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File Nos: 166-2-3411
166-2-3412

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

FREDERIC AGER

 grievor

AND:

TREASURY BOARD
(Ministry of Transport)

employer

DECISION

Before: M. Falardeau-Ramsay, Deputy Chairman .

For the grievor: C. Maclean, counsel.

For the employer: H. Newman and P. Hamel, counsel.

ART 7

Heard at Montreal on May 1, 1978.

DISCIPLINE
FORCED TRANSFER

DECISION

These references to adjudication are the result of incidents which occurred during August 1977 at the Montreal Control Centre and as a result of which Mr Ager received a written reprimand and a seven-day suspension and was transferred from his operational position as a Performance Development Officer AI-6 (TACQ-3263), to a non-operational position as an Equipment Specialist, AI-6 (TACQ 3388).

At the outset of the hearing, it was agreed that employer would acknowledge the validity of the grievance contesting the suspension and the letter of reprimand (grievance 166-2-3411), and I take cognizance of this decision.

In a memorandum dated August 25, 1977 (Exhibit U-6), signed by Mr M Pitre, Mr Ager was informed of the employer's action in these words:

Subject: Transfer to Regional Office ATS.

This is further to the meeting held on August 25, 1977 in the Unit Chief's office of Montreal Area Control Centre between yourself, your representative and Messrs C. Lafrenière, A. Lavigne and R. Tremblay.

It has been recommended and approved that effective immediately you are reassigned to the Regional ATS Office and will be transferred from position T-ACQ-3263 (AI-6) Performance Development Officer to position T-ACQ-3388 (AI-6) Equipment Specialist.

This decision has been taken after in-depth analysis of all pertinent factors, and we have concluded that your competency as a Performance Development Officer has been too seriously impaired to be allowed to continue functioning in that capacity.

Mr Ager then filed a grievance (166-2-3412 which reads as follows:

This grievance is being filed pursuant to Article 5 of the Collective Agreement between the Canadian Air Traffic Control Association (CATCA) and the Treasury Board, signed July 29, 1976, code 402/76, as extended and amended by an Act of Parliament, Bill C-63, given Royal Assent on August 10, 1977.

On August 26, 1977, the grievor was advised by a letter of that date from Mr. J.C.M. Pitre, Regional Manager of Air Traffic Services for Quebec that effective immediately, the grievor was to be transferred from his position, number TACQ 3263, AI 6, Performance Development Officer (PDO), Montreal Area Control Centre, to position number TACQ 3388, AI 6, Equipment Specialist, Regional ATS office. A copy of that letter is attached to this grievance.

This letter was received by the grievor at the same time, and in conjunction with, two other letters of the same date from the Employer (sic) was taking for what he alledged to be activities of the grievor requiring such action. These other forms of discipline, a seven day suspension and a written warning of reprimand, are the subject of a grievance filed with the Employer on September 6, 1977.

The Employer, in notifying the grievor of the transfer, has cited as his reason for it, what in his opinion is the impairment of the grievor's competency to perform the duties of his position as a PDO.

The grievor's response in answer to this transfer and the Employer's allegations surrounding it are:

1. He has never requested such a transfer or applied for the position he is being transferred to; therefore the transfer is without his consent;
2. The transfer is disciplinary action resulting in a financial penalty to the grievor since,
 - a) he was notified of this action on the part of the Employer at the same time and in conjunction with other forms of discipline which are indisputably that; and,
 - b) the transfer results in a change of status for the grievor from that of an operating employee working 34 hours per week to **that** of a non-operating employee working 37½ hours per week, thereby imposing a financial penalty on the grievor; and,
3. That the grievor has not proven himself to be incompetent in the performance of his duties.

Corrective Action Requested

1. That this grievance be forwarded immediately to Step Three of the grievance procedure for reply as the circumstances that give rise to it are the result of actions taken by Management representatives who are identified as being responsible for replying to grievances at Steps One and Two.
2. That no action be taken to carry out the proposed transfer pending the final resolution of this grievance.

3. That the proposed transfer be rescinded and the grievor continue to be allowed to work in his position as an AI-6 PDO in Montreal ACC, namely, TACQ 3263
4. That should the grievor suffer any financial penalty, full restitution of salary or benefits lost be made to him.

The grievance was denied at all levels of the grievance procedure, the employer arguing that the decision to transfer the grievor has been made for operational reasons and that it had the authority, as part of its management rights, to assign duties. The grievance was then referred to adjudication on January 3, 1977, and in a letter dated April 18, 1978, Mr H Newman informed the Board of his intention to challenge its jurisdiction to hear the grievance since, in his opinion, the measure in question did not constitute disciplinary action resulting in a financial penalty. This objection was raised again orally at the start of the hearing.

Having regard to the objection raised by counsel for the employer, we must therefore determine whether, on the basis of the evidence submitted, the grievance filed by Mr Ager contesting his transfer can be referred to adjudication. As is the case with grievances contesting a rejection during the probationary period, we must look beyond the explanation given by the employer for the action taken and determine whether this action was in fact motivated by disciplinary considerations.

Case for the aggrieved employee

Mr. Frederic Ager joined Transport Canada in 1959 as a trainee for the Quebec Region. After having performed the duties of a VFR tower controller for one year, he was assigned the position of IFR controller in the Montreal Area Control Centre for 15 years. From 1975 to 1977, he worked as a Performance Development Officer before being transferred to the position of Equipment Specialist by a memorandum dated August 25, 1977.

The witness stated what are the duties of a Performance Development Officer (V-1). He explained that, generally speaking, his job, by evaluation, is to determine whether operational controllers meet the established standards. He used three different means which are:

1. written examination;
2. monitoring telephone and on the job conversations and;
3. "over the shoulder evaluation" for two working days.

He then discussed the results with the individual concerned in order to find the right approach for improvement. There follows a discussion with the controller's immediate supervisor to let him know if there is any deficiency. If so, the matter is then taken with higher management. There are three positions for Performance Development Officers and their actual number varies between two and three. They are responsible for all controllers and for the Montreal Control Centre. Mr. Ager mentioned that, in his region, unlike other units, to insure fairness, the Performance Development Officers decided to remain in all three areas instead of specializing in one area only. This means that the three officers would assess in all areas.

The witness testified that when an individual was not meeting the standards of the unit, the matter would be brought up to the

immediate supervisor, then to the Centre Operations supervisor and finally, to the Unit Chief. First and foremost, Mr. Ager told the Board, he has training in psychology and he attempted to gain acceptance from the individual. He declared that generally, when he has an objection, he gained acceptance and instituted some program of corrective action. In the case where an individual would be in serious disagreement with him, he would go to his immediate supervisor. In Mr. Ager's unit, the immediate supervisor has got responsibility of a specific crew composed of 13 employees, more or less. The Performance Development Officer proceeded by an ongoing day to day monitoring. He watched overall and would not focus on one individual. If the supervisor disagreed with his evaluation, they would discuss the matter and he would reassess his position. Mr. Ager declared that all reports are confidential and that they are not used in deciding promotions. He mentioned that there is almost definitely a second evaluation of the same controller and that somebody else can do it. The witness stated that before August 1977, he never received negative comments concerning the manner in which he performed his duties. On the contrary, he was told how well he was doing. His objectivity was never questioned.

During the August 1977 strike, Mr. Ager was a designated employee. There was a national strike declared by CATCA. The Sunday evening shift was uneventful. On Monday, the situation had changed. The Quebec Control Unit (Quebec City) had adopted a position of opposing CATCA on other matters and decided not to go on strike. A NOTAM was issued to the effect that operations in Quebec were normal. Arrangements had been made to insure that emergency, mercy and northern supply flights were working. A situation occurred where a flight was going to take place and should have taken over at some point by controllers of the Quebec Control Unit. He had no guarantee that people in Quebec would stay working as there was no designated employee on duty. Mr. Ager

explained that in normal circumstances, when a flight has got a clearance to go to Quebec, he would pass the estimate to the Quebec Control Unit and would give the radar hand off. He cleared out the flight because he thought then that there was a designated employee on duty in the Quebec Control Unit. When he learned that such was not the case, the flight was airborne. Mr. Lafrenière, the Unit Chief, Montreal Control Centre, asked him to find out who was the designated employee in Quebec and he was informed that there were none. Consequently, he informed the pilot that there was no designated employee there and that he would not give radar hand-off nor pass estimate. He cancelled the pilot Instrument Flight Rule (IFR) clearance and the flight proceeded to Quebec under Visual Flight Rule (VFR). The weather was clear and there were no clouds. He had no contact with anybody in Quebec. Mr. Ager explained that he took this attitude because he was conscious that he would go back to work with the Montreal Controllers after the strike and that it would be awkward if he had cooperated with scabs. He did not like to have to take this position and he expressed his feelings to Lafrenière who volunteered: "Don't worry about it, Fred. You did what was right, it was the only thing you could do."

On August 10, the witness was interviewed by Christopher Bain of the Montreal Gazette, on the request of CATCA officers. As a result, the following appeared in the August 11, 1977, issue of the newspaper (U-3):

"Personally I would not fly today because I just don't think it would be safe," said Fred Ager, a Canadian Air Traffic Control Association (CATCA) member who is responsible for the capabilities of the controllers in the Dorval Tower.

On the same day, August 11, Jean Poitras, the Shop Steward, approached him and asked him to sign the following memorandum (U-2):

To: Unit Chief DL Acc.
From: Staff of DL Acc.
Subject: Scab Employees

On the days of August 7, 8, 9, 1977, controllers of your unit were away from work on a legal strike.

It has come to the attention of the undersigned that the following employees reported to work for their regular shift:

Noel Solomon
Roger Brusion
Guy Michaud
Allain Jacques
Robert Fleury
Jacques Leduc

Notwithstanding their reason for reporting to work, they are still members of CATCA, which decided to strike in a democratic manner.

Hard feelings and cold relation now exist between the undersigned and the above mentioned employees because of their actions.

In the conditions & atmosphere that exist in the center at this time, unnecessary additional frustrations and pressure would be created if we were obliged to work beside these named employees.

(Nine signatures including aggrieved employee's)

The witness stated that some people had already signed it and that it reflected a good part of his own thoughts on the matter. There was pressure put on him and it caused him some frustration. He was then aware that many controllers were preoccupied by this aspect. The whole situation was a cause of concern professionally because it was causing aggravating circumstances. He thought the situation would go on for a couple of days, not for weeks and months.

On August 11, he was requested along with Mr. Jodozi and the

executive of CATCA to attend a meeting with MM. Lafrenière and Lavigne to discuss the interview and the ensuing article as well as the issue of the memorandum (U-2). On this last matter, Mr. Lafrenière expressed distaste and mentioned that he had thrown it in the garbage saying: "It is where it properly belongs." After his August 11 shift, Mr. Ager was going on annual leave.

On August 12, there was a CATCA meeting held at the Grand Motor Hotel; the national executive of CATCA, the complete executive and the members of the Montreal Branch attended. Mr. Livingston, the President and Mr. Jim Cought, the Vice-President were there. It was a large meeting, 30 people at the most coming and going, composed of a cross-section of all members including scabs. The question of the "scabs" arose at one point during the meeting when Mr. Livingston asked what should be done concerning all strike breakers in general. Mr. Ager told him that any action against them would be decisive and would impair work. This was the end of the subject according to the witness.

On August 25, when he came back from his annual leave, Mr. Ager was called by either Mr. Lafrenière or Mr. Lavigne, his immediate supervisor, to discuss the Gazette article. He asked them if he could request the presence of Mr. Bain, the journalist. He was told that this was not necessary. Nevertheless, he called Mr. Bain and asked him to be there, since he thought that his testimony would be well appreciated. Mr. Bain agreed to come and was introduced to Mr. Lafrenière but the latter told him that his presence was not required. The witness mentioned that, at that meeting, MM. Ray Tremblay, Bert Lavigne and Claude Lafrenière represented the employer while Mr. Jodozi accompanied him as a CATCA representative. He does not remember discussing the memorandum but he recalled Mr. Lavigne telling him he was part of management even though the supervisor finally recognized that Mr. Ager

was not always management. He was the only one quizzed, the others were not questioned. He thought it most probable that there was discussion on his objectivity.

On the morning of August 26, Mr. Ager was asked along with Mr. Jodozi to attend another meeting where Mr. Lafrenière, Mr. Lavigne, Mr. Pitre, Mr. Arcand and Mr. Daigle were present. He was handed out the reprimand (U-4), the suspension (U-5) and the transfer (U-6). There was very limited discussion. It came as a shock to him. He remembered having asked Mr. Pitre how he could conclude that his competency had been impaired by signing the memorandum. Nothing in the past, in his record indicated a problem. As far as he was concerned, he had dealt with it in his own mind and it would have been possible for the employer to monitor his performance at any time. The employer's representatives answered him that they were not prepared to take that chance and that their decision was the result of a collective judgment.

Mr. Ager told the Board about having been suspected of sabotage. He was told that two police officers wished to see him. They interviewed him concerning his possible involvement in the sabotage of telephone lines on August 12. The officers were perfectly satisfied that he had no role to play in the matter and informed his superiors accordingly since the following day Mr. Daigle told him so in happiness and glee.

The transfer had the effect of assigning him to a non-operating position while he was performing an operating position before. Based on the present collective agreement and on projection the witness made, it implied monetary and other losses. He would work longer, would have less overtime. It would also affect his possibility of early retirement and his potential for shift differential. He underlined that while the monetary aspect was very important, he was concerned more than anything

else, by the change in life style it meant.

In cross-examination, the witness acknowledged the fact that he was transferred from an AI-6 position to another AI-6 position. He explained that he would have to work more hours to get the same pay. He also stressed that as a non-operational employee, he would not work on shifts and consequently, would work only during day-time hours. According to Mr. Ager, the pressures are of a different nature when one is performing non-operational. Although he was available for emergency overtime, he mentioned that his family was far more important for him than money in his order of priorities.

Mr. Ager gave some further details concerning the document U-2. He stated that the incident occurred on August 10, around 9:00 or 9:30 p.m. He was then asked by Jean Poitras as official for CATCA to sign it. The latter told him that Mr. Lauzon of the union had asked him to do it. Mr. Ager played no part in drafting the document. He read it a couple of times and he signed it with misgivings and frustration. He assured the Board that he did not solicit any signatures. He recalled having seen Mr. Labelle who is a supervisor with the same AI-6 classification, but he denied having asked him or anybody else to sign or even having acted in a manner which would have been construed as inciting to sign the memorandum. Mr. Ager agreed that the memorandum intended a negative reflection on the scabs. He stated that he was concerned by the effect the scabs have had on the operations from both a professional and a personal point of view. There were hard feelings and relations, but he was convinced that his capabilities to judge objectively would not be impaired. His reaction would have been to discuss the matter, since it was bothering him. He even offered management to put him in charge of the scabs and see what happened in evaluation. He would have had a golden opportunity to press the matter at the CATCA meeting, where there were no management people. If

management entertained any doubts concerning his possible prejudice, they could have made enquiries. He did not ask to have his name removed from the memorandum because when his superior mentioned that it was worth the "garbage pan", he assumed this was tantamount to giving no weight to the signatures thereon.

In re-examination, Mr. Ager mentioned that he returned the memorandum to Jean Poitras.

Case for the Employer

Mr. Claude Lafrenière, Unit Chief, Montreal Control Centre, was Mr. Ager's supervisor before the transfer took place. He testified that he was involved in the decision and discussed the transfer with Mr. Pitre. He remembered the meeting held on August 26, with MM. Arcand, Tremblay, Pitre, Lavigne and Daigle, in his office. They discussed the memorandum (U-2) and he suggested that he could not believe the grievor could function as a Performance Officer because he was called upon to make personal reports on controllers and he felt that he could be prejudiced against one of the individuals whose name appeared on the memo. He underlined that Mr. Ager's reports carried a lot of weight. Even at the time he was testifying, he did not know if the controllers were aware of their name being on the document and he still believed that Mr. Ager cannot work as a Performance Officer because of the possibility of prejudice from his part. The decision to transfer the grievor was taken by all concerned strictly on the basis of evaluation possibilities and they did not want to harm or prejudice Mr. Ager in any way.

In cross-examination, Mr. Lafrenière recognized that Mr. Ager was not only a competent officer, but he was extremely satisfactory. His reports were heavily relied on. He stated that on August 8, he was

aware of the Quebec air flight incident. Concerning the memorandum, he became aware of it on the morning of August 11. Discussions pertaining to possible disciplinary action against Mr. Ager were held much after August 19. He declared that Mr. Daigle received a memorandum from the Unit Chief in Quebec on August 25. He referred the matter of the memorandum and of the article in the Gazette to Mr. Daigle with no suggestion of action at the time. It was only on August 26 that these matters were fully discussed. After the interview he had on that date with other persons of management, they decided to take action against Mr. Ager. On the 25, there were no discussions relating to the general conditions in the Centre, strictly Mr. Ager's case was discussed. He volunteered that after August 20, there were no difficulties encountered in the Centre. He stated that incompetency was the sole ground for the transfer. On August 26, during the interview, he was made aware of Mr. Ager's current attitude towards scabs. Testing the aggrieved employee's objectivity could have been an alternative. He stated that he could have arranged that Mr. Ager did not evaluate controllers, but he was not willing to accept only half a Performance Officer, which would have then been the case. He had never experienced that kind of situation before. He declared that as a Performance Officer, the aggrieved employee had that possibility of appraisal. He assessed the personnel not the operations. His appraisals were used for merit increase.

Mr. Guy Lebel, the next witness, was a supervisor at the material time. He remembered having seen the memorandum (U-2). He was approached by Mr. Ager during working hours, shortly after the strike and was asked to sign. There was a lot of animosity. He said that he could not sign the document "within a ten-foot pole." He was involved with group discussion which he overheard. It pertained to animosity between groups of employees and, according to him, it jeopardized safety. He reported those facts to his superior. He found it a difficult period to work.

In cross-examination, Mr. Lebel could not recall having seen Mr. Poitras. He testified that there were a few signatures, six or more, already on the memorandum when he saw it. Mr. Ager asked him to sign it. There was a discussion going on and he saw the aggrieved employee with a piece of paper. He was less than two feet from Mr. Ager. According to the witness, Mr. Ager asked five or six people to sign the paper while he was within earshot. It is possible that the aggrieved employee discussed the emotional conditions. He cannot recall being part of discussions involving scabs. He could not remember the names of the controllers on duty at that time.

The third witness, Mr. Maurice Pitre, is positive that he attended the August 25 meeting. On the 26, he recalled meeting Mr. Ager and informing him of his transfer. He explained the decision to transfer as being based on the need for a Performance Officer to be totally impartial. It appeared almost impossible that Mr. Ager would show this kind of impartiality towards the people whose names appeared on the memorandum since he had signed it. It never entered his mind that the transfer would be for disciplinary reasons.

In cross-examination, Mr. Pitre stated that he could not recall having discussed the matter personally with Mr. Ager before the 26. The decision to take action against him was taken during the 24 hours preceeding the 26. He did not examine Mr. Ager's personal file. He recognized that he was an above-average employee and that never in the past were there any problems involving his impartiality. He would still take the same action of transferring Mr. Ager. Concerning the role of the supervisor, Mr. Pitre explained that supervisors are line management. They are responsible to ensure safe and efficient operations of the unit while they are on duty. They receive and transmit complaints and queries from the users. They represent the minister. They would have authority to remove a controller from the Board. In case of discipline, they would

call the R.C.M.P. They approve leave as long as they follow management directives. He said that the action taken against Mr. Ager was one of the contributing factors, although the smallest, in helping to relieve the malaise in the centre.

Reply of the aggrieved employee

Mr. Jean Poitras, an air traffic controller, in the Montreal terminal centre since 1973, testified that at the material time, he was acting-treasurer of CATCA. He did recognize the memorandum (U-2). On August 10, during the 4 o'clock shift, he was given the message that the vice-chairman of the CATCA Montreal Branch wanted him to write a memorandum concerning the scabs. He did agree to do so. At 8:00 p.m., he sat in the lounge and drafted it. He circulated the document himself and obtained all the signatures. On the 4 to 12 shift, he saw all the 16 controllers, Fred Ager among them and got eight out of 16 to sign it. He crossed one of the names. He remembered that he saw Mr. Ager and asked him to sign it. After some hesitation at first, Mr. Ager did sign it. He testified that those who signed did not refuse to work with the scabs, but that the situation was generating nervousity and animosity. There was no duplicate of the memorandum. He did not see what Mr. Lebel described.

In cross-examination, the witness stated that he was not always physically present when the memorandum was passed around. At midnight, he gave the document to Mr. René Lauzon and asked him to pass it at 7:00 a.m. He never saw the document in between. He stated that during the first four hours, he was always in possession of the memorandum and that Mr. Ager gave it back to him. He could not have asked Mr. Lebel to sign it.

Mr. Ager was recalled as a witness. He testified that on August 10, he was on the 4 to midnight shift and did not stay after midnight. He never saw the document again save at the meeting on the 11. He stated that there were a lot of discussions going on. It was the sole topic. He felt bound to observe as much as possible of what was going on and to inform management. He felt free to discuss.

Case for the aggrieved employee

Counsel for the aggrieved employee stated that from the evidence, it was obvious that in Mr. Ager's case, it was not the monetary penalty which was important, it was the emotional effect it had on him. She pleaded that under the Act, to be adjudicable, it must be shown that a transfer is a disciplinary action bearing a financial penalty.

Concerning the financial penalty, Ms. MacLaine argued that even though Mr. Ager receives the same annual rate, there are many differences between the two positions. The number of hours of work performed by operational and non-operational employees is different. They work fewer days. They have different fringe benefits, like early retirement plan and shift premium. She concluded that it was clear a financial penalty was incurred due to the transfer, even though the yearly salary is the same.

Counsel for the aggrieved employee contended that all the actions taken should be viewed globally and that they amount to one penalty on three different pieces of paper. Referring to the Quimet case (166-2-2471), she underlined the distinction between a voluntary action from the part of the employee which would entail a disciplinary measure and an involuntary action which would lead to an administrative action. According to MM. Pitre and Lafrenière, the transfer did not

provide for punishment. It was for the good of all employees. Counsel pleaded that the Board should examine whether this was the true motive of management to take the action they did. According to her, an objective look at the evidence demonstrated that management was involved in a disciplinary process. On the Status Report and the Merit Report, the transfer was referred to as a disciplinary measure. One of the intentions behind it was to cure the malaise and to calm down the employees. Counsel inferred from those facts that there was from the management part, a desire to set an example which implies disciplinary motives. She argued that there is no basis in the evidence permitting to assume that the aggrieved employee's objectivity was impaired and that the Board should look for another motivation. She added that when given an opportunity, Mr. Ager virtually disowned his signature on the memorandum (U-2). He made sure his opinion was known on the subject at the CATCA meeting. She maintained that it would have been possible for management to test the aggrieved employee's objectivity, but instead they decided to remove him. This attitude, she sustained, is inconsistent with worrying with the competency of an employee but is consistent with making an example. No second chance was given to Mr. Ager. Counsel concluded that the transfer was decided for disciplinary motives and that, the grievance should succeed.

Case for the employer

Counsel for the employer stressed that before August 8, 1976, the aggrieved employee was very much trusted and that the hard decision to remove him from his job was felt in the interest of the service after many discussions. He stressed that after the national strike, in the atmosphere which was then prevailing, it was necessary to restore efficient and smooth operations. Mr. Newman pleaded that Mr. Ager's functions of evaluation not only required impartiality but necessitated

that he appear to be impartial. The decision to transfer Mr. Ager was taken by management to insure smooth operations.

According to counsel, transfer is a management prerogative, and there is no limitation in the collective agreement; management has an untrammelled right to do so. He pleaded that it would be unwise for the Board to substitute its opinion to management, particularly when the safety of the public is at stake.

Mr. Newman maintained that the purpose of the transfer was not disciplinary but was a mean to re-establish efficiency. Whether management took a wrong decision is not for the Board to decide. Management had information on Mr. Ager's attitude and acted upon them. In the air traffic control field, management has a duty to be conservative since the safety and security of the public is involved. There was no intent to penalize.

Counsel for the employer put forward that there was no financial penalty incurred by the aggrieved employee since he received the same salary. All other benefits referred to by counsel for the aggrieved employee are not relevant. He submitted that the transfer was an administrative decision and that, as an employer's prerogative cannot be adjudicable.

Subsidiarily, should the Board find that the transfer is disciplinary, he asked the Board to conclude that it was appropriate in the circumstances.

Reasons for decision

The Board has been asked to decide whether the employer by transferring the grievor, sought to impose a disciplinary measure within the meaning of section 91 of the Act. In order to arrive at a conclusion on this matter, it is necessary to study the facts of the case in the light of the criteria established through earlier decisions.

The grievor's function as a Performance Development Officer deals primarily with the assessment of personnel. As mentioned before the Board, he performs his duties by means of written examination, by monitoring telephone and on the job conversations and by "over the shoulder evaluation". Even though there are two or three Performance Development Officers in the Montreal Control Centre each one is responsible for all controllers of the area. Even though the reports are confidential, and not used for promotions, they are consulted for merit increase. Needless to say, the performance of this function requires impartiality from the incumbent. The incident of the signature by Mr. Ager of the memorandum of August 11, was sufficient in the opinion of the Board to cast a doubt in the employer's mind on the capacity of the grievor to fulfill the duties of his function without bias or prejudice towards the controllers who have worked during the strike. As to the question of whether or not the aggrieved employee asked other employees to sign the memorandum, it does not, in my opinion, carry such a weight as to consider it a determining factor. Moreover, the article in the Montreal Gazette of August 11, 1977 was not to help changing the employer's perception on the matter. Can it then be said that Mr. Ager's transfer constituted a disciplinary measure or was it the result of an administrative action?

To answer this question, it is appropriate to study the jurisprudence pertaining to the jurisdiction of the Board in such cases. Some principles were set forth by the Adjudicator, Mr. Kenneth E. Norman, in Smith (166-2-3017). Although the latter case deals with the rejection of an employee on probation, the criteria governing the distinction to be made between the real and the apparent jurisdiction of the Board can be applied

mutatis mutandis in the present case, since as in a case involving rejection on probation, the Board's jurisdiction is based on the establishment of the existence of a cause of a disciplinary nature underlying the employer's decision. The difficulty of distinguishing between disciplinary and non-disciplinary measures is dealt with in Quimet (166-2-2471 and 2496) by Deputy Chairman Jolliffe, who writes as follows at page 10:

The meaning of the term "disciplinary action" presents - as it has in the past and will continue to do - numerous problems. Experience has shown that the distinction between administrative and disciplinary measures is often a narrow one, since each concept may easily overlap the other in certain aspects. In some cases, termination of employment for reasons that are clearly non-disciplinary may take the form of disciplinary action involving discharge. Thus, the evidence must be examined, above and beyond the formal aspect of things, finding those factor peculiar to each situation.

Although there may be reasons which may be termed as disciplinary for the transfer of the grievor, the latter has failed to prove to the Board's satisfaction that the reasons which persuaded the employer to transfer him were in fact of a disciplinary nature and were not designated to ensure the efficiency and safety of operations. The right of the employer to transfer an employee is discussed at length in the decision rendered in Crewe (166-2-294), at page 27:

Having regard to the Removal Expense Regulations the broad provisions of Section 7 in the Financial Administration Act, it is beyond doubt that statutory authority exists for the transfer of an employee from place to place. If such authority exists, I find no basis on which I could hold that it is subject to acceptance by the employee. Nothing whatever in the statute or the

regulations has been brought to my attention to suggest that the consent of the employee must be obtained before the authority to transfer can be exercised or implemented.

If the employer has the right to transfer an employee from one place to another, then it clearly has the authority to transfer him from one position to another for reasons involving the employee's capabilities to perform adequately the duties of his function.

This authority of the employer to transfer laterally an employee has been examined by M. Justice Cattnach in Ager and her Majesty the Queen, Federal Court of Canada, Trial Division, court file N^o T-3727-77, decision dated June 23, 1978, not yet reported. The facts of the case stand on all fours with the case at hand. It involves the transfer of the same employee which happened at the same time within the same set of circumstances and under the same collective agreement and laws. In this case, the plaintiff who is the grievor in the present case was seeking a declaration that he was entitled to be reinstated in his former position with full salary and benefits as well as a declaration that he was entitled to overtime rate for all hours worked in excess of 34 hours per week while he performed the duties of the position to which he had been transferred, since his normal work week was 34 hours in his former position and 37 hours in the position to which he was transferred. At p. 6 of the decision, judge Cattnach states the following:

In seeking the answer to this crucial question I accept as an incontrovertible premise that every federal department of government is created by a statute which defines the function of the department over which a Minister of the Crown shall preside and who "has the management and direction of the department".

Section 3 of the Department of Transport Act, R.S.C. 1970, Chapter T-15, provides:

"3. (1) There shall be a department of the Government of Canada called the Department of Transport over which the Minister of Transport appointed by commission under the Great Seal shall preside.

(2) The Minister has the management and direction of the Department and holds office during pleasure."

In the absence of any limitation thereon by statute regulation or contract, the words "management and direction" would confer all necessary authority for the efficient operation of the department under the Minister's control including the transfer of employees to positions within the department in which their abilities would result in more efficient management.

I also accept as a corollary premise that there is no vested right in any particular position in the Public Service but that the tenure is in the Public Service rather than in a position within that service.

It is now necessary to consider whether a financial loss was sustained by the aggrieved employee. It should be kept in mind that a financial loss suffered by an employee must be looked at in terms of benefits he was actually entitled to receive as a matter of right. In a case involving a transfer, this flows from the difference of the maximum rate of pay for the positions involved and its consequences, viewed in the light of the collective agreement. According to the Air Traffic Services Continuation Act, Appendix "A" to the agreement is replaced by schedule I of that statute. The evidence before the Board establishes that the aggrieved employee who held the position T-ACQ-3263 before October 1, 1977

was transferred to position T-ACQ-3388. It is also in evidence that both positions are in the same group and level, that is AI6. Clause 14.01 of the collective agreement stipulates that an employee is entitled to the pay specified in Appendix "A" for the classification of the position, that is the annual rate of pay. There is only one annual rate of pay for a position classified as AI-6 and there is no distinction between operating and non operating employees. It follows that the aggrieved employee suffered no financial penalty as far as his annual rate of pay is concerned.

In considering the questions of possible loss of overtime pay, the hourly rate of pay according to the collective agreement is the annual rate of pay divided by the number of hours comprised in the normal work week of an employee, that is, 34 hours for an operating employee (clause 13.02) and 37½ hours for a non-operating employee (clause 13.01). This means a difference in the rate of overtime applicable for the two categories of employees. However, overtime work does not belong to employees as a right. The employer has the sole authority to decide if and when overtime work is required and who will be assigned to perform it, provided the provisions of clause 15.03 are respected. In other words, overtime work shall be kept at a minimum and shall be assigned equitably among the employees. It follows that no employee can be assured in advance that he will be asked to perform overtime work and working overtime can even be considered a burden or a disadvantage for an employee. Consequently, a possible loss in overtime pay cannot be held as a determining factor in deciding the question of financial penalty.

These comments also apply for loss of shift premiums and lieu days benefits, since it is the employer's prerogative to assign shift to an employee and to decide when an employee will be required to work on a holiday.

This position has been expressed in the Ager decision of the Federal Court referred to earlier:

Accordingly neither overtime or shift work is an entitlement of the employee. The employee cannot demand overtime work or the undesirable shifts. That is a managerial decision. The employee has no contractual right to work overtime. His only contractual right is to receive compensation therefor if and when assigned to so work by the employer.

The fact that the Board cannot determine any contractual financial loss to which the aggrieved employee could be entitled is sufficient to deprive it of its jurisdiction, as Deputy Chairman Kates pointed out in the Moreland decision (166-2-3080), at p. 11.

That is to say, because no financial penalty ensued in that Mr Moreland continued to be paid the same salary once the transfer was effected, the grievor was without status to refer his grievance to adjudication and accordingly the Board was without jurisdiction to entertain it. On that basis alone the instant grievance must be dismissed.

For the above reasons, the reference to adjudication of the transfer of the grievor is dismissed.

For the Board,

M. Falardeau-Ramsay
Deputy Chairman

OTTAWA, September 5, 1978.

