4-15-2001

Re NAV Canada and CATCA (Barnes)

Innis Christie

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE CANADIAN AIR TRAFFIC CONTROL ASSOCIATION (C.A.T.C.A.)
(The Union)

and

NAV CANADA
(The Employer)

RE: Grievance of Lori Barnes, one day suspension
NAVCAN File No. 2000-023

BEFORE: Innis Christie, Arbitrator

HEARING DATE: December 18, 2000

AT: Moncton, New Brunswick

FOR THE UNION: Ainslie Benedict, Counsel
Art Bateman, Maritime Regional Director C.A.T.C.A.

FOR THE EMPLOYER: George Rontiris, Counsel
Brian Kinney, Labour Relations Advisor, NAV Canada, Atlantic Region
Neil McDonald, NAV Canada Manager Moncton Airport

DATE OF AWARD: April 15, 2001

Union grievance on behalf of the Grievor alleging breach of the Collective Agreement between NAV Canada and the Canadian Air Traffic Control Association,

signed September, 1999, effective to March 31, 2001, which the parties agreed is the Collective Agreement that governs this matter, and in particular of Article 13, in that the Employer suspended the Grievor for one day without just cause.

At the outset of the hearing counsel agreed that I am properly seized of this grievance, that I should remain seized after the issue of this award to deal with any matters arising from its application and that all time limits, either pre- or post-hearing, are waived.

AWARD

The Grievor was given a one day suspension for insubordination for calling in another air traffic controller to work on the January 18, 2000 midnight shift allegedly contrary to the explicit directions of the Employer's Manager at the Moncton Airport. The issue is simply whether, on all the facts, there was " just cause" this discipline as required by Article 13.01 of the Collective Agreement.

Neil McDonald was NAV Canada's Manager at the Moncton Airport on January 17 and 18, 2000, with responsibility for delivering air traffic control services. There were eighteen air traffic controllers reporting to him at the time.

At about 1730 on January 17 McDonald received a telephone call at home from one of the duty controllers, Paul LeBlanc, advising him that Mike McGinty, one of the controllers scheduled for the midnight shift, had called in sick. LeBlanc also told him that the only controller on days who would not go over the hours of work limits

under the *Canada Labour Code* if called in could not be contacted. LeBlanc had called that controller several times and left messages on his answering machine.

McDonald checked the schedule and the situation, including the days worked and leave situation of Jeff MacLeod. He was aware that MacLeod had worked four midnights, had had special family leave for one, to be in hospital with his child, had worked two more as scheduled, now had one scheduled off, and was scheduled to then work eight more. He was well aware of Article 20.04 of the Collective Agreement which provides;

> 20.04 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

He was also aware that since January 1, 2000 a Letter of Understanding in the Collective Agreement had required that there be two controllers in the tower at all times. The LOU, "received and accepted this 29th day of March 2000", provides;

> This letter is to confirm that effective January 1, 2000 in accordance with Conciliation Commissioner Burkett's recommendation of May 17, 1999, NAV CANADA will not schedule single controller coverage on the midnight shift at any ACC Tower or TCU except where the parties agree to some other arrangement in respect of a particular location.

This had added to staffing difficulties at the Moncton Airport, which has been chronically short staffed for the past three years, with a number of the complement of eighteen controllers on long term sick leave. One result was that all

active controllers were routinely required to work overtime. McDonald acknowledged in cross-examination that to avoid the nine day limit in Article 20.04 he has sometimes had to grant special leave. I should note also that there is an argument, upon which I take no position here, that, by "scheduling" two controllers for the midnight shift on January 18, 2000, the Employer was in compliance with the LOU, even if, because of sickness, only one worked.

Before McDonald could call LeBlanc back, LeBlanc called again and advised that Paul Robichaud, who was scheduled to work the following day shift, starting at 0645 on the morning of the 18th, had also called in sick. In these circumstances McDonald told LeBlanc to go home at 2045 that evening, the 17th, and come back to work at 0645 the following morning, although that left the other controller on the evening shift, Dave Liem, alone from 2045 to 0015. McDonald also told LeBlanc that the Grievor, the controller scheduled to work the midnight shift with McGinty, would have to work alone.

At about midnight McDonald got a call at home from the Grievor. She had worked the previous midnight shift on overtime, and had in fact worked nine midnights that January. He testified that she said in part and in effect, "So I have to work alone?" to which he replied "Yes", he was afraid she did. She said that there was another option, that McDonald could have phoned MacLeod. He said that he had looked at that and decided against it "because it would have meant MacLeod working twelve straight". According to McDonald's testimony the Grievor then said "Can I call him?" to which he replied, "Call Jeff, no". She responded "No?" and he replied, "No. I've already gone through it and looked at it" adding by way of explanation that, in view of the time MacLeod was working and others were working, he had decided not to call him.

The discussion continued. The Grievor expressed concerns about the courier traffic through the night and the fact that some snow was falling so that there would be plows on the runway. McDonald testified that he said that he did not like the situation either, but that he had made his decision. It is not disputed that the Grievor did not say to McDonald that she could not or would not work alone, only that she did not fell comfortable working alone.

The Grievor testified that her understanding was that the reason for the LOU precluding controllers from working alone was primarily safety. She explained, for example, that if she went to the toilet she would have to close the tower and take the hand-held radio with her in case she fell going or returning. In cross-examination she acknowledged that on the night of the 18th there was a trainee in the tower with her, but because she was not formally qualified to work with a trainee, that person could only do some clerical work, or assist if she fell and injured herself. She had worked midnights alone in the past. In fact for the period she had worked in Moncton, from October of 1995 to December 1999, there was always only one controller on midnights. She had regularly worked alone on midnights, once every five or six shifts.

However for eight of the nine midnights she had worked since the effective date of the LOU the Grievor had worked with a partner. She had not expected to have to work alone on the midnight shift in question and was upset when she arrived at work at 2350 and found she was going to have to. She then called McDonald, as he testified.

The Grievor testified that she had not recalled that McDonald had given her a direct order not to call MacLeod, and when subsequently, in the Grievance meeting, she heard the tape of what had been said she was very surprised. Nevertheless, after speaking to McDonald she had been so dissatisfied that she had called T.R. Fudakowski, the Employer's Regional Director for Eastern Canada. There was no answer so she left a voice mail message. She then called MacLeod, who had no reservations about coming in and was there in half an hour.

I note that it is normal for controllers to deal with the necessity of calling someone in for overtime when the need arises in the normal course of operations. The Grievor testified that she called MacLeod, because, after going over the schedule with Liem, she thought she had "solved the problem of me working alone". That is they found days in their schedules when they could work for MacLeod so that even if he came in that night he would not necessarily have to work "illegally" later in the month. However the Grievor acknowledged in cross-examination that it was McDonald who had final authority to make decisions about overtime, although he would often take suggestions from the controllers.

When he went to work the next morning McDonald was surprised to find that MacLeod had signed in for work from 0030 to 0645 that morning. When he first met with the Grievor she said she did not recall that he had given her an order not to call MacLeod. MacLeod subsequently told McDonald that he had not known that McDonald had told the Grievor not to call him.

McDonald arranged to meet with the Grievor on January 24. Brian Kinney, one of the Employer's Labour Relations Advisors, Art Bateman, the Union's Maritime Regional Director, and Mark Curwin, the Union's site representative, attended.

McDonald played the tape, which was a tape routinely made of telephone conversations from the control tower, of his conversation with the Grievor. He told the Grievor he believed she had been insubordinate because he had given her a direct order and she had decided to defy it.

On that basis McDonald imposed a one day suspension. Part of his consideration, he testified, was that her action had cost the Employer two overtime shifts, the equivalent of four days pay. In cross-examination he acknowledged that there is routinely a great deal of overtime worked in the Moncton tower. Also, the *Canada Labour Code* imposes a maximum number of hours. Thus the Grievor's action had greatly reduced his flexibility.

The letter of discipline dated January 24, 2000 states;

> To Lori Barnes
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> LETTER .OF DISCIPLINE
>
> The circumstances surrounding the events of the midnight shift of January 18,2000 have been reviewed.
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> On that night, I informed you that I had carefully considered all of our options for coverage and that I would not authorise bringing Jeff MacLeod in for that shift. I further advised you that you did not have permission to call Jeff to try to get him to come in. During that discussion you indicated that you understood that instruction and that you were very disappointed with this decision. I have also determined from my investigation that you indicated to others that you knew you did not have permission to call Mr. MacLeod to work overtime.
>
> In spite of this, you called Mr. MacLeod and made arrangements for him to come in to work overtime that night in defiance of the direction you had been given. This is considered to be an act of insubordination.

As a result, you are being suspended without pay for one day to be served on Feb 27, 2000.

This action is intended to impress upon you the seriousness of your behavior. In future, you are expected to follow management direction as given. Failure to do so could result in discipline of a more serious nature up to and including termination.

Neil J. McDonald
NC Manager Moncton Airport

On January 28 the Union grieved. Under date of February 4 the Grievance was denied by T.R. Fudakowski, the Employer's Regional Director Eastern Canada, in the following terms;

DECISION OF AUTHORIZED EMPLOYER REPRESENTATIVE AT THE 1ST LEVEL

I have reviewed the circumstances surrounding this grievance in detail.

I conclude from this review that the grievor demonstrated that she was aware that she had been given specific direction by her manager not to call another controller in to work on the midnight shift of January 18, 2000. Further I conclude that. in spite of that direction, she knowingly and willing defied it and hired a person on overtime end approved future leave for him which also necessitated the spending of overtime dollars.

Regardless of her motivations, this action was insubordinate and I find that the discipline was both warranted end appropriate.

For these reasons, the grievance is denied.

I note that, according to Mr. McDonald's undisputed testimony, since January 1, 2000 each time a controller has been required to work alone on the Moncton

tower there has been a Grievance, which, at the date of the hearing, were nearing resolution.

Issue. As I said at the outset of this Award, the issue is whether, on all the facts, there was " just cause" this discipline as required by Article 13.01 of the Collective Agreement, the only relevant part of which is;

> 13.01 No employee shall be disciplined or terminated except with just cause. ...

Insofar as there is any difference in the testimony there is an issue of fact. Beyond that, there is the question of whether, on the facts as I find them, the Employer has breached this provision of the Collective Agreement by imposing a one day suspension. Was there reason for any discipline, and, if so, was this discipline excessive?

Decision. On all of the evidence I find as a fact that in the course of their telephone conversation on the night in question McDonald gave the Grievor a direct order not to call MacLeod. Notwithstanding her testimony to the contrary, I further find that she was aware of that order when she called MacLeod, although she may have gone through some process of rationalization rather than acting in simple defiance. As well as the inconsistencies in her recollection of the conversation with McDonald, the Grievor's call to Mr. Fudakowski simply does not square with what she now says was her state of mind at the time. I therefore do not need to concern myself with the submission by counsel for the Union that there

must be an element of willfulness in insubordination. On the facts as I find them the Grievor did willfully disobey McDonald's order. She was clearly insubordinate.

Counsel for the Union agreed that this case did not come within any of the "classic" exceptions to the "work now grieve later" rule, but she invoked the following passage from Brown and Beatty, *Canadian Labour Arbitration* (3rd Edition) [footnotes omitted];

> Finally, some arbitrators, invoking what has been characterized as the "disproportionate harm" exception, have taken the view that where the refusal to comply does not affect the employer's ability to maintain production, or challenge its symbolic authority, the conduct of the grievor should not be viewed as serious or even as being insubordinate. Between these two alternatives, it seems that for the majority of arbitrators a finding that the grievor did not intend to challenge the employer's authority, that he did not act with a blameworthy state of mind, or that the employer's production was unimpeded by the refusal, will affect the severity of the penalty that may properly be imposed, rather than justify the complete exoneration of the employee.

I do not find here that the Grievor "did not intend to challenge the employer's authority", although there is no evidence to suggest that she wanted in any way to make a show of doing so. I agree with counsel for the Union that there is no evidence before me to substantiate the statement on the discipline letter that the Grievor "indicated to others that [she] knew [she] did not have permission to call Mr. MacLeod to work overtime." That, however, is not necessary to the Employer's case, nor do I think that it was significant in the Employer's decision to impose a one day suspension on the Grievor.

I have already rejected the submission that the Grievor here did not act with "a blameworthy state of mind" in the sense that her disobedience was other than intentional, and I do not agree that the "employer's production was unimpeded", although the overtime cost was minimal in the larger picture.

Was there reason for any discipline, and, if so, was this discipline excessive? Without any doubt at all, the answers follow from my findings of fact. There was cause for some discipline and a one day suspension was not excessive, even though there were not previous incidents of insubordination on the Grievor's record.

Conclusion and Order. The Grievance is dismissed.

Innis Christie
Arbitrator