

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

BETWEEN:

BERNARD LEVESQUE,

grievor,

AND:

TREASURY BOARD,
(Ministry of Transport)

employer.

DECISION

Before: M. Falardeau-Ramsay, Deputy Chairman.

For the grievor: J. Nelligan, C. MacLean, counsel.

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

ART 7

Heard at Montreal, April 26 and 27, 1978.

DISCIPLINE WRITTEN REPRIMAND
AND FORCED TRANSFER

DECISION

These grievances relate to incidents which occurred in August 1977 at the Montreal Area Control Centre, as a result of which Mr Lévesque received a written reprimand and two consecutive suspensions of fifteen days each and was transferred from his operational position of Shift Supervisor, AI-6 (T-ACQ-1319), to the non-operational position of Instructor at the regional school, AI-6 (T-ACQ-3229).

Although the two grievances are separate, a large part of the evidence submitted at the hearing applies to both cases and will be recorded as such with the required nuances. For the purposes of clarity, however, the two grievance statements and the corrective action requested should be reported word for word.

The grievance relating to the reprimand and the suspension - 166-2-3414

On August 30, 1977, Mr Lévesque was given three letters informing him of disciplinary measures taken against him. They read, in part, as follows:

(Trans)

DISCIPLINARY NOTICE: WRITTEN REPRIMAND

DATE AND PLACE OF THE INFRACTION: August 10 to 19, 1977 at Dorval

NATURE OF THE INFRACTION:

Having behaved so as to embarrass the Ministry during a conversation with an airline pilot and, in addition, having replied in a vulgar manner to a journalist who was inquiring about conditions relating to the movement of aircraft.
(Exhibit U-11)

DISCIPLINARY NOTICE RELATING TO A SUSPENSION

DATE AND PLACE OF THE INFRACTION: August 10 to
19, 1977 at
Dorval, Québec

NATURE OF THE INFRACTION:

This is in reference to an investigation of your actions during the above-mentioned period and the opportunity given to you to explain these actions at meetings held on August 26 and 29, 1977.

(1) Having known of and encouraged the actions of personnel under your authority by urging them no to return to work as required under Bill C-63.

(2) Having taken an action which might have caused additional delays in Montreal FIR by issuing NOTAM No 431.

(3) Having suspended the TRSA operations despite the fact that personnel exceeded the minimum required.

Consequently, you are suspended from your duties for a period of fifteen (15) working days. As you have already been suspended for an indeterminate period since last August 10, this suspension is effective from this date until September 13 inclusive. If you believe that this decision is unjustified, you shall have the opportunity to file a grievance in accordance with the provisions set out in your collective agreement.

(Exhibit U-12)

DATE AND PLACE OF THE INFRACTION: August 10 to 19,
1977 at Dorval,
Quebec

NATURE OF INFRACTION:

This is in reference to an investigation of your actions during the above-mentioned period and the opportunity given to you at meetings held on August 26 and 29, 1977 to explain the incompatibility of your behaviour and your position of supervisor at the Montreal Area Control Centre.

(1) Having shown a lack of respect for your superiors on several occasions in the presence of subordinates and the head of the Centre by vociferating against the government, the Ministry of Transport, management in general and even the regional director of your association.

(2) Having reacted negatively in the presence of your subordinates with respect to Bill C-63 and its provisions and thereby encouraging employees to act in a similar manner.

(3) Having refused to comply with established procedures during a change of shift.

Consequently, you shall be suspended from your duties from September 14 to October 6 inclusive, that is, for a period of fifteen (15) working days. If you believe that this decision is unjustified, you shall have the opportunity to file a grievance in accordance with the provisions set out in your collective agreement. (Exhibit U-13)

On September 6, 1977, the employee submitted a grievance against these disciplinary measures, denied the merits and the truth of the reasons advanced by the employer and requested the following corrective action:

1.

2. That both periods of suspension without pay (August 20, 1977 to September 13, 1977 and September 14, 1977 to October 6, 1977) be immediately revoked and that the grievor be reinstated with no loss of benefits, and further that he be reimbursed for all financial penalties suffered as a result of these disciplinary actions.
3. That the letter of reprimand for allegedly bringing disrepute on the Department of Transport be immediately removed from the grievor's files and destroyed.

The grievance was dismissed at the three levels of the grievance procedure and referred to adjudication on January 3, 1978.

The grievance against the transfer - 166-2-3413

On August 30, 1977, Mr Lévesque was given a memorandum signed by the Regional Manager of Air Traffic Services, which reads as follows:

(Trans)

Transfer to the Regional Office-ATS

This is in reference to the meetings of August 26 and 29, 1977 in the office of the head of the Air Traffic Control Centre between yourself, your representatives and Messrs C Lafrenière, A Lavigne and R Tremblay.

It has been recommended and decided that starting on October 1, 1977, you shall be reassigned to the Regional Office of Air Traffic Services and shall be transferred from the position T-ACQ-1319 (AI-6), Shift Supervisor, to the position T-ACQ-3229 (AI-6), Instructor: regional school.

This decision was made after careful consideration and serious appraisal of your potential for effectiveness and ability to adequately fulfil the duties of the position that you currently hold. This constitutes the advance notice required under clause 13.08 of the collective agreement applicable to your occupational group. (Exhibit U-14)

On September 9, the employee submitted a grievance alleging that the transfer was a disciplinary measure resulting in a financial penalty, and sought the following corrective action:

1.
2.
3. That the proposed transfer be rescinded and the grievor continue to be allowed to work in his position as an AI-6 Supervisor in Montreal ACC, namely, TACQ 1319.
4. That should the grievor suffer any financial penalty, full restitution of salary or benefits lost be made to him.

The grievance was dismissed at the three levels of the grievance procedure and referred to adjudication on January 3, 1978.

From the outset of the hearing, Mr Newman presented the following arguments. As the letter of reprimand was no subject to adjudication, no evidence would be submitted in this regard; oral and documentary evidence would be limited to the incidents which gave rise to the suspension, Secondly, counsel for the employer announced his intention to raise an objection concerning the Board's jurisdiction to hear the grievance relating to the transfer on the grounds that it did not fall within the scope of section 91(1) (b), in that it was not a disciplinary measure resulting in... a financial penalty.

Evidence of the employer

The first witness to be heard was Pierre Marcotte. He related that on August 10th, 1977, he was employed as an acting data systems supervisor at the Dorval Air Traffic Control Centre. He had been employed in this capacity for about one year and he was a désigné employee. A strike had been going on for a few days. He was working on the midnight shift, that is from 12:01 a.m. to 8:00 a.m. The situation was normal until about 3:00 a.m. when he learned that Bill C-63 had just been passed to put an end to the strike. He was advised by another employee by the name of Patenaude. He immediately called his supervisor Murray Daigle and he was advised to start calling employees for the 7:00 a.m. and 8:00 a.m. shifts. He was able to reach all the air controllers. He saw Ben Levesque shortly before 7:00 a.m. Levesque immediately said that he was not sure that the operation could start at 9:00 a.m. Levesque felt that there was no rush and he called Murray Daigle. Levesque did not seem to want to get going and he was upset. Marcotte thought that he should speak to his chief unit René Charette about Levesque's attitude. He left the operation room shortly and when he returned, Levesque advised him that he was going for a long breakfast. He however returned fifteen minutes later. Levesque also told him that he would cancel his overtime. There was then in the operation room resentment and a general slowdown. On August 17th, Levesque came in for his shift from 7:00 a.m. to 3:00 p.m. Marcotte tried to give him a picture of the events which had taken place and were taking place but Levesque would not listen. Exhibit E-1 which is an extract from the Manual Operation was then filed by consent.

When cross-questioned, Marcotte admitted that when he spoke to Levesque in the early morning of August 10, 1977, the latter immediately agreed to come to work as a supervisor and he was on time. Marcotte repeated that Levesque expressed doubts that the operation could work. Marcotte admitted that the controllers had a right to refuse overtime. He also admitted that it was not unusual for a supervisor not to talk to another supervisor. Marcotte added once more that Levesque had said at one time that he was going for a long breakfast and that there would be long delays.

René Charette was the second witness. On August 10th, 1977, he was the en route supervisor at the Montreal area control centre. He has been employed by Transport since May 15, 1957. He was responsible for all operational aspects including discipline and performance and he was reporting to Claude Lafrénière. He came to work in the morning at 7:25 a.m. There are no partitions in the control centre. He said that it struck him that Levesque was furious and agitated. He was also grumbling. Charrette said good morning and Levesque did not reply. Later on Levesque said that there would be delays during the day. Levesque did not give reasons for his attitude. Levesque said loudly that there was only one way to control traffic and he suddenly declared: "I am going to have breakfast and it is going to be a long breakfast." Levesque was showing frustration and he appeared mad. During the morning of the 10th, there was in the centre, sadness, but generally speaking, no lack of discipline. Later on one night, Levesque said that he was cancelling his overtime for the next day and he gave no reasons for this. As a rule Levesque was working long hours and he was always accepting to do overtime. It seems as if another employee by the name of Leblanc also refused to work overtime.

When cross-questioned, Charette said that when he arrived at work he was immediately advised by Pierre Marcotte that Levesque was not in a good humour. Charrette was a designated employee. Levesque was in very bad humour and he said very clearly and loudly that there would be delays. Charette stated that he was concerned. Levesque was the only one to say that there would be delays. Charrette felt that Levesque's whole attitude was not professional. He stated that a supervisor had to be an image at all times. There were in fact no delays on August 10th but there were some delays in the next few days. Charette denied that Levesque meant to make a prophecy when he spoke about delays which would occur. Charrette did not speak to Levesque about his attitude. Levesque was rude and Charrette was scared. Charrette stated that it was bad for Levesque to cancel his overtime at that time but he admitted that he had the right to do so.

Réal Pelletier was the next witness. He has been employed as an electronic technician by Transport Canada since August 1977. He is a technician since 1971 and a radar technician since 1976. He was responsible for the maintenance of the equipment in good order. He was advised on August 16, 1977, by maintenance officer liaison Proulx of a defect in the radar equipment. He filed as Exhibit E-2 a copy of his log book. When checking the radars he found that there were several reflections on both systems. He had previously seen similar reflections and he also saw such reflections after August 16. The false returns were due to several reasons including the bad weather. He effected the necessary repairs within about an hour. He filed Exhibit E-3.

The fourth witness was Georges Nadon. He is a shift supervisor. He has been employed in the air traffic control centre since 1968. At the time of the return to work, he was on holidays and his first

working day was on August 18th. Upon his arrival at the centre, he was briefed by Pierre Marcotte and advised that the situation was tense and to remain cool. He came in to relieve Ben Levesque. He was told of the trouble in the radar system and that the ASR5 was wrong. He filed as Exhibit E-4, copy of a document known as a NOTAM which is a notice which was sent out to all airmen. He stated that the radar has been functioning badly. He added that the ASR5 had never been a good system and that there were increased reflections due to surrounding buildings and that this could lead to misleading information. The air controllers however had been used to such reflections. He stated that the AASR1 could have been used as a backup for the other system which was defective. He had to go to air radio to get a copy of the NOTAM. Usually there should have been a copy of this notice on his desk. The NOTAM had been in effect at that time for 48 hours. Between four and seven supervisors were on duty during that period. Temperature in his opinion was not a problem. Other employees in his opinion had authority to withdraw the NOTAM. Before issuing a NOTAM, it was a good practice to consult with the MLO. He could not have been aware of the NOTAM if the document was not on his desk.

The fifth and last witness was Claude Lafrenière, who on August 10, 1977, was the unit chief of the Montreal area control centre. He had been unit chief for 15 months and previously was with air control in various capacities for 23 years. He was responsible for the overall operation of control centre including personnel, money spending, etc. At about 10:00 a.m. on August 10th, he was in the operation room and near the supervisor's desk when he saw Levesque answering a call and suddenly getting up, seemingly very angry. He heard Levesque saying loudly: "I don't want to speak to that bastard." On August 11th, he received a call from Bill Irving of Air Canada reporting that there were excessive delays and that his captains were reporting dangerous

situations contrary to air safety. For example, an aircraft would be cleared and then a moment later would be assigned to another airway. He immediately sent for supervisors Labelle and Levesque and he gave them the ultimatum to clean up the operation. Levesque was supervising the terminal control unit. Lafrenière sent Pierre Marcotte and others to give a hand. At 11:00 a.m., Levesque came to his office and he threw a memo on his desk signed by Claude Bælval to the effect that he was under a stress and unable to work. Three employees were then released but on the following day declared fit after a medical examination. There was a diminution of floor control in the afternoon and at night. On August 12th in the evening, there was a sabotage of the telephone line and this was the first day that the controllers would refuse to work overtime. There was then a reduction in traffic. Lafrenière drew a sketch showing the installation of the two radar systems that is, the ASR5 or airport surveyance radar -5, and AASR1 or airport and aviation surveyance radar -1. Each radar system has two channels and each radar system is equipped with an SSR which is an electronic aid. Each channel of each system is a backup for the other. Lafrenière also drew a sketch to explain what is a false return. He stated that on the 16th, it was reported that channels A and B of the SSR pf ASR5 were giving false returns. He indicated that if a pilot is asked to identify himself and to deviate slightly from his route, it will be easy then to ascertain about a false return. He added that if one SSR is not working the other SSR can be used with possibly less false returns. There is also another possibility which is to use the primary system that is, the ASR5 or AASR1. In fact, according to witness Lafrenière, eight systems could be used at all times. When there are delays, an aircraft has to carry more fuel and this is the effect of a NOTAM. The consequence of a NOTAM was definitely to slow the traffic. In his opinion there was never a NOTAM issued in a case

such as this one. In the evening of August 17th, he looked at the controllers' schedule and he found out that there were seven controllers scheduled to be on duty that night. He filed Exhibit E-5 as being a copy of the schedule. He stated that during all summer, six controllers only were on duty because in fact, there are only six positions. He was in the operation room and he heard Levesque saying on the phone that Mirable and Dorval were closed. Lafrenière asked Levesque why Dorval was closed, to which Levesque replied that he had two controllers gone for supper. He noticed later on that two other controllers had gone to supper. Levesque explained that he had to send people to eat and he gave no other reasons. The visibility at the time was 20 miles and Exhibit E-6, a weather report, was then filed.

On August 18th, during the day shift, Lafrenière went to the operation room. He then saw Levesque getting up and with his arms in the air talking against Otto Lang, the Government, management, etc. All the people around heard and watched the show. Levesque had a negative attitude. On the 19th at 8:45 p.m., he received a call from the Boston area centre and he was explained that at 8:00 p.m., an Eastern flight had been held for 11 minutes due to what was reported as being a defective radar system. He was asked to clean it up. He immediately called Daigle and he was asked to report with Charrette in Ray Tremblay's office. He then made the decision to suspend Levesque in the afternoon indefinitely. He called Levesque and gave him the document confirming the suspension to which Levesque said: "Why me and not the others?"

When cross-questioned, Lafrenière admitted with regard to Air Canada delays that he had not listened to the tapes which had simply been simply been sent to R.C.M.P. He stated that he had advised Levesque about the complaints and to stop using flow control or that

he may have to close the operation altogether. He does not know if Levesque passed the instructions on to others. He stated that Levesque had no respect for his immediate supervisor. The sabotage to which he previously referred was not established to be related with Levesque. According to him he was advised on August 16th that Labelle was against the NOTAM advice. He referred to a document filed on the 17th in Lavigne's office as Exhibit U-7 and he stated that he had refused to sign it. He argued that the problem with the radar was not a malfunction but simply a result of a false return. He added that both radar systems are equally accurate. He explained that there were abnormal delays for about two days and that the air controllers did not know about the NOTAM advice. No one knew about the NOTAM except the supervisors. He admitted that there was a problem also in Toronto which affected Montreal in part. He talked about Toronto being responsible for about 50% of the problems in Montreal. He advised that Levesque was never taped and that he should not have restricted the traffic. He was not looking to shaking everyone by punishing Levesque. He did not feel that there was a conspiracy. He never talked to Dumas. The notice to Levesque was filed with a translation as Exhibit U-8. Regarding paragraph 1 of the notice, he corrected himself by saying that in fact he thought that there was a conspiracy and that all facts were pointing towards Ben Levesque. In his opinion Levesque was a chief conspirator. The decision to reprimand, suspend and eventually transfer Levesque was not his. He stated in connection with the incident of August 18th, that Levesque was disrespectful in the way that he was acting and that he was shouting. He added that Levesque said at one time: "This is not the end, they will have to do something else." He never reprimanded Levesque before the above incident, and he admitted that Levesque was fairly high in the service and competent in his field. He did not see the necessity to talk to him about his conduct. The atmosphere was too tense to talk.

Discipline has to be correctional and not punitive. It was the first time that the management was suspending an employee pending an investigation. He was afraid of a walk-out if he would have talked to Levesque. He never warned Levesque himself that he would be disciplined.

EVIDENCE OF THE AGGRIEVED EMPLOYEE

Before starting with the grievor's evidence, his counsel filed as Exhibit U-10, copy of a memorandum of January 5, 1978, and report concerning the operation status of the Quebec region.

The first witness was Bernard Levesque. He is the grievor. He has been employed by Transport Canada since September 2, 1958. At one time he was an air controller, later on an IFR controller and finally a supervisor at the Montreal centre. He is a supervisor since 1972. Since August 19, 1977, he has been a career and development specialist and acting chief for training. He is still acting chief for training and he has been doing this work since February 1978. He claims that he is now one grade lower, being grade AI 5 as compared with AI4 before the transfer. He stated that before the strike began, he was on duty and he carried the function of supervisor. He had been instrumental in shutting down the operation due to the strike with other supervisors and he advised all companies of the shut-down, sent a NOTAM in this regard, etc. He received no complaints whatsoever in connection with the shutting down of the operation. He heard about the legislation putting an end to the strike by a telephone call in the morning and he said that he would be on duty at 7 a.m. The evening before receiving the telephone call, he had been out dining and wining and he had gone to bed at 1 a.m. He states that he was at work 20 minutes before 7 a.m. He declared that the management seemed

to be in a hurry to open the operation. The staff came in slowly and there were various discussions in connection with the back to work order. Everybody seemed upset and left continuously for a few minutes. He was kept busy answering telephone calls and he wanted to let the staff cool down. He stated that everything should go on around 9:30 a.m. He felt that the opening so early would create possible safety dangers since all staff was not there and that the personnel was upset. He declared that when he met René Charrette and that the latter said good morning, he replied first of all in a very low voice and then said "bonjour" louder. He admitted having said that he was going for a long breakfast but he stated that he changed his mind after having had a coffee and that he was back in fifteen minutes. He denies that he spoke rudely to the director. He admits that he may have said about Patenaude: "I will not talk to the bastard." He denies that he spoke with disrespect to anyone. He claims that he has a strong voice by nature and that he speaks loud. He remembers having met in a private office Lafrenière, Lavigne, Marcotte and Labelle. He does not believe that Charrette was there. According to him Lafrenière said that the management had passed an order that everything should be back in order by 12:00 and that otherwise everybody would be fired. He stated that he argued against this order and a threat of this nature. He claimed that he spoke with Marcotte and Labelle about the order for the air controllers. Shortly after, Claude Beival sent a memo saying that he could not perform his duties under the circumstances. He saw other personnel also writing memos. He went to Lafrenière's office and threw the memo on his desk saying: "Here is one and there will be more". Other memos came with other reasons. He stated that he did not have to work on the 12th and that he would have worked overtime on the 13th but that he phoned Charrette well in advance to cancel his overtime. He stated that he was tired due to pressure and what had taken place and that he went up north for four days. He admitted that in the past, he had used to

work 27 out of 30 days per month. When he came back to work on the 16th, there were problems with the ASR5 terminal radar, the TRSA (terminal radar service area) and the AASR1. There were extreme false returns. He felt that rather than taking action exclusively, that it would be fair for Proulx to come with him together with Desjardins and Labelle to check the radar further. It was concluded then that there were excessive false returns and he decided upon the NOTAM to be issued. He was the one who wrote the NOTAM but he showed it to the other supervisors and discussed if there should be a time mentioned. Proulx was going to the telecommunications room and he took the NOTAM along with him. Proulx said that he was in agreement. The NOTAM came back to the supervisor's desk and it was placed on a special board with a clip to hold it. At night, the NOTAM was still there and nobody discussed it with him. Concerning Exhibit U-7, was drafted by Labelle at his request as there were serious problems with the reflections. Concerning Exhibit E-6, there was a thunder storm and bad visibility at 3:00 p.m., but it was a lot better an hour later. It did not improve before 4:00 p.m. At 7:00 a.m., it was very bad. He stated that there was a saturation of traffic and that he requested all personnel to go to their station. According to him, Lavigne said at one time that the aircrafts at Dorval were just like "bees". He explained the situation of the radar systems and he said that in the past several reports had been made concerning near-misses between VFR (visual flight rules) and commercial airlines. He advised that the TRSA is hardly used at night and had been closed on the 12th by another supervisor and that a NOTAM was then issued. He admitted that the next day he discussed the government position but he said that such discussion was normal on account of the fact that he had already discussed the matter previously with the air controllers. He does not recall his exact words. He admitted that he did talk against management. He claimed that when he talked to René Charrette to ask him to work with him, Charrette replied:

"I am not talking to you now as we are no longer friends. I will talk to you only if the legal counsel is present." Levesque stated that he did not understand Charrette's attitude and that he went to Lafrenière to ask for an explanation. At 2:30 p.m. in the afternoon, he was handed a notice of "congé sans solde" (Exhibit E-8). He stated that he was hot and cold at the same time. He refused to sign the document and asked for an explanation but nobody would say a word. As a result he said that he collapsed and that he had to be taken to the General Hospital where he was examined by Doctor Poitras and prescribed Valium 10, every four hours. He stated that he was suffering from hypertension and panic. The medication went on for two weeks. His mother was also taken to hospital and his wife became sick. He stated that he has no knowledge of conspiracy and that he still did not understand why the management had acted like that. He filed as Exhibit U-11 a copy of the reprimand, Exhibit U-12, a copy of the first suspension, Exhibit U-13, a copy of the second suspension and Exhibit U-14, a copy of the transfer. All these documents were served to him on August 30, 1977. He filed a memorandum concerning the alleged financial loss caused by the suspensions and the transfer. He read and commented on the memorandum.

When cross-questioned. Levesque stated that he was not a designated employee and that he had participated in the strike. He admitted that he was not impressed about coming back to work and that he did not want to discuss with Fournier the return to work. He admitted that at one time he said that "the guys are working up some kind of system and they will kind of get back at them". He stated that he always tried to get involved and that he knew that somebody else would hear him when he said: "I am going to go for a long breakfast". He claimed that he previously issued a NOTAM advice. He admitted that it could be that he said: "why me and not the others?" He admitted

that when he was transferred his salary remained the same.

The second witness was Robert Desjardins. He is a shift supervisor since May 1977. He had previously acted as air traffic controller since 1966. He was on duty on August 16th from 3:00 p.m. to 11:00 p.m. He was working on the route side, more particularly on the west side, whereas Labelle was on the east side and Levesque on the terminal. He was asked to check the terminal radar. He found more reflections than usual. He stated that had been a problem with the radar before. He could not see the difference between real and false target. He stated that it was fair to warn the users of delays or at least possible delays through a NOTAM. He checked the NOTAM with Labelle. There was no comment from the MLO. One objection was put to the effect that there would be a time and it was made by him but withdrawn after additional discussion. The next day he worked from 8:00 a.m. to midnight. Other supervisors briefed him concerning the NOTAM. No action was taken to lift the NOTAM. There were false returns probably due to the bad weather. On terminal two controllers were criticizing the management and Levesque said: "If you don't cooperate with us we don't need you here".

When cross-questioned, Desjardins stated that he knew Levesque since 1970 and that he was not a designated employee. He came back from holidays on August 14th and back to work on the following day. The purpose of the NOTAM was to advise on possible delays. It took between fifteen minutes and one hour to take the decision. The Toronto airport was applying full control. He does not believe that the NOTAM was a drastic measure.

The third witness was Daniel Proulx. He is a radar supervisor and acting MLO since May 1976. He was a radar technician for 12 years.

He is not a member of CATCA. He stated that on August 16th at 3:00 p.m., he was asked as MLO to check the radar and that he saw more reflections than usual. He changed a panel and there were still some reflections on the other. He admitted that electronically there was nothing wrong. He stated that nobody was against sending a NOTAM. The next day, the radar still had reflections. It was wet and raining and he admitted that there are reflections if it is wet and raining. He did not recall that a NOTAM would have been sent before for similar reflections. He stated that he could have said no to the NOTAM advice.

When cross-questioned, he stated again that there were more reflections than usual but that technically speaking, the radar was perfect. He admitted again that when it is wet and raining, there are more reflections.

Jean Poitras was the fourth and last witness. He has been an air traffic controller since 1970. He was at the airport in Claude Lafrenière's office on August 17th. The telephone rang and Lafrenière asked Lavigne to go to the operation centre. Lavigne came back shortly afterwards stating that the sky was "full of bees". He stated that at one time, Tremblay said to him: "Did the grievances against Levesque and Ager have any influence of calming or cooling the staff?"

REBUTTAL

Maurice Pitre testified. He has been the regional manager - air traffic services - since March 1974. He is superior to Daigle and Lafrenière. He reports directly to the regional administrator for the Canadian Air Transport Administration, André O. Dumas. He recalled that on or about August 10th he realized that there was a malaise or something capable of creating a danger. He talked of disruptive

elements and what was going on in Toronto. He took part in the decision of the administrative enquiry. He was aware that Levesque had been on indefinite suspension. The enquiry went on for a number of days. He read the report carefully. His foremost thought was air safety and he wanted to remove safety hazards. He concluded after reading the report that Levesque had not behaved in conformity with the existing rules. The evidence of fifteen or twenty witnesses was such that there was only one way that safety would not be placed in jeopardy and that Levesque was not in par. There was no intent on his part to single out anyone in particular and there no question of disciplinary action. He never had in mind to cause Levesque to suffer a financial loss. Levesque had showed interest in training and he was not to be demoted. He took steps with the superintendent of training with a view to re-establish Levesque on level AI 5. The transfer was meant to be a lateral transfer. He wrote a letter saying that his level would be retained. He did not intend the transfer to have punitive consequences. What he wanted to do was to remove the malaise and the only evidence that came forth lead to more specifically one individual, this individual being Levesque. He repeated that Levesque had in that environment not fulfilled the duties of supervisor to the expectation of management.

When cross-questioned, he stated that the facts revealed during the investigation pointed out towards one person only. He added that if Levesque would not have been transferred, the safety of the travelling public could have been at stake. The intent was not to give an example. He concluded by saying that if he would find facts found by the Board to be incorrect, he would be prepared to reverse his decision.

Employee's arguments regarding the transfer

Counsel for the grievor submitted that the grievance was subject to adjudication because Mr Lévesque's transfer was, in fact, a disciplinary measure resulting in a financial penalty.

With respect to the financial penalty, Mr Nelligan maintained that the testimony given by M Pitre and Mr Lévesque specified the financial implications of the transfer. Mr Lévesque must work more hours per week in his new position. Opportunities to work overtime occur less frequently and consequently, he receives a lower rate. He has less leave and his retirement benefits are reduced.

With respect to the disciplinary aspect of Mr Lévesque's transfer, counsel for the employee relies on Jacmain (decision rendered by the Supreme Court, September 30, 1977, unreported) in which it is recognized that the Board may conduct an investigation in order to determine the nature of the measure taken against the employee. In other words, the Board may consider whether this measure is of an administrative or disciplinary nature.

Mr Nelligan maintains that the distinction made between a disciplinary measure and an administrative measure in Robertson (166-2-454) and Quimet (166-2-2471-2494) should apply to the present case. In his

opinion, it is necessary to consider that which an employee does voluntarily with the intention of injuring the employer and the involuntary action which is beyond the employee's control or ability. Counsel maintains that any disciplinary measure is, in part, an administrative measure.

Counsel argues that at this time and for a short period thereafter, the atmosphere was emotionally charged and that an element of panic or fear could have prompted management to make a decision that it believed would remedy the situation. When Mr Pitre decided to transfer Mr Lévesque, the latter was serving a suspension of indefinite duration. No doubt, the manner in which the facts were presented to the regional director of Aviation Safety seemed to point toward Mr Lévesque. It was the conclusions reached during the investigation that led management to make the two decisions, namely, to suspend Mr Lévesque and to transfer him.

Counsel for the grievor adds that great care was taken to camouflage the measure as a transfer, which is not subject to review. He claims that this transfer cannot be considered an administrative action since it occurred in the same circumstances and at the same time as the suspension. Mr Nelligan maintains that the employer had to look for a position in which to employ the grievor, whereas normally, an employee is transferred because his services are required in a specific position. In making the decision to transfer Mr Lévesque, the employer did not take into consideration the grievor's overall performance, but instead based its arguments on a period of nine days, which could, in fact, be reduced to five. The tension existing during this period had negative effects; Mr Lévesque showed signs of physical and nervous tension.

Counsel adds that the grievor is a good, loyal employee and that he was shocked that his employer considered him otherwise. Although Mr Lévesque did not necessarily act as he should have, he was not lacking in good faith. The evidence is too weak, according to Mr Nelligan, to refuse the employee the right to ve in the operational category. The employer was seeking to demonstrate that it was in control of the situation. It made an example of the grievor by imposing a suspension and a transfer on him. Mr Nelligan concludes that the evidence shows that the measure taken was a disciplinary one, subject to adjudication under section 91.

Employer's arguments regarding the transfer

Counsel for the employer maintains that the argument advanced by counsel for the grievor is tantamount to denying the employer its right to manage its employees. Relying on the decision rendered in Crewe (166-2-294), he maintains that the employer is entitled to transfer an employee. He adds that in the present case, article 3 of the collective agreement acknowledges this right. Mr Newman points out that Mr Lévesque was transferred laterally from one AI-6 position to another. It is true that there was a reclassification, but this does not change the fact that these two positions have the same salary rate and that this transfer is in no way a demotion.

In order for the Board to have jurisdiction to hear the case submitted for adjudication, this case must, under section 91(b), involve disciplinary action resulting in a financial penalty. According to counsel, the wording of the notice of transfer indicates that the employer took public safety and the employee's difficulty in managing personnel into consideration. Referring to the criterion used by Chief Adjudicator Jolliffe in Bolton (166-2-139), counsel argues that

the transfer did not have the effect of punishing Mr Lévesque since the reprimand and the suspension given to him had precisely this effect. The grievor's presence was detrimental to smooth operations. Citing Chief Adjudicator Jolliffe in Sproule (166-2-250), counsel adds (page 14) that:

The real question to be decided is whether the weight of evidence proves the action taken to have been predominantly and effectively penal rather than a negative judgment on performance resulting in a decision to withhold an increase not merited by performance.

In accordance with this principle and by analogy, counsel maintains that it is up to the grievor to prove that his transfer is "predominantly and effectively penal" and that in the present case, Mr Lévesque has not succeeded in doing so. Mr Newman points out that the purpose of the employer's action was to restore order to the operations. In addition, according to counsel, the employer was of the opinion that the grievor could not fulfil his duties effectively.

With respect to the grievor's argument that he incurred a financial loss, counsel for the employer replies that although Mr Lévesque may believe this, the fact remains that he is in exactly the same situation and classification as before. Any loss of overtime is a matter of speculation. In addition, the difference in the number of hours worked per week can be explained by the nature of the work performed. The employees in the operational sector work fewer hours not in order to increase their remuneration but because of the greater tension to which they are subject. Nothing in the evidence indicates that the purpose of the transfer was to deprive the employee of financial benefits. Counsel adds that overtime is not a right and that overtime is not incorporated in the employees' regular working hours.

Counsel for the employer concludes that the transfer was of a purely administrative nature and that consequently, the Board does not have jurisdiction to hear the case referred to it for adjudication.

Employee's reply regarding the transfer

In reply, counsel for the grievor, relying on Moreland (166-2-3080), points out that there are several ways of imposing disciplinary measures. Mr Nelligan maintains that the Sproule case should be distinguished from the present case, since in the former, the employer acted on the basis of the employee's overall performance. He adds that in Mr Lévesque's case, the employer acted on the basis of a number of specific facts relating to a limited period of time.

Counsel for the grievor stresses that, in his opinion, a financial penalty was inherent in the transfer. Although overtime does not constitute a right as such, the fact remains that the employees' work schedules regularly included overtime. The grievor has also worked overtime in the position that he has held since his transfer, but without being paid accordingly.

Counsel reiterates that, in his opinion, this is an obvious case of financial penalty and, consequently, a case of penalization. From this, he concludes that the Board has jurisdiction to rule on this matter.

Employer's arguments regarding the suspension

Counsel for the employer began his arguments by recalling the nature of the infraction and describing in detail the acts that the grievor is alleged to have committed. There is no purpose in repeating them here as the disciplinary notices are quoted in full at the beginning of the decision.

Mr Newman then reviews the various events which occurred from August 10 to 19, 1977 and which were recorded in the evidence submitted. He first mentions the employee's confrontation with Mr Charrette, Mr Lévesque's use of terms which he describes as inappropriate and the employee's tone of voice. According to Mr Newman, the employee's behaviour was irresponsible. He adds that the tenor of the telephone conversation between Mr Lévesque and Mr Fournier, the grievor's comments and the fact that he was upset by the situation suggest that he intended to "throw a spanner in the works". This attitude alerted the employer because, according to counsel, it had the effect of creating dissension among the other employees.

Counsel submits that it is against this background that the subsequent events must be examined. Thus, even if an employee is entitled to refuse to work overtime, this refusal is indicative of a given type of behaviour. Mr Newman contends that the employee knew for a fact that his conduct would have the effect of slowing down service, decreasing the public's confidence and "keeping the pot boiling". With respect to the poor functioning of the radar system, counsel maintains that the explanations given by the employer are only a rationalization of the facts. Referring to the Hansard incident, he maintains that the grievor showed a lack of respect toward the head of his unit and thus encouraged other employees not to hold Mr Lafrenière in high esteem. According to counsel, this constitutes insubordination and conduct of a nature to cause the withholding of services. This attitude is inconsistent with the duties pertaining to the position of supervisor which the employee held. Counsel stresses the aspect of public safety and adds that the unrest which followed the adoption of the legislation cannot in any case be considered an attenuating circumstance. In this regard, he draws the attention of the Board to Liske (166-2-2898).

Mr Newman argues that while Mr Lévesque may not in this instance have endangered the safety of the public per se, this is nevertheless what he was deliberately attempting to do. In this connection, he cites the Plattsburgh incident. Even though the employee cannot be held responsible for all the events which occurred between August 10 and 19, 1977, he must bear a large part of the responsibility for them since his role as supervisor is to set an example.

According to the argument of counsel for the employer, the employee's misconduct was sufficient to justify his discharge and consequently, the penalty imposed was far from excessive. In imposing the penalty, the employer took into consideration the fact that this was Mr Lévesque's first offence, that his record was unblemished and that he had had a promotion. Mr Newman contends that there is nothing in the evidence which would support the conclusion that Mr Lévesque was used as a scapegoat. On the contrary, he claims that the grievor could be clearly identified as the principal actor in the drama. He is therefore requesting the Board to dismiss the grievor's reference to adjudication, on the basis of what he alleges to be the deliberate nature of acts committed.

Argument of the grievor with respect to the suspension.

Counsel for the grievor draws the Board's attention to the fact that the employee occupies a middle management position and argues that his position had become untenable during this period of tension. He contends that if the grievor made mistakes, they were attributable to the difficulty of his position. He faced the situation squarely, trying to get along with both sides.

Mr Nelligan then turns his attention to Mr Lévesque's behaviour during his testimony. Prior to August 10, 1977, the employee's

authority was accepted. His ability to supervise personnel was acknowledged. On this date, not only he personally, but also the employees under his supervision suffered a setback.

Counsel for the grievor then reviews the conclusions of the administrative inquiry which appear in Exhibit U-9. Counsel argues, contrary to the conclusion stated in paragraph 1.1 of the report, that the employee, far from showing a reluctance to accept the provisions of Bill C-63, returned to work early in the morning, of his own accord. According to Mr Nelligan, Mr Lévesque's refusal to work overtime cannot be held against him. On the contrary, he contends that it was wise for him, in the circumstances, to take a few days' rest. With regard to the dissatisfaction with the way in which the matter was handled, counsel argues that this was a natural reaction which was to be expected and that acceptance and dissatisfaction are two concepts which must not be confused.

With respect to the comments which are reproduced in subparagraph 1.1(b) of Exhibit U-9, counsel explains that during his conversation with Mr Fournier, the grievor was constantly on the telephone. It was normal for the employees, who were wondering what was happening, to consult him since he was on the premises. Counsel argues that there is nothing in these comments which can be interpreted as endangering the safety of the public. Moreover, according to counsel, the grievor warned his employer of the possibility of delays on that particular day. Mr Nelligan contends that these remarks could have been made by anyone and that the conversation was an inoffensive one, reflecting a personal opinion. As for the incident involving Mr Charrette, counsel claims that the latter surely must have been upset to have taken offence at Mr Lévesque's rather terse "Hello".

With regard to the issuance of the NOTAM (subparagraph (b) of Exhibit U-9), counsel for the grievor contends that this action cannot be viewed as evidence of a plot, since two of the witnesses and the technician were consulted and all agreed with the decision to issue the notice. According to Mr Nelligan, however, the Board does not have to determine whether from a technical standpoint this action was advised or ill-advised. Even if it was ill-advised, there is nothing in the evidence to indicate that it was intended to delay air traffic.

As for the allegation contained in subparagraph (c) of Exhibit U-9, counsel contends that the TRSA service was not discontinued, but simply reduced for a short period of time. He further contends that the entire afternoon had been difficult. Moreover, the testimony given by Mr Poitras to the effect that "the sky was full of planes" refutes the argument that Mr Lévesque wanted to slow down traffic. Counsel argues that on the contrary, the grievor, when he realized that he was short-staffed, sent word requesting that a meeting be ended, and that when it became apparent to him that no one had yet returned, he personally went looking for his employees.

Counsel claims that Mr Lévesque was under no obligation to display a positive attitude toward the back-to-work legislation. In his opinion, it is necessary to consider the situation as a whole and to determine whether the employee performed the duties of his position. As for the Hansard incident and the conversation with Mr Fournier in the presence of the other employees, Mr Nelligan argues that this was a matter which concerned all employees, and that the grievor cannot be accused of being disrespectful to his employer or superiors since they were not responsible for drafting the law. Turning next to the incident involving Mr Belval's memorandum, which was flung across the superior's desk, counsel contends that Mr Lévesque's purpose in making this

gesture was to cool the tempers of the employees who were threatened with discharge. Counsel argues that although this behaviour may have been ill-advised, it was nevertheless devoid of any malice. Both the employer and the employee acted in good faith.

With regard to the allegation contained in subparagraph 2.1(a) of Exhibit U-9, Mr Nelligan claims that the evidence shows that there were no complaints regarding his matter.

Referring to subparagraph 3.1(b) of Exhibit U-9, counsel for the grievor contends that Mr Marcotte stated during his testimony that a supervisor normally is not brought up to date when he replaces another supervisor working on another shift.

With regard to the grievor's negative attitude discussed in subparagraph 3.1(b) of Exhibit U-9, Mr Nelligan argues that Mr Lévesque is a sincere man, but not a diplomat. He further contends that although the employee did not hide his feelings concerning Bill C-73, this attitude did not prevent him from carrying out the employer's orders.

Counsel for the grievor contends that no evidence was presented which established that operations had been slowed down, and that the evidence shows that there was no delay or endangering of the safety of the public, He claims that Mr Lévesque was punished in order to make an impression on the other employees. Counsel concludes that in the light of the evidence presented, the employee is not guilty of the acts of which he is accused, that the transfer was a disciplinary measure and that the references must be allowed.

Reply of the employer concerning the suspension

Counsel for the employer contends that counsel for the grievor minimized the latter's misconduct by claiming that if he was guilty of anything, it was merely of having committed a number of minor sins. Counsel argues that the Board must consider the evidence as a whole in order to discern a pattern of behaviour. He concludes by stating that the references to adjudication must be dismissed.

Decision concerning the suspension

Beofre examining the question of jurisdiction raised by the transfer, we must first consider the suspensions imposed on the grievor.

In order to reach a decision on this question, the Board must determine, in the light of the evidence presented, whether the imposition of a disciplinary measure was justified, and if so, whether the penalty imposed is commensurate with the misconduct.

An examination of the evidence with regard to the acts alleged against the employee reveals that some of this evidence is contradictory and that certain allegations made by the employer have not been proven.

For example, there is contradictory evidence concerning the events surrounding the closing down of the TRSA system. The employer was unable to prove its allegations regarding the issuance of the NOTAM. On this particular point, the weight of the evidence is to the effect that all the persons involved were consulted and agreed with the decision to issue the NOTAM. It should be remembered in this regard that the Board does not have to determine whether, from a technical standpoint, the issuance of the NOTAM was appropriate.

However, other facts have been established to the Board's satisfaction. There is no doubt that Mr Lévesque behaved in a cavalier manner toward his superiors, and on certain occasions, in the presence of employees under his supervision. Irrespective of the employee's temperament, the fact remains that as a supervisor, he is obliged to set an example. In this connection, the employee deserves to be censured for his criticisms and disparaging remarks concerning the government and the employer, not some much because of the nature of the remarks themselves, but because they were the kind of remarks which heightened the atmosphere of tension. Viewed in this light, Mr Lévesque's misconduct could endangeralbeit indirectly - the safety of the public.

The evidence as a whole reveals a lack of co-operation with management and a negative attitude on the part of Mr Lévesque. The refusal by the grievor to work overtime is one example. Although overtime is not compulsory under the terms of the collective agreement, it was established that Mr Lévesque was the "king of overtime" and that he normally worked 27 or 28 out of 30 days. The explanation given by the employee for his refusal is not very convincing. Even though an atmosphere of tension and nervousness prevailed, Mr Lévesque had worked only a few days at very most since returning to work, and since he was not one of the employees designated under the provisions of section 79 of the Act, he had not worked during the strike.

The Adjudicator, Mr R D Abbott, in rendering his decision in Liske (166-2-2898), stated that he would disregard "the assertion that the disturbed labour situation exvused or mitigated the grievor's wrongdoing". The Board must do the same in this case. Once the grievor had returned to work, he was obliged to co-operate with the employer in re-establishing operations and reducing the atmosphere of tension

and nervousness which prevailed at the time, instead of aggravating the situation.

However, having carefully examined the evidence, the arguments of the parties and the authorities cited, taken into account the conflicting evidence presented concerning certain incidents and the absence of evidence relating to other incidents, and considered the grievor's unblemished record, the Board reduces the penalty imposed to a fifteen-day suspension.

Decision concerning the transfer

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. Even though it is difficult to discover the real reasons for a particular action, it has proven necessary to examine thoroughly the facts which gave rise to this measure in the light of the criteria established through earlier decisions.

The various witnesses have differing perceptions of the facts. The evidence reveals that the atmosphere was emotionally charged and particularly tense. On the one hand, it appears to me that this strained atmosphere, far from being eased by Mr Lévesque, was at least maintained by his behaviour. On the other hand, the employer's objective was to ensure the safety of passengers at any cost. There are no doubt various reasons for the transfer of the grievor, as is apparent from the memorandum of January 5, 1978 (U-10). However, the facts show that Mr Lévesque's behaviour during August 1977 could justify the conclusion reached by the employer and cause it to take the decision to transfer the grievor in the interest of the safety

of the public and harmonious working relations. The Board wishes to make clear that these comments are in no way intended to reflect on the grievor's high degree of technical skill.

This conclusion is consistent with the principles 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 (166-2-2671 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 place to another in order to ensure the safety of the public and re-establish harmonious working relations.

This authority of the employer to transfer laterally an employee has been examined by M. Justice Cattanach 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 an 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 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 Cattanach 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-1319 before October 1, 1977 was transferred to position T-ACQ-3229. 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 of 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.

