IN THE MATTER OF AN ARBITRATION
OF A GRIEVANCE

CONCERNING **MURRAY JOHNSON**

BETWEEN:

NAV CANADA

Company,

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,

Union

A W A R D

For the Company: Pat Brethour & Jennifer Birrell, Counsel

For the Union: Peter J. Barnacle, Counsel & Richard Nye, VP, Labour Relations

Before: Ken Norman

Heard in Edmonton, April 27, 28, July 5 & 6, 2000

Murray Johnson, Air Traffic Controller, Edmonton ACC, grieves a letter of reprimand authored on November 4, 1998, by Jim Strukalo, Shift Manager. The letter cites an incident of September 26, 1998, involving, as I learned in great detail, a refusal to carry out an instruction from Supervisor Kevin Kurtz to reroute SAS #937 back to its filed flight plan. Mr. Strukalo's letter provides Mr. Johnson with the following advice for his future conduct in such matters:

> You are expected to follow the directions of your supervisor as given. If you have concerns about the direction given, you may address your concerns to the Shift Manager or higher levels of management or you can use formal mechanisms available to you.

Although there is some conflict in the evidence provided by Murray Johnson and Kevin Kurtz as to what was said and how on the morning in question, for my purposes, it is common ground that there was a clear, direct, repeated instruction which Mr. Johnson initially ignored and then explicitly refused. It is also accepted by both parties that, from this point, arbitral doctrine of "obey now/grieve later" shifts the onus to the employee to bring himself or herself into either the "personal health and safety" exception or the "unlawful act" exception to the rule. The latter defense is the only possible course for Murray Johnson to take on the facts of the incident. So far, so good.

Where the going gets tough is when one faces, as CATCA has in recent years since the advent of Nav Canada as the exclusive air traffic control service provider in Canada, the unique regulatory regime now governing controllers. Unlike the situation which prevailed prior to privatization, CATCA members are not only answerable to their employer, their licenses are subject to independent regulatory investigation and penalties.

Flight path and aircraft taxiing separation standards have now the status of being statutory regulations, the *Canadian Aviation Regulations,* [CARs]. As CATCA has learned, in the half dozen cases to date where one of its members has been charged with a CARs violation, the Minister of Transport [MoT] and the Civil Aviation Tribunal and Appeal Panel, with the approval of the Federal Court, hold a controller strictly liable, subject only to the defense of due diligence. Of particular concern, in terms of CATCA's counsel's argument before me, was the case of *Peter Hudgin*, a Dorval Tower Controller whose $250 fine for actions of his trainee, in violating CARs taxiing separation requirements, was upheld last year by a Civil Aviation Appeal Panel. In addition to imposing vicarious strict liability on Mr. Hudgin for his trainee's error, the Appeal Panel expressed the opinion that "the attitude of the Appellant should have been of increased prudence due to the defective equipment at the time". [The equipment problem in question was poor reception on headsets.]

On September 28, 1999, CATCA published to its members an Operational Update on this case advising, amongst other matters that:

> You are not required to obey an order to carry out training in any manner that could **reasonably expose your license under CARs.** Therefore, the "obey now, grieve later" rule does not apply in such circumstances.
>
> [Emphasis added]

I have emphasized part of this advisory statement because it captures Murray Johnson's issue. At the conclusion of his testimony I asked him if the following rhetorical question pretty much covered the ground on which his grievance stood, "Who's license is it

anyway?" He said that it did. In final argument, counsel for CATCA added his concurrence. So did counsel for Nav Canada, with the qualification that the relevant license to which this question ought to be understood to refer is that carried by Nav Canada as exclusive supplier of air traffic control services in Canada.

So, this grievance is an integral part of a much bigger struggle. I take CATCA's point that there seems to be a serious disconnect between its members' answerability to CARs and to their employer, Nav Canada. I was encouraged to hear Kathy Fox, Director, Air Traffic Services, testify that she was working some aspects of this. Last December 10 she convened a tripartite meeting with the regulator to discuss MoT procedures and understandings of the interrelationships of the parties concerning any given investigation. And, Ms. Fox testified that she has had discussions with CATCA on the question of just how the current gulf on CARs investigation interviews might be bridged.

In the meantime, counsel for CATCA invites me to solve part of the problem of a controller's license being exposed to independent MoT/CARs investigations by ruling that Murray Johnson did not have to follow his supervisor's instruction to reroute SAS #937 on the morning in question. The argument here is not that the "obey now/grieve later" rule is inapplicable. Rather, it is that the situation at issue falls within the "unlawful act" exception. The difference in judgment between Murray Johnson and his supervisor, Kevin Kurtz, amounts to this. Mr. Kurtz was of the opinion that, given the absence of safety concerns, it was preferable as a matter of customer service, to leave SAS #397 on its filed plan because it would save fuel - about 3 minutes of flying time. Murray Johnson testified

that he had done a calculation of the difference in flying time and had concluded that only about 1 minute was involved. He took this into account in deciding to follow the practice, since June, of requiring international aircraft to fly published routes or tracks north of 55N through the North High air space because of the current unreliability of the NADS [Northern Airspace Display System], a computerized simulation and traffic conflict prediction system. Airlines had learned of this via a NOTAM [Notice to Airmen] of June 6 published in order to create a manageable situation in the event of a temporary NADS failure.

Because controllers were apparently automatically requiring all aircraft to follow this NOTAM, Al Schick, Manager ACC Operations, Edmonton ACC, issued an ops bulletin on June 24 advising that the NOTAM was not binding on controllers. The bulletin explained that the NOTAM "... neither prevents a controller from exercising normal control and decision making practices nor permits a controller to delay or restrict traffic without operational cause." It also advises that "Decisions to permit non-compliant flights to operate as planned or to approve other operator requests remain with the controller." Murray Johnson, his colleague Don Clark, and I take it, other controllers paid attention to this last sentence rather than the one which I have quoted ahead of it. In other words, during the life of the NOTAM, non-compliant flights were rerouted by them to NOTAM tracks. Period.

Though Mr. Johnson put emphasis in his testimony on the staff shortage, and other speculative factors concerning the specifics of the SAS flight plan, I think it fair to say that his primary position was that his license, the ops bulletin and the defective NADS system,

left him with a free hand to stick absolutely to the NOTAM for all international aircraft all the time should he consider that to be the safer control course to take. While NADS was going down from time to time, he testified that he just did not feel comfortable leaving any such flight on a random route. Without NADS to support his control responsibilities he wanted to know that every flight was on a set path. As he put it in his statement attached to the grievance, "After accepting sole responsibility for the safe operation of this sector as required by ATC MANOPS and CARs it was incumbent upon me to plan for a safe and orderly flow of traffic through the airspace that I was now legally responsible for. Given all the options and based on my experience and past practice of virtually all coworkers and due to the critical staff shortage **it was my decision that all aircraft must be in compliance with this NOTAM**." [Emphasis added]

In terms of the legal argument advanced by CATCA's counsel, in the end this position, reflecting the larger struggle between the parties, becomes a narrower subjective claim that, due to the heightened potential risk of a CARs standard being breached due to SAS #397 flying a random route should a sustained NADS crash occur, Murray Johnson's exposure to MoT investigation left him facing liability to a fine or perhaps even a suspension of his license notwithstanding that the action was Mr. Kurtz's, not his. As a consequence of the *Peter Hudgin* ruling the problem with the NADS equipment entitled Mr. Johnson, indeed obliged him, to have adopted a standard of "increased prudence due to defective equipment". In light of this, what Murray Johnson faced amounted to a "risk of illegality" thus bringing him within the "unlawful act" exception to the "obey now/grieve later" principle.

I am not persuaded. Arbitral doctrine on the "illegality" exception is pretty well settled in the case of professional and other highly skilled employees and does not support an "anticipation of possible legal liability on the occurrence of some future event" argument such as lies at the heart of the legal argument supporting Murray Johnson's grievance. *Brown & Beatty's Canadian Labour Arbitration, 3rd ed.*, summarizes the doctrine as follows, at 7:3610

> While it has been recognized that professional employees as well as persons who perform skilled trades may hold positions of particular responsibility, have obligations to professional codes, and are expected to exercise some degree of independent judgment as to the performance of their duties, nevertheless, where others are better qualified to assess the reasonableness of an order ... the "work first and grieve later" principle has been determined to govern their behavior as well. In other words, any assertion of an independent judgment by professionals ultimately must also stand the test of arbitral review.

The "unlawful act" exception is stated at 7:3622:

> It is uniformly accepted by arbitrators that an employee is justified in refusing to perform an assignment which would involve him in committing an unlawful act. At least where such an unlawful act could lead to his arrest, and the doctrine of "superior order" would not provide a valid defense to any subsequent criminal charge, it is manifest that the grievance and arbitration procedure could not provide any meaningful or appropriate redress. Accordingly, arbitrators are agreed that in such circumstances, or in other situations in which the employee could incur legal liability from compliance with the order, an employee may properly refuse to obey such an order.

I have reviewed all of the arbitral awards which are cited in footnotes to these doctrinal summaries. With regard to the final sentence in these excerpts, six awards are noted. None are at all akin to the circumstances of this case. None involve the mere possibility of

an infraction of the law, a matter as to which there "is a considerable degree of uncertainty" [*Re Mount Sinai Hospital and Ontario Nurses' Association* (1979), 17 L.A.C. (2d) 242 (Brandt), at p. 260] with no immediate or appreciable danger. We do not have any thing like the extreme hypothetical offered in testimony by Kathy Fox where a supervisor orders a controller to turn an aircraft into a mountain.

On the facts before me, by all accounts, Kevin Kurtz did not direct a control action in violation of CARs, that is, the commission of an unlawful act as such. On the same mutual basis, there was no immediate danger posed to SAS # 397 or to any other flight by his instruction. Traffic was light at the time. The SAS flight in question was following a northern route some 300 miles away from the other handful of flights in the sector. Thus, my task becomes one of assessing the reasonableness of the conflicting judgments of Murray Johnson and Kevin Kurtz as to whether, at the time of their stand off, the control action required by Mr. Kurtz posed an appreciable heightened risk of a CARs infraction emerging some time later on that day for which the grievor might well be held strictly liable. The factors which I have considered in this assessment are the following.

First, the possibility of a conflict with "Asian flow" traffic originating in the south east was at least three hours away and was no greater on the filed flight plan than it would have been on the published route which Murray Johnson wanted the flight to follow through North High air space. In either case, by imposing vertical separation on "Asian flow" flights, conflict with SAS #397 could easily be avoided

Second, the possibility of an Aeroflot flight entering the sector on a following path to the SAS flight, at the same altitude, was at very least an hour away. Given the CARs separation standard for such a situation this time difference posed no appreciable potential risk. At the moment in question, an estimate on the Aeroflot flight's entry into North High had not even been received. Given that less than 1% of the time did such estimates arrive in the sector in less than the prescribed 45 minutes advance notice of flight arrival time the risk posed by the Aeroflot flight is extremely remote.

Third, though a Lear Jet Air Ambulance might "pop up" by taking off at any time from its Cambridge Bay base or from another point during the hours when SAS #397 would be traversing North High air space, such a flight would have to seek controller clearance to operate at above 23,000 feet. The SAS flight was at 35,000 feet.

Fourth, though staffing for the day was down by about 50% as of 7:00 a.m., this was not an abnormal situation. Management had been coping effectively with similar scenarios for some time prior to the morning in question. That day, the Shift Manager had the problem in hand. Given the experience of the days leading up to September 26, it was entirely likely that sufficient numbers of controllers would be found to come in early to cover the absences and provide relief. This was indeed what began to happen later that morning. Thus, the contention by Murray Johnson that, should NADS fail catastrophically for an hour or more, CARs separation standards might be violated as there would be no extra hands to help deal with the situation of controlling flights manually, is more than a bit of stretch. Though NADS had been experiencing problems for some time, in the weeks prior to the incident its failures had been overcome within a minute or so by the

controller simply rebooting the CPU. Each time this had occurred NADS had come back up with no loss of data. In light of this evidence, there was no appreciable risk of a catastrophic NADS crash. Thus, the argument from *Peter Hudgin* that the standard applicable for Murray Johnson to have observed was one "of increased prudence due to the defective equipment" has no sufficient basis in fact.

Finally, concerning CATCA's "vicarious strict liability" issue, as I indicated to counsel during the course of final argument, I see no parallel between Supervisor Kevin Kurtz and the trainee in *Peter Hudgin*. Mr. Kurtz was a qualified controller in North High with far more experience than the grievor. Further, he was fully aware of the situation at hand as he had been on shift for some time prior though not at that particular desk. In light of this expertise and his authority as a supervisor, it is hard to imagine that the MoT/CARs officials might hold Murray Johnson strictly liable for the control direction at issue in this matter. In the phrase utilized by *Brown &* Beatty, at 7:3610, Kevin Kurtz was "better qualified to assess the reasonableness of the order" than was Murray Johnson. On this footing, I am confident that the arbitral doctrine of "superior order" would be applicable in these circumstances where no unlawfulness was involved in Mr. Kurtz's direction.

For the reasons which I have given, this grievance is dismissed. The burden of establishing the "unlawful act" exception to the "obey now/grieve later" arbitral principle has not been discharged on the evidence before me. Accordingly, Jim Strukalo's letter of reprimand of November 4, 1998, stands.

Dated at Saskatoon this 3rd
day of August, 2000.

Arbitrator