

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

BARRY JOHN GREEN

Grievor

and

**TREASURY BOARD
(Transport Canada)**

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: Sean T. McGee and Catherine H. MacLean, Counsel, for the
Canadian Air Traffic Control Association

For the Employer: Ronald M. Snyder, Counsel

Heard at Sudbury, Ontario, November 15 to 17, 1995 and May 7 to 10, 1996,
and Ottawa, Ontario, May 22 and 23, 1996.

DECISION

The grievor, Mr. Barry J. Green, was terminated from his employment as an air traffic controller at the Sudbury airport as the result of an incident which occurred on May 9, 1995. This adjudication arises out of his grievance against his discharge as of May 29, 1995.

The letter of discharge to the grievor reads as follows:

The purpose of this letter is to provide you with notice of employment termination for disciplinary reasons.

The investigation into your actions on May 09, 1995 has been completed.

I have determined that, on May 09, 1995, you wilfully left the Sudbury Control Tower unmanned for approximately 35 minutes. In doing so, you potentially jeopardized the safety of the flying public and demonstrated a gross disregard for the responsibilities of your position.

These actions constitute an irreparable breach of trust.

As a result, I have no alternative but to proceed with termination of your employment from your AI-OPR-02 position effective close of business Monday, May 29, 1995. This termination from the Public Service is for disciplinary reasons in accordance with the authority contained in Section 11 (2) (f) of the Financial Administration Act.

Should you disagree with this decision, you have the right to file a grievance.

Mr. Green was the sole controller on duty in the Sudbury Control Tower during the day shift on May 9, 1995. This situation resulted from another controller, who was to be the second controller on shift, calling in sick that morning. Mr. Green did not know that he would be working alone until he came to work the morning of his shift. Mr. Green left the tower unmanned for approximately 35 minutes while he went to the washroom, attended to other matters of personal hygiene, and had lunch in the airport restaurant.

Summary of Evidence

Mr. Mel Cooper, Superintendent, Control Tower Operations, Ontario Region, testified that one of the reasons for the existence of air traffic controllers is to guarantee separation of aircraft (and ground vehicles) in the positive control space

(under the direct control of air traffic controllers) of a particular tower. Once an aircraft has filed an IFR (Instrument Flight Rules) flight plan according to air regulations, separation is guaranteed from other IFR aircraft, from VFR (Visual Flight Rules) aircraft as well as from other ground vehicles.

Once a tower is advertised as open, these guarantees continue. There are concomitant legal liabilities on the Department of Transport if separation is not maintained. The controller is responsible for the overall safety of aircraft although the pilot is also responsible.

Mr. Cooper described the very high level of responsibility of an air traffic controller as “awesome”. During advertised hours, the tower must be “manned” at all times. This concept is basic to the whole system of air traffic control and is emphasized from the very beginning of a controller’s training. Relief breaks may be taken by controllers working alone but they are to be taken only as needed for bathroom relief and limited to a very few minutes. They are not lunch breaks. Lunch breaks are not contemplated in such circumstances.

Referring to Exhibit E-6, the witness stated that all towers across the country have this policy and it was in existence years before May 9, 1995. This policy, which is supposed to be contained in a binder in the tower cab, was not there on May 9, 1995. For some unknown reasons, it was removed; perhaps management was in the process of dealing with it in some way. The policy remained in effect at all times and specifically on May 9 even though its written form was not in the tower that day. Unless canceled, the document remains in effect.

In any case, the basic rules for relief breaks are set out in MANOPS (Manual of Operations). Although a local policy can elaborate on MANOPS, it cannot contradict it. MANOPS always governs.

Looking at the log entries of other controllers in the Sudbury tower which indicate the relief breaks taken by them in a seven-year period prior to May 9, 1995, Mr. Cooper noted that the average range of length of break is three to five minutes; the peak is 10 minutes. The circumstances of the time length are unexplained. The only other unusual entry was made by Roger Larivière, one other Sudbury controller, which indicated that on July 23, 1994 he took a one-half hour meal break.

Mr. Cooper testified that in order to accommodate the controllers who need to eat while on tower duty, a spacious kitchen is provided with a large refrigerator, hot plate burner, toaster, cupboards, and lockers for storage of food. In addition, there is a refrigerator and food warming facilities and some cooking facilities in the cab of the tower itself so there is no need to leave the tower itself in order to get food. On May 9 in particular there were some food stuffs in the tower, including cereal.

Mr. Cooper stated that if no break is provided, the controller eats at his position, if at all, and only if traffic permits. The controller knows this and should come to work prepared for this. It has been known for a number of years prior to May 9 that a controller can expect that occasions will arise when he will have to work alone.

Mr. Cooper testified that Mr. Green had followed a number of the procedures outlined in the local policy but not all of them. He was not allowed to leave on a lunch break at all. Any break must be of short duration, probably five minutes or less, when there is “no known or anticipated traffic”. In addition, Mr. Green forgot to change the ATIS (Automatic Terminal Information Service) which provides updated information to aircraft on a number of matters. This should be changed hourly to reflect changing conditions. An aircraft should be able to rely on the information conveyed in the ATIS.

Mr. Cooper outlined a number of safety concerns that arose out of Mr. Green’s absence from the tower.

At the time of his departure, there was a training helicopter (EEN) practicing “touch and goes”. Having a student pilot in itself should result in a higher level of safety concerns. A helicopter should never be left unsupervised because of its particular flying restrictions as compared to planes. Two aircraft with call letters GILM and VAL were awaiting departure. GILM was a Beach 100 aircraft, with 12 to 15 passenger capacity. VAL 101 was an air ambulance working for the MOH (Ministry of Health, Ontario). There was also an anticipated arrival of an aircraft designated with letters OEL, a 50 to 60 passenger Turbo Prop belonging to a Canadian Partner Airlines.

The GILM and VAL 101 aircraft both took off during the grievor’s absence without assistance from the tower. There were delays in their departures and it is

recorded that there were “wake turbulence problems” which would have been unknown to these aircraft. In fact, they took off over Runway 22 which runs counter to Runway 4 which was advertised as open on the unchanged ATIS. There was a potential safety hazard had a flight chosen to use this runway when there was no controller in the tower, just at the same time as GILM or VAL was taking off. Mr. Cooper stated that one-half to two-thirds of Sudbury traffic is unscheduled VFR. In fact, the Canadian Partner flight OEL landed on Runway 4 only 11 minutes after the other two took-off on Runway 22.

There is a manned "crash team" at the airport at all times and the control tower has a "crash button" which provides an alerting service to it. If a collision had occurred, there was no one in the tower to alert the "crash team".

All the activity in the control tower is taped. There is a “MACS “telephone in the tower which can be used to report crashes, forest fires and troubles of various kinds. It keeps ringing until picked up. This phone rang continuously for 11 minutes during Mr. Green's absence. No one ever found out who was calling or why. Even a few seconds can be very important in some life and death situations.

During Mr. Green's absence there was a lot of confusion as to what was taking place. The witness stated that there is no room for confusion when aircraft activity is taking place. He gave a number of examples. The training helicopter broadcast that it was resting on the button of Runway 22. In fact, it was resting on the button of Runway 12. An examination of the tapes shows aircraft in the Sudbury zone calling each other by the pilots' first names instead of by their call letters. The presence of a controller is dictated during the advertised hours of the tower. Aircraft are counting on service to be provided during those hours. When the airport is closed at night, aircraft are alerted to the fact that they must use their own resources and rely on the systems in place for Class E airspace. This would not be expected during the advertised hours.

GILM and VAL 101, in departing during Mr. Green's absence, did not get the guaranteed separation to which they were entitled. The Toronto ACC (Area Control Centre) could not guarantee separation until they were airborne. The OEL flight also had to give up its guarantee of positive separation so that it could land.

There was also a ground vehicle, an ESSO truck, which made a number of calls to the tower during Mr. Green's absence. Finally, it went about its business after giving notice of its intentions on the ground frequency, not the tower frequency. Precautions should have been taken by Mr. Green to ensure that everyone would be operating on the same frequency. Another helicopter, referred to as GIGS, was attempting to land using the tower frequency. There was a potential danger in having a helicopter and an ESSO truck operating in the same area on different frequencies.

When Mr. Larivière, another controller at Sudbury, went for a 30-minute lunch break in July 1994, he was given specific permission to do so by his manager, Mr. Eastaugh, who took into account special considerations. Mr. Larivière left in a period of very different flying conditions from those of Mr. Green and he also followed all procedures to the letter.

At the time Mr. Cooper interviewed Mr. Green about the events of May 9, he also interviewed Mr. Green's peers regarding their understanding of the relief policy. Mr. Cooper indicated that he gave a copy of the questions he would be using to Mr. Larivière in his capacity as a union representative. Mr. Larivière was to keep these confidential. The witness expressed great outrage that before his interview with Mr. Green, he walked into the cafeteria at the airport and observed Mr. Green and Mr. Larivière sitting together with the questions spread out on the table before them. To him it seemed obvious that Mr. Larivière was, contrary to instructions, coaching Mr. Green on the questions.

In cross-examination, Mr. Cooper angrily denied that he had ever told another controller, Andrew Turner, in 1987 or 1988 that he would "get" Mr. Green. He also stated that in 1987 and 1988 he was working on Toronto Island, not in North Bay.

In recommending the penalty of discharge, Mr. Cooper took into consideration Mr. Green's knowledge of the rules for relief breaks, his willful leaving of his post and the potential jeopardy to public safety. He stated that management could not trust him again. Although Mr. Green apologized for forgetting to change the ATIS, he did not otherwise apologize for what he did. In fact, Mr. Green had insisted that he left a safe operation in his absence and stated that in the same circumstances he would go

to lunch again. He stated that he took into account Mr. Green's 23 years of service before he recommended discharge.

Mr. Sheldon Scholtz, A/Shift Manager of the Toronto Air Traffic Control Centre on May 9, 1995, gave evidence for the employer. Mr. Scholtz has 27 years of experience as an operational controller. The controller at Toronto ACC who was responsible for controlling the North Bay sector (which includes Sudbury) on May 9, 1995 was Scott Taylor. Mr. Taylor reported to Mr. Scholtz on that day. Mr. Taylor reported to him that he could not get hold of the Sudbury controller after the latter had indicated that he had gone for lunch. He was astonished to hear that a controller who was managing his shift alone had gone for lunch. He called his own shift manager, John Goulden, who was about 50 feet away and told him what was going on. He asked him to find out what was happening. Mr. Scholtz then told Mr. Taylor that he did not want anyone cleared into the Sudbury zone until they learned what was going on. They had no idea what aircraft was in the Sudbury zone; it could have been full of unknown aircraft. They were concerned about adding to the congestion and possible confusion. Until he knew what was happening, the Sudbury controller, Mr. Green, remained in control of his own airspace. Mr. Scholtz then stood behind the sector controller, Scott Taylor, to help him if any abnormal circumstances arose. They were aware of movements in the zone at the time: VAL 101, GILM, both of whom were waiting for clearance, and OEL, Canadian Partner inbound to Sudbury airport. Since Toronto ACC could not be responsible for the separation of aircraft in the Sudbury zone, they could not give clearance for takeoff to the GILM and VAL 101 aircraft on the ground. These aircraft were informed that they would not be given clearance until they were clear of the Sudbury zone. They would have to arrange their own takeoffs. The witness testified that in his 27 years of experience, he never before faced a situation where a lone controller left the tower for 30 to 35 minutes. All of this meant an additional workload for Mr. Taylor who was talking to aircraft on the ground in Sudbury, who were asking for instructions which Mr. Taylor was not prepared to give from Toronto ACC. He was also having to explain to the inbound OEL aircraft what was happening. It was a completely abnormal situation for the air traffic controller in Toronto to be talking to an IFR plane on the ground in Sudbury. The ACC in Toronto cannot issue departure clearances because it does not know what traffic is in the Sudbury area and does not know what is on the runway. As far as

Mr. Scholtz was concerned, they were dealing with Class D airspace (controlled by the tower); there was nothing to indicate otherwise. They anticipated that the controller could be back at any moment. If the controller had been away much longer, they would have assumed incapacity on his part and made some other arrangements.

With regard to the inbound OEL Canadian Partner flight, the controller, Scott Taylor, at Toronto ACC had to give the pilot two choices. The pilot was to either cancel his IFR flight plan because no guarantee of separation from other IFL or known VFR traffic could be given to him and proceed on his own, or have Toronto Air Traffic Control hold him outside the zone until Toronto was able to reestablish communication with the absent controller. The OEL flight elected to cancel its IFR plan so that it could land. In doing so, it was giving up its guaranteed separation from other aircraft.

If Mr. Green had shut down the tower there would be set procedures to revert to in the Class E situation. In cross-examination, Mr. Scholtz would not agree that from the point of view of safety and communication there would be no real differences from the situation that occurred in Mr. Green's absence and what would have happened if the tower had been shut down creating Class E airspace, that is, uncontrolled airspace.

Mr. Scholtz testified that Mr. Green's absence caused confusion at the Toronto ACC because no one knew what had happened to Mr. Green. Mr. Green had indicated he had gone for lunch, an unheard of situation for a lone controller. They did not know how long he would be and expected that he might be back any moment. Having to deal with the Sudbury situation as well as their own areas caused increased congestion in the Toronto frequencies, an undesirable situation. As a result of this incident, a CADORS (Civil Aviation Daily Occurrence Reporting System) Report was issued, an incident report which goes up through the line of authority to the Department Minister (Exhibit E-25).

Mrs. Lillian Shelsted, Administrative Clerk at the Sudbury Control Tower, testified. She was working in her office in the reception area of the tower on the morning of May 9. Around 11 o'clock she received a telephone call from Mr. Green asking if Wayne Guembel, a member of management, was around. She told him that

Mr. Guembel would not be in until after lunch. Shortly after that, she started to hear the tower telephone start to ring. There were six to eight different calls to the tower which she did not answer because she was not qualified to deal with calls to the tower. She has worked at the Sudbury Control Tower as a CR-03 since January 1981, and noted that the tower telephone had never before been allowed to ring long enough to be forwarded to her telephone downstairs. She became very concerned. At about 11:35 a.m., Mr. Green came in and told her that he had been for lunch and that planes were flying all over the place, making a gesture to indicate flying planes over his head. She testified that she was astonished but that Mr. Green seemed nonchalant to her. Mr. Green delayed proceeding to the tower to resume his duties for a few minutes while talking to her. He left after she put her head down and started writing to hint that he should leave. He did not say anything to her about having needed relief of any kind. Mrs. Shelsted testified that she always kept food on hand in the lunchroom. This included bread and margarine in the refrigerator, pop or juice, and other ready to eat food. Although she thought that Mr. Green was acting in a nonchalant and a non-caring manner, in cross-examination she admitted that Mr. Green might have been angry and upset.

Scott Taylor, the controller responsible for the North Bay sector at the Toronto ACC on May 9, 1995, testified on behalf of the grievor. He stated that he is also an experienced commercial pilot, holding his pilot's license since 1990. He had been fully qualified as a controller for approximately one year on the date in question. He testified that he was responsible for a trainee that day in Toronto who actually performed most of the operational duties of his station under his supervision.

When asked about ATSAMM (Air Traffic Services Administration Management Manual) (Exhibit G-1, Tab 15) in effect since 1990, the witness stated that he had never seen this prior to May 9, 1995. The section referred to reads:

203.2

Unit managers shall develop unit guidelines for controllers or specialists to follow in the event they must vacate their operating position for relief purposes, and no other qualified person is available to assume responsibility for the position.

203.2 Note 1:

It is expected that a "lone" controller or specialist will only vacate a position of necessity and will use good judgment and

foresight to limit the break to a few minutes, and during a period when there is no known or anticipated traffic. The controller or specialist should inform appropriate units (e.g.; local FSS, Control Tower, IFR unit, etc.) and broadcast on appropriate frequency(ies) that the unit will not be in operation for (X) minutes.

203.2 Note 2:

As soon as a tower controller broadcasts that the unit will be unattended, the control zone reverts to Class D [now Class E] airspace. The control zone automatically reverts back to Class C [now Class D] airspace with the broadcast of the return of the controller.

203.2 Note 3:

The FSS will provide the same services it normally provides when the control tower is closed.

He knew that when a tower closes at night it reverts to Class E airspace which is not actively controlled by the tower. He was not aware that when a tower is “unattended” it did also and so he continued to treat it as Class D airspace.

It was not unusual for a sole controller to request a relief break. He gets requests for this about once a month, but normally for two to five minutes. In his experience, 35 minutes was abnormal. The airspace is always treated as Class D in these circumstances.

It was also not unusual for IFR aircraft to switch to VFR under the pilot’s own control in order to expedite landings. He contended that safety is not an issue when this happens or they would not do it. He stated that the departures of GILM and VAL aircraft without tower assistance on May 9 was as safe as if they had taken off in Class E airspace, that is when the tower is not controlling movements. However, he added, “I have to believe air traffic controllers serve a purpose; the more information the better”.

He did have an increased workload as a result of the activities resulting from Mr. Green’s absence.

Roger Larivière, a controller at Sudbury since October 1993 with more than 19 years experience as a controller, testified. He has served as Secretary-Treasurer of CATCA and also as a branch chair. He recounted the events of July 23, 1994 when he

was ordered to work by himself but was given authorization by his manager, Mr. Eastaugh, to go for lunch. He was told to turn the operation over to Flight Services which at that time was still located in Sudbury; it was not until the end of April 1995 that they moved to Sault Ste-Marie. He informed Toronto ACC that he was leaving and changed the ATIS. The weather was such that VFR traffic would not resume until noon. Sometime after this event, he told Mr. Green about it.

Mr. Larivière stated that he met with Mr. Green prior to the latter being interviewed by Mr. Cooper. He did so in his capacity as Mr. Green's local union representative. He stated that he placed the questions on the table but used them for reference only. He stated that he did not disclose the questions to Mr. Green. At this meeting in the cafeteria, Mr. Cooper came upon them and became irate. He was very angry and accused Mr. Larivière of violating a trust and stated that the questions were not to have been taken out of the office.

He stated that in July 1994 the Sudbury FSS (Flight Service Station), to whom he turned the operation over, had many of the capabilities that a controller would have whereas the Sault Ste-Marie FSS had very little.

Mr. Barry Green, the grievor, has been an air traffic controller at Sudbury since June 1982. He is 47 years of age, married with two children.

The grievor testified as to his eating practices. He cannot eat breakfast before he comes to work. He is usually working with another controller and so he would take a break and have breakfast in the airport restaurant when traffic allowed it. He stated that he kept absolutely no food at the tower and never had except perhaps for the occasional piece of leftover pizza.

Before he learned that Mr. Larivière was allowed to take a lunch break in July 1994, it was always his understanding that a relief break was to be for the shortest period of time possible in order to do what one had to do. Before this, a controller alone going for a meal break was unheard of. He considered that this was a break-through with management who now "saw the need for us to have a nourishment for a reasonable time". He conceded in cross-examination, however, that there was no change in directions given to the controllers which would reflect this break-through.

As to calling someone else on overtime to replace him on May 9, he did not think he had the authority and in any case it would take some considerable time to bring someone in.

He spoke of his understanding of the relief break policies which referred to the necessity of timing them at a period when there was no traffic or anticipated traffic. His understanding was that they could be taken at periods of minimum traffic based on a conversation he had with a previous manager, Barry Cubitt. This same manager on another occasion called him to his office and informed him that he had absolutely no authority to close the tower. The only authority he had was to leave the tower “unattended” for relief breaks. He stated that from then on that is what he did. He characterized his absence for lunch as leaving the tower “unattended” and that terminology is what appears in his taped conversation with Toronto ACC on May 9. Elsewhere in his testimony, he used the term “closed” several times.

On May 9, he was suffering from severe back pain after injuring his back a few days before. He was able to work his regular hours on May 9 and in the preceding days of shift. He did not take any medication nor did he see his doctor because he felt that the latter would not do him any good.

He was also stressed because a week before his wife had threatened to leave him and take the children. He had put this threat to the back of his mind until his wife called him at the tower and asked him for money on May 9. This conversation, which was recorded, revived some of the previous stress he felt. The tape of the conversation was played at the hearing. As it turned out, his wife could not afford to leave him and is still living with him.

He learned at 7:00 a.m. that he would be working alone that day, his partner, Jim Thompson, having called in sick. During the morning, he felt the need for a bowel movement but did not go for a relief break because (1) he was waiting for Wayne Guembel, a member of management, to arrive so he could provide relief and kept watching to no avail for his truck to arrive and (2) there was too much traffic.

In cross-examination, however, the grievor admitted that there were at least eight occasions that morning when there were breaks in traffic which would have allowed him time to use the bathroom and return to the tower.

He testified that although he had never really felt the need to eat that morning he was starting a headache and knew that he needed food. By 11:00 a.m., his need to use the bathroom was urgent and his headache was progressing.

He started to look through the books in the tower to see if he could find a local policy on relief breaks. He noted the document was missing. He did not think to check MANOPS which, he agreed, was the bible of operating controllers. Section 113.5 and the note thereto read as follows (Exhibit E-5):

113.5

Supervisors may give personnel periods of relief by combining operating positions provided: (N)

- A. current and anticipated workload permits; and*
- B. the employee can be quickly recalled.*

113.5 Note:

To the extent that staffing and workload permit, personnel will be given time away from operating positions for:

- brief periods of rest; and*
- a reasonable lunch period.*

He checked for food in the tower without success. He did not think of arranging to have some food brought to him by Mrs. Shelsted downstairs or having it delivered. He testified that he thought he was allowed to take a lunch break. He decided to leave and informed Toronto ACC that he was leaving for lunch and sent a fax to Sault Ste-Marie FSS informing them he was leaving the tower unattended but not how long he would be away. He forgot to change the ATIS message so that during his absence it continued to broadcast some incorrect information.

Before leaving he called downstairs and asked Mrs. Shelsted if Wayne Guembel was in his office. He testified that he stayed another one to one-half minutes in the tower cab looking around and wondering what else he could do. He was very angry at management for leaving him in the tower without directions. His need to go to the bathroom was urgent. In fact, he did not make it and soiled himself. He washed out his underwear in the bathroom and took it to his truck. From there he proceeded directly to lunch where he ordered spaghetti, the "special of the day", the fastest food he could get, sat down, ate it, and returned to the tower. While he was in the restaurant, he noticed that the GILM flight took off overhead and then on his way

back noted that the Voyageur flight took off. He did not note the time because “I don’t wear a watch”, he said. Later he entered their departures in the logbook.

He stopped for a couple of minutes at the reception desk telling Mrs. Shelsted he had gone for lunch and “planes were flying all over the place”. He stated that the reason he waited there for a couple of minutes was to rest his back by leaning on the counter with his hands.

He stated that he had not been briefed on the services that would be provided by Sault Ste-Marie FSS after its recent move from Sudbury. He thought it would be similar to that provided by the Sudbury FSS. In cross-examination, he acknowledged that he had signed a document entitled “Mandatory Briefing” (Exhibit E-27) which indicated that he had indeed been briefed. He could not recall signing the document or receiving the briefing.

He indicated that he had no safety concerns at all during his break. He believed that the aircraft would just carry on as they would if the tower were closed as it is between 11:00 p.m. and 7:00 a.m.

Approximately 17 minutes after he returned to the tower, Mr. Cooper called him to question him about whether or not he had absented himself from the tower for lunch. (In this telephone call, Mr. Green gave Mr. Cooper no information about back problems, his need to go to the bathroom or other stresses he was feeling.) Mr. Cooper was upset and raised his voice to the point where Mr. Green’s stress level just about doubled, he testified. Later he was interviewed by Mr. Cooper. Although Mr. Cooper accused Mr. Larivière of coaching him and showing him the questions, the grievor denied this.

Mr. Green was asked about the following passage in the interview (Exhibit E-22):

Q: When can you take a meal break away from the tower?

A: When it is for health wise to keep the operation going, you can take a meal break.

Q: Would you leave the tower unattended to have a meal?

A: Yes.

He denied that this meant that he would do it again. He testified that now he would likely try to keep some dry goods of some sort on hand in case he got caught on a single shift again. He added, however, that he could not keep enough dry goods in the little locker provided to make a meal of.

He testified that in his interview on May 15, 1995 with Mr. Cooper, he had apologized for forgetting to change the ATIS. He also felt that he was apologizing for everything; "For all the things people said I'd done wrong". When asked by his counsel what his reaction was to Mr. Cooper's statement that he did not feel he could be trusted again, the grievor stated that in his 24 years of service he did not think any pilot or controller would have anything negative to say about him. He also added: "For forgetting one thing, I don't think I should be talked about as Mr. Cooper talked about me". He stated that in his view Mr. Cooper "overreacted".

In cross-examination, Mr. Green stated that when he went for lunch there was a 50-50 chance that neither the GILM nor the VAL aircraft would leave before the end of his meal break. He admitted that during the break the Canadian Partner Airlines (OEL) had tried to contact the tower on three occasions without success.

Mr. Green stated there was nothing in the collective agreement which indicated that he was entitled to a meal break no matter what; it was subject to operational requirements. Also, he agreed that MANOPS does not specify absolute entitlement to a meal break. However, he indicated that it was not likely he would have consulted MANOPS before May 9. He stated: "I don't read MANOPS". When it was suggested to him that MANOPS is the bible of air traffic controllers, he stated: "Not for me". He argued that he certainly knew since 1990 that he might have to work alone on shift but that "never in his whole life had he brought lunch except for a couple of pizzas".

When he spoke to Mr. Cooper after his return from the tower, they only spoke about him going for lunch. He did not tell him that he had looked for the relief policy (Exhibit E-6) and could not find it, nor did he tell him about his urgent bathroom need, his back problem, nor the stress he had been feeling as a result of his wife's call. Mr. Green stated that he did not consider that the telephone conversation was a proper time to explain these matters.

Mr. Green was questioned about his claim that he knew that Mr. Larivière had been allowed to go for lunch. He was asked about a taped conversation (Exhibit E-29), played at the hearing, which he had with Mr. Larivière on May 15, 1995, which reads exactly as follows:

*TRANSCRIPT - SUDBURY CONTROL TOWER
TELEPHONE - MAY 15, 1995*

<i>TIME</i>	<i>AGENCY TWR/GRD</i>	<i>COMMUNICATION</i>
		<i>Mr. Roger Larivière - (RL)/ Mr. Barry Green - (BG)</i>
<i>22:20:08</i>	<i>RL</i>	<i>Hello</i>
<i>22:20:08</i>	<i>BG</i>	<i>Hello</i>
<i>22:20:09</i>	<i>RL</i>	<i>How Ya doin?</i>
<i>22:20:09</i>	<i>BG</i>	<i>Good</i>
<i>22:20:10</i>	<i>RL</i>	<i>Have a good weekend?</i>
<i>22:20:10</i>	<i>BG</i>	<i>Oh Huh, Huh, not really.</i>
<i>22:20:11</i>	<i>RL</i>	<i>Not really? Ha, Ha, Ha, those questions are so stupid eh?</i>
<i>22:20:17</i>	<i>BG</i>	<i>Ha, Ha, Ha</i>
<i>22:20:17</i>	<i>RL</i>	<i>Ah, Yeah, lets. Ah, I got Ah, do all those other people see, your still at two, I'm going to plan to be here, around, well, I'm going to be here early, I'm gona talk to Cooper before</i>
<i>22:20:34</i>	<i>BG</i>	<i>Ya</i>
<i>22:20:36</i>	<i>RL</i>	<i>and Ah, guess their gonna have the questions, apparently,----- ready that their going to ask Ya</i>
<i>22:20:39</i>	<i>BG</i>	<i>Ya</i>
<i>22:20:40</i>	<i>RL</i>	<i>OK, so once I do that, then their gona do, they wana talk to some other people, I don't know what that's all about</i>
<i>22:20:47</i>	<i>BG</i>	<i>Ya</i>
<i>22:20:47</i>	<i>RL</i>	<i>then I'm gona have those questions to apparently so I'll have an idea. But definitely before we go in there. Ah basically what what we covered there the other day, with you, we'll just have a little thing</i>
<i>22:21:00</i>	<i>BG</i>	<i>Ya</i>
<i>22:21:01</i>	<i>RL</i>	<i>Ah, one other factor is, like I said and that's the way I'm looking ----- the ATIS thing we can't do</i>

		<i>anything about</i>
22:21:05	BG	<i>No</i>
22:21:06	RL	<i>No, you've, Ah whatever, you forgot or whatever</i>
22:21:07	BG	<i>Ya, that's right</i>
22:21:09	RL	<i>Ah, the only thing is probably, what they'll zero in on, is justification or what made you think you were justified to go</i>
22:21:15	BG	<i>Em, Em</i>
22:21:16	RL	<i>and all you've got basically to go on is from what I can see, is Ah, I did the very same thing</i>
22:21:19	BG	<i>Ya, no, no, I'm not going to say that</i>
22:21:22	RL	<i>Well no, I did!</i>
22:21:22	BG	<i>Well so what!</i>
22:21:24	RL	<i>Eastaugh told me to</i>
22:21:26	BG	<i>What?</i>
22:21:26	RL	<i>Eastaugh, I mean Eastaugh told me to</i>
22:21:27	BG	<i>Oh, did he?</i>
22:21:28	RL	<i>Oh Ya!</i>
22:21:29	BG	<i>Oh, I'm sorry I didn't know that</i>
22:21:29	RL	<i>Oh Ya!</i>
22:21:30	BG	<i>Oh see I wouldn't say anything</i>
		<i>Oh no</i>
22:21:35	RL	<i>Oh no!</i>
22:21:35	BG	<i>(unintelligible), Roger</i>
22:21:36	RL	<i>I logged it and everything, No, No, its logged and everything</i>
22:21:36	BG	<i>Oh ----- OK, I'm sorry I didn't know that, OK</i>
22:21:39	RL	<i>Ya, Ya</i>
22:21:40	BG	<i>OK, See I wasn't going to say a word, I though that that was between you and me, thats all as far as it was going to go</i>
22:21:43	RL	<i>Oh No, No, No</i>
22:21:44	BG	<i>Oh, I'm glad you said that because I would never</i>
22:21:47	RL	<i>Oh well that's what I mean</i>
22:21:49	BG	<i>brought that up in a million years</i>
22:21:50	RL	<i>that's what I'm saying, lets get together then before</i>
		<i>OK?</i>
22:21:50	BG	<i>OK, OK</i>
22:21:51	RL	<i>A few things</i>
22:21:52	BG	<i>OK</i>
22:21:54	RL	<i>So that, you get here, I don't know</i>

22:21:59	BG	<i>around around oneish?</i>
22:22:01	RL	<i>Sure that's fine with me</i>
22:22:01	BG	<i>I've got a medical at 11:00</i>
22:22:02	RL	<i>Ya</i>
22:22:03	BG	<i>then I'm going to come out here,</i>
22:22:04	RL	<i>OK man</i>
22:22:07	BG	<i>Ya, thank you for calling</i>
22:22:08	RL	<i>See you tomorrow</i>
22:22:10	BG	<i>See you tomorrow</i>
		<i>Bye</i>

Despite the tape, the grievor claimed that he did know about the authorization and explained the dialogue by stating that he did not know there was authorization logged. Then he added, "I thought he meant written authorization".

He stated that Mr. Cooper had overreacted to the events of May 9. Mr. Cooper should not have spoken about him in the way he did for failing to do one thing.

Andrew Turner, an AI-5 controller at Ottawa airport since 1990, testified for the grievor. He has known both Mel Cooper and Barry Green professionally for many years. He recalled that he had a conversation with Mel Cooper in 1987 or 1988. He believed that Mr. Cooper was the Terminal Operations Manger in North Bay at the time. He did not remember how the subject came up and he could not remember if there were others who could overhear the conversation. He stated that Mr. Cooper had said to him that in one fashion or another he would get even with Mr. Green. Mr. Turner said that he had no knowledge of any background interactions between Mr. Green and Mr. Cooper. The topic of Mr. Green never came up again.

Roger Larivière was recalled to speak to the tower tape (Exhibit E-29) which records his conversation with Mr. Green on May 15. He produced his personal file notes which record Mr. Green telling him on May 12 that he knew that Mr. Larivière had been authorized to leave the tower (Exhibit G-21). The relevant excerpt from these notes reads: "*Remembered that Eastaugh told R.L to take a reasonable break in the same situation*".

Argument for the Employer

Counsel for the employer argued that Mr. Green's act in leaving the tower unmanned for a period of 35 minutes while he went for lunch was an act of gross

malfeasance which resulted in numerous safety hazards. There was also great potential for further dangerous situations. Flight OEL gave up its guarantee of positive separation from other aircraft, a guarantee to which it was entitled when the pilot filed IFR flight plans. It was necessary for OEL to give up this guarantee so that it could be allowed to land. According to witness Scholtz, this was the first time in his 28 years of service that he had known an IFR inbound airplane having to give up its separation guarantee in order to land.

Counsel for the employer referred to the grievor's lack of candour on a number of occasions during his evidence. He submitted that despite Mr. Green's contention that one of the factors he relied on in making his decision to leave the tower on May 9 was his knowledge that Mr. Eastaugh, the manager, had permitted Mr. Larivière to leave for a lunch break in 1994, the tape transcript of May 15 reveals that he did not know about this until that very day (Exhibit E-29). The transcript is quite clear and unambiguous. Also, the grievor had indicated that he had not been briefed on the transfer of Sudbury flight services (FSS) to Sault-Ste-Marie. Yet when he was shown the document entitled "Mandatory Briefing" (Exhibit E-27), he identified his signature, the purpose of which was to attest to the fact that he was familiar with the contents.

Mr. Green's complaint of severe back pain was very suspicious considering that he saw no doctor, took no medication, and told no one about it. None of the controllers with whom he worked in the days prior to May 9 came to testify about any back problems he may have been having at work. Counsel for the employer also submitted that Mr. Green was being less than truthful about his urgent need to use the bathroom. There were approximately eight occasions when Mr. Green had breaks in traffic for up to 20 minutes when he could have slipped downstairs and used the bathroom. He could also have called downstairs to the offices to ask Mr. Guembel to relieve him while he went to the bathroom during the morning. Mr. Guembel could have come in another way. He did not do so, saying that he was watching for Mr. Guembel's truck instead. He argued that Mr. Green was trying to be misleading when he stated that he was stressed by a call from his wife and that this was a factor in his decision to leave the tower. He urged that I refer to the tape which was played at the hearing and which contained no raised voices, no abusive comments, just a husband and wife being cordial and civil to each other.

No reliance should be placed on the grievor's contention that he was affected by the fact that the relief policy was not in the cab of the tower on May 9, 1995. The question is whether or not despite its absence he knew its contents. This relief policy, which states that "relief breaks shall be restricted to a few minutes when there is no known or anticipated traffic", was in effect since 1990. After 23 years of service, the grievor would be hard pressed to say that he did not know what was expected of him on May 9, 1995.

The grievor was a CATCA branch chairman for nine years and a CATCA representative. He should have known that the collective agreement did not provide for a guaranteed meal break. Subclause 13.01(3) states that meal breaks are subject to operational requirements. He referred me to MANOPS, section 113.5 and the note thereto (Exhibit E-5).

As an experienced controller, he should have been prepared for the eventuality that he might have to work alone. He could have brought a lunch or made some other arrangement for food that day. Counsel for the employer relied on the Whitley case (Board file 166-2-16199).

Argument for the Grievor

Counsel for the grievor argued that when the grievor left the tower on May 9 "unattended" it reverted to Class E airspace, that is, airspace uncontrolled by the tower (Exhibit G-1, Tab 15). After 11:00 p.m. until the tower reopens in the morning, Sudbury Tower airspace is Class E, uncontrolled. Certain procedures are in place for aircraft to use the airport during uncontrolled hours. It was his position that aircraft did what they were supposed to during Mr. Green's absence and conducted themselves as if it were Class E uncontrolled airspace. He urged me to find that there was a history between Mr. Green and Mr. Cooper and that this history had improperly motivated Mr. Cooper to decide to discharge the grievor.

Because of a conversation Mr. Green had had some years before with a Mr. Cubitt, a previous manager, Mr. Green felt that he could go on a break during low traffic periods. In addition, Mr. Green knew on May 9 that another controller, Mr. Larivière, had been authorized to take a meal break in July 1994.

On the day in question, Mr. Green was suffering with back problems and pain can be a stressor. Mr. Green was also suffering from other stresses on that particular day. He had arrived at work to discover that since another controller had called in sick he was going to have to work alone. The call he received from his wife asking him for money was stressful to him in light of the fact that only a week before she had spoken to him about leaving him and taking the children. Mr. Green's pressing need to go to the bathroom and his need for food to allay his headache are all factors that mitigate against a serious penalty being imposed on Mr. Green. If Mr. Green committed an error in judgment, these factors that placed him under stress must be considered as contributing to that error in judgment.

In deciding what to do, Mr. Green recalled that in another extreme situation one year ago Mr. Larivière had closed the tower and went to lunch. This is confirmed by Mr. Larivière's notes of his meeting with Mr. Green on May 12, 1995. Except for failing to change the ATIS, Mr. Green was conscientious in the precautions he took when leaving the tower.

The grievor's counsel submitted that while most relief breaks are between three and five minutes, other controllers had taken longer breaks. Counsel referred me to the following cases: Whittley (supra); Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd. (1965), 16 LAC 73; Caruana (Board file 166-2-25276); Douglas (Board file 166-2-18237); MacDonald (Board files 166-2-15227 and 15228); Powell River General Hospital and British Columbia Nurses' Union (1995), 46 LAC (4th) 177; Deering (Board file 166-2-26518).

By referring me to a number of mitigating factors, counsel for the grievor urged me to consider that the purpose of discipline is to be corrective and rehabilitative. He suggested that Mr. Green could be rehabilitated and that it was not likely that Mr. Green would again leave the tower unattended on a whim.

Reasons for Decision

The fact that Mr. Green was away from his post for approximately 35 minutes during which time he ate lunch in the airport restaurant is not in dispute.

Much of the thrust of Mr. Green's defense was to the effect that this action was not extremely serious in that the tower is closed at Sudbury airport between the hours of 11:00 p.m. and 7:00 a.m. every night and that therefore during the period of Mr. Green's absence on May 9 air traffic would conduct themselves as they would during the night hours and with the same degree of safety. I cannot accept that argument. The controllers in Toronto expected that he would be back any minute. Without any further information, they treated the situation accordingly and continued to deal with the Sudbury zone as controlled airspace. Mr. Green remained in control of his own airspace. The potential for confusion arises out of the fact that no one knew exactly what was going on, where the controller was and how long he would be gone. Aircraft and airport vehicles expect positive control except during certain hours. They have the right to count on this and make their plans accordingly.

Counsel for the grievor maintained that during the grievor's absence, the airspace reverted to Class E airspace. Whether or not this is the case, the ATSAMM makes it clear that a lone controller shall vacate a position only of necessity, only for a few minutes and only when there is no known or anticipated traffic.

I accept the evidence of Mr. Cooper that having the tower "manned" at all times during advertised hours is basic to the training and experience of all controllers and the absence of the relief directive from the tower does not in any way excuse Mr. Green from that obligation. Mr. Green, as an experienced controller, knew what he was supposed to do. He simply decided on May 9 to go for lunch and disregarded these basic principles of air traffic control.

Furthermore, this hearing was not about a controller who found himself in desperate straits, who needed a quick relief break to use the bathroom and who returned as quickly as possible to his post having first taken all possible precautions for his anticipated absence. Mr. Green very simply went for lunch.

There were also several times during the morning when traffic would have allowed him to take a relief break if he had an urgent need to do so. Despite the grievor's claim that he had an urgent need to use the bathroom, he announced to Toronto Air Traffic Control that he was going for lunch before he left the tower. Similarly, in his telephone conversation with Mr. Cooper only 17 minutes after his

return to the tower on May 9, the only reason he gave Mr. Cooper for his absence was that he had gone for lunch. He admits that he did not return from his bathroom break before leaving for lunch.

The grievor should have been aware of the fact that as the sole air traffic controller in charge of the tower he must not leave his post unmanned except when there was no traffic and then only for urgent “relief” needs which have in the past been interpreted as “bathroom” needs. Despite the fact that the relief policy document was not in the tower cab that day, he showed that he was well aware of the policy itself.

The grievor described in detail how he had soiled himself on the way to the bathroom and had to wash out his underwear and put it in his truck before going for lunch. When he spoke to Mrs. Shelsted on his return to the tower he told her that he had gone for lunch, making no mention of any other personal emergency or other indisposition. What appeared to be uppermost in the grievor’s mind as the reason for absenting himself from the tower then as earlier was having lunch.

The grievor justified his action in leaving for lunch, despite the fact that there was traffic in his zone, by indicating that a former manager of his by the name of Mr. Cubitt had orally told him that the written policy, which was extant in his day, could be interpreted as meaning that relief breaks could be taken during “minimum” traffic periods and not restricted to times when there was no traffic. Mr. Cubitt was not called to testify. However, Mr. Green has had subsequent managers who issued their own memoranda on the matter of relief breaks which restricted them to times when there was no traffic. Mr. Green agreed that he had not been told by either of these two more recent managers that he could disregard their precise written instructions.

In any case, Mr. Green took a lunch break, not just a “relief” break per se. He stated that he was developing a headache and needed food. It has been known for a number of years that controllers can be expected to work alone on occasion. He made no provision for such an eventuality by bringing lunch or having an emergency supply of food at work. He did not try to send out for food, or order food in, nor did he even bring his food back to the tower to be warmed in the microwave there. Indeed, he

ordered the special of the day in the restaurant, sat down and ate it and then returned to the tower. On his return he entered the reception area and told the clerk, Mrs. Shelsted, that he had gone for lunch and made a sign above his head to indicate flying aircraft as he said: "With airplanes flying all over the place". Whatever Mr. Green was feeling, concern for the flying public was not uppermost in his mind.

The grievor's position was that he had it in his mind that it was permissible for him to leave the tower for lunch because Mr. Larivière had been authorized to do so in July 1994. In support of Mr. Green's position, Mr. Larivière testified that Mr. Green had told him this and submitted his personal notes of May 12 to substantiate this (Exhibit G-21). The truth of this evidence is clearly belied by tower tapes played at the hearing which record a telephone conversation between Mr. Green and Mr. Larivière on May 15. Nothing could be clearer than Mr. Green's own words expressing his astonishment that Mr. Larivière had been given permission to leave for lunch. Furthermore, there were a number of factors which made Mr. Green's case and Mr. Larivière's very different.

Leaving the tower unmanned during advertised hours while aircraft were actively using it is a grave misdemeanour warranting discharge. I have considered all the mitigating factors suggested by counsel for the grievor and must find that they are insufficient to mitigate the penalty of discharge.

The grievor's counsel urged me to find that this isolated incident in Mr. Green's long 23 to 24-year career as a controller was unlikely to ever occur again. I wish I could believe that that would be the case.

Considering the grievor's good record and long service I searched the evidence for signs of remorse or appreciation of the implication of his actions. In fact, after the event he continued to justify and minimize his actions in his interview with Mr. Cooper on May 16 and at the hearing. Although he did say in his interview with Mr. Cooper that he was "sorry for all the stuff that was happening", other evidence suggests that even at the hearing he did not understand the gravity of his actions on May 9 (Exhibit E-22). He expressed his aggrievement against Mr. Cooper for talking about him the way he did when "he only failed to do one thing". In his view, Mr. Cooper had "overreacted".

It was suggested that there was a history between Mr. Green and Mr. Cooper and that this had somehow motivated the latter's decision to discharge the grievor. The only evidence introduced in this matter was of a remark made "in one fashion or another" alleged to have been made in 1987 or 1988 in North Bay without any real context being given. In the light of Mr. Cooper's denial and in light of the fact that it was his unchallenged evidence that he was working on Toronto Island at the time, I give little weight to this evidence. In any case, there are ample facts to justify Mr. Cooper's decision to discharge.

In these circumstances, the employer's position that the bond of trust between it and Mr. Green is irretrievably broken is not unreasonable. The evidence cannot support a finding on my part that the employer's decision to discharge Mr. Green is unreasonable, such as to allow me to set aside its decision.

The grievance is denied.

**Rosemary Vondette Simpson,
Board Member**

OTTAWA, June 14, 1996.