

56 of 64 DOCUMENTS

*Cited as:*  
**NAV Canada and Canadian Air Traffic Control Assn. (Summers  
Grievance)**

**Arbitration  
Between  
NAV Canada (the "Employer"), and  
Canadian Air Traffic Control Association (the "Union")  
With Respect to the Termination of Employment of Richard  
Summers on 3 February 1998**

[1998] C.L.A.D. No. 660

Canada  
Labour Arbitration

**D.P. Jones, Arbitrator**

Heard: Edmonton, Alberta, June 8, 9 and 18, 1998

Decision: October 28, 1998

(22 pp.)

**Appearances:**

For the Employer:

Philip G. Ponting, Q.C., Counsel.

John Gormley, Counsel.

Janice Foley, Regional Manager, Human Resources.

Dennis Lukawesky, Regional Manager, Technical Training.

For the Union:

Peter J. Barnacle, Counsel.

Fazal Bhimji, Vice-President - Labour Relations.

Rick Snow, Western Regional Director.

Richard Summers, Grievor.

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SUMMARY OF AWARD

**1** The primary issue was whether the Employer was entitled to terminate the Grievor's employment as a trainee air traffic controller when he refused to move from Edmonton to Whitehorse. Other issues arose because of the privatization of the civil air traffic navigation system in November 1996, including the applicable standard of review.

**2** Held: Grievance dismissed. The Grievor did not comply with the "obey now, grieve later" rule, and none of the exceptions to that rule applied in this case. Applying the highest standard of review, this constituted just cause. It was not possible to say that there was no training component in the new position. The Arbitrator declined to exercise the statutory discretion to substitute a lesser penalty.

## AWARD

### I. LEGISLATIVE BACKGROUND

**3** Prior to 1 November 1996, the aircraft navigation system in Canada was operated by Transport Canada. The system involved a number of bargaining units represented by different unions. Labour relations were governed by the federal public service legislation (including the Public Service Employment Act and the Public Service Staff Relations Act). Under this statutory régime, certain matters were not capable of being bargained collectively or being included in a collective agreement, including many aspects of the staffing and appointment process, and the ability to grieve termination of a probationary employee's employment. Air traffic controllers were governed by the 1991-93 collective agreement between Treasury Board and the Canadian Air Traffic Control Association.

**4** When the civilian air traffic control system was privatized in November 1996, labour relations became governed by the federal private sector legislation (the Canada Labour Relations Code). This transition raises a number of issues which may be relevant to this grievance. By virtue of the Civil Air Traffic Control Privatization Act and the Code, the 1991-93 collective agreement has continued in force pending negotiation of a replacement collective agreement. In the meantime, Nav Canada and its various unions signed a Memorandum of Understanding dated 19 November 1996 to apply during the transition period, which (among other things) includes Appendix B replacing the previous grievance and arbitration procedure under the collective agreement<sup>1</sup>.

### II. ISSUE

**5** The issue in this arbitration is whether the Employer was entitled to terminate the Grievor's employment as a trainee air traffic controller when he refused to move from Edmonton to Whitehorse in February 1998.

**6** Resolving this issue involves - or may involve - a consideration of (a) the "obey now, grieve later" rule, (b) whether the transfer to Whitehorse was for a training purpose, (c) whether the termination was for just cause, or otherwise; and (d) what standard of review is applicable by the arbitrator in this case.

**7** The parties asked me to reserve jurisdiction to deal with quantification of any compensation payable to the Grievor, in the event that the grievance is successful.

### III. SUMMARY OF THE EVIDENCE

**8** In addition to 34 documents, the parties presented evidence from the following witnesses:

(a) For the Employer

- Dennis Lukawesky, Manager of Technical Training, Western Region.

(b) For the Union

- Fazal Bhimji, Vice-President of Labour Relations.
- Rick Snow, Western Regional Director of the Union.
- Doug Schildwalker, an AI3 ATC in Edmonton.
- Richard Summers, the Grievor.

**9** Notwithstanding the considerable amount of testimony, there is no real dispute about the facts. The salient points can be summarized as follows.

**10** In 1995, the Grievor applied to Transport Canada to be trained as an air traffic controller. On 12 May 1995, he was notified that he had been "selected to participate in the classroom and simulation air traffic control program" (Exhibit 4). This letter contemplated that he would do a 5-week pre-basic air traffic control course in Edmonton, and would then spend approximately 6 months at the Transport Canada Training Institute ("TCTI") in Cornwall. The letter stated that "[t]he time spent in training is not considered employment in the Public Service and therefore you are not entitled to any employee/employer benefits such as insurance and pension plan benefits". The letter went on to state:

Upon successful completion of the two (2) segments at TCTI and meeting all of the applicable conditions of employment (such as security and medical requirements), you will be offered an appointment as an Air Traffic Controller Trainee. You will become a Transport Canada employee upon reporting to a unit/school in a Transport region for the qualification phase. This phase will vary in length from approximately five (5) to fifteen (15) months depending on the site and nature of the work involved.

**11** Attached to the letter was Appendix "A", which is reproduced here:

95-03-17

APPENDIX A  
Conditions to the Training  
Program for Air Traffic Control  
Instrument Flight Rules (IFR)

After Having successfully completed the basic air traffic control training at Transport Canada Training Institute (TCTI) in Cornwall, the following conditions apply to the IFR training:

1. Mobility:

In the course of your career, you will be required to work in different locations, some of these isolated or semi-isolated, across Canada. Therefore, your willingness to relocate where and when required becomes a condition of your employment.

2. Probationary Periods:

a) You will be subject to probation throughout the training program or twelve months, whichever period is longer. If you do not qualify as an IFR controller, you will be rejected on probation unless you meet the requirement set forth in 2(c). Your probation period will not be affected by any appointment and/or deployment.

b) Trainees who previously achieved Visual Flight Rules (VFR) qualifications and who are rejected on probation will not be eligible for vacant tower positions as they will no longer meet all the qualifications of those positions due to their absences from the tower.

c) Trainees who successfully complete the regional IFR course (theory and simulation) and entered into the final phase of on-the-job training in an IFR unit, as outlined in the Unit Qualification Training Program, will be considered as having the potential for IFR. Trainees who fail their IFR training beyond that point may be offered the opportunity to train for existing vacant tower positions. Once Visual Flight Rules (VFR) qualification is achieved, those trainees will no longer be part of the Training Program for Air Traffic Control - (IFR).

3. Operational Pool Positions:

As a participant of the Training Program for Air Traffic Control - (IFR), you will not be eligible to seek other operational positions under the Selection by Seniority Program. However, your seniority will start building on the day of your initial VFR qualification.

4. Ulterior Training:

Upon management's decision, you will be required to undergo further training until the IFR qualification is obtained. If you refuse this subsequent training, you will be deemed to have withdrawn from the training program and you will be considered as having abandoned your position.

I have read the conditions of this program.

[illegible signature]

Signature of Acceptance

Signature of Refusal

May 17/95

Date

**12** The Grievor accepted this offer, signed Appendix A, and successfully completed both the 5-week pre-basic course in Edmonton and the 6-month TCTI basic training course in Cornwall. In February 1996, he was posted to Edmonton International Control Tower for on-the-job training (Exhibit 5), with an indication that his "... posting may change subject to operational requirements within the Region". The actual appointment letter is Exhibit 6, which appointed the Grievor to Position Number SSA-10861 in the AI-OPR-01 classification effective 19 February 1996 "at which time you will commence the qualification phase of your training". The letter indicated that:

After you qualify as a VFR controller in Edmonton your posting may change subject to operational requirements .... Your salary on appointment will be at the AI-00 rate of pay (\$19,852.00 per annum) until you qualify as VFR controller.

I wish to point out that your appointment will be subject to the probationary period contained in the attached Appendix A.

All ab-initio trainees successfully completing the basic ATC training program at the Transport Canada Training Institute (T.C.T.I.) are subject to provisions of the Revised IFR Training Stream Program. The conditions with respect to your training program after successful completion of Basic ATC training at T.C.T.I. are contained in Appendix A ....

As an employee of the Public Service of Canada you will be entitled to employee benefits such as accumulation of annual and sick leave, and superannuation and insurance plan.

**13** This letter also indicated that the system was in the process of being privatized, and that his employment would be transferred to the new employer.

**14** By August 1996, the Grievor had checked out on VFR, and was appointed to Position Number ACE-2941 on an acting basis, for an anticipated period of one year to 25 August 1997 (Exhibit 7). The Grievor was paid the higher salary for this acting position.

**15** [On 1 November 1996, the civil aviation navigation system was transferred from Transport Canada to NAV Canada.]

**16** It was anticipated that the Grievor would proceed in Fall 1997 to the Edmonton Regional School for IFR training courses. On 19 July 1997, he was notified that he was scheduled to attend the IFR training course 97-2 (Calgary Enroute) in October, with pre-training to commence on 15 September 1997 (Exhibit 8). On 29 July 1997 (Exhibit 9), he was notified that he had been re-classified effective 15 September 1997 to AI-NOP-02, with its corresponding lesser level of pay than his previous acting position (Exhibit 9). This letter again indicated that he "will continue to be subject to the probationary period contained in the Appendix A, which you previously signed with your original letter of offer for ATC training".

**17** However, in the summer of 1997, Nav Canada closed the Moncton Area Control Centre. As a result of a settlement between Nav Canada and the Union (Exhibit 10), Nav Canada cancelled the IFR courses it had scheduled at the Edmonton Area Control Centre for September and November 1997, and agreed to replace them with courses which were made available first to Moncton ACC controllers who moved to Edmonton pursuant to the Seniority Bid Program executed by the parties on 25 August 1997 (Exhibit 23). As a result, the Employer advised the Grievor on 27 August 1997 that it had cancelled the IFR course to which he had been assigned, and arranged for him to remain as an Air Traffic Controller in the Edmonton International Control Tower as an acting AI-OPR-02 (with a higher salary in the range of \$44,159 to \$63,265), with a new anticipated termination date of 15 September 1998 (Exhibits 11 and 12).

**18** About this time, staff from the Whitehorse Control Tower exercised their seniority to bid to take IFR courses. Accordingly, there was an operational need for controllers in Whitehorse. On 27 November 1997, the Employer advised the Grievor that it was assigning him to Whitehorse "as a continuation of [his] Direct Stream IFR training" (Exhibit 13). The effective date said to be was negotiable, but was anticipated to be before the end of January 1998. The letter also referred to the applicable relocation allowance, which was clarified (perhaps still incorrectly) when a slightly amended version of the letter was issued on 2 December 1997 (Exhibit 15). At the same time, the Employer also transferred another employee, Kevin Busse, to Whitehorse on the same terms.

**19** The Grievor and Mr. Busse immediately contacted Wally Curran in Staffing, to ask "why us?" Mr. Curran (who did not testify) apparently responded that he needed people up there now, who could check out there in the shortest possible time, and the transfers had been approved by Ken Soady, the General Manager of Airport Operations. A few days later in December, the Grievor and Mr. Busse subsequently met with Mr. Curran, Bill Gawiuk (then acting Nav

Canada manager in Edmonton), two representatives from Human Resources, and Doug Schildwalker (vice-chair of the Union's Yellowhead Branch). According to the Grievor, Mr. Curran apparently quickly shut down any discussion about alternatives by indicating that the decision had been made and the transfers were going to be implemented. Mr. Curran could not promise how long they would be assigned to Whitehorse, when the next IFR courses would be scheduled, whether they would be selected for those courses, whether Whitehorse might be shut down altogether and they be transferred to (say) Yellowknife, although he did confirm that they would still be in the IFR training stream. There was also discussion about whether they might be offered a "substantive" VFR position at Whitehorse (as had occurred previously at Yellowknife), which would allow them to accrue seniority for future bidding into IFR courses - but Mr. Curran indicated he couldn't do this, because vacancies were not being filled until after the completion of the Aeronautical Study that would determine the future of Whitehorse, so could only offer them a permanent VFR slot if they were "cease trained" (i.e., if they failed) in the IFR stream. Finally, there was some discussion about what items the applicable relocation allowance would cover (e.g., the sale of the Grievor's house in Edmonton, or the cost of maintaining two residences during training, etc.), and the fact that the transfer would cause the Grievor financial hardship because the salary applicable to the Whitehorse position was lower, he couldn't sell his house in Edmonton for what he had invested in it, the cost of living in Whitehorse was higher, and his wife (who is a teacher, who was on maternity leave at the time but was scheduled to return to work in May 1998) could not easily move. Finally, the Grievor asked whether he could have a leave of absence, but Mr. Curran subsequently told him that would not be possible.

**20** In January 1998, the Grievor and his wife went to Whitehorse on a house-hunting trip. While there, he made two or three visits to the Tower. After he returned to Edmonton, the Grievor wrote a letter (Exhibit 15) to Dennis Lukawesky, the Manager of Technical Training at the Air Traffic School for the Western Region, indicating that the Grievor:

... must decline this transfer. This is not a letter of resignation and should not be viewed as such. There are a number of reasons why I must decline this transfer.

When I signed my contract with Transport Canada there was a two way agreement on the way the training would be done. I have been in the stream program for two and a half years. In the guidelines that I received with my contract it stated that final phase of training would take approximately five to fifteen months. Nearly two years has passed since I returned from TCTI (I graduated from TCTI on February 8, 1996). I was offered and subsequently accepted an IFR course for the Calgary Enroute specialty. A week before the course was to start it was cancelled. I have waited patiently at the Edmonton International Control Tower knowing the problems that Nav Canada is having with training given the relocation of Moncton controllers. I however do not think it is fair to order me to an isolated location.

The reasons I can not accept this transfer are as follows. I was hired to be an IFR controller and not to fill VFR positions. Second Nav Canada has given me no security with this transfer, no substantive position offer, no date out; and what happens if Whitehorse closes? Am I posted to Yellowknife next? All I have been told by Wally Curran is "trust me". Believing that I would be an IFR controller by now, I can't afford to wait possibly another three or four years to see if I check out IFR. Other TCTI graduates who started in the company after I did are on the AOC floor checking out.

The next reason I cannot accept the transfer is a monetary issue. Going from an AI-03 pay to an AI-01 pay is a 26% pay cut. The cost of living in Whitehorse is 26.5% higher than Edmonton. Also, my wife would not be able to get full time work in her career field. I would lose all the

equity we have built u in our property just to live u there. I have worked the numbers in many different ways and we can not afford it. I understand that my present position is acting only, and that I would have gone to an AI-02 when on an IFR course [and therefore have a lower salary in that event, too].

This transfer does not continue my IFR training. I should not be used to fill VFR substantive positions. I enjoy Air Traffic Control and would like to continue to control. I do care about the company, in fact I have been volunteering my time to program a new Knowledge Verification Test generator with Rollie Lavallo of Villeneuve Control Tower. I work well [with] my fellow controllers and believe I have gained their respect as a controller and a team player. I am also an O[n] t[he] J[ob] I[n]structor and believe I can offer a great deal of quality instruction to the next general of controllers. I hope Nav Canada can see that not only has it invested a large amount [of] money in my training but it would be losing a loyal employee if they released me. I suppose this is a good time to see if Nav Canada is serious about its new value system. I am ready to go on an IFR course now, or perhaps stay at an Edmonton tower and wait for a course, or even be laid off until a course becomes available.

I will return to the Edmonton International Control Tower for a continuation of my duties there, until I hear further from you. I appreciate your taking time to consider my case.

**21** After a brief telephone discussion with the Grievor, Mr. Lukawesky sent a letter dated 27 January 1998 to the Grievor (Exhibit 17), making it quite clear that he was required to report to Whitehorse by 1 February 1998, and that failure to do so would mean that he would be deemed to have withdrawn from the training program and his employment would be terminated. The Grievor did not report to Whitehorse, and Mr. Lukawesky sent him the termination letter on 2 February 1998 (Exhibit 18).

**22** On 23 February 1998, the Union filed the following grievance (Exhibit 19):

This constitutes a grievance on behalf of Mr. Rick Summers:

Mr. Summers was discharged for failing to report to Whitehorse. We believe the employer's actions in this matter to be improper and contrary to existing practices, policies and the Collective Agreement including articles 7 (Discipline), 5 (Treated unjustly) among others.

As corrective action, Mr. Summers requests that he be immediately reinstated in his former position with restitution with interest for any loss of pay or benefits or otherwise to be made whole ....

**23** There is no dispute that the Grievor was a good employee, and there is no evidence of any disciplinary record.

**24** There is also no dispute that the Grievor's salary would have decreased if he had been assigned to the school to take IFR courses, compared to what he was receiving in his acting position at the Edmonton Tower. His remuneration at Whitehorse would also have been lower, because Whitehorse is classified as a less complicated Tower; but he would have been entitled to a northern living allowance, and nothing required him to sell his house in Edmonton.

**25** There is a difference in the evidence about whether there would have been a training aspect in the position in Whitehorse. Mr. Lukawesky says "yes", because it is helpful for a controller to have varied experience, and the different type of interface with the Edmonton Air Control Centre would have developed skills that were not emphasized as much

in the Edmonton Tower, even if the operation at Whitehorse is simpler. To some extent, Mr. Schildwalker (who used to work in Whitehorse) concurred, but pointed out that the degree of complexity in Edmonton is much greater. One of the reasons the Employer decided to move the Grievor and Mr. Busse to Whitehorse was to cover off its operational requirements there.

**26** The Grievor did not file a grievance about the IRF course being cancelled, or about the increased length of his training, or about the direction to report to Whitehorse. Although he was advised by his union to "obey now, grieve later" (which Mr. Busse did), the Grievor decided not to report to Whitehorse as directed.

#### IV. SUBMISSIONS FOR THE EMPLOYER

**27** Mr. Ponting started his submissions by referring to the terms of the actual grievance filed in this case - namely, against Mr. Summers' discharge for failing to report to Whitehorse.

**28** Article 3.01 preserves management's rights in the following broad terms:

#### ARTICLE 3

#### MANAGEMENT

3.01

The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

- (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
- (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

**29** Appendix A makes it quite clear that the Grievor may be required to work in different locations across Canada, and that the Grievor's willingness to relocate was a condition of his employment throughout his career, and not just during training. Appendix A was signed by the Grievor when he first started work, and at every step in his career thereafter. There is no suggestion that Appendix A has been negotiated or amended through the Memorandums of Understanding since the operation was privatized in November 1996, or otherwise. The only relevant change in the contractual relationship between the Union and the Employer since privatization is Appendix B dealing with the grievance and arbitration process. There has been no change about Appendix A.

**30** Mr. Ponting pointed out that Appendix A is a continuing condition of employment; it is not a vague policy, or a government regulation, or an unarticulated past practice. Appendix A is not related solely to training, but is relevant to staffing throughout an employee's career. Failure to comply with the directive to move to Whitehorse therefore clearly violates the conditions of the Grievor's employment. He knew that his choice not to report would result in the



termination of his employment. Despite being advised to "work now, grieve later", the Grievor made a conscious decision not to report to Whitehorse. None of the recognized exceptions to the "obey now, grieve later" rule apply: *Re Squamish Terminals Ltd. (Waterfront Foremen Employers Association) and International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514*, (1997), 68 L.A.C. (4th) 165 (McPhillips), at pp. 170-172. There is no evidence that the transfer to Whitehorse would adversely affect the health and safety of the Grievor, would require him to commit an illegal act, or would incur any potential legal liability. Accordingly, the Grievor's failure to report to Whitehorse constitutes just grounds for dismissal - which was the very reason given by the Employer for terminating his employment (Exhibit 18).

**31** Further, Mr. Ponting submitted that there is evidence to support the training component of the Whitehorse posting, particularly with respect to non-radar skills, the human element, and the different perspective of how a tower like Whitehorse rather than a more complicated tower like Edmonton relates to ACC. This would assist the Grievor in continuing his training and moving from VFR to IFR. Given this training objective, it does not matter that there might also be an operational benefit to the Employer in posting the Grievor to Whitehorse.

**32** The Grievor did not grieve the November 27, 1997 decision to send him to Whitehorse. The Grievor's letter of January 21, 1998 (Exhibit 15) is not a grievance. Nor does the actual grievance (Exhibit 19) grieve the Employer's refusal of his request for a layoff or a leave of absence. In any event, there is no evidence that the refusal of a layoff or a leave of absence was made in bad faith, discriminatorily or arbitrarily. There is no evidence to show that the Employer's actions in this case are contrary to any established practice or company policy.

**33** Mr. Ponting submitted that discharge for failing to report to Whitehorse does not constitute "discipline". Rather, it was simply a recognition of the consequences of the unilateral decision by the Grievor not to continue his employment. Alternatively, if it was disciplinary, then there was just cause because the Grievor did not "work now, grieve later".

**34** Whatever the standard of arbitral review, Mr. Ponting acknowledged that a probationary employee can grieve under this collective agreement as amended by Appendix B. However, the same standards of discipline might not be applicable to a probationary employee; and, further, probationary status may be relevant in the exercise of any discretion to reduce penalty.

**35** With respect to the submission that the Grievor has been "treated unjustly" because of the financial disadvantages of being transferred to Whitehorse, Mr. Ponting submitted that this allegation does not hold water in light of the Grievor's willingness to accept a layoff or unpaid leave of absence. No one required him to sell his house in Edmonton, or to buy a house in Whitehorse. Even if he had stayed in Edmonton, his salary was going to go down significantly when he left his acting position at the Edmonton Tower to enter the IFR courses.

**36** Finally, Mr. Ponting pointed out that the Employer had an obligation under the recently-negotiated seniority bid provisions to accommodate not only the Moncton controllers but also the Whitehorse controllers whose successful bidding had required coverage. In all of the circumstances, what the Employer was doing was reasonable, and it had the right to require the Grievor to report to Whitehorse.

**37** Accordingly, Mr. Ponting submitted that the grievance should be dismissed.

## V. SUBMISSIONS FOR THE UNION

**38** Mr. Barnacle submitted that it was important to remember that this grievance arises during the transfer of an employer from the federal public statutory régime to the private sector. Because the negotiations for the new collective agreement have not yet been completed, a number of matters (for example, everything dealing with staffing and the appointment process) could not be bargained under the Public Service Staff Relations Act and the Public Service Employment Act. This explains why the Union did not - and could not - negotiate various matters like the structure and length of the IFR training stream. After privatization in November 1996, the collective agreement was modified by the Memorandum of Understanding and its four appendixes (Exhibit 28). Article 2 of Appendix B makes it clear that a

probationary employee can file a grievance, discipline requires just cause, and all Employer discretions must be exercised in good faith, without discrimination and in a non-arbitrary fashion:

## APPENDIX "B"

### GRIEVANCE AND ARBITRATION PROCEDURE

#### 2. Just Cause

No employee shall be disciplined or discharged except for just cause. However, the discharge of a probationary employee for non-disciplinary reasons may be carried out at the discretion of the Employer at any time during the probationary period. The Employer's discretion must be exercised in good faith, without discrimination and in a non-arbitrary fashion.

**39** Mr. Barnacle submitted that the grievance in this case did not crystallize until the Employer told the Grievor that he would be dismissed if he did not report to Whitehorse. It was not necessary to grieve anything before that consequence took effect. It is the termination which reaches the just cause requirement under section 2 of Appendix B.

**40** Mr. Barnacle submitted that Appendix A has been in conflict with the collective agreement since privatization in November 1996. A trainee who becomes a permanent employee can no longer be bound by Part 1 of Appendix A (dealing with mobility throughout an employee's entire career).

**41** Further, there is no "deemed to quit" provision in this collective agreement. The concept of "abandonment" of a position comes from the statutory backdrop of the previous public service context; it is not contained in the collective agreement. Mr. Barnacle referred to the decision in *Canada (Treasury Board - Indian and Northern Affairs Canada) and Horn*, (1992), 32 L.A.C. (4th) 250 (P.S.S.R.B.; Deans). Accordingly, the Employer must rely on either the Grievor's resignation (although he specifically stated that his refusal to report to Whitehorse was not to be construed as a resignation) or a termination. Further, the reference to a refusal to move in the "ulterior training" portion of Appendix A does not constitute a "deemed to quit clause"; and, even if it did, it would now be unenforceable because it breaches the just causes provisions in Appendix B. Mr. Barnacle submitted that, under general labour law which is now applicable to this bargaining relationship, there must be a resignation to constitute an "abandonment" or just cause for terminating employment. Resignation requires a subjective intent (which is clearly absent in the present case): *MacIlroy and Treasury Board (Revenue Canada, Customs and Excise)*, [1982] C.P.S.S.R.B. No. 89 (26 May 1982); *Gilmour and Canadian Security Intelligence Service*, [1994] C.P.S.S.R.B. No. 90 (28 June 1994).

**42** That part of Appendix A dealing with mobility during ulterior training cannot have any application, even if it does not conflict with the collective agreement since November 1996, where the actual reason and motivation for the transfer is not training at all: *Beaugard, Dupéré and Bourgon v. Treasury Board (Transport Canada)*, 16 July 1996 (P.S.S.R.B.). Mr. Barnacle submitted that there was no real training purpose in sending the Grievor to Whitehorse. No training reason was offered by management in November or December 1997 or January 1998. The overwhelming weight of the evidence indicates that it was for operational staffing reasons. Further, the evidence is that other trainees were not sent to two towers during their training, except where they were offered a substantive position after check out at the second tower (like Yellowknife). However, headquarters directed that substantive positions were not to be made available in Whitehorse until after the Aeronautical Study there had been finished. Accordingly, Mr. Barnacle submitted that the Employer did not have authority to order the Grievor to go to Whitehorse.

**43** Mr. Barnacle referred to the following authorities:

- *Re Prince Rupert Fishermen's Cooperative Association and United Fishermen and Allied Workers Union*, (1985), 19 L.A.C. (3d) 129 (Larson).
- *Brown and Beatty's Canadian Labour Arbitration*, Third Edition, at para. 7:3112 (dealing

- with reasonable explanation of absence).
- Brown and Beatty at para. 7:2200 (dealing with alteration of grounds).
- Re Carter Carburetor Division of A.C.F. Canada Ltd. and International Association of Machinists, Local 2243, (1977), 16 L.A.C. (2d) 166 (Adams).
- Brown and Beatty at paras. 7:3610 through 7:3622 (insubordination, refusal to follow instructions).

**44** Mr. Barnacle submitted that the Employer can only rely on the "obey now, grieve later" rule from the time it first raised that - namely, at the hearing. There is also an exception to the rule where an arbitral remedy would not otherwise be able to make the Grievor whole.

**45** Finally, even if there is just cause for discipline here, Mr. Barnacle submitted that it is still open to the arbitrator to review the proportionality of the discipline which has actually been imposed. There is no evidence of any alternative disciplinary action having been considered, and no evidence of progressive discipline.

## VI. DECISION

**46** After carefully reviewing the evidence, submissions and authorities referred to at the hearing, I have come to the conclusion that this grievance must be dismissed for the following reasons.

**47** The "obey now, grieve later" rule clearly applies to this case. The Grievor was directed to report to Whitehorse; he did not do so, despite having been advised by his Union representatives of the "obey now, grieve later" rule. None of the recognized exceptions to the rule applies in the present case: Re Squamish Terminals Ltd. (Waterfront Foremen Employers Association) and International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514, (1997), 68 L.A.C. (4th) 165 (McPhillips), at pp. 170-172; and see also the recent Alberta decision by Arbitrator Sims in TransAlta Utilities Corporation and TransAlta Employees' Association; Doug Cox Grievance (7 October 1998).

**48** With respect to the Union's observation that this collective agreement does not contain a "deemed quit" or "abandonment" provision (because that was dealt with in the statutory portion of the pre-November 1996 régime governing this bargaining unit, and not the collective agreement), I would only observe that an employer in the private labour relations context does not require a specific provision in a collective agreement in order to be able to terminate the employment of an employee who either abandons his position or does not comply with a management direction. Although collective agreements in the private sector do sometimes include specific clauses about abandonment or deemed resignations, the usual function of those clauses is to prescribe clear circumstances to denote when an abandonment or deemed quit has occurred. The articulation of such a provision does not create the employee's obligation to comply with the management direction or otherwise limit management's authority to react to such a failure to comply. Further, this management right is almost always preserved by the management's rights clause in the collective agreement, and Article 3.01(b) of the present collective agreement is undoubtedly wide enough to preserve this authority:

### ARTICLE 3

#### MANAGEMENT

3.01

The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

- (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
- (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

[Emphasis added.]

**49** I have not been referred to any other provision of the collective agreement which modifies or restricts the Employer's right to organize and assign work, or which would prevent the Employer from transferring a trainee like the Grievor.

**50** With respect to the applicable standard of review, there is no dispute between the parties that Appendix B allows an employee in the Grievor's position to file a grievance and to have access to the arbitration process:

#### APPENDIX "B"

##### GRIEVANCE AND ARBITRATION PROCEDURE

###### 2. Just Cause

No employee shall be disciplined or discharged except for just cause. However, the discharge of a probationary employee for non-disciplinary reasons may be carried out at the discretion of the Employer at any time during the probationary period. The Employer's discretion must be exercised in good faith, without discrimination and in a non-arbitrary fashion.

**51** I am satisfied that even applying the highest standard (just cause), there was just cause for the Employer to terminate the Grievor's employment upon the latter's willful refusal to report to Whitehorse.

**52** Given this conclusion, it is not strictly speaking necessary for me to determine what I would have done if the Grievor had obeyed the direction to go to Whitehorse and filed a grievance about whether (a) the Employer had the right to transfer the Grievor in any event and for whatever reason, (b) whether Appendix A is in conflict with the collective agreement since November 1996, and (c) whether this particular transfer could be justified for training purposes (if that is a limitation on the Employer's ability to transfer trainees like the Grievor). As an arbitrator, I am quite reluctant to second-guess the Employer about whether there was a training component in the work which the Grievor would have done in Whitehorse, particularly where much of the training consists of on-the-job work in an acting capacity in an operational setting. On reflection, I have decided that it is better not to comment further on this aspect of the case, because it is clear that the parties in their new non-statutory context are going to have to devote collective bargaining time and energy to sorting out the structure and parameters of the training process.

**53** Nevertheless, given that I have found just cause for the termination of the Grievor's employment, I must however go on to consider whether to exercise my statutory discretion to substitute a lesser penalty. While I think that the Employer might well have been more imaginative in how it coped with absorbing the employees from Moncton and the staffing problems at Whitehorse otherwise than by implacably directing the Grievor to be transferred to Whitehorse, the

fact remains that the Grievor knew when he signed on for training that he might be posted anywhere in Canada and might be moved. Accordingly, I have considerable difficulty with the Grievor's steadfast refusal to report to Whitehorse, particularly despite his knowledge of the "obey now, grieve later" rule. In these circumstances, I am not inclined to exercise my discretion to substitute a lesser penalty for the termination imposed by the Employer.

**54** Having said this, however, the fact is that the Employer recognized throughout the hearing that the Grievor was an excellent employee, with full potential to complete IFR training successfully; and it has a chronic shortage of fully qualified air traffic controllers. In my opinion, it would be entirely appropriate for the Employer to offer to re-employ the Grievor, and to reintegrate him into its training program at the earliest opportunity.

qp/s/clw

<sup>1</sup> The 1991-93 collective agreement is Exhibit 21. The multi-union Memorandum of Understanding is Exhibit 28. Appendix B to the Memorandum of Understanding was entered twice, as Exhibit 21A and Exhibit 28B.