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File No: 166-2-2348

THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

SERGE CORMIER,

Grievor,

AND:

TREASURY BOARD
(Ministry of Transport),

Employer.

DECISION

Before: Georges-E. Gauthier, Deputy Chairman of the Board (and Adjudicator).

For the Grievor: S. Cormier, grievor.

For the Employer: Pierre Delage, counsel on June 22.

Gabriel Terkel, counsel on July 22.

*ART 7
CODE
402/75*

Heard June 22 and July 22, 1976, at Montreal.

*UPON DISCIPLINE FOR USE OF THE
FRENCH LANGUAGE*

DECISION

1. The grievor, Mr. Serge Cormier, is an AI-5 Air Traffic Controller employed at the Dorval Air Traffic Control Centre, Ministry of Transport. He received a disciplinary penalty as a result of incidents which occurred on December 8, 1975. His grievance was as follows:

This is further to your notice of disciplinary action dated December 9, 1975 accusing me of insubordination. If a mistake was made, it was not a case of resisting authority and refusing to comply in a spirit of insubordination nor a refusal to carry out orders from a superior, but rather a situation which is the direct result of exasperation, tension and, perhaps, perplexity engendered by the frequently inconsistent application, in the past, of ambiguous directives which, in our opinion, are contrary to the law. Within this context, a suspension, whatever its duration, is too hasty and too severe a measure.(Translation).

2. The grievance was accompanied by a copy of a letter dated December 11 from the Commissioner of Official Languages, Mr. Keith Spicer, to Mr. Sylvain Cloutier, Deputy Minister of Transport, and a copy of a letter dated December 12, 1975, from the Minister of Transport, Mr. Otto Lang, to Mr. Serge Cormier. These letters are reproduced below:

Mr. Sylvain Cloutier
Deputy Minister of Transport
Transport Canada Building
Place de Ville
Ottawa, Ontario
K1A 0N5

Dear Sir:

This is further to our letter of December 10, 1975, which dealt with the suspension of two controllers at the Dorval Control Centre.

Since this case seemed to demand urgent handling, I went to the Control yesterday evening to meet the controllers in question and their superiors. As agreed with Mr. Walter McLeish, I was accompanied by Mr. C.G. Foy of the Ministry of Transport.

In addition to Mr. M. Pitre and Mr. L. Desmarais, I met with English- and French-speaking controllers. During these consultations, I realized that a healthier psychological climate would have to be instituted without delay at the Control Centre if a "technical" solution acceptable to all were to be found.

Although the question of ground communications between controllers is to some extent related to the problem of air-to-ground communications, which I examined in my letter of July 30, 1975, I am of the opinion that these two areas must be kept separate for the present.

Furthermore, the discussions that I had in Montreal convinced me that the Ministry of Transport, while giving constant priority to air safety,

should find, as soon as possible, some means of ensuring that those controllers who so desire are allowed to make use of French in ground communications. In fact, while I acknowledge that the Ministry has an unquestionable moral and legal duty to protect the public's safety, as a matter of principle I find it abnormal that French-speaking controllers in Quebec should have to speak English to one another.

I do not want to propose formal recommendations at once, since this would lead me into a technical area in which I am not nearly as qualified as yourself. For the time being, I would simply like to construct a three-point analysis, by way of hypothesis, and thereby, essentially, set the debate on a level where reason takes priority over every other consideration.

- (1) The situation that has prevailed for several weeks now at the Dorval Control Centre made the two suspensions appear to be inevitable. Even though the importance of the language element in ground-to-ground communications is variously assessed, from the standpoint of air safety, by those concerned, the information that we have substantiates that the general atmosphere of indiscipline existing at the Control Centre at the time of the suspensions was clearly a threat to safety in itself.

- (2) The suspended employees (Mr. S. Cormier and Mr. R. Buisson) and their superiors (Mr. M. Pitre and Mr. L. Desmarais) were in a sense all victims of a situation that had been allowed to deteriorate for too long. The suspended employees, in fact, were working in an environment where insults and provocations between certain English-speaking and French-speaking employees were all too common. It is reasonable to think, then, that the suspended employees were led to commit rash acts out of a feeling of exasperation, tension and even perplexity, perhaps, under the pressure of a situation where directives in the past had sometimes been ambiguous and where their application had frequently been inconsistent. As for the two supervisors, this same situation forced them to apply the regulations under conditions that were very hard for them personally, and they ended up (at least in a certain part of the press) as the scapegoats of an unpopular decision. In my opinion, their treatment was unfair.
- (3) The Ministry will announce today that by early January it will be in a position to assess a current study that is reported to offer considerable hope that French can be used in certain ground-to-ground communications. I think that the Ministry, in its own interest, should perhaps make a spontaneous gesture of détente and lighten the monetary effects of the two suspensions. To my way of thinking, this gesture would not mean either defeat or victory for anyone nor

would it open the way for potentially unsafe acts of indiscipline by other employees while a short-term solution is in the process of being sought.

In fact, even though my own mandate is to ensure language equality, I do not think that any political considerations should be allowed to interfere with the safety of passengers and aircraft personnel. In the case at hand, our only task is to discover a realistic procedure that would enable us to depoliticize this dispute, if only briefly, since in the final analysis the issue is a technical one and, in my opinion, requires a technical solution. Basically, all concerned, whether they be English-speaking or French-speaking, whether controllers, pilots or departmental experts, claim that their attitudes on language use are based solely on questions of air safety. The Canadian people, I think, expect these professionals to back up their respective theses with well-grounded, objective arguments. Obviously, this will only be possible if the Ministry succeeds in creating a climate of serenity, thereby achieving one of the main aims behind our consultations and also this letter.

I would be grateful if you would send me, as soon as possible, any comments you may have.

Yours truly,

(sgd) Keith Spicer

cc The Honourable Otto Lang, Minister of
Transport.(Translation)

* * * * *

Mr. Serge Cormier
Montreal Regional Control Centre

Dear Mr. Cormier:

It is regrettable that corrective measures had to be taken in your case.

I believe that everyone recognizes the necessity, at all times, of a climate which is favourable to sound management and conducive to excellent working relations.

It is in that spirit that I wish to inform you of a reduction of your suspension to a period of four hours.

I hope that this will contribute to maintaining an excellent working atmosphere.

OTTO LANG
Minister of Transport
(Translation)

3. The employee is requesting the following corrective action:

Cancellation of all disciplinary measures in this case.

4. Also reproduced below is the decision of the authorized employer representative, W.H. Huck, Administrator, at the final level of the grievance procedure, dated March 15, 1976:

DECISION OF THE AUTHORIZED EMPLOYER REPRESENTATIVE

We have carefully studied the subject of your grievance. I must recognize the appropriateness of the replies you received at the previous levels of the grievance procedure. Since you failed to abide by the accepted procedure, disciplinary action was warranted. Consequently, you were given a one-day suspension, later reduced to four hours. Since I concur in this decision, I am unable to comply with your request.

March 3, 1976
Date

Ottawa, Ontario K1A 0N8
Location

W.H. Huck
Signature of employer
representative

Administrator
Canadian Air Transportation Administration
for the Deputy Minister
Title

DECISION RECEIVED BY THE EMPLOYEE

March 15, 1976 10.30 am
Date

(sgd) S.J.F. Cormier
Signature of employee
(Translation)

5. The hearing of this case began on June 22, 1976. Mr. Delage, counsel for the employer, made a preliminary statement to the effect that a key witness in the presentation of his case, Mr. Cunnius, refused to co-operate and would not appear unless subpoenaed. Mr. Delage expected that Mr. Cunnius, a supervisor and thus a member of management, would co-operate with the hearing without being given a formal summons. Mr. Cunnius was apparently Mr. Cormier's supervisor at the time of the alleged incidents and as such, would be in a

position to testify with respect to a conversation in French between Mr. Cormier and another person.

6. Mr. Delage's statement was not, strictly speaking, a request for adjournment, since he was prepared to proceed, provided that Mr. Cormier admitted he had spoken in French.

7. Mr. Cormier, acting in his own defence, then admitted that he had spoken in French, but added nothing regarding the subject of the conversation, the date, location, time, the person with whom he spoke, and so on. Furthermore, he expressed the desire to cross-examine Mr. Cunnius, making it clear that his defence would hinge chiefly on this cross-examination, since the other witnesses appearing on behalf of the employer knew of the incidents only by hearsay.

8. Since a witness essential to both parties was absent, and in order to allow a subpoena to be served on Mr. Cunnius, I declared the hearing adjourned sine die.

9. The hearing resumed on July 22, Mr. G. Terkel replaced Mr. Delage as the representative of the employer, and Mr. Serge Cormier, the grievor, continued to defend himself.

10. At the beginning of the hearing, Mr. Terkel stated that a subpoena had been delivered to the residence of Mr. Cunnius; the bailiff reported that since Mr. Cunnius was out, the subpoena was served on his wife. The subpoena was then submitted, together with a report on service. Mr. Terkel informed the Adjudicator that several

attempts had been made to persuade Mr. Cunnius to come and testify voluntarily, but Mr. Cunnius had stated categorically that he would not appear unless subpoenaed.

11. The Ministry allowed Mr. Cunnius to go on leave beginning July 10. There is no indication that, in granting such permission, the employer, as a precaution and in view of the attitude adopted by Mr. Cunnius, sought or received his assurance that he would appear at the hearing of Mr. Cormier's case, for which an adjournment had been granted for the express purpose of compelling him to appear.

12. According to Mr. Terkel, under the Board's Regulations and Rules of Procedure and the regulations of the Code of Civil Procedure of the Province of Quebec, for legal purposes it suffices to serve the subpoena on the wife of the person to be summoned. The subpoena in this case was served on July 20, 1976, between eight and nine o'clock in the morning. According to Mr. Terkel, it is the responsibility of this Board to take whatever measures it deems appropriate in the case of Mr. Cunnius.

13. Mr. Terkel admitted that under these circumstances, the employer could present only indirect evidence concerning certain points. However, he felt that previous decisions by the Board had established that such evidence was acceptable. He cited Legris, Cathcart and Constantineau (the file numbers were not given). He stated that he had not had time to prepare adequately since he had received this case at the last minute, adding that in any event, the Adjudicator could easily locate these decisions at the Board's premises and take legal cognizance thereof.

14. The first witness to appear on behalf of the employer was Mr. Bernard Levesque, a shift supervisor at the Dorval Regional Air Traffic Control Centre. He ensures that operations proceed normally, that there is sufficient staff, and that employees adhere to the standards set out in the operations manuals and conduct themselves properly. He was on duty on December 8, 1975, the day of the incident, and had jurisdiction as a management representative.

15. He has known Mr. Cunnius since the latter began working at the Control Centre, that is, for more than eight years. When asked by Mr. Terkel whether he was familiar with the incidents leading up to Mr. Cormier's grievance, he replied: "I am sorry to have to tell you that I was not present at the time of the incidents in question."

16. When asked whether the incident in question had been reported to him, he replied that it had, but that he did not remember by whom. He did recall that when he returned from lunch, he was requested to investigate an alleged violation of the rules by Mr. Cormier, who had spoken in French. Since conversations are recorded on tape, he was asked to check the appropriate tape. He did not recall who requested him to do so. In any event, he asked the liaison officer responsible for maintenance to remove the tape and bring it to him (he did not remember the officer's name) so that he could listen to it on the playback machine. He discovered that there had in fact been a conversation in French between Mr. Cormier and Val d'Or at the time indicated. He listened only to the conversation between Mr. Cormier and Val d'Or, which related to an estimate. According to Mr. Levesque, to pass an estimate is to inform the recipient of an approaching flight. He believed that in this instance, it had been a Nordair flight that was approaching Val d'Or. According to him,

Mr. Cormier had stated, in a very normal tone of voice, that the Nordair flight would arrive at Val d'Or at a given time. As a supervisor, he saw nothing unsafe about this, since the person at the other end was also French-speaking. In other words, Mr. Levesque felt that there had been no breach of safety, and he cited the fact that the practice was still followed as proof that it was not dangerous.

17. Two directives were submitted, one dated August, 1974, and the other August 21, 1975. They are reproduced below:

MONTREAL

AREA CONTROL CENTRE

UNIT POLICY

File: CYUL ACC

Effective date: August 1974

Subject: LANGUAGE

Regional Policy - RMATS - April 9, 1974

English only shall be used when control or coordination is involved in the operations room.

ALL CONTROLLERS

STAFF CIRCULAR

MONTREAL AREA CONTROL CENTRE

No. 43/75

File: 5400-16

Effective date: 21-08-75

Subject: USAGE OR FRENCH FOR AIR TRAFFIC
CONTROL. (IFR)

Related directive: Staff Memo 74-91
Memo Regional Manager, A.T.S.
09-04-74

For a number of years now, the use of the French language in the Operations Room has increased to the point where it frequently exceeds established policies. For many, this practice amounts to increased pressure in their duties of controller or supervisor.

Since the publication of the Bilcom report, several comments have been made by various group and individuals on the subject. It is obvious that some of you wish to have this situation resolved come what may.

As Unit Chief, I cannot allow the workplace to be the trial ground for the solution. The question must be resolved at the Ministry and administrative areas before action can be taken in the operational area, if it is so decided.

Air Traffic Control has always been and will remain a team effort to which all individuals must participate fully.

It is thus necessary to reiterate to all that according to present policies pertaining to the control of air traffic, the work will be done in English.

If on occasion, a pilot initiates a call in French, the controller involved will advise the pilot that he is not authorized to use French for routine IFR control and to repeat this message in English. As indicated in related directives, inter-sector and inter-unit coordination must also be done in English.

The situation is presently creating much tension and it belongs to one and all to display goodwill so as to reduce this additional pressure.

I am counting on your cooperation to ensure that more definite action will not be required.

Louis J. Desmarais
Unit Chief,
Montreal ACC.

The controllers have ready access to directives. The August 21 directive was posted on the notice board for approximately two to four weeks. Mr. Cunnius was present when Mr. Levesque listened to the tape and recognized the voice speaking French as that of Mr. Cormier. They met with the Unit Chief, Mr. Louis Desmarais, to inform him of what had happened.

18. Mr. Desmarais asked that Mr. Cormier be fetched. Mr. Cunniss went to get Mr. Cormier, while Mr. Levesque rewound the tape so that Mr. Cormier could listen to the conversation. The witness did not remember whether Mr. Cormier actually listened to the recording of the conversation.

19. The next witness was Mr. Louis Jean Desmarais, Unit Chief, Montreal Area Control Centre. He has known Mr. Cormier since about 1967. He confirmed that Mr. Cormier is bilingual, that the training of controllers is normally conducted in English, and that for some time now, an effort has been made to give certain courses in French, as well as to provide explanations to French-speaking candidates in their mother tongue so that they would understand better. Before the Official Languages Act came into force, a French-speaking person wishing to become an air traffic controller had to be bilingual. Later on, courses were offered to unilingual French-speaking candidates. However, before embarking on their careers, they had completed the English-language course successfully. The witness was bilingual and was familiar with the facts of the grievance.

20. The tape was submitted by the employer, and it was played so that it might be identified and its authenticity established. It was concluded that the tape was not the original but perhaps a

re-recording of a portion. None of the witnesses could testify as to who had prepared it. It was therefore impossible to identify the tape or to establish its authenticity, since no one knew under what circumstances and by whom it had been recorded. However, Mr. Levesque, who had listened to the original, was very surprised to hear, in this recording, that the conversation with Val d'Or concerned a Quebecair flight. He was under the impression, as revealed in his initial testimony, that it had been a Nordair flight.

21. Mr. Levesque's account of the circumstances surrounding the grievance was corroborated by Mr. Desmarais, who also stated that on the day in question, namely, December 8, 1975, a supervisor, whose name he could not recall, informed him that Mr. Cormier had spoken French in a very loud voice while performing his duties as air traffic controller. Mr. Desmarais considered the tone of this conversation not only a challenge to his directive but also a gesture of insubordination. After relieving Mr. Cormier of his duties, he advised Mr. Cormier to report to his office the following morning to discuss the situation and to decide what action management would take in his case. The following morning, Mr. Cormier appeared with his lawyer, Mr. Richard Thivierge. Following the discussion, Mr. Desmarais informed Mr. Cormier that he was suspended for one day and that written notification would follow. The suspension was served on December 9, 1975. Mr. Cormier doubted that Mr. Desmarais had the authority to prohibit him from using French.

22. With regard to the directive of August 21, 1975, Mr. Desmarais identified it and acknowledged that he was the author. This directive had been discussed with Mr. Cormier. Mr. Desmarais

said that the supervisors issued warnings directly to the controllers and that a record of these warnings was kept. Prior to this incident, disciplinary action had apparently been taken against another controller for using French; however, after thinking it over, the witness concluded that the disciplinary measure in that case was not of the same nature as that imposed on Mr. Cormier and that the controller in question had been involved in other earlier incidents; hence he deserved a harsher penalty. Mr. Cormier was given a one-day suspension, but it was subsequently reduced to a half-day by the Minister, Hon. Otto Lang. Mr. Desmarais was at no time consulted regarding a reduction in the disciplinary measure. According to the record, the Minister apparently decided on the reduction at the request of Mr. Spicer.

23. Following Mr. Desmarais' testimony, Mr. Levesque, the supervisor, again took the stand. He stated that he had heard French being used in air traffic control for the past 14 years and that, in his opinion, Mr. Cormier had spoken in a normal tone of voice when giving flight information to Val d'Or. Following the events of December, French had continued to be used. He had never taken corrective action against the use of French. He had approached a number of controllers requesting them to curtail somewhat their use of French, but had never issued a formal reprimand, despite the fact that he was empowered to do so. He lacked authority to impose more severe disciplinary measures. As far as he knew, the only supervisors to have issued reprimands were a Mr. Marcotte and a Mr. Cunnius. He felt that of the two supervisors, Mr. Cunnius was more strongly opposed to any use of French. To illustrate this point, he stated that during radio station CFCF's campaign against Bill 22, Mr. Cunnius had canvassed the Centre during working hours, seeking contributions of 25 cents to support the campaign.

24. The supervisor's authority is limited to issuing a verbal warning to the employee, talking to him, filling out a form stating that the employee has received a verbal warning, and having the form signed by the employee. This form is then placed on file. If the verbal warning is not heeded, it is the supervisor's duty to inform the unit chief so that he may take other measures. The record of the verbal warning is not entered in the employee's file but kept in a special file. The warning may eventually be taken into consideration if there are other breaches of the rules.

25. During Mr. Levesque's testimony, Mr. Terkel drew the Adjudicator's attention to the fact that in previous decisions, other adjudicators have ruled that the adjudicator is not bound by the disciplinary code.

26. During his cross-examination, Mr. Desmarais acknowledged the existence of a letter dated 1969 from a Mr. Scott in Ottawa, which dealt specifically with the language used in air traffic control. Mr. Desmarais admitted that the first time he saw this letter was in November or December, 1975. After reading it, he wondered whether it should not be revised, considering that it had been in effect for six or seven years. He was informed by headquarters, however, that the said letter was still in effect. The letter is reproduced in full below:

SEND TO Q.A.D. MONTREAL VIA FACSIMILE

Q.A.D. MONTREAL 75 NOV 27 9 06

266-402-10

(GATP)

A.D.M.A.

Use of French language in Montreal Area
Control Centre

1. It has just been brought to my attention that a matter relating to your Region which arose during the last National Consultation meeting with the Canadian Air Traffic Control Association has not yet been brought to your attention.

2. At that meeting their spokesman expressed concern that some of the bilingual controllers when on duty in the Montreal Centre tend, on occasion, to lapse into French to discuss operational matters or indeed exchange operational information. While the Association representatives recognized that this is a natural inclination, they were concerned that some information, about which it is essential that their unilingual English-speaking fellow controllers be aware, could thus be inadvertently denied them with a possible consequent degradation of the service provided. Accordingly, the Association strongly recommended that all discussions in the Centre on matters of operational significance be conducted in English.

3. I do, of course, completely understand that French-speaking controllers would naturally revert to that language for facility in communication and, under normal circumstances, I would not condone any interference with their

right to do so. However, as I am concerned about the possible consequences of matters of operational significance not being available to unilingual controllers, I must ask you to ensure that the bilingual French-speaking controllers are made aware of the possible implications of following this practice and are cautioned to use only the English language, when on duty, in any discussions or exchanges on operational matters.

G.A. Scott,
Assistant Deputy Minister, Air.

IGB:tb

Letter Book (23/7/69)

27. Mr. Desmarais admitted that the use of French did not in itself pose any danger, but said he took disciplinary action in this case because Mr. Cormier has spoken very loudly when he communicated with Val d'Or in French. These transmissions were not made in a normal tone of voice but rather in a provocative tone, as if to draw everyone's attention to the fact that the speaker was using French. Mr. Desmarais interpreted this tone as a provocation, and this led him to take disciplinary action. In his opinion, Mr. Cormier's action was tantamount to questioning the authority of supervisors to enforce the directive he had issued in August on the use of French. In other words, he considered this a case of insubordination. The sole reason for the disciplinary measure was the loud tone of Mr. Cormier's voice. According to the witness, the use of French, especially in a provocative tone of voice, creates a staff relations

problem for the management and could ultimately have an indirect effect on service since a number of unilingual English-speaking employees who do not understand French feel isolated, and thus do not participate fully in the work. The witness admitted that he himself had not heard Mr. Cormier speaking and that he had acted on the basis of a report he received. He did not remember who reported to him or the tone of voice used by Mr. Cormier. Mr. Desmarais admitted that Mr. Cormier had an unblemished record prior to the December 8 incident.

28. Submitted next was a letter dated June 11, 1974, from M.H. Hutchon, Director, Air Traffic Services, clarifying the use of languages in relation to the Aeronautics Act. It is reproduced below:

June 11, 1974

Your file Votre Reference 266-402-9

Our file Notre Reference 5400-1

To: AIR TRAFFIC CONTROLLERS

Re: OFFICIAL LANGUAGES ACT AND THE
AERONAUTICS ACT

In accordance with the provisions of the Official Languages Act, the Ministry of Transport has, during recent months, reviewed all positions with a view to determining their linguistic status. The process, carried out as a result of promulgation of the Statute, is in accordance with the provisions thereof which amongst other things, declares that the English and French languages are the official languages of Canada possessing and enjoying equality of status, right and privilege as to their use.

In the course of examining the Ministry's relationship with its air traffic controllers it has become obvious that the need exists to clarify

the relationship between the Official Languages Act on the one hand, and the Aeronautics Act on the other, in order that all controllers may be fully cognizant not only of their rights under the Official Languages Act but their responsibilities under the Aeronautics Act.

Under the Official Languages Act the Minister of Transport in the conduct of his regulation-making powers under Section 6 of the Aeronautics Act ensures that all rules, orders and regulations and other legal instruments made pursuant thereto are made in both official languages subject, of course, to the exception provided for in Section 4 of the Official Languages Act where time is of the essence. This responsibility is being fulfilled and monitored, and to the best of our knowledge has been the subject of no complaint from either the public or officialdom. On the other hand, the Minister of Transport under the Aeronautics Act is charged by the Parliament of Canada with the performance of those duties enumerated under Section 3 of the Statute. Those duties are very extensive, and included amongst them is the responsibility for ensuring that aerial navigation is conducted in the safest and most practical manner for the benefit not only of Canadians but those non-Canadians as well to whom Canada by virtue of various treaties and international commitments has undertaken the discharge of a multitude of tasks in accordance with recommended uniform and standard international practices and procedures. One of the areas in which the Minister of Transport has implemented such internationally recommended practices and procedures lies in the field of air traffic control where the Council of the

International Civil Aviation Organization has recommended to States Members of the Organization the use of standard phrases and nomenclature in English. Directives issued pursuant to Part VI of the Air Regulations implementing such recommended practices and procedures are familiar to all air traffic controllers.

In connection with the foregoing and the examination of the Ministry's relationship with its air traffic controllers, it is evident that some controllers are of the view that policies and directives issued by or on behalf of the Minister of Transport for the purposes of the control of aerial navigation in the public interest, as hereinbefore described, are in breach of certain provisions of the Official Languages Act. Examination of the Official Languages Act in conjunction with other statutes of the Parliament of Canada makes it abundantly clear that a statute providing for equality of status between languages was not intended to prejudice the implementation of practices and procedures deemed requisite to public safety in fields like aeronautics resulting from those duties statutorily imposed by the Parliament of Canada. Neither Sections 9 or 10 of the Official Languages Act, when speaking of a Department's duties in the area of service to the public were intended to alter such statutorily imposed duties. Those sections are clearly limited to communication with the travelling public on the one hand and the services rendered from government offices on the other.

The Ministry recognizes, however, that there has been an increasing demand for the use of the French language in air/ground communications and has

undertaken studies to determine the nature and extent of the demand for air traffic control services in both official languages and the relevance of such demand on safety. When the studies are concluded, they should indicate whether any alternatives to existing practices and procedures are required. Instructions contained in existing directives will continue to apply with the exception of the new procedures involved in the implementation of NOTAM 12/74. This is clarified in a new directive to the Quebec Regional Administrator, a copy of which is attached to this letter, and all controllers are requested to continue to perform their functions within the limits of those practices and procedures duly enacted for the purpose of public safety in aerial navigation.

H. M. Hutchon,
Director, Air Traffic Services.

29. The next witness was Mr. Yves Saulnier, a controller. He works in the same sector as Mr. Cormier, namely, the James Bay sector. Before Mr. Cormier arrived on the day in question (December 8), Mr. Saulnier had been using French in controlling air traffic, and he continued to do so after Mr. Cormier's departure. He was not reprimanded for this. He further stated that when he is seated in a given sector, he can hear what is happening in sectors that are perhaps half the width of the centre away. He has noticed that the controllers raise their voices as the volume of traffic increases. The supervisor's office is located more or less in the middle of the building, so that on the day in question, he would have been able to hear his French being spoken.

30. The next witness was Mr. Alfred Petrauskas, who stated that he was an AI-5 Montreal Terminal Controller, and continued his testimony in English. He has been a controller since 1966. He had heard French spoken since his first day on the job. In his opinion, the use of French presented no danger. In fact, he himself had used French even though he did not speak it very well. He had never experienced any difficulty with his supervisors over this matter. He did, however, file a written complaint with management concerning the conduct of the supervisor, Mr. Cunnius, in certain circumstances which bore no relation to the present case. Because of this complaint, Mr. Cunnius sent a letter to management stating that he no longer wished to act as supervisor when Mr. Petrauskas was on the floor.

31. The next witness was Mr. Steven Corrie, who could and wished to testify in French. He is an AI-5, air traffic controller RFR. He took his controller's course in Ottawa in 1966-67. At that time, no courses were given in French at Ottawa. He learned his French at Quebec City, where he worked in the control tower for approximately two years before transferring to Dorval. He had heard French spoken and spoke it himself. He did not believe that safety was in any way jeopardized when two people spoke French. According to his testimony, there was even proof that the use of French facilitated air traffic control in a number of airports.

Employer's arguments

32. According to the employer, the evidence presented to the Board clearly shows that the grievor, Mr. Serge Cormier, did not comply with the air traffic control directive which prescribed that only English must be used in the operations room in the performance of duties relating to control and co-ordination. Moreover, the evidence clearly shows that the grievor knowingly and deliberately contravened the

directive, the burden of proof was shifted, and it became the grievor's responsibility to justify his actions. According to the employer, previous decisions under the Public Service Staff Relations Act are to the effect that an employee who questions the validity of a directive from the employer, received at work, must first obey the directive in question and then present a grievance or take other appropriate legal action if he believes the directive encroaches upon his rights. The employee does not have the right to take the law into his own hands. Obviously, he cannot presume to pass final judgment on the employer's decisions. Otherwise, the work environment would undoubtedly be one of chaos. In adopting this principle, adjudicators have followed a very simple line of reasoning. They were of the opinion that adherence to this principle would usually ensure that work was carried out in a normal manner and without disruption—this being essential to the well-being of both employer and employees—while at the same time providing the employees with appropriate and satisfactory means of obtaining fair redress. The employer referred the Adjudicator to the following cases: Warnick(166-2-1930), Fardella(166-2-734), and Leduc(166-2-201); as well as Re United Steelworkers and Lake Ontario Steel Co. Ltd., 19 LAC 103.

33. The above principle is subject to some exceptions. Firstly, an employee may refuse to obey a directive from his employer if he has good reason to believe that, by obeying it, he will endanger his health or safety. In the case before us, however, it is obvious that the directive in question did not endanger the health or safety of the grievor.

34. Secondly, an employee is not obliged to comply with a directive which would force him to commit an illegal act and thus render him subject to criminal proceedings. In this connection, the employer cites Re International Nickel Co of Canada Ltd, 6 LAC (2d) 172.

The employer maintains that the grievor in no way showed that the directive in question would have forced him to commit an illegal act which would have rendered him subject to criminal proceedings. Mr. Keith Spicer, the Commissioner of Official Languages, who investigated this matter (mentioned in his fifth annual report, 1975), concluded that the directive in question was in accordance with the provisions of the Aeronautics Act and that that Act took precedence over the Official Languages Act. The employer referred the Adjudicator to page 162 of the report which, being a public document, was admissible in evidence without its contents having to be proved.

35. With respect to the Official Languages Act, it appears to have been intended and promulgated primarily for the benefit of the public. The word "public", for example, appears in sections 3 and 9 of the Act. Moreover, section 10 speaks of services being provided in both official languages to the travelling public. The Act is not specifically concerned with relations between employer and employees in the public sector. In any event, it contains no provisions which would prevent the employer from formulating a directive providing that only English could be used in a particular area of the public sector. Section 2 of the said Act, which establishes the equality of status of the two official languages, does not say, for example, that both languages will be used equally in all fields of activity. The section contains only a statement of principle and although subsequent sections are more specific and speak of protecting the public by providing access to services in both languages, they leave room for Mr. Hutchon's point of view as expressed on page 2 of his letter dated June 11, 1974:

Examination of the Official Languages Act in conjunction with other statutes of the Parliament of Canada makes it abundantly clear that a statute providing for equality of status between languages was not intended to prejudice the implementation of practices and procedures deemed requisite to public safety in fields like aeronautics resulting from those duties statutorily imposed by the Parliament of Canada. Neither section 9 nor 10 of the Official Languages Act, when speaking of a Department's duties in the area of service to the public were intended to alter such statutorily imposed duties. Those sections are clearly limited to communication with the travelling public on the one hand and the services rendered by government offices on the other.

36. The employer also relied on article 3 of the collective agreement in force at the time of this incident. This article is entitled "Management" and reads as follows:

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 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.

37. Of course, this article is binding on the employees as it is on the Association and the employer, under section 58 of the Public Service Staff Relations Act. Hence, the employer had the exclusive discretionary power or jurisdiction to decide whether or not air service could be provided safely if the French language was used and, consequently, whether English must be used. It is thus clear that legally, the employer had the unquestionable right to issue the directive in question. It cannot be claimed that the directive was contrary to the Act or to the collective agreement.

38. Thirdly, an employee is not required to obey an order if he does not have the necessary knowledge or physical ability to do so. With respect to this point, it is abundantly clear that the employee was bilingual and could have easily obeyed the directive in question.

39. Fourthly, an employee may refuse to obey an order if it bears no relation to the regular operations of the organization and if the employee would be unable to obtain fair redress should the order prove inappropriate. With respect to this exception, it is clear that the employee could have availed himself of the normal grievance procedure or, alternatively, the grievance procedure provided for in the Official Languages Act. The employer referred the Adjudicator to section 26 of the said Act. According to the employer, the evidence shows that the employee disregarded the legal remedies open to him and that he decided to take the law into his own hands. Only after he had received his suspension did he file a complaint with the Commissioner of Official Languages.

40. The employer submits that the employee was the author of his own misfortune and that, under the circumstances, he has only himself to blame. As regards the final disciplinary measure imposed by the employer, namely, a four-hour suspension, the employer feels that it is appropriate under the circumstances and that it should not be reduced by the Adjudicator. This sanction is in accordance with the recommendation made by Mr. Keith Spicer in his report. It is shown to be in no way arbitrary or discriminatory when compared with the sanction imposed upon Mr. Buisson for a similar infraction. By not filing a grievance, Mr. Buisson acknowledged that the disciplinary action taken by the employer was justified.

41. Counsel for the employer pointed out to the Adjudicator that in his testimony, Mr. Desmarais had clearly explained to the Board that he had to rely on the co-operation of his supervisors because he was not on the spot and that if the supervisors did not report infractions, he would not be able to take disciplinary action. He required names, precise reports and so on. If these infractions were allowed to persist, they would lead to chaos. It was absolutely necessary to punish such infractions severely. The evidence also showed clearly that Mr. Cormier was well aware of the directive and that it had been discussed among the employees.

42. It should also be noted that the sanction imposed was not a major one such as dismissal or a thirty-day suspension, but rather a very short suspension. The employer believed that, considering the circumstances surrounding the case, this suspension must be upheld in order to preserve its authority. The employer submitted that the grievance presented by the grievor is unfounded and should be dismissed by the Adjudicator.

Grievor's arguments

43. In the grievor's opinion, the employer did not prove that he spoke French very loudly or that he spoke in a provocative tone of voice. The tape cannot be admitted into evidence because it cannot be identified or authenticated. The employer did not prove that the use of French was prohibited by the Ministry. Counsel for the employer based his claim to this effect on the testimony of Mr. Desmarais. However, during cross-examination, Mr. Desmarais tried without success to show that it was forbidden to speak French; he referred to various documents, but was unable to present the Adjudicator with a document which clearly and specifically prohibited the use of the French language. The majority of the documents refer to air-to-ground communications and even the one cited by the witness himself states: "The Ministry recognizes, however, that there has been an increasing demand for the use of the French language in air/ground communications." No mention is made of internal or ground-to-ground communications. Therefore, these documents cannot be relied upon. The employee believed he had succeeded in proving the inconsistent application of ambiguous directives. The employer claimed that service could not be provided safely in French. The grievor thought that this was completely untrue and that the testimony of all witnesses supported his view. He added that he believed there was a tendency to misinterpret the words of the Minister of Transport, and that this was what he was fighting against. He stated that it is safe to use the French language and that this was what he wished to prove.

44. Counsel for the employer had relied on the Buisson case. However, in that case, the problem was certainly not one of language and if the words used in that case could be repeated, they would be seen to be insults based on difference of race rather than of language.

Mention was made of chaos in the control tower. If chaos and an unhealthy atmosphere prevail now, they have done so for fourteen years. To illustrate his point, counsel for the employer had read an article in French from the agreement between the Canadian Air Traffic Control Association and the employer. In reply to this evidence, the grievor pointed out that the Association refused to sign the French version of the agreement. He acknowledged that an unhealthy atmosphere does indeed prevail. He adopted the argument put forward by the employer to the effect that an employee may refuse to obey any given rule if it would affect his health to do otherwise. The employer had stated that the directive in question certainly did not affect the grievor's health. Mr. Cormier replied that, on the contrary, his health has been affected. Evidence of this lies in the fact that psychologists, psychiatrists and doctors are now at the control centre implementing a program of so-called preventive medicine. Mr. Cormier, however, views the program as one of passive medicine, aimed at mending the damage already done.

45. With respect to the grievance procedure, Mr. Cormier maintained that it was not followed. Although the letter from the Minister reduced his suspension to half-a-day, it prevented his grievance from being settled at one of the three levels. He felt the Minister had interfered in the grievance procedure. A system was set up to enable the employee to defend himself but it was not being followed. Was it reasonable to assume that the head of a centre, a regional director or even an administrator in Ottawa could overrule or reverse the Minister's decision? In other words, the grievor was being forced to take action at a level above the first three, where his grievance might have been settled.

46. As for the Aeronautics Act cited by the employer, the grievor drew the Adjudicator's attention to section 3, where the many responsibilities of the Minister are set out. However, in his opinion, nowhere in this section does it provide that the Minister may specify the language to be used by controllers for internal communications. The purpose of this piece of legislation is certainly not to regulate the language used.

47. Moreover, evidence was presented which showed that on the day of the incident in question, French had been used in the same sector both before his arrival and after his departure. Mr. Cormier said that although the employer claimed he tried to take matters into his own hands—or at least attempted to give the impression that this was so—the opposite held true; rather, it was the employer who had decided to be more severe, in order to set an example. Mr. Cormier felt that this is what happened and it the reason he now found himself before the Adjudicator. If chaos prevailed because of the language problem, then it had existed for at least 14 years. He himself had simply used the language of the person to whom he was speaking.

48. Mr. Cormier concluded by stating that, first of all, the Official Languages Act provided that both the French and English languages possess official status and that they enjoy equal rights and privileges as to their use in the institutions of the Parliament and Government of Canada, and secondly, a resolution adopted by Parliament in June, 1973, confirmed this right by recognizing that public servants should in general be able, subject to the provisions of the Official Languages Act, to work in the official language of their choice within the Government of Canada.

forward to testify. The only person who might have been able to testify was Mr. Cunnius, who refused to testify at the first hearing and who did not appear even after the adjournment, which had been granted for the express purpose of enabling him to testify, although a subpoena had been issued at the employer's request. I cannot but deplore the fact that the employer allowed Mr. Cunnius to take leave during the time this case was to be heard without at least ensuring that he would be present on the day of the hearing. The employer had known since the adjournment of the case on June 22, that it had been granted solely to enable Mr. Cunnius to testify.

53. Mr. Desmarais himself was not present when the alleged incidents occurred. He took action on the basis of a report from someone he could no longer identify.

54. I have thus reached the conclusion that the employer did not present sufficient evidence to justify the rejection of the grievance.

55. In addition, I must mention that my decision is also based on the fact that the employer did not follow the grievance procedure. Article 5.08 of the collective agreement between Treasury Board and the Canadian Air Traffic Control Association reads as follows:

5.08 Step Three

If a decision in Step Two is not acceptable to the employee, he may, not later than ten (10) days after receipt of the decision was received, not later than fifteen (15) days after the last day on which he was entitled to receive a decision, present the written grievance to his immediate supervisor who will sign it indicating the time and

the date received. A receipted copy will be returned to the employee and a copy forwarded to the Deputy Minister or his delegated representative authorized to make a decision at Step Three. The Deputy Minister or his delegated representative shall give his decision as quickly as possible and not later than twenty (20) days after the grievance was presented. The decision will be in writing and the employee copy will be returned, through the immediate supervisor, to the employee. The decision of the Deputy Minister or his delegated representative at the final step of the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication.

56. After the second level of the procedure but before the delegated representative of the Deputy Minister received the grievance, the Minister of Transport, Hon. Otto Lang, reduced the sanction decided upon at the second level. However well-intentioned the Minister's action may have been, his interference at this stage is more than a mere irregularity. It relieves management of the responsibility imposed on it by the collective agreement and removes the grievance to a political level not provided for under the agreement. That is not all. Even if the grievance was considered at the third level after this political intervention and the Minister's decision upheld, would it be reasonable to assume that objective, impartial and independent consideration had been given to the merits of the grievance? One would have to be naive to think that the administrator could overrule the Minister's decision. The grievor is not that naive. He maintains he did not receive the consideration to which he was entitled at the third grievance level, and I agree with him.

57. I therefore uphold the grievance submitted by the grievor on

the basis of the employer's failure to adhere to the grievance procedure.

58. I also grant the corrective action requested by the grievor.

For the Board,

Ottawa, August 31, 1976

Georges E. Gauthier
Deputy Chairman