decision upon which the employer relied.

Union's argument

Counsel for the Union gave his analysis of Letter of Understanding 4-91. The meaning of the second paragraph, particularly the first part, is in dispute. It is not ambiguous. It says:

> Functions now performed by members of other bargaining groups will not be normally assigned to members of the Air Traffic Control group [controllers and supervisors]... .

This requires a factual inquiry to determine what functions were members of other bargaining units performing at the date of Letter of Understanding 4-91 being August 30, 1991. The functions at issue are those of the OSS, members of the P.S.A.C. bargaining group. The third paragraph provides a procedure for reaching mutual agreement to deviate from the restrictions imposed by the second paragraph. As of August 1991 there was one exception to the restriction in the first part of the second paragraph. It was that the Employer could assign to controllers and supervisors functions performed by other bargaining groups provided the assignment to controllers and supervisors was not normal. The Employer would have the arbitrator read in a second exception. This implied exception would be that the word "only" be read in before the word "performed" where that word first appears in the second paragraph, as follows:

> Functions which are now *only* performed by members of other bargaining groups ... .

When one reads the last part of the second paragraph one sees that the parties agreed to protect the controllers and supervisors from the assignment of the functions which are:

> . . . . .
> presently only performed by members of the Air Traffic group ... to members of other bargaining groups.

The words the parties used to construct the second paragraph make it clear that when they wished to refer to functions performed only by one bargaining group they expressly said so.

In the French version of the collective agreement the word "uniquement" appears in the same relative position as the word "only" appears in the English version in the second paragraph and not elsewhere in that paragraph.

In 1991 there were OSSs in the Vancouver and Victoria Towers. For the busy hours at each airport the management schedules OSSs. The evidence shows that on an increasingly regular and normal basis the Employer has assigned OSS work to controllers and supervisors in those towers. What was formerly done by OSSs is now done by controllers and supervisors. This is not a work load issue. The evidence of Pye is that taking a controller's attention away from controllers "heads up" duties can be dangerous and risky. This can result in civil liability for controllers and supervisors; see the *Nav Canada News* article. The collective agreement expresses a concern for the safety of the public. Article 1.02 of the collective agreement records the desire of the parties to provide safe and efficient services to the public. The arbitrator should give the concern for safety as much weight as the concern for efficiency. The work now reassigned by the Employer from OSSs to controllers was not normally done before the Employer began to normally cut corners in staffing. It is irrelevant that controllers under different circumstances have performed some OSS duties, for example on the midnight shift and during OSS meal breaks.

Counsel contended that the list of 44 towers showing staffing of OSS past and present of not prove anything and not sufficient to prove a practice. The destaffing of OSSs in 1992-1993 at the Victoria Tower, many years ago, is insufficient for use as an aid to interpretation of the dispute provision. There is no ambiguity and no practice available to assist the Employer.

Counsel referred to authorities. He asserted that the Abbott decision was wrongly decided. The same paragraph that was in issue there is in issue here. Adjudicator Abbott does not refer to the second part of the second paragraph. In the second part the subject is "functions ... presently only performed ... whereas the subject of the first part is "[f]unctions which are now performed ... ." The Abbott decision ignored the rule of interpretation that requires disputed words to be considered in their context. Adjudicator Abbott did not consider context. Also the adjudicator dealt with an individual grievance.

In *Professional Institute of the Public Service v. Canada,* Federal Court of Appeal, September 27, 1990, the appellant was a bargaining agent which had brought a grievance to the Public Service Staff Relations Board established by the *Public Service Staff Relations Act.* Section 99(1) of the *Act* authorized a bargaining agent to bring a grievance to adjudication by the Board to enforce a collective agreement or award (an obligation) provided the obligation is not one which may be the subject of an employee grievance. The Court declined jurisdiction because s. 99(1) only allows a reference to the Board when it could not be the subject of an individual grievance. In the case before the court individuals could have brought grievances so the Court found the Board had properly declined jurisdiction. In the Abbott case the Union was not fully in control of the grievance because of. 99(1).

In *United Association of Plumbers & Pipefitters, Local 593, & London Labour Bureau* (1961) 11 L.A.C. 306 (Reville) at p. 309 the arbitrator says that a contract speaks as of the date of execution unless the operation of the agreement is deferred to a specific date or time set forth in the agreement itself. Letter of Understanding 4-91 speaks as of August 30, 1991.

In the Tarte decision the Union was successful in a s. 99(1) reference. In that case the Employer acknowledged that it had assigned OSS functions in the Ottawa Tower to controllers and supervisors (AI personnel) during the material period but denied any violation of Letter of Understanding 4-91. The Employer acknowledged that controllers and supervisors carried out OSS functions regardless of whether an OSS was present. The same circumstances occurred in the present case. It was the Employer's practice during the material period that it was the responsibility of AI personnel on shift to perform the duties of a vacant OSS position. The same thing occurred at both towers in the present case. In the case before Chairman Tarte the Union did not allege a violation where controllers were assigned OSS functions on the day and evening shifts except where the Employer denied collective agreement entitlement (e.g. leaves) in order to fill a vacant OSS position. Also the Union did not allege a violation where AI personnel were brought in on overtime to fill a vacant OSS position. There were instances where a controller covered an OSS shift even though the controllers were at the minimum required staffing level. The Ottawa Tower was short at least one OSS between June 1995 and December 1996. The tower manager testified that his reluctance to use overtime to cover a vacant OSS position had less to do with cost than underutilization so it was unnecessary to staff. The circumstances were similar to those in the present case. The evidence showed that the Employer had denied controllers' requests for leave because of the shortage of OSS which controllers covered. The Union argued that Letter of Understanding 4-91 restricts the rights of the Employer to manage its operations by prohibiting the "normal" assignment of OSS functions to controllers. In this context "normally" means as a rule, usually, ordinarily or in a normal manner. The word "normally" implies regularity or policy. The evidence showed both. The Employer argued that the Union was motivated by the greed of its members. The Employer relied upon the Abbott decision where the situation was not normal. The staffing situation was not normal so the Employer had to adopt staffing

practices which were not normal. In his reasons for decision Chairman Tarte adopts the literal interpretation of Letter of Understanding 4-91 advanced by the Union.

Counsel referred to *Degaris and Treasury Board (Transport Canada)* Public Service Staff Relations Board, Burke member, PSSRB File Nos. 166-2-22490, 166-2-22491 January 4, 1993. Controller Degaris asked for leave to work for the International Civil Aviation Authority (ICAO) under Article 10.09. It provides "operational requirements permitting" for leave without pay to work for ICAO among other organizations. Degaris worked at the Toronto Tower which was chronically understaffed. The Employer denied his applications for leave on the ground that operational requirements did not permit the Employer to grant the leave. Relying on authorities Board member Burke concluded that the Employer must take into account contractual obligations when determining the number of staff required. The Employer was short-staffed for a long period and did not apply the proper multiplier to determine how many staff would be required to cover all of their needs. The Board member allowed the grievance.

In *Re Orenda Ltd. and International Association of Machinists, Lodge 1922* ((1973) 1 L.A.C. (2d) 72 (Lysyk) 72 at 73 the board of arbitration says:

> The parties are obviously free to negotiate a term in the collective agreement specifically prohibiting performance of bargaining unit work by non-bargaining unit personnel, with or without certain exceptions. When there is such a specific prohibition, a board of arbitration will not be astute to imply exceptions not spelled out in the agreement.

In the present case the arbitrator ought not to be astute to imply the word "only" in the first part of the second paragraph.

The Union seeks as remedies a declaration and a cease and desist order.

Employer's argument

Counsel for the Employer said the Union contends that Letter of Understanding 4-91 restricts the normal management right to assign work to employees as it deems right and appropriate. There is a heavy onus on the Union to establish that restriction and prove a violation of it; In *The Board of School Trustees of School District No. 39 (Vancouver) and International Brotherhood of Electrical Workers, Local 213 and International Union of Operating Engineers, Local No. 963* Labour Relations Board Decision No. 333/86, December 19, 1986, Davison, vice-chairman, at pp. 13 cites with approval *Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910*, (1982), 4 L.A.C.(3d) 323 (Chertkow) in part as follows:

> We ought not to impose upon an employer any restrictions on its right to organize and reorganize its work force unless it clearly and unequivocally bargained so to do.

The Union failed to show that the collective agreement contained clear and unequivocal language to support its contention that the collective agreement contained a restriction on management's right to assign work. The arbitrator dismissed the grievance.

Counsel for the Employer asserted that Letter of Understanding applies only to assignment to controllers of functions that are the exclusive property of other bargaining units. For example, repairs, cleaning and vacuuming. This is work which controllers do not perform. All of the functions which OSSs perform in the Vancouver and Victoria Tower are performed by controllers at those places. In many other towers there are no OSSs so controllers perform all of those kind of functions all of the time. The exclusivity requirement in the Abbott decision is consistent with the general arbitral jurisprudence; see *Canadian National Railway Company and Brotherhood of Maintenance of Way Employees*, Canadian Railway Office of Arbitration, Case No. 2026, June 15, 1990, where arbitrator Picher had to interpret and apply Article 43.3 of the parties' collective agreement:

> 34.3 Except in cases of emergency or temporary urgency, employees outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department .
>
> . . . . .

The arbitrator rules as follows:

> It is well established in prior decisions of this Office that where both Maintenance of Way employees and employees within another jurisdiction both perform a particular type of work assignment, work which falls under such a shared jurisdiction cannot be said to belong to Maintenance of Way employees within the meaning of Article 34.3 of the Collective Agreement (see e.g., CROA 1316).

The arbitrator rejected local practice as a basis for giving jurisdictional exclusivity to the maintenance of way employees.

In *Re Fairhaven Home for Senior Citizens and Ontario Nurses' Association* (1991) 28 L.A.C. (4th) 399 (Thorne) the arbitration board considered a case of overlapping duties. Nursing assistants in the Canadian Union of Public Employees' bargaining unit performed work which overlapped with that of the registered nurses in the Ontario Nurses' Association's bargaining unit. Article 2.05 of the O.N.A.'s collective agreement was in part as follows at pp. 404-405:

> [T]he Employer agrees that no one outside of the above-mentioned bargaining unit shall perform the work normally performed by members of this bargaining unit, except for the purpose of instruction, experimentation or in the event of an emergency situation.

The duties of the registered nurses and the nursing assistants were partially overlapping. Relying upon the unreported decisions in *Re Matawa General Hospital and C.U.P.E., Loc. 1465* January 4, 1984 (Rayner) and *Re Manitoulin Lodge and O.N.A.* March 6, 1990 (Craven), summarized in 18 C.L.A.S. 160 the Fairhaven board concluded at p. 409:

> What seems clear, however, is that "work normally performed" cannot be exclusively reserved when it has already been shared with others.

Counsel also referred to *Re Miramichi Pulp & Paper Inc. and Canadian Paperworkers Union, Local 689* (1994) 35 L.A.C. (4th) 289, *Re Kincardine & District General Hospital and Ontario Nurses' Association* (1995) 42 L.A.C. (4th) 199 (Verity), *Re Canada Post Corporation and Public Service Alliance of Canada and Association of Postal Officials of Canada* P.S.A.C. Grievance No. 20101-UG-95-051 February 21, 1996 (Chertkow), *Victoria Hospital Corporation and The Office and Professional Employees' International Union Local 468*, unreported, May 30, 1989, and *The Salvation Army Grace Hospital and Service Employees' Union, Local 210*, unreported, November 5, 1991 (Roberts).

Counsel referred to the Tarte decision. The issue there was the assignment of work to a controller of OSS shifts in circumstances which resulted in leave denials to controllers. Instead of increasing the complement of OSSs at the Ottawa Tower when faced with a shortage of OSS staff the Employer maintained two OSS shifts back to back daily and filled vacancies on OSS shifts with controllers. At the Victoria Tower the Employer reduced the scheduling from two to one daily and at the Vancouver Tower the Employer reduced the OSS scheduling from three to two daily. The Union did not allege a violation of Letter of Understanding at the Ottawa Tower where the controllers were paid overtime to fill OSSs shift vacancies. The Tarte decision refers to the Abbott decision only on the "normal" issue. The Tarte decision contains no analysis. Chairperson Tarte makes no reference to any authorities or to past practice in reaching his conclusions. The decision is not helpful. In the alternative the Tarte decision is distinguishable. It is concerned with denials of leave and there was no evidence in that case that the Employer assigned controllers to OSS shifts on a normal basis. However, counsel stressed that his principal argument is that the Tarte decision is wrong.

In *Re Simon Fraser University and The Association of University and College Employees, Local 2*, unreported, October 8, 1981, (Bird), referred to in *The Board of School Trustees School District No. 39* at pp. 17 and 18, the arbitrator says;

> Arbitrators should avoid interpretations which can lead to absurdities and prefer interpretations which are reasonable.
>
> When faced with two linguistically permissible interpretations, however, arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility, and which interpretation would give rise to anomalies.

The Union's interpretation is absurd. The Employer could apply it by taking away from controllers across the country the OSS functions and give them to OSSs. There would then be fewer controllers and more OSSs, there being no exclusivity in those functions. Once they were completely assigned to OSS there would be exclusivity and those functions could never go back to the controllers. The parties' practice is consistent with the Employer's interpretation of Letter of Understanding 4-91. In the alternative counsel for the Employer contended that the circumstances were not normal. The tower managers did the best they could under the circumstances and they had the management right to do what they did.

Responding to the Union's arguments, counsel for the Employer contended that the Abbott decision implies the word "only" in the first part of the second paragraph of Letter of Understanding 4-91. The Union had the opportunity to negotiate a change in this since 1971 but has not tried to do so. Although the OSS are in a separate classification from controllers the OSSs' functions are all controllers' functions. Only 9 of 44 towers in Canada employ OSSs. The Union relies heavily on ATSAMM staffing levels. However, they are guidelines only, do not bind management and are not part of the collective agreement. The Union does not view the grievance as a work load issue but rather a safety concern. There is no evidence that the hypothetical horribles described in the *Nav Canada News* have ever manifested themselves. The Union had the conduct of the grievance

decided by adjudicator Abbott. Although the Union's counsel mentioned leave denials in his opening in the present case, there is no evidence of such. The Employer acknowledges that in proper circumstance an arbitrator under the collective agreement may issue a cease and desist order but there is no basis in the evidence for making such an extraordinary order.

Union's reply

In the Tarte decision the Union stated that it was only arguing specific violations. The Union did not have to argue each violation. However, in the present case the Union is free to argue violations similar to those it did not argue before. The Union does not deny that Brassington did all he could. However, the Employer was simply trying to save money by deliberately short staffing. The private sector cases show that to establish exclusive work jurisdiction one must show clear contractual language. The interpretation the Union seeks is not absurd. The second part of the second paragraph of Letter of Understanding 4-91 protects the Union's exclusive work jurisdiction. This is consistent with the line of authorities cited by counsel for the Employer. The Union does not claim that ATSAMM was negotiated by the parties to the collective agreement. The Union says that the ATSAMM staffing levels were in force and the Employer did not change them. Counsel urged the arbitrator not to twist words. It may be that if the arbitrator accepts the plain wording interpretation advanced by the Union the Union will be estopped for asserting it in respect to OSS breaks or in other comparable situations.

Arbitrator's analysis and conclusions

There are no serious credibility issues in this case. All witnesses testified truthfully as far as I am aware.

I address the disputed interpretation. Adjudicator Abbott ignored an important rule of interpretation in reaching the conclusion that the first part of the second paragraph of Letter of Understanding 4-91 is to the interpreted as follows:

> [W]hen the letter of understanding precludes the employer from assigning to controllers the functions of another bargaining group, it must mean that controllers are not to be assigned the functions which are peculiarly, uniquely, the functions of the other bargaining groups and which are not at all the functions of controllers. (pp. 7 and 8)

The rule of interpretation which adjudicator Abbott disregarded is described in Brown and Beatty: *Canadian Labour Arbitration* Third Ed. paragraph 4:2100 at 4-32 as follows:

> The context in which words are found is also a **primary source** of their meaning. This, it is said that the words under consideration would be read in the context of the sentence, section and agreement as a whole. [my emphasis.]

When one looks at the remainder of the second paragraph of Letter of Understanding one sees that the parties expressly dealt with a situation in which work was only or uniquely performed by the members of a bargaining group (unit):

> ... nor will functions which are presently only performed by members of the Air Traffic Group be assigned to member of other bargaining groups.

When one considers the *Abbott* decision in the context of the whole of the second paragraph one sees that he regards these phrases as equivalent:

> Functions which are now performed by members ...

and

> ... functions which are presently **only** performed by members ... .[my emphasis]

The interpretation I give to the first part of the second paragraph is that it simply means what it says. There is no basis for restricting the first part to work

exclusively performed by other bargaining groups (units). The parties reaffirmed each letter of understanding in the form of Letter of Understanding 4-91 each time they entered into a new collective agreement and gave it a current date. I take this as an expression of the common intention the parties that each letter of understanding should speak as of the particular date of the letter of understanding; see *London Labour Exchange*. The first part of the second paragraph addresses work shared by the controllers and OSS. As contended for the Union, it requires the Employer to make a factual inquiry to determine what work OSSs were doing in a tower at the date of the letter of understanding. Then it requires the Employer not to assign that work to controllers when circumstances are normal.

What are normal circumstances? *Webster's New World Dictionary* Third College Edition gives these definitions:

normal ... **1** conforming with or constituting an accepted standard, model, or pattern;

normally ... **1** in a normal manner **2** under normal circumstances; ordinarily.

The evidence shows that in 1991 at the Vancouver Tower the OSS complement was six. The tower manager scheduled one OSS on the morning shift, one on the afternoon shift and one who straddled the other two shifts. This scheduling established the work at the tower "now performed by members of other bargaining groups," in that case the OSSs. This is the work covered by the Letter of Understanding. With the exception of some data entry, all work which the OSSs performed was work of a kind shared with the controllers and supervisors in the sense of work jurisdiction. At the Vancouver Tower controllers and supervisors did that kind of work when there were no OSS on duty late at night and in the early morning and when they relieved OSSs during their breaks. Accordingly the work which OSSs were scheduled to perform as of August 30, 1991, the date of the Letter of Understanding, was and continues to be subject to the first part of the second paragraph of Letter of Understanding 4-91. It required the

Employer not to normally assign any of it to controllers. Put another way, the Employer bound itself not to assign any of that work to controllers under normal conditions.

The Employer cannot escape obligations under the collective agreement including Letter of Understanding 4-91 by understaffing thereby creating conditions other than normal; see *Degaris* above. During the day shift and afternoon OSS shifts at the Vancouver Tower all work of the kind performed by OSSs on August 30, 1991, should not be normally assigned to controllers or supervisors. By December 10, 1996, it had become apparent to the Union that the Vancouver Tower manager had given up day and afternoon shift OSS coverage as the norm and had applied a staffing policy of economizing on the employment of OSS and contollers covering vacant OSS shifts where possible. From December 1996 to at least April 1997 the staffing level frequently fell below three OSS positions per day covered. The tower manager had problems with OSSs' absences due to illnesses. On December 1, 1996, the manager issued a staffing memorandum reducing regularly scheduled coverage by OSS from three per day to two back to back, i.e. a morning shift and an afternoon shift. When the availability of OSSs permitted he would schedule an overlapping shift as well. However, except in emergencies he would not use a controller to cover an OSS shift vacancy. The result of not covering simply meant that most OSS work would be performed by another OSS on shift where shifts overlapped or failing that by a controller. The short staffing by OSS of OSS positions, according to the statistics provided to me, persisted from November 11, 1995, to July 27, 1997, and was particularly acute in the months of December 1996, January and March 1997. If those three months stood in isolation the explanation of OSSs' illnesses might be sufficient to justify the slippage of work from unfilled OSS positions to controllers. However, for nearly a 20 month period the tower was frequently operating during the day or afternoon shift short staffed as measured against the staffing level implicit in the Letter of Understanding dated August 30, 1991. Such a long record of failing to fully staff OSS

positions on shifts points to chronic understaffing. In such circumstances it became normal for the Employer to specifically assign controllers to cover OSS shifts and by not filling OSS shifts to implicitly assign priority OSS functions to controllers by default.

For a tower to function effectively it requires heads up work and heads down work. When the Employer does not provide an OSS on shift at the Vancouver Tower, most of the heads down work still had to been done by those who are on shift, being the controllers. As I have already determined the Employer cannot avoid its commitment not to normally assign OSS work to controllers by chronically understaffing OSS. Because of understaffing the assignment of OSS work to controllers had become normal by the time the Union filed the grievance before me and it remained so up to at least July 1997. This violated the Letter of Understanding.

I turn now to the evidence about the Victoria Tower's staffing. The date from which Letter of Understanding 4-91 speaks is August 30, 1991. I infer from tower manager Brassington's evidence that the authorized shifts at Victoria for OSSs as of that date were one OSS day shift and one OSS afternoon shift, Mondays to Fridays. That determined the functions performed by members of another bargaining group under the first part of the second paragraph of the Letter of Understanding.

The evidence shows that from July 16, 1996 to September 11, 1997, there were 51 days when either scheduled OSS shifts were not staffed with OSS or were short-staffed by OSS. Brassington explained that he had difficulty with OSS staffing because of illnesses and delays in hiring caused by the transfer of the air traffic control system from the Department of Transport to the Employer. He, like Campbell, treated the ATSAMM staffing standards for OSSs as guidelines and exercised his judgment by not filling vacancies on OSS shifts during periods of low traffic volume.

Brassington changed the staffing instructions for the Victoria Tower in May 1996. There would continue to be two OSS scheduled shifts per day, Monday to Friday, one on day shift and one on evening shift. Having to contend with a very limited access to overtime funds and a shortage of supervisors and controllers he limited the coverage of vacant OSS positions on scheduled shifts by controllers and supervisors "when necessary" to a total coverage of OSS positions from 8:00 a.m. to 6:00 p.m. On December 13, 1996, he reduced the OSS normal staffing level, Monday to Friday, from two to one and carried forward the policy of providing OSS function coverage from 8:00 a.m. to 6:00 p.m. by payment of overtime when necessary.

Insofar as violations of the first part of the second paragraph are concerned in a normal situation it does not matter whether the Employer assigns a controller or supervisor to cover an OSS vacancy on a shift or leaves it vacant. In either situation a controller or supervisor will be performing OSS functions. Except for some data entry work, all OSS work has to be done promptly. It cannot be left for another day.

The Employer allowed the Victoria Tower to operate short-staffed without the manager seeking special authority but generally would not allow him to operate over staffed without specific authority. He operated under severe budgetary constraints on overtime and had difficulty in maintaining a complement sufficient to meet the normal requirement of the Victoria Tower. By cutting back the normal staffing of OSSs in December he responded to economic and other pressures over which he had no control.

Whenever the Tower was short staffed or not staffed by OSSs, controllers performed OSS functions. I accept Brassington's evidence that illness and administrative delays played a part in creating the difficulties he had in getting OSSs to cover their assigned shifts. The illness of an individual is seldom predictable. In a large organization

one can be confident that some individuals will become ill and be incapable of attending work. The Employer has a large organization. I see no justification for isolating the Victoria Tower from the nation-wide organization of which it is a part when it comes to dealing with staffing problems created by illnesses of longer and uncertain duration. The Employer was content to leave the Victoria Tower manager to struggle with staffing problems. From the point of view of efficiency and safety he appears to have done well. However, a result of leaving him to fend for himself was that he made work assignments in breach of the Letter of Understanding. The isolation of that tower from the personnel resources of the Employer will not relieve the Employer of responsibility for the breaches. I find that throughout the period from May 1996 to September 1997 the Victoria Tower as a matter of management's policy was insufficiently staffed so as to meet the requirements of the first part of the second paragraph of the Letter of Understanding. I find that during that period the Employer normally assigned members of the Air Traffic Control Group to perform functions performed by members of another bargaining group, i.e., Operational Support Specialists, as of August 30, 1991. The assignments were direct, such as when a controller filled a vacant OSS position on a shift, and indirect when a controller or supervisor had to perform work for which an OSS was or should have been scheduled to work but did not do and the Employer assigned no one to cover the vacancy.

The Union asserts that the grievance dated December 10, 1996, against normally assigning OSS functions to controllers is a continuing grievance. In my opinion this is correct. I am entitled to take into account alleged violations of the Letter of Understanding occurring after the date of the grievance pursuant to a continuing policy of understaffing. To hold otherwise would be to expect the Union in a case of a continuing breaches to present a grievance for each day after December 10, 1996, when the Employer repeated the conduct that attracted the grievance in the first place. This would dramatically

increase the cost of arbitration by requiring a separate appointment of an arbitrator for each grievance. This would be wasteful and would offend common sense.

Controllers relieve OSSs during their work breaks. The controllers and supervisors' task of relieving OSSs when no other OSSs are available to relieve is and has always been controllers' and supervisors' work and is not covered by the limitation in assignment of work in the Letter of Understanding. The limitation also does not cover other assignments of controllers which are not normal. I see no need to impose an estoppel.

I regard the ATSAMM as something internal to management but providing some evidence as to normal staffing levels. While the Union made much of safety issues in relation to the grievance I note that there is no evidence before me suggesting that any staffing decisions at either tower created any hazardous situations. The Union abandoned its allegations that because of regular short staffing by OSS of OSS shifts the Employer violated various other provisions of the collective agreement, for example, by denying leave to controllers. I assume the Union intended that the safety issue take the place of the other issues as a justification for the grievance. All who are subject to the terms of the collective agreement have a compelling interest in safety. Careless or incompetent performance of controllers's functions could lead to terrible tragedies. The parties recognize in their collective agreement the importance of safety. I note that the Letter of Understanding makes no reference to the motives of either party in agreeing to restrict the sharing of work between the controllers and supervisors and other bargaining groups. Bargaining table evidence might have been helpful to identify motives but the substance of the current Letter of Understanding was negotiated long ago. I doubt that the evidence has survived the erosion of time.

The Employer took the position that the interpretations advanced by the Union was absurd because under it the Employer could shift much more work to OSSs. Then that work would belong permanently to the OSSs, thereby reducing considerably the need for controllers. This is an absurd interpretation which I should reject, according to the Employer, relying on *Simon Fraser University*.

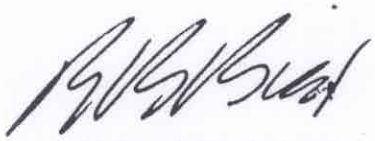
I note that the first part of the second paragraph is unusual in that under the Union seeks to avoid or reduce volume of work its members do. One reason the union advances is safety. This is not an absurd reason for the Union seeking to reduce the volume of work for controllers which otherwise might be theirs.

The Employer took the position that the Union accepted the Abbott award. The Union neither negotiated out of it nor did it seek to overturn it until the Tarte decision in 1997. The Union acquiesced in the Abbott decision and should be bound by it, according to the Employer. It seems to me that the Tarte decision precludes the Employer from taking that position now. There is no evidence before me that the Employer raised the issue of long acceptance of the Abbott decision before chairpersons Tarte. At the point I entered the dispute about the Letter of Understanding I am presented with prior conflicting decisions. One is favourable to the Employer and one favourable to the Union. In neither case the unsuccessful party has sought to overturn the decision against it. I am convinced one decision is wrong and the other does not disclose the reasoning of its author. The best I can do in these circumstances is to try to discover what the parties intended when they agreed to the Letter of Understanding. I have not much more to work with than the words of the Letter of Understanding. That is why I adopt a plain meaning interpretation relying on the context in which the disputed words appear.

The collective agreement is national in scope. Mutually accepted practice which has endured may be a basis for granting an estoppel or may be an aid to

interpretation of the collective agreement; see *John Bertram & Sons Co. Ltd.* (1968) 18 L.A.C. 362 (P. C. Weiler). In order to use past practice for interpretation of the parties collective agreement it would have to be national in scope. If this were not so an arbitrator might use past practice in one part of the country to interpret the collective agreement in ignorance of a contrary and more wide spread practice elsewhere. This would be an illogical use of past practice

I understand that the parties are now in negotiations for the renewal of the collective agreement. I will simply give declaratory relief at this time. I declare that the Employer breached the first part of the second paragraph of Letter of Understanding 4-91 during the periods I have described. I reserve jurisdiction to grant further remedies upon the application of the Union



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