IN THE MATTER OF AN ARBITRATION
UNDER PART I OF THE CANADA LABOUR CODE (R.C.S., c. L-2)

BETWEEN:

NAV CANADA

(THE "EMPLOYER")

AND:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

(THE "UNION")

UNION GRIEVANCE: COMPULSORY MEDICAL CERTIFICATION — SICK LEAVE
COLLECTIVE AGREEMENT: SECTION 9.03

AWARD

Sole Arbitrator:	Mr. Serge Brault
Appearances for the Employer:	Ms Mary J. Gleason (Ogilvy, Renault), Counsel, Assisted by: Ms Arlene Yakely, General Manager IFR Operations Edmonton Control Centre Mr. Steve Cooper, Labour Relations Advisor
Appearances for the Union:	Mr. Peter J. Barnacle, Counsel Assisted by: Mr. Richard Nye, Vice-President Labour Relations Mr. Cliff Durrwachter, CATCA Metro Toronto R.D.
Place of Hearing:	Toronto (Ontario)
Dates of Hearing:	September 23, 24, October 20, December 7, 1999
Date of Award:	February 18, 2000

I

INTRODUCTION

This award deals with a Union grievance filed on September 2, 1998 in which the Canadian Air Traffic Control Association ("CATCA" or "the Union") challenges a policy decision of NAV Canada (management or the Employer) imposed in May to require a medical certificate for all sick leave at its Toronto Area Control Centre ("Toronto ACC"). The grievance read as follows:

> "*Controllers at both Toronto Area Control Centre and Toronto International Tower are being required to produce medical certification for all sick leave absences. The union maintains that this policy is inconsistent with the provisions of Article 9 of the Collective Agreement.*
>
> *The employer's entitlement to medical certification under the collective agreement must be exercised in a manner consistent with the intention of the parties, as demonstrated by the language of the collective agreement. Thus, the employer is entitled to medical certification, where it has the discretion to do so, only in circumstances where bona fide reasons exist to question the absence of the particular controller involved. A blanket policy of requiring all such absences to be supported by a medical certificate is improper and, in effect, reads out a significant portion of Article 9.*
>
> *We demand that the employer withdraw the mandatory medical certification policy at the Toronto Area Control Centre and Toronto International Tower cease and desist from violation of the collective agreement and comply with the terms of the collective agreement in this matter in the future. We also demand the employer reimburse any employee for the reasonable costs arising from the requirement to produce a medical certificate arising from a violation of the collective agreement. Such costs would include, but not limited to, any charges for completing a certificate by a medical practitioner and the costs of travel to attend upon such a practitioner to obtain a certificate.*
>
> *[ ]"*

Also before me are individual grievances, filed either shortly before, or after the filing of the Union grievance by individual air traffic controllers employed at the Toronto ACC. These grievances were filed as a result of the Employer's decision to withhold pay for days of absence where no medical certificates were provided.

The following statement of fact has been agreed to by the parties:

> *"[ ]*

1-On September 2, 1998, CATCA filed a National Union Grievance in respect to the mandatory certification of all sick leave at the Toronto Area Control center and Toronto Tower. ( )

2-Prior to and shortly after the filing of the Union Grievance, the following controllers submitted individual grievances as a result of being required to provide mandatory medical certificates and as a result of the employer's pay action to deduct pay for the days of absence without Physician Certification. The grievors are Wayne Barry, Allan Rupert, Eamonn Flynn, Steven Rundle, Phil Robinson, Ernie Gauthier, Brian Dunlop, Frank Scobel, Mike Smith, Patrick O'Neil and David Brook.

3-In respect of the individual grievances at Toronto Area Control Centre, each of the grievors received a letter from the employer advising them, as per Toronto ACC Staff Memo 034-98, which was subsequently replaced by Staff Memo 035-98, that all absences due to illness must be supported by a Physician's Certification. Furthermore, failure to submit the required documentation would result in pay recovery and that the circumstances would be reviewed to determine if discipline is warranted. ( )

4-

5-Further to CATCA's correspondence dated December 23,1998, NAV CANADA agreed that the individual grievance of David Brook, Brian Dunlop, Jeff Gillespie, Patrick O'Neil and Mike Smith in reference to medical certification, are to be joined and held in abeyance pending the outcome of the arbitration hearing in respect of the National Union Grievance on Medical Certificates. ( )

6-On September 14, 1999, CATCA issued a subsequent letter to the employer thereby confirming its intention to join and hold in abeyance, pending the outcome of the above noted arbitration hearing, the individual grievances of Wayne Bell, Scott Keighan and Jeff Hamilton in reference to medical certification. The parties agree that these individual grievances are to be joined and held in abeyance.

7-All of the individual grievors mentioned above currently work as air traffic controllers at Toronto Area Control Centre.

[ ]""

The following provisions of the collective agreement are material to the issue:

> *"ARTICLE 1 PURPOSE*
>
> *1.02 The parties to this Agreement share a desire to improve the quality and to increase the efficiency of the Air Traffic Control Service and to promote the well-being of its employees so as to provide safe and efficient services to the public.*
> *[ ]*

ARTICLE 3 MANAGEMENT

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

a) to plan direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;

(b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.
[ ]

ARTICLE 9 SICK LEAVE
[ ]
9.02 An employee is eligible for sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:

(a) an employee has the necessary sick leave credits,

and

(b) the employee satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

9.03 Unless otherwise informed by the Employer before or during the period of illness or injury that a certificate from a qualified medical practitioner, licensed chiropractor, dentist, dental surgeon or orthodontist, will be required, a statement signed by the employee stating that because of this illness or injury the employee was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 9.02(b):

(a) if the period of leave requested does not exceed five (5) days,

and

(b) if in the current fiscal year, the employee has not been granted more than ten (10) days' sick leave wholly on the basis of statements signed by the employee."

My jurisdiction over this matter is not at issue, nor the fact that the grievances were filed pursuant to the relevant provisions of the collective agreement.

II

THE EVIDENCE

A non-profit entity, NAV Canada took over from the Treasury Board on November 1, 1996 as the public authority responsible for air traffic control in Canada. Although its staff was carved out of the public service, NavCan's labour relations comes within the jurisdictional purview of the *Canada Labour Code,* not the *Public Service Staff Relations Act,* by virtue of being a separate and distinct entity.

The first collective agreement was not signed before August 1999; in the interim, the collective agreement entered into between Treasury Board and CATCA remained in effect. Initially due to expire on December 31, 1993, it was extended at various times and modified through memoranda of understanding to suit arising circumstances for the parties.

The negotiations of the first collective agreement between the parties under the *Canada Labour Code* were eventful. They were initiated in October of 1997, and a tentative settlement was reached in late March of 1998. After massive rejection of the deal in April by the membership, parties were forced to return to the bargaining table; an impasse was reached in July of 1998. A notice of dispute was filed with the Department of Labour, leading to the appointment of a conciliation commissioner. The conciliation commissioner filed his report in May of 1999 which was released a few days later by the Minister of Labour.

A new round of negotiations began which, under the intervention of a neutral called in to resolve what was described as interpretation issues, led to a tentative agreement later ratified by

membership. There were as well other incidents that were thought to have retarded the conclusion of a first agreement. One involved an alleged work disruption during which an unusually high number of employees of the Toronto ACC called in sick in the spring of 1998.

It is in response to this allegedly high level of absenteeism on the weekend of May 17 1998, that the Employer issued the following policy regarding sick leave. Part of this policy reads as follows:

"Following a work disruption on Sunday, May 17, 1998, Staff Memo No. 034-98 was issued outlining a number of measures to ensure a safe and efficient Air Navigation System.

[ ]

However, the following remain in effect:

1- all absences due to illness must be supported by a certificate from a physician who has actually seen the ill employee. Failure to provide such a certificate on return to work will mean that the sick leave will not be authorized. Even with a certificate, sick leave may not be authorized, depending on the circumstances. Additionally, depending on the circumstances, further medical information may be requested including, where appropriate, a referral to MEDCAN, which is now providing NAV CANADA and its employees with occupational health and integrated disability management service.

[ ]"

From the testimony of a Toronto ACC controller, Jack Heitzneir, work at that location is organized along eight specialties: Terminal, Airports, West High, West Low, East High, East Low, North, and North Bay. A portion of airspace is under the responsibility of each specialty. For instance, the Terminal specialty controls all aircraft arriving at, and departing from Pearson International Airport within a 26 miles radius. Prior to 1997, there were only 6 specialties at Toronto. The Union's view is that the reorganization increased the number of staff required to cover each specialty at a time no new staff was available. Witnesses from the Union explained that the old East and West specialties were each subdivided into High and Low sectors when CATCA's call for more staff resulting from such splits went unheeded. Indeed, following that reorganization, there was a requirement for ATC staff to become qualified in each sector before being able to work a given specialty. In conjunction with the reorganization, the Employer

introduced a vast training program for new controllers, and promoted ongoing training for those already working, a situation that caused a reduction of the workforce actually available for duty.

These difficulties seemed to be particularly acute on the night shift given the small number of ATC on duty and the need to provide regular breaks and relief periods. In response to an arbitral award, shoulder shifts were introduced to enable the night staff to break during the course of their shift.

According to Me Heitzneir, these factors were behind a very high demand for overtime, something most ATC felt compelled to do however demanding and difficult.

The testimony of another Toronto traffic controller, Clifford John Durrwachter, was along the same lines. In his view, "management threats and pressure" as he characterizes management action, left ATCs no choice but to perform overtime systematically. This fatigue factor eventually translated into higher level of absenteeism.

Former General Manager of Operations at the Toronto ACC, Ms Arlene Yakely, testified that the policy requiring the medical certification of all sick leave was aimed at achieving greater attendance at work at the time where the rate of absenteeism was a concern. It had increased to such a level that even minimal shift coverage had become problematic. She indicated that, prior to the general implementation of the policy, a similar practice had been implemented for the midnight shift in the fall of 1997.
Her account of events of the weekend of May 17 in Toronto was that 17 controllers had called in sick, while 3 who had agreed to work overtime had canceled. Based on her records, the level of absenteeism on that day was double the rate of the past, and 5 out of 6 who were due to report on the day shift at the Terminal had called in sick.

In addition, Ms Yakely pointed out that, despite an increase in AC staff in Toronto subsequent to the reorganization, air traffic had dramatically increased, as had the demand for more air traffic control services.

As well, the evidence adduced suggests some connection between the increased level of absenteeism, or its sharp rise in May 1998, and collective bargaining issues. Indeed, the Canada Labour Board had issued orders at the time in response to alleged unlawful strike action by ATCs in Toronto.

III

ARGUMENTS

Union

Counsel for the Union submits that the Employer policy requiring medical certification for each and every case of sick leave regardless of individual circumstances contravenes the collective agreement, is abusive and contrary to section 9 calling for the Employer to exercise discretion on an individual basis when requiring a medical certification of sick leave.

His view is that, since section 9.03 provides that in many single-day absences a simple declaration is enough to establish a leave condition, requiring medical certification in all cases of sick leave, as management did in this instance, would not be reasonable, nor in compliance with those provisions.

Even if the policy at issue was not per se contrary to the collective agreement, Counsel further suggests that the evidence adduced needed to demonstrate that it was actually necessary to establish a proper justification.

He referred on that point to the high level of absenteeism in May 17th 1998 as the sole basis for the Employer's decision. Mr. Barnacle insisted that the only question at issue before the arbitrator is whether management is entitled under the collective agreement to implement such a policy. He stressed that, contrary to management suggestion, it was not for the arbitrator to determine whether employees had actually engaged in unlawful job action that day. If, for instance, management had considered that unlawful activities were taking place, the course open to it was to exercise whatever recourse available to it at the time, not to simply ignore its obligations under the collective agreement and take the law into its own hands.

According to counsel, by poorly managing the reorganization management literally exhausted employees and was responsible for the high level of absenteeism. Now the Employer cannot duck its obligations by refusing to acknowledge that its own policies contributed to the state of fatigue among ATCs.

Counsel for the Union referred to the following authorities: *Re Government of Province of Alberta and Alberta Union of Provincial Employees (BANACK)*, (1992) 26 L.A.C. (4th) 327 (Koshman); Re *Meadow Park Nursing Home and Service Employees International Union, Local 220*, (1983) 9 L.A.C. (3d) 137 (Swan); Re *City of Toronto and Canadian Union of Public Employees, Local 79*, (1984) 16 L.A.C. (3d) 384 (Picher); Re *St. Joseph's Health Centre and Canadian Union of Public Employees, Local 1144*, (1988) 34 L.A.C. (3d) 193 (Joyce); *Re Women's Christian Association of London (Parkwood Hospital Veterans Care Centre) and London and District Service Workers' Union, Local 220*, (1983) 10 L.A.C. (3d) 336 (Brown); *Re Rosewood Manor and Hospital Employees' Union, Local 180*, (1990) 15 L.A.C. (4th) 395 (Greyell); *Re St. Lawrence Lodge and Ontario Nurses' Association*, (1985) 21 L.A.C. (3d) 65 (Emrich); *Donald R. Clark and Treasury Board (Transport Canada)*, March 31, 1994 (Louis M. Tenace); *Nav Canada and The Canadian Air Traffic Control Association*, July 10, 1998 (Kenneth P. Swan); and *Nav Canada and Canadian Air Traffic Control Association*, October 8, 1999 (Kenneth P. Swan).

Employer

The essence of the Employer's argument is that the language of sections 9.02 and 9.03 grants management the unfettered right of requiring medical certification in each and every case of sick leave regardless of individual circumstances. Counsel Gleason adds that the particular language used in section 9.03 is such that the arbitrator is precluded from inquiring into the reasons for such a requirement by management.

Referring to the case law relied upon by the Union, she observed that in most cases the language of the collective agreements sets out a threshold point for the exercise by management of some

form of discretion. This point is invariably the reference to individual employee circumstances. Not so with the instant collective agreement and its particular language.

In a subsidiary argument, Counsel argued that, if I were to find that the collective agreement does allow for an inquiry into the reasonableness of the Employer's requirement for medical certification, the factual elements of the case demonstrate that its decision was indeed reasonable. The issuance of two successive cease and desist orders by the C.L.R.B. following the events of in the spring of 1998 is also referred to by Counsel as evidence of the fact that Toronto ATCs were engaged then in unlawful strike action within the definition of the *Canada Labour Code.* In her view, anonymous leaflets posted at the time on the Union's bulletin board, openly calling for job action likely to affect job attendance, suggest likewise. As do the statistics she referred to that show a dramatic increase in absenteeism just when the Employer felt it had no choice but to oblige employees to justify each and every sick leave with a medical certificate. Finally, Counsel noted that, its actual wording notwithstanding, the policy implemented by management was not applied blindly but adapted to individual circumstances.

In summary, the Employer's main position is that the language of the collective agreement stands for the proposition that the parties knowingly negotiated wording that allows management to require medical certification in each case of sick leave. It follows that the arbitrator has no authority to inquire into the circumstances of how and why it should be required. Subsidiarily, it argues that the issuance of such a requirement, initially for all shifts at the Toronto A.C.C. and subsequently for the night shift, was fully justified in the circumstances.

The Employer referred to the following case law: *Re Nav Canada and Canadian Air Traffic Control Association*, July 10, 1998 (K.P. Swan); Re *Salvation Army Grace Hospital, Windsor, and Canadian Union of Operating Engineers and General Workers, Local 100*, February 6, 1980 (R.H. McLaren); *Re City of Toronto and Canadian Union of Public Employees, Local 43*, July 27, 1987 (E.N. Davis); *Re Jones et al. and Treasury Board (Department of Transport)*, April 3, 1981 (D.H. Kates); and *Re Treasury Board (Agriculture Canada) and Bingham et al.*, December 3, 1990 (R. Young).

Reply

In reply, Mr. Barnacle reiterated that to be properly construed sections 9.02 and 9.03 need to be read in conjunction. In his view, the collective agreement does contain a casual leave provision of sorts which calls for a threshold test to be applied, namely that management has to assess individual circumstances in each case of short-term leave where medical certification is required.

IV
ANALYSIS

The question at issue is whether management is entitled, based on the terms of the collective agreement, to require through a policy of general application as is the case here, medical certification for all sick leave.

To management's suggestion that it has the unfettered right to do so, and that any inquiry into the reasons behind such a policy is beyond the arbitrator's reach, the Union's reply is that such a policy contravenes the collective agreement, not to mention that it is unreasonably applied as well.

It is a matter of common understanding that, unless management rights are otherwise restricted, the Employer is entitled to adopt and implement policies aimed at directing and organizing the workplace. In that sense, the present collective agreement can be said not to restrict the Employer's ability to do so.

In general terms, the adoption by management of a policy aimed at preventing absenteeism and setting rules to govern absences from work due to illness or injury is in keeping with this principle. To be sure, in the absence of specific language to the contrary in the collective agreement, there is nothing unreasonable in management wanting to ascertain through a formal policy the reasons for such absences to determine whether they are genuine or not. In fact, management has the right to know whether illness or something else is behind an employee's absence.

This being said, one is also to recognize that all rights including management ones, are subject to some limits in a collective bargaining context, the primary one being that they be exercised in good faith and in compliance with the terms of the collective agreement. It is now well established that, when a conflict arises between a traditional right of management and some specific terms and conditions in the collective agreement, the latter will prevail.

In *Re City of Toronto* (supra), arbitrator M.G. Picher in referring to a policy governing sick leave reviewed the principles set out above as follows: [page 9]

> *« **The ability to implement that kind of measure would generally derive from the broad ambit of management's rights as described in art. 2.01 (a), would presumptively include the ability to implement a reasonable programme [sic] of deterrence in respect of absenteeism. However, that right is subject to the more particular rights spelled out between the parties elsewhere in the agreement**, as stated by art. 2.02. A review of the terms of the collective agreement reveals that the parties have addressed the issue of when medical certificates shall be automatically required following an absence due to illness »*
>
> [Emphasis added]

In the instant case, the very point of the union grievance is to challenge the Employer's right to issue and implement a policy governing the compulsory medical certification of all sick leave absences.

We shall determine whether the collective agreement, particularly 9.02 and 9.03, restricts in some fashion the Employer's ability to require of all controllers in advance the medical certification of all sick leave irrespective of circumstances. A related issue is our own jurisdiction in the matter, and whether the Employer's right to adopt such policy is limited by the collective agreement.

Before dealing with the scope of sections 9.02 and 9.03, what the Supreme Court of Canada recently said about statutory interpretation in *65302 British Columbia Ltd. v. Canada*, November 25 1999 should be borne in mind:

"[ ]

It is well established that the correct approach to statutory interpretation is the modern contextual approach, set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

> " . . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

The modern rule is again described in *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131:

> "There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning."

["]

We concur in this view and believe that such an approach is appropriate with respect to the interpretation of the provisions of a collective agreement, namely that their central purpose is to be taken into account, that they need to be read in their proper context, etc. To the extent that many contractual provisions in collective agreements are negotiated and made to extend to a host of individuals who are not personally party to the contract - commonly referred to as the law of the parties, they have a statutory flavor to them to which the interpretation approach suggested above is well suited. Brown and Beatty in *Canadian Labor Arbitration*, Third Edition, wrote: [paragraph 4:2000]:

"[ ] Conceptually the task of interpreting a collective agreement is no different than that faces by other adjudicators in applying statutes, private contracts and other authoritative directives and generally speaking, arbitrators view and approach their function in much the same way. "

The language of sections 9.02 and 9.03 is quite broad in its recognition of the Employer's ability to require the medical certification of sick leave. These two provisions need to be read together and in harmony.

Section 9.02 sets out two conditions of eligibility for a paid sick leave: first, an employee has to have "the necessary sick leave credits" and, second he is to satisfy the Employer of his or her health condition "in such manner and at such time as may be determined by the Employer."

Section 9.03 elaborates on the principle laid out in section 9.02 that one's health condition is a prerequisite to the right to paid sick leave. Specifically, it provides that, in the case of an employee absent for five days or less and subject to a restriction regarding frequency of occurrence, simple filing with the Employer of a statement signed by the employee stating that illness or injury prevented him or her from working, will be deemed to have satisfied the requirement of section 9.02 with respect to the establishment of one's health condition. Again, it is clear that this option is restricted to those employees away for five days or less, and who have not benefited during the same fiscal year of more than ten days' sick leave granted on the basis of such signed statements. In our view, such is the general rule governing entitlement to short term paid sick leave. There is, however, an overall proviso governing the application of that general rule. It states that an employee potentially eligible has not been "otherwise informed [ ] before or during the period of illness [ ] that a [medical certificate would] be required [ ]" to establish his or her condition.

While the introductory sentence of section 9.03 leaves little doubt as to the right of management to require the medical certification of one's health condition either before or during the course of their period of leave, the rest of the section makes it no less clear that by filing a statement instead of a certificate issued by a health professional an employee will be deemed to have met the "requirements of clause 9.02 b)". The sense to emanate from such a wording is that the parties intended the employee's statement to prevail as the primary means to establish "the manner in which and the time when" the employee's condition requested in clause 9.02 b) would be met. In that sense section 9.03 can be said to set out a presumption clearly meant to be of

general application vis-à-vis short term leave, subject to the Employer's option of asking for such certification.

In *Re NAV Canada and Canadian Air Traffic Control Association*, July 10, 1998, the arbitrator was asked to determine whether the employer could require the release of personal medical information to a physician and the medical examination of an employee by a physician. While the case referred to a separate issue, the arbitrator nonetheless had to consider sections 9.02 and 9.03 of the collective agreement. This is what he wrote they meant: [pages 19-20]

> « The first issue that must be resolved is the meaning of clauses 9.02 and 9.03. These are the only specific provisions in the collective agreement which deal with medical certification in any way, ( ).
>
> [ ]
>
> ( ) Read as a whole, the logical inference is that clause 9.03 only refers to the limited circumstances set out in paragraphs 9.03a) and (b), where the employee is requesting sick leave not exceeding ten days in total in the current fiscal year. In those circumstances, the employee's written statement is sufficient to justify the leave unless the Employer puts the employee on notice that a certificate will be required.
>
> The provision does not say that a certificate will always be conclusive, regardless of its quality, nor does it speak at all to other circumstances than those covered under clause 9.03. In my view, the generality of paragraph 9.02 (b) is not affected, and the employer has a right under that provision, as it states, to require the employee to satisfy it of a medical condition justifying sick leave « in such manner and at such time as may be determined by the Employer. »

The arbitrator then characterized as follows the rights conferred on management vis-à-vis the justification of sick leave: [page 20-21]

> *"Such a broad provision, however, is clearly the kind of discretion conferred on the Employer that must be exercised reasonably"*

In fact, the collective agreement implicitly provides for the compulsory medical certification of sick leave in the circumstances set out in paragraphs 9.03 (a) and (b). Be that as it may, the operation of the clause rests on the discretion conferred on the Employer to require medical certification, during or after the period of illness. And we agree with arbitrator Swan that such right of the Employer to require medical certification is essentially a « discretion that must be exercised reasonably » given the purpose as well as the wording of clauses 9.02 and 9.03. That such a discretion would exercise itself through the application of a policy requiring in advance the blanket medical certification of each and every short term sick leave claim, would be in our view excessive.

From this we find that the blanket requirement imposed by management in its May 17 1998 policy is not compatible with the exercise of the discretion conferred upon it by sections 9.02 and 9.03. What it does in fact is eliminate any notion of discretion, i.e one where proper consideration would be given to the actual circumstances giving rise to an individual employee's claim for sick leave. Even in cases where coverage would be denied, management would need to consider the circumstances giving rise to the claim.

Although section 9 gives the Employer the right to deny coverage even where medical certification is provided, the right to require certification is a discretion subject to the context of the provision that grants such discretion. This discretion is particularly evident when short-term leave is concerned. As drafted, it clearly represents an exception to the principle set out in section 9.03 where a declaration under the employee’s signature as opposed to medical certification is deemed to meet the eligibility requirements.

It follows that the discretion given to management to ascertain through medical certification the condition of an employee seeking leave is not synonymous with, nor can it be equated to the issuing of a blanket policy aimed at the whole staff and whose application is unrelated to individual circumstances. Moreover, limiting the application of the policy to a given shift or location, as it here happened, would not change things. This would mean not recognizing, or denying in advance by virtue of the shift they happen to work, or where they work, rights to individuals who are granted identical rights with regard to paid sick leave under the agreement

and whose attendance records and alleged illness might even be the same. This would not constitute, in our view, a reasonable exercise of discretion.

We share the views expressed in *Re Meadow Park Nursing Home:* [page 4]

> *"Similarly, arbitrators have applied similar principles as a part of the process off collective agreement interpretation where,* ***having regard to all of the language used by the parties, it is impossible to conclude that the conferral of a certain decision-making authority on management could have been intended to confer an untrammeled and capricious license. In every case, the standard of arbitral review of management's action will depend upon the words used by the parties to confer the discretion, in the context of the collective agreement in which the discretion is included.*** *"*
>
> [Emphasis added]

As mentioned earlier the subject collective agreement gives the Employer the discretion to require medical certification. The granting of such discretion does not mean, however, the right to systematically require certification through the implementation of a policy of universal application. Indeed, this is tantamount to a denial of any discretion. Given the purpose and the language of clauses 9.02 and 9.03, we conclude that the issuance of a general policy like the one here at issue is arbitrary in nature to the extent it substitutes for the exercise of discretion envisaged under this agreement the application of a rigid policy of universal application.

As seen above, tense labour relations and doubtful union action were factors which, according to the Employer, made the issuance and the application of the policy unavoidable. In turn, the Union questioned the management by the Employer of its human resources, and suggested that it had caused the exhaustion and exasperation of the staff. In such circumstances, the role of the arbitrator, if well known, is quite limited. For the purpose of disposing of this grievance, we rely on the following views expressed in Re Me*adow Park Nursing Home* : [page 4]

> *«Since the employer always has the capacity to invoke disciplinary remedies to deal with culpable absenteeism, it also appears likely that the provision is intended to deal with those cases where an employer cannot or would not allege dishonesty in respect of a claim for sick leave, but has simply come to the conclusion that a particular employee is missing more times through what might be called « casual illness » than is consistent with the effective operation of the work place, We are not here, of*

course, discussing the wisdom of a control of this sort; we are merely attempting to construe it in context.

In these circumstances, where the parties have agreed to give the employer a discretion to suspend the payment of earned benefits on certain circumstances, ***we think that it must have been intended in using that formulation to incorporate a number of elements of the administrative law concept of discretion. In particular, we think that the exercise of the employer's discretion must be in good faith, must be a genuine exercise of discretion and not merely the application of a rigid policy, and must include a consideration of the merits of each individual case.*** *"*

[Emphasis added]

For the reasons set out above, I allow the union grievance, and I direct the Employer to withdraw its policy on the mandatory certification of all sick leave at the Toronto ACC.

As mentioned earlier I will remain seized of the individual grievances held in abeyance pending this award, as well as of the issue of remedy should any difficulty arise in the implementation of this award.

OTTAWA, this 18th day of February 2000.

Serge Brault
Sole Arbitrator

Adjudex inc.
903-615-FP
S/A 303-00