CANADA

PROVINCE OF NEW BRUNSWICK

In the matter of the Canada Labour Code Part I

- and –

In the matter of three (3) References to Arbitration

Between:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

- and -

NAV CANADA

Grievances of Robert Allan, Phillip Randall and Gilles Rousselle

Appearances:

For the Association:	Peter Barnacle
For the Employer:	Patricia P. Brethour

Before:	Thomas S. Kuttner, Arbitrator
Date of Hearing:	23-24 March 2000 at Halifax, NS
Date of Decision:	11 April 2000

AWARD

INTRODUCTION

1. These are three (3) Referrals of grievance to arbitration arising out of the Employer's Halifax Tower location where the three grievors, Robert Allan, Phillip Randall and Gilles Rousselle are engaged as Air Traffic Controllers. They have been consolidated for hearing in a single arbitral proceeding, the facts and circumstances giving rise to the grievances and the relief sought being common. The dispute arises under the terms of a collective agreement originally bargained between Treasury Board (Transport Canada) and the Canadian Air Traffic Control Association [CATCA] effective 1 January 1991 – 31 December 1993, the term of which was statutorily extended through to 31 December 1997 by reason of the Federal wage restraint legislation of 1991 and 1993 [SC 1991 c. 30; SC 1993 c. 13]. During that time Canada's air navigation and transportation system was privatized with the enactment of the *Civil Air Navigation Service Commercialization Act*, 1996 [SC 1996 c. 20].

2. By the terms of the Act, Nav Canada [NAV CAN] assumed full managerial and operational control of the system becoming the successor employer to Treasury Board of those employees formerly engaged by the Department of Transport in air transportation and navigation. As such it was deemed bound by the terms of the several collective agreements extant on the date of the transition [1 November 1996] as between Treasury Board and the several agents who represented the employees of Transport Canada including CATCA, although collective bargaining as between the two parties moved out from under the umbrella of the *Public Service Staff Relations Act*, RSC 1985 c. P-35

[PSSRA] into the arena of Part I of the *Canada Labour Code*, RSC 1985 c. L-2. On 19 November 1996 NAV CAN entered into a Memorandum of Understanding [MOU Ex 1, Tab 3] with the ten (10) bargaining agents representing its employees, including CATCA, which was to apply during the transition period and address lacunae which inevitably arose in the transferal of the air transportation and navigation system from the public to the private sector. The terms of the MOU were to remain in effect for each of the bargaining agents between the date of transfer until entry into a renewal collective agreement bargained freely between the parties. In the case of the air traffic controllers, CATCA and NAV CAN entered into a collective agreement effective 13 August 1999 with a two-year term terminating 31 December 2001. These grievances were filed on 30 April 1997 and so are governed by the grievance and arbitration procedure which is included in the MOU at Appendix B.

3. The parties have agreed to a list of regionally based arbitrators to hear matters in dispute between them as they arise in each of the several regions of the Employer's national enterprise, with the understanding that employee grievances are to be heard, where feasible, at the locale where the grievor is engaged and the matter in dispute arises [MOU, Arb. procedure s 3; s. 10]. This matter was originally scheduled to be heard before Arbitrator Christie in September 1999, but on the eve of the hearing the Employer purported to grant the grievances and in the circumstances the hearing did not get underway as originally scheduled. There is a dispute between the parties as to whether or not there is jurisdiction in any arbitrator to proceed in this matter given that Employer action, and the matter is addressed fully below. Ordinarily, that preliminary issue itself

as well as the grievances on the merits would have been remitted back to Arbitrator Christie, but inasmuch as he was unavailable at the time sought for hearing, the parties agreed that the matter be remitted instead to me for determination on both the preliminary and substantive issues.

PRELIMINARY OBJECTION

4. By letter dated 20 March counsel for NAV CAN submitted that the issue before me for determination was moot and alternatively, premature. By agreement, the parties put this preliminary issue to me for determination by way of telephone conference on 21 March, but it quickly became apparent that the scope of the preliminary objection as to my jurisdiction to proceed – the underlying circumstances giving rise to it and the arguments and authorities both in support and in opposition, - was such as to make its full consideration by way of telephone conference impracticable and its resolution prior to the dates set for hearing not feasible. In the circumstances, counsel agreed that we proceed as originally scheduled, and that full argument on the preliminary objection be made at the hearing. In addition I advised the parties that I would reserve on the jurisdictional question and proceed to hear the matter on the merits as, in my view this would avoid unnecessary delay in a matter already postponed for six months from the original date set for hearing. Moreover, there would be the added expense should the preliminary objection be dismissed thereby necessitating a reconvening of the proceedings and the concomitant delay and expense associated therewith. This is in accord with established arbitral practice and has received the imprimatur of the Courts – see *New Brunswick v. Council of Hospital Unions* (1986) 77 NBR(2d) (CA) where the authorities are reviewed,

as well as the remarks of Justice LaForest speaking for the full court in *Dayco v. CAW Canada* 93 CLLC case No. 14,032 [SCC] on the legitimacy "of pressing forward with the merits of a grievance, despite a challenge to jurisdiction." [p. 12,191]. The within case went forward on that footing, a further objection as to the admissibility of extrinsic evidence, which is dealt with below, being treated in a similar fashion.

The Grievance: Its background and purported resolution

5. The three grievances were submitted by CATCA simultaneously on 30 April 1997. The matter in dispute was the refusal of management to reimburse each of the grievors for expenses incurred in using their own vehicles [privately owned transportation] to drive from Halifax to Moncton for Radar Training at the Moncton Air Traffic Control Centre. Only the grievor Robert Allan testified. There is really no dispute between the parties as to the underlying circumstances giving rise to the three grievances and these can be briefly stated. In mid February, 1997 the three grievors and a fourth employee Ms. Ivamy [who elected not to grieve] were directed to travel to the Moncton Air Traffic Control Centre where they were to participate in a training session on the Radar Simulator – Allan and Randall to act as on-the-job instructors [OJI] for the two trainees Rousselle and Ivamy. Shortly before their departure, their supervisor Ross Kay, who was acting manager of the Halifax team, advised that they were to carpool i.e. rent a van and travel together to Moncton for the training session and back again to Halifax. No formal arrangements had been made as to who was to rent the van or act as designated driver or drivers. In the event, the employees each choose to make the round trip by personal vehicle and claim reimbursement for doing do – a procedure each understood to

be governed by article 28 of the Collective Agreement which itself incorporates by reference a Treasury Board Travel Directive [TB Travel Directive Ex. #4]. Each did so and in each instance the claim filed was rejected, thus precipitating the within grievances.

6. Because argument as to whether the grievances were resolved, and so effectively withdrawn from arbitration on the eve of the hearings originally scheduled before Arbitrator Christie in September 1999, rests in part on their particular formulation, each is here reproduced in relevant part.

> Robert Allan grievance: [Ex. No. 1 tab 1, p. 1] Details of grievance: "After having been told I was to go to Moncton to [unclear] Radar Training commencing 18 Feb 97, I elected to use my own vehicle. I was subsequently told that I was to travel by van pool, however, was not told who was to rent the van or drive it due to a lack of clear direction and a winter storm coupled with the fact that everyone in the group were concerned about safety and driving conditions, I elected to travel by myself as outlined in Articles 28.01 and 28.03 of the collective agreement."
>
> Corrective action requested: "In view of management's arbitrary refusal of my request to use privately-owners motor vehicle, especially in light of this policy not being applied fairly throughout the region, I request reimbursement in the amount of $202.21".
>
> Phillip Randall grievance [Ex. No. 1 tab 1 p. 4] Details of grievance: "In preparing for Radar Student Training in Moncton, I was initially approved to travel via Air (Air Nova) on Feb 18/97 – and informed that my Airline ticket had been purchased and was to be picked up at the ticket counter. Shortly before departure I was advised that the airfare was now cancelled and that I was now to report to the airport to vanpool to Moncton – at this point I elected to travel in my own vehicle due to winter storms and very poor road conditions I had experienced in past trips; I was already involved in one accident!"
>
> Corrective action requested: "In accordance with Collective Agreement Article #28.03, I request reimbursement in the amount of $192.36."
>
> Gilles Rousselle grievance [Ex. No. 1 tab 1 p. 6] Details of grievance: "I was instructed to report to work as usual on Feb. 18,97 and travel to Moncton for training in the afternoon. I was to travel in a rented van with other colleagues. As it turned out there was no van and I had to use my private vehicle for the trip. I was advised on April 8, 97 that the mileage portion had been deleted from my claim since I was advised to travel by other means. Those other means were not provided."
>
> Corrective action requested: "That the mileage portion of the claim be reimbursed as submitted in the amount of $200.39."

7. On May 20, 1997 J.L.J. Chamberland, Regional Director Air Navigation Services issued his common first level written response to the three grievances in the following terms:

> "DECISION OF AUTHORIZED EMPLOYER REPRESENTATIVE AT THE 1ST LEVEL
>
> I have had the opportunity to discuss the particulars of your grievance with your representative.
>
> A review of the Travel Directive (1.1.1) and the applicable provisions of the collective agreement indicates that the employer has the right to determine the method and means of travel of its employees. Article 28.03 of the AI collective agreement only applies after article 28.01 has been met and 28.01 again provides for the employer to determine the method and means of travel.
>
> I believe that you were given appropriate direction to travel by van and that any changes to that should have been approved by your manager. The decision to travel by personal vehicle was not approved and, therefore, cannot be supported.
>
> It is my position that all employees who travel on behalf of the company shall travel by the most practical and economical means possible. From time to time it may be necessary to travel by less economical means but this will only be as a result of compelling reasons and must be authorized by the appropriate manager. Written direction will be forwarded to all managers on this matter.
>
> For all of the reasons stated above. I cannot grant the requested corrective action and your grievance is denied."
>
> [Ex 1, Tab. 1 p. 2]

8. CATCA pursued the matter on through to 2nd level grievance and on 3 December 1998 Tor Veltheim Director Labour Relations for NAV CAN wrote Fazal Bhimji, then Vice President Labour Relations CATCA in the following terms:

> "RE: FINAL LEVEL GRIEVANCE REPLY – ROB ALLAN ET AL-HALIFAX TOWER NCJC TRAVEL/RELOCATION
>
> Dear Mr. Bhimji:
>
> Further to the our consultation meeting I have thoroughly reviewed the details of the above grievance.
>
> CATCA's position is that the three employees, Mr. R. Allan, Mr. G. Rousselle, and Mr. P.M. Randall should be reimbursed mileage at the applicable rate in the Travel Directive for using their private vehicle for NAV CANADA business as directed under 28.01 and 28.03 of the CATCA collective agreement.

> As per clause 28.01 of the collective agreement, Management has the right to direct employees to use a particular mode of transportation and they directed all the employees in this instance to take one vehicle to attend a training session. While employees are permitted to use an alternative mode of transportation it must not entail additional costs.
>
> With respect to clause 28.03, which provides for the reimbursement of mileage when electing to use your private vehicle, this is subject to clause 28.01 and also does not permit employees to ignore management's direction and unilaterally proceed to each drive their own vehicle at a higher cost to NAV CANADA.
>
> Based upon the above reasons, the grievance is denied.
>
> Sincerely,
>
> Tor Veltheim
> Director, Labour Relations"
>
> [Ex. 1, tab 1, p. 3]

9. This was how matters stood at the time these grievances were referred on to arbitration by CATCA and there remained until the very eve of the first date set for the hearing of the matter before Arbitrator Christie, the parties having scheduled two days for the proceedings on 9 – 10 September 1999. By fax letter dated and transmitted 8 September 1999 M. Ross Langley, at the time counsel retained by NAV CAN on this matter, wrote to Ms. Ainslie Benedict who had been retained to act on behalf of CATCA, as follows:

> "Dear Ms. Benedict:
>
> Re: Grievance No. MV97-98-001 (Robert Allan) dated April 30, 1997
> Grievance No. MV97-98-002 (Phillip Randall) dated April 30, 1997
> Grievance No. MV97-98-003 (Gilles Rousselle) dated April 30, 1997
>
> Nav Canada has had an opportunity to consider again these three grievances and has determined that there may have been some confusion as to who was to rent and drive the van to Moncton.
>
> Given the amount of expenses in dispute in relation to the anticipated time and cost involved in proceeding to an arbitration hearing in Halifax, Nav Canada has advised that since there may have been some confusion about who would rent and drive the van, it will grant the grievances by paying within 14 days of the date of this letter the expenses claimed by Messrs. Allan, Randall and Rousselle.
>
> We have written to Professor Innis Christie (a copy of our letter is enclosed) advising that there is no requirement to proceed to a hearing tomorrow.

Yours truly,

M. Ross Langley"

[Ex. 1, tab. 4 p. 11]

As indicated, Arbitrator Christie was so advised by fax letter of same date. This correspondence of Langley's prompted an immediate fax reply from Benedict on the same date addressed to Arbitrator Christie with a copy to Langley in the following terms:

"Dear Professor Christie:

RE: CATCA and NAV CANADA
- Grievances of Allan, Randall and Rousselle
Our File No. 1362-128

This is further to Mr. Langley's letter of today's date, advising of NAV CANADA's decision to grant the above-noted grievances by paying the expenses claimed.

The actual dollar amounts being sought by the grievors were low; the real issue underlying the grievances remains in dispute and part of the remedy being sought through the grievance procedure has not been satisfied.

I have advised Mr. Langley that, under the circumstances, it is CATCA's position that the hearing scheduled for tomorrow and Friday has been adjourned *sine die*, at the request of NAV CANADA.

Upon final payment of the expenses claimed, CATCA will withdraw the grievances. I would ask that you retain jurisdiction until that time.

Yours very truly,

Ainslie Benedict"

[Ex 1, tab 4, p. 13]

10. Benedict wrote to Arbitrator Christie again, somewhat more expansively by fax letter dated 10 September 1999 again copying Langley:

"Dear Professor Christie:

RE: CATCA and NAV CANADA – Grievances of Allan, Randall and Rousselle
Our File No. 1362-128

On September 8th , Ross Langley, counsel for NAV CANADA, advised you of the company's decision to grant the above-noted grievances by paying the expenses claimed.

The actual dollar amounts being sought by the grievors were low; however, the underlying issue that gave rise to the grievances remains in dispute and part of the remedy being sought through the grievance procedure has not been satisfied. I have advised Mr. Langley that, under the circumstances, CATCA is treating the hearing

scheduled for September 9th and 10th as having been adjourned *sine die* at the request of NAV CANADA.

CATCA will re reassessing its position over the next few weeks as to whether or not it will continue to pursue the grievances on the basis that the central issue remains outstanding, or whether it will file a union grievance on the same matter. Until CATCA makes this determination, it will not be in a position to withdraw the grievances. You have confirmed that you will retain jurisdiction until advised that the expense monies have been paid and this matter finally settled to the satisfaction of both parties.

Yours very truly,

Ainslie Benedict"

[Ex. 1, Tab 4, p. 9]

This letter in turn prompted two further pieces of correspondence between the two outside counsel – the first from Langley to Arbitrator Christie on 21 September 1999 and the second from Benedict to Langley on 23 September 1999. These are in the following terms:

"Dear Professor Christie:

Re: CATCA and Nav Canada
Grievances of Allan, Randall and Rousselle

I refer to Ainslie Benedict's letter to you of September 10, 1999.

NAV Canada does not agree with CATCA's position that the hearing of these grievances has been adjourned *sine die* because NAV Canada granted the grievances as stated in my letter to you of September 8th, 1999 and my letter to Ms. Benedict of the same date.

NAV Canada's position is that the grievances will be fully resolved once payment has been made to the grievors.

Yours truly,

M. Ross Langley"

[Ex. 1, Tab. 4, p. 8]

"Dear Mr. Langley:

RE: CATCA and NAV CANADA – Grievances of Allan, Randall and Rousselle
Your Reference: NS23281-7

Our File No. 1362-128

I have your letter to Professor Christie dated September 21, 1999.

> It is my understanding that the parties are currently discussing how to proceed on this matter. In the interim, it is CATCA's position that, even if NAV CANADA does make the payments to the grievors, it would be inappropriate for you to advise Professor Christie that the grievances have been finally resolved. Depending on the outcome of CATCA's discussions with NAV CANADA on resolving the main issue that gave rise to the grievances, CATCA may continue to take the position that the grievances have not been resolved".
>
> [Ex. 1, Tab 4, p. 7]

11. Shortly thereafter, the parties themselves became actively engaged in the question as to whether the matter had or had not been resolved, through direct discussion between their in-house counsel, Ms. Brethour and Mr. Barnacle. Although the three grievances remained the substratum of their discussions, the focus shifted to whether 'car-pooling' could be required by the Employer as a 'method of travel' at all under the provisions of the Travel Article. CATCA took the view that this was in essence a still unresolved issue underlying the three grievances, whereas NAV CAN took the position that that issue could be raised, if at all, only as a national policy grievance. However, in any event NAV CAN indicated it willingness to resolve the issue in the Atlantic Region by requiring controllers to travel by bus between Moncton and Halifax with an election to car pool as an alternative should employees so consent. [Correspondence Brethour to Barnacle 29 September 1999; Barnacle to Brethour 29 September 1999 [Ex. No. 1 tab 4 pp.4-6].

12. It is on the basis of that record that the preliminary objection to my proceeding any further is made. For NAV CAN, Ms. Brethour argued quite forcefully that the matter in dispute was either moot (if viewed in terms of a demand for mileage reimbursement) or premature (if viewed as a general attack on car pooling as a method of travel open to the Employer to direct). Here the grievors clearly raised the issue of confusion as to the

directive given them by the Employer and sought a specific remedy: reimbursement for mileage expenses. Those amounts were paid in full as undertaken by the Employer on the eve of the date originally set for hearing of the matter before Arbitrator Christie. By admitting to the confusion and paying out the monies NAV CAN has dealt fully with the issues as framed in the grievances. The question as to whether NAV CAN has any right at all to order employees to travel together by car pool is a distinct and separate one raised after the grievances had been granted. It is not yet ripe for determination particularly inasmuch as the Employer has undertaken not to direct car pooling in the Atlantic Region. There is no live issue in dispute between the parties. In any event, such an issue engaging as it does rights of the entire bargaining unit, would have to be raised as a policy grievance for a determination centrally at Ottawa as agreed informally by the parties. Pleaded in support was the decision of Arbitrator P. Picher in *Re Stelco Inc. and USWA Local 1005* (1999), 78 LAC 4th 118.

13. For CATCA Mr. Barnacle argued equally strenuously that the preliminary objection made is without merit. The parties have expressly agreed at article 7 of the Arbitration Procedure contained in Appendix B to the MOU that the Arbitrator "shall hear and determine the real issue of the difference or allegation in dispute". Here a fair reading of the grievances makes it clear that employee rights under Travel Article 28 touching both the method of travel which may be required by the Employer and reimbursement for travel expenses incurred by an employee, are at issue. The purported resolution of the grievances by the Employer touched only the monetary relief sought. It did not address the underlying claim of breach by the Employer of the article in requiring

that employees travel together by car pool. That remains a live issue for determination which touches the rights of the grievors as well as of other members of the bargaining unit. An individual grievance may raise issues of contract interpretation of broad application across the bargaining unit and under the terms of the governing MOU there is no requirement that such be framed as a policy grievance. Considerations of efficiency and expediency in addressing labour relations issues counsel entertainment of the grievances here filed as, notwithstanding the grant of monetary relief, a live issue remains outstanding between the parties. Cited in support were four decisions: that of Arbitrator Weiler in *Re United Steelworkers and International Nickel Co. of Canada* (1972) 24 LAC 51; that of Arbitrator Rayner in *Re Union Gas Co of Canada and International Chemical Workers' Union Local 741(1973),* 4 LAC (2d) 132; that of Arbitrator Thistle in *Re Canada Post Corp. and Canadian Union of Postal Workers (Mundle)* (1989), 8 LAC (4th) 201 and that of Arbitrator Brandt in *Re Durham Region Roman Catholic Separate School Board and CUPE Local 218* (1991) 19 LAC (4th) 72.

DECISION ON THE PRELIMARY OBJECTION

14. In her decision in *Stelco* Arbitrator Picher drew on the jurisprudence of the Supreme Court of Canada to determine the issue of mootness as follows:

> "In *Borowski v. Canada (Attorney-General*) (1989), 57 D.L.R. (4th) 231 (S.C.C.), Mr. Justice Sopinka, speaking for the Supreme Court of Canada, stated that he considered a case to be moot if it failed to meet the "live controversy" test. At p. 239 he stated the following:
>
> > Mootness
> >
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient

> must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed further hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Secondly, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test.

[at p. 124]

15. The 'live controversy test' takes as determinative of mootness whether or not the decision of the tribunal will 'have the effect of resolving some controversy which affects or may affect the rights of the parties'. Absent a practical effect on those rights a Court will ordinarily decline to decide a case although it retains a discretion to do so in any event. In *Borowski*, Justice Sopinka adopted a two step analysis determining first 'whether the required tangible and concrete dispute has disappeared and the issues have become academic.' This in turn requires one to look carefully at the dispute as formulated to determine whether or not subsequently occurring events have had the effect of stripping it of any ongoing vitality in the sense that a live controversy has ceased to exist and the issue reduced to one of academic interest only. In *Stelco*, Arbitrator Picher concluded that once the employer there had resiled from its intended implementation of a rotating shift schedule, coupled with its undertaking to advise the union of any intention on its part to do so in the future within a timeframe sufficient to allow its challenge before an arbitrator, the live controversy test had not been met: the asserted rights of the employees under the collective agreement as to scheduling had not yet been engaged

whatsoever and their anticipated engagement in the future was too remote to attract resolution through the arbitral process.

16. Here, the circumstances are somewhat different. The Employer issued a directive to employees under article 28 that they adopt the method of travel stipulated: car pooling by way of rental of a single vehicle. It then denied the grievors' claims for reimbursement for use of their own private vehicles in lieu of traveling by way of car pool rental van – claims filed under the terms of article 28. Counsel for NAV CAN characterizes the controversy between the parties to be limited to the question of entitlement to the monies claimed, that claim rooted in 'some confusion about the directions given to the employees' 'as to who was to rent and drive the van to Moncton' [8 September 1999 letters of Langley *supra*]. That characterization is drawn from the wording of the grievances which nowhere explicitly challenge the right of the Employer to direct car pooling, and which limit the corrective action sought to the payment of expenses incurred by each in the use of their own personal vehicles. For CATCA, counsel argues that this is much too restricted a reading of the grievances, one of which explicitly references both articles 28.01 & 28.03 [that of Allan] another article 28.03 [that of Randall] and all of which claim reimbursement in an amount which has been calculated in accordance with the latter article. The real issue in dispute between the parties is not the payment of expenses claimed for use of a personal vehicle arising out of confusion as to a management directive, but rather the legitimacy of the directive made and its effect on the right of the employees to the reimbursement claimed. I agree.

17. I take as my starting point the express intention of the parties as found in the Grievance and Arbitration Procedure contained at Appendix "B" to the MOU. Counsel for CATCA referenced article 7 of the arbitration procedure in support of the proposition that an arbitrator hear and determine the real issue of the difference or allegation in dispute. In my view even more telling is the overall Objective of the MOU Grievance and Arbitration Procedure which sets the framework within which it is to be interpreted as follows:

> "Objective:
>
> The parties wish the grievance and arbitration procedure to address *the real issue* of each party's complaint in an expeditious, efficient, economical and fair manner." [Ex. 1, tab 4, p. 5, emphasis added].

This joint commitment dovetails well with the public policy rooted in the governing legislation that the grievance arbitration process be a viable and vibrant mechanism for the resolution of collective bargaining disputes. The Courts and arbitrators have long recognized this, and so have been intolerant of claims of defect in form or technical irregularity in the processing of grievance complaints. A recurrent theme in the jurisprudence is that form not triumph over substance in the arbitral process. For instance Justice Brooke speaking for the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. V. United Brotherhood of Carpenters, Local 2486* 75 CLLC case no. 14,295 cautioned:

> "Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed."
>
> (at p. 657)

18. The arbitral jurisprudence is equally as insistent on the need to combat the tyranny of form. See for example, *City of Lethbridge and Canadian Union of Public Employees, Local 70* (1982), 4 LAC (3d) 289 (England*); Re Barbour Hydraulic Turbine Ltd. and United Steelworkers of America,* (1979), 20 LAC (2d) 372 (Shime); and *Re Fabricated Steel Products (Windsor) Ltd., and United Automobile Workers, Local 195* (1978), 16 LAC (2d) 148 (O'Shea). To be sure, as Arbitrator O'Shea noted in the last-cited case, a grievance should state with sufficient particularity when, where, how and by whom the grievor alleges that the terms of the governing Collective Agreement have been violated. This is for a two-fold purpose – namely, that the processing of the grievance might be facilitated and as well that the employer might be made aware at the earliest possible opportunity of the nature of the dispute. That test has been met here. But such particularity is not to be insisted upon at the expense of arbitrability. In an early case, Arbitrator Lang quoted from a paper delivered by the then Professor Bora Laskin as follows:

> "The grievance documents are, so to speak, the 'pleadings' of the court lawsuit, but whereas rules of procedure govern the particularity of the statement of a cause of action (as well as the defence) in a lawsuit, and provide an orderly scheme for amendments, the labour arbitrator has no such formal code of control, save as one may be found in the particular collective agreement. In my submission, it is better that he be left fairly free to help the parties, if necessary, to pinpoint the issues in a grievance claim. The expedition and informality sought through arbitration would be lost if the written grievance form became the soverign talisman, and if formal motions to amend had to be made. After all, we are not concerned in labour arbitration with meticulous definition of issues for a jury, nor are we concerned with tactical maneuvers designed to protract proceedings or to compound costs. Of course, neither party to a labour arbitration, should be put at a disadvantage by reason of the opponent's amendment of claim or answers; but this can usually be resolved on the spot, or an adjournment

> could be granted to permit preparation to meet what turns out to be a new or modified form of the issue between the union and employer."

See *Re United Steelworkers, Local 3998, and Dunham Bush (Canada) Ltd*. (1965), 15 LAC 270 at 274.

19. All of these are cases in which the arbitrability of a grievance on the merits was at issue from the outset, but they are equally applicable here where having granted monetary relief as requested, the principle of mootness is pleaded to challenge an arbitrator's jurisdiction to proceed. As in an original challenge to arbitrability, so too in a plea of mootness, the arbitrator must take a broad view of the pleadings so as to determine the real issue in dispute between the parties. Indeed, it is interesting to note that the spokespersons for the Employer who first dealt with the grievances had little difficulty in discerning the real issue they raised. In their common responses to the grievors, both Chamberland at level 1 and Veltheim at level 2 asserted in response to the claim for reimbursement made under 28.03, its contingency upon the right of the employer under article 28.01 to determine the method of travel – in this instance by way of rental van car pool. This is the real issue the union seeks to have determined in these proceedings.

20. Here, payment of the monetary claim *simpliciter* does not address the real complaint made and recognized by the Employer. In *Blouin Drywall* Justice Brooke emphasized that it is only upon the real complaint being dealt with that an appropriate remedy can be provided so as to give effect to the provisions of the collective agreement which are in dispute. He enumerated by way of remedy the declaratory order, the mandatory order, and the monetary award. Here what has been effected by the unilateral

act of the Employer has been simply the payment of the monetary claim, leaving undetermined the important question as to the rights and duties of the parties under Article 28 of the collective agreement which had precipitated the grievances in the first place. This was the initial stance taken by CATCA on 8 September 1999 when counsel on its behalf responded to the correspondence of that same date from counsel for NAV CAN purporting to grant the grievances and withdraw them from arbitration, - a position which CATCA has maintained consistently ever since. Nor, in the context of this collective agreement does the distinction between policy and individual grievances have any determinative bearing on the preliminary issue before me.

21. The MOU itself stipulates at article 3 of the Grievance Procedure that grievances include individual employee grievances, group grievances, union grievances, and employer grievances. And although specific provision is made at article 8 for the processing of grievances alleging violation of a National Joint Council Policy [NJCP] which is referred through to the NAV CAN Joint Council [NCJC], nothing in its terms necessitates the formulation of a grievance as a policy or union grievance merely because its outcome may affect the entire bargaining unit. These particular parties have just come out of a collective bargaining regime which prohibits the formulation of a grievance as a union or policy grievance where it can be prosecuted by way of employee grievance: see, PSSRA s. 99. True, now that the parties function under the *Canada Labour Code* the lifting of that restriction opens the possibility of the filing of a union or policy grievance rooted in Employer conduct which might itself precipitate an employee grievance. But this cannot be said to fetter the right of an employee affected by an Employer decision to

file a grievance seeking individual relief and as well an authoritative interpretation of the collective agreement terms in dispute. This is a commonplace. It may well be the better part of wisdom as Justice Laskin, then of the Ontario Court of Appeal once noted, that "the interpretation of a particular term of an agreement and its consequent application to many or possibly all employees" be prosecuted by way of policy grievance, a mechanism he described as "an extension of the administration of the bargain by the parties who concluded it". That was in *Re Hoogendoorn and Greening Metal Products and Screening Equipment Co*. 67 CLLC case no. 14,017 at p. 80; rev.'d *aliter* on appeal *ibid* 67 CLLC case no. 14,064 (SCC). However, that being said, absent clear provisions to the contrary in the governing collective agreement, the mere possibility of formulating a policy grievance without grounding it in a particular set of circumstances cannot strip an employee of the right to file an individual grievance precipitated by conduct on the part of an employer which has affected that employee in particular. The most that can be said is that in some circumstances there may be a double aspect to an employer's conduct which grounds both a policy and an individual grievance. That may very well be the case here, but as events transpired, it was the conduct of the Employer as it touched these particular employees which precipitated a dispute they have elected to pursue by way of individual grievance. This they are entitled to do under the terms of the MOU.

22. In this, the first part of the two-step analysis articulated by Justice Sopinka on the mootness issue, I conclude that the tangible and concrete dispute between the parties which first arose upon filing of the three employee grievances has neither disappeared nor become academic. As in the cases cited in support by counsel for CATCA a live

controversy subsists notwithstanding the action of the Employer in unilaterally choosing to reimburse each of the grievors the amount of compensation originally sought. I might add here that even had I come to the opposite conclusion on that score, I would in any event have exercised my inherent discretion to hear the case on the merits and this for reasons of efficiency, expediency and enhanced labour relations as between the parties. The important comments of Justice Cory in *Dayco* would militate towards the exercise of my discretion in that direction. "Unresolved disputes fester and spread the infection of discontent" he wrote, and continued:

> "They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution."
>
> [at p. 12,210-211]

23. Although the foregoing suffices to address the matter, I would not want to leave the issue without commenting upon it from another perspective. That is the tripolar relationship between employer, employee and trade union which gives to collective agreements their distinctive flavour – one so foreign to the common law that it could not countenance their having any legal status whatsoever. That weakness of the common law has long since been remedied by act of the legislature, collective agreements since the advent of PC 1003 in 1944 being fully enforceable, albeit by way of arbitration rather than by action before the Courts. Nevertheless the same legislation jealously protects the status of trade unions as bargaining agents and generally vests in them, and them alone jurisdiction to pursue a matter through to arbitration. This has serious implications where

an employer seeks, as was done here, to resolve a grievance arbitration matter directly by granting relief to the aggrieved employees. The matter is compounded within the context of this particular collective bargaining relationship inasmuch as the MOU not only vests in the parties alone – NAV CAN and CATCA - the right to refer their unresolved grievances to arbitration, but indeed on the trade union side limits even the processing of an individual grievance through steps 1 and 2 of the grievance procedure to an authorized bargaining agent representative. In such circumstances, the arbitral jurisprudence confirms that even should an employee desire to settle a dispute and withdraw a grievance from arbitration this cannot be effected directly between the employee and the Employer but only through the bargaining agent which retains the right to proceed through to arbitration despite the employee's express desire to the contrary. See *Re Dartmouth General Hospital and Community Health Centre* and CBRT Local 606 (1981) 1 LAC (3d) 444 (Langille).

24. One way of looking at the events of September 1999 is that they comprised in effect an abortive settlement process. Of course settlement between the parties of a grievance arbitration dispute although highly desirable is not always possible. But settlement is a *mutual* process. Here by his letters of 8 September 1999 counsel for NAV CAN sought to dictate unilaterally the term of a settlement between the parties, and even went so far as to seek to withdraw the matters from arbitration on the terms he set. But it was simply not open for him to do so, Counsel on behalf of CATCA from the outset – although there was an initial wavering – insisting that full resolution i.e. settlement of the matter as proposed, could only be effected on consent of the union. That consent was

never given, CATCA insisting that the asserted right of the Employer to direct travel by way of car pooling be resolved to its satisfaction, failing which the matter would have to proceed to arbitration. This was notwithstanding payment out by the Employer of the monies claimed by way of compensation for use of personal vehicles in the particular circumstances underlying the three grievances. In my view, absence of mutuality as between CATCA and NAV CAN in the proposed settlement of this dispute, itself precludes any assertion of mootness by NAV CAN, premised as it is on its own unilateral action in paying the monies claimed.

THE DISPUTE ON THE MERITS

25. The resolution of this dispute turns on the interrelationship between Articles 28.01 and 28.03 of the collective agreement. Article 28, which governs Travel Policy reads in full:

ARTICLE 28

TRAVEL

28.01 Where an employee is required by the Employer to travel to or from the employee's headquarters area as normally defined by the Employer, the employee's method of travel shall be determined by the Employer. However, if an employee wishes to use a different method, the employee's wish will not be arbitrarily refused provided that the method chosen is consistent with the purpose of the travel and does not entail additional costs.

28.02 When required to travel, the employee will be compensated in the following manner:

(a) On a normal working day on which he or she travels but does not work, the employee shall receive his or her normal pay for the day.

(b) On a normal working day on which the employee travels and works, the employee shall be paid:

(i) his or her normal pay for the day for a combined period of travel and work but not exceeding his or her normal hours of work,

and

(ii) at the applicable overtime rate for additional travel time in excess of the employee's normal hours of work, with a maximum payment for such additional travel time not to exceed eight (8) hours' pay at the applicable overtime rate in any day.

(c) On a day of rest or on a designed paid holiday, the employee shall be paid at the applicable overtime rate for hours travelled to a maximum of ten (10) hours' pay at the applicable overtime rate.

28.03 When an employee is required by the Employer to travel to or from the employee's headquarters area as normally defined by the Employer, the employee may in accordance with paragraph 28.01 above:

(a) Elect to travel via scheduled air carrier at the most economical air fare or its equivalent; or

(b)Elect to use privately-owned transportation and be reimbursed at the rate shown in paragraph 4.5.3 of the Treasury Board Travel Directive; or

(c) Be requested by the Employer, or elect to use privately-owned transportation and be reimbursed at the rate shown in paragraph 4.5.2 of the Treasury Board Travel Directive.

(d) When the employee elects under paragraphs (b) or (c) above to use privately-owned transportation, the employee shall be paid at the applicable rate for the time normally required to travel portal to portal by air carrier.

(e) Employees travelling to or from Ottawa or the Transport Canada Training Institute for temporary assignments in excess of five (5) days, whose headquarters area is in Newfoundland or the Pacific or Western Region, who elect to use privately-owned transportation under paragraphs (b) or (c) above shall be allowed an additional day in which to travel and shall receive normal pay for that day. An employee travelling to or from Ottawa or the Transport Canada Training Institute for temporary assignments in excess of five (5) days, whose headquarters is in the Pacific Region will be allowed a day with pay in addition to the day noted immediately above.

(f) An employee who elects to use privately-owned transportation under paragraph (c) above shall be reimbursed at the rate shown in paragraph 4.5.2 of the Treasury Board Travel Directive, or an amount equal to the most economical air fare including the normal airport limousine fares, whichever is the least, in lieu of travel expenses.

28.04 When an employee requires hotel accommodation, the employee will select a hotel that has been approved and is listed in the Department of Supply and Services Hotel Directory. He or she will choose accommodation which his or her supervisor agrees is convenient for the purposes of the travel and which does not require unnecessary related transportation costs. Where the work site is an airport, transportation costs between the airport and the hotel which do not exceed the official limousine fares shall not be deemed to be unnecessary related transportation costs.

28.05 Except as may be modified in this agreement, employees will be reimbursed for all travel expenses in accordance with the current Treasury Board Travel Directive.

Two issues engage our attention in this matter and are the focus of our inquiry:

(i) is car pooling i.e. the direction by the Employer for employees to travel together whether by way of rental vehicle or privately-owned transportation, a 'method of travel' within the meaning article 28.01;

(ii) in any event, in what circumstances is an employee who 'wishes to use a different method' from the car pooling directive and to use privately-owned transportation, entitled to be reimbursed at the rates stipulated under Articles 28.03.

EXTRINSIC EVIDENCE

26. For CATCA, Mr. Barnacle submitted that on both issues the language of the collective agreement provisions are sufficiently ambiguous as to warrant the admission of parole or extrinsic evidence to assist in its interpretation. He proposed to adduce first, in the form of notes of the bargaining sessions in 1977, evidence of the bargaining history leading to the language of the agreement as now framed, supported by the testimony of a union negotiator; and secondly the evidence of the past practice of the Employer in implementing the article both as to method of travel directed under article 28.01 and as to reimbursement for use of privately-owned transportation under article 28.03 – this in the form of testimony from several witnesses. Counsel referred to several authorities in support including two decisions of Arbitrator Christie – *Re Strait Crossing Joint Venture and IUOE* (1997), 64 LAC (4th) 229 and *Re Izaak Walton Killam Hospital for Children and SGEU Local 22A* (1992), 29 LAC (4th) 332, two adjudication decisions interpreting the identical provisions of the then governing collective agreement between the predecessor employer Treasury Board and CATCA in *Re Yates and Treasury Board*

(Dept. of Transport) (1984), 5 PSSRBD 11 and *Re White and Treasury Board Transport Canada* (1982) 2 PSSRBD 11; and finally a decision of Arbitrator Bird arising out of the same collective agreement and MOU as that here in *NAV CAN and Canadian Traffic Control Association* (1997) CLAD No. 687.

27. For her part, Ms. Brethour on behalf of NAV CAN submitted that the test for admissibility of extrinsic evidence is a stringent one which is not met here, even were one to detect at least a latent ambiguity in the contract language, which was expressly denied. She emphasized the particular weakness of evidence tendered in support of any asserted practice when as here the practice was that of a predecessor employer. Counsel referred to three arbitral awards arising out of this bargaining relationship: that of Arbitrator Swan in Re *NAV CAN and CATCA* (Medical Information/Examination Policy Grievance) unreported 10 July 1998; that of Arbitrator Chertkow in re *NAV CAN and Canadian Air Traffic Control Association* (Ron Schroeter & Mike Dooling) discipline grievances) unreported 30 November 1999 and most recently that of Arbitrator Jolliffe in *NAV CAN and Canadian Air Traffic Control Association* (Doerksen grievance) unreported 28 February 2000.

28. The thrust of the parole evidence rule was succinctly articulated by Lord Wilberforce in *Schuler A.G. v. Wickman Machine Tool Sales Ltd*., (1973), 2 All ER 39 at 53 as follows:

> "Extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained on legal principles of construction from the words they have used. It is one and the same

> principle which excludes evidence of statements, or actions during negotiations, at the time of the contract, or subsequent to the contract…"

The principle has long been held to be applicable to the interpretation of collective agreements. Its strictness is tempered however by several exceptions, the most notable of which is that of ambiguity. Present ambiguity in the terms of the agreement, extrinsic evidence may be admitted as an aid to its construction – not however to vary alter or contradict its terms. Ever since the decision of the Ontario Court of Appeal in *R. v. Barber ex parte Warehousemen & Miscellaneous Drivers Union Local 949,* 68 CLLC case No. 14,098, it has been recognized that the admissibility of extrinsic evidence in the collective agreement setting is a two edged sword. On the one hand it falls within the general rubric of the governing legislation allowing for the admission of evidence before an arbitrator as the arbitrator deems proper, whether admissible in a court of law or not [cf. *Canada Labour Code* s. 60(a) incorporating by reference the provisions of s. 16 (c) to that effect]. On the other, the Court cautioned that the statutory provision "does not relieve a Board from acting only on evidence having cogency in law"[at p. 435]. The Court went on to note:

> "Nor does the subsection alter the principles of law as to the construction of written documents, and the rule which permits extrinsic evidence of intention to be considered only in construing ambiguous writings is essentially one of construction. Where a writing is unambiguous such evidence, although received, cannot be used to construe it."
>
> [Per Justice Jessup at p. 435-36]

29. Such remains the law, although in the recent jurisprudence couched more in the language of patent unreasonableness and deference. Thus, in *United Brotherhood of*

Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd. 93 CLLC case no. 14,033(SCC) Justice Sopinka confirmed that by legislative provisions such as those contained in the *Code*,

> "…the legislator has specifically indicated that the Arbitrator need not concern himself with the common law rules governing the admission of extrinsic evidence, including the debate as to whether an ambiguity need be patent or latent *or even exists at all*."[emphasis added]
>
> [p. 12,223]

At the same time he confirmed that cogency is the touchstone of any reliance upon such evidence, and continued:

> "While provisions such as these do not oust judicial review completely, they enable the arbitrator to relax the rules of evidence.
>
> …
>
> Accordingly, an Arbitrator's decision in this regard is not reviewable unless it is shown to be patently unreasonable. While failure to give effect to a rule of privilege or an exclusionary rule of evidence which embodies an important aspect of public policy might, without more, attract review, the use of extrinsic evidence to interpret a collective agreement is very much in the core area of an arbitrator's function. In this regard, the Court is not apt to intervene provided the approach adopted by the arbitrator with respect to the use to be made of the evidence assists in determining the true intention of the parties.
>
> [ibid]

30. Arbitrator's have consistently held that even if admissible, evidence of the sort here sought to be adduced – and indeed adduced – before me must still meet the test of cogency. As to negotiating history, Professor Christie, after first citing the Ontario High Court Decision in *Leitch Gold Mines Ltd. v. Texas Golf Sulphite Co.* (1968), 3 DLR(3rd) 161, a decision of Chief Justice Gale and the *locus classicus* on 'latent ambiguity', as well as that of the Ontario Court of Appeal in *Noranda Metal Industries Ltd. v. IBEW*

Local 2345 (1983) 44 OR(2d) 529, cautioned as follows in the *Strait Crossing Joint Venture* case *supra*:

> "My purpose in quoting so extensively from the authorities on this subject is to make it clear that, while evidence of negotiating history may be relied upon, including evidence of what was said during negotiations, both to show that language is ambiguous and to resolve that ambiguity, such evidence must be clear and cogent. Evidence of what people thought, even when corroborated by evidence of their actions, does not easily meet that requirement. Such evidence does not alone provide a basis for concluding what the parties agreed upon, or appeared to have agreed upon."
>
> [at 238-39]

31. Similarly, past practice i.e. Lord Wilberforce's 'actions …subsequent to the contract' must be approached cautiously and as Arbitrator Swan noted in the Medical Information case as between these parties "…the law requires a high standard for evidence to be used in such an interpretative fashion" [*supra* at p. 15]. He cited as the 'best statement' on the matter that of Arbitrator Weiler in *Re International Association of Machinists, Local 1740 and John Bertram & Sons Co. Ltd.* (1967), 18 LAC 362 p. 368 as follows:

> "Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. [i.e., to resolve an ambiguity]. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provisions; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice."
>
> [at pg. 15-16]

32. I cite both the caveat of Arbitrator Christie and that of Arbitrator Swan because, although an arguable case can be made at least for latent ambiguity as to the phrase 'method of travel' in article 28.01 governing Employer travel directives, and as to the phrase 'in accordance with paragraph 28.01 above' at article 28.03 governing reimbursement for travel, on hearing the evidence proffered by CATCA I am not at all satisfied that it rises to that level of cogency and clarity required of the jurisprudence. In the event, I have reached my conclusions without critical reliance upon that evidence, although it can be shown nevertheless to be consistent with the conclusions I have reached on both issues before me. This is explained more fully below.

ARTICLE 28: GENERAL CONSIDERATIONS

33. Article 28 of the collective agreement governing Employer directed travel on the part of the employee has existed in its current format since 1978. Prior to that time the article addressed only the question of compensation upon a directive to travel by the Employer i.e. substantively the matters covered now by the provisions of article 28.02. [Ex. No. 2, p. 1]. In 1978 these somewhat limited provisions were expanded so as to address more fully two further issues: first, the range of responses open to an employee upon being directed to travel by the Employer; and second, the reimbursement for expenses to which an employee is entitled – the question of compensation being further revised. A subtext to the entire article is the TB Travel Directive applying generally across the federal public service [Ex. 4], the terms of which are incorporated by reference into the Travel Article as modified by its terms [art.28.05]. In structure, the parties recognized at article 28.01 the Employer's managerial right to require an employee to

travel and more importantly for our purposes, to determine the employee's 'method of travel'. The Employer's determination of the method of travel is not absolute, inasmuch as the wish of an employee 'to use a different method… will not be arbitrarily refused'. That wish is subject to a two-fold caveat: first the method chosen by the employee must 'be consistent with the purpose of the travel' and secondly the method chosen must be one that 'does not entail additional costs'. Ordinarily when required to travel an employee is compensated in accordance with the provisions of article 28.02 which equate travel time with work time. Insofar as these touch hotel accommodation they are treated at article 28.04, but otherwise Article 28.02 does not address reimbursement for travel expenses, a subject exhaustively set out generally in the TB Travel Directive.

34. Article 28.03 addresses those circumstances where an employee chooses to travel by a different method than that originally determined by the Employer. Under its terms an employee may 'in accordance with paragraph 28.01' elect to travel by a schedule air carrier at the most economical airfare or elect to use the employee's privately owned transportation and be reimbursed accordingly. Use of privately owned transportation is reimbursed at one of two rates: The lower operating cost rate [article 28.03(b)] or the higher ownership cost rate [article 28.03(c)] as set out in the TB Travel Directive. However, reimbursement at the ownership rate is capped at 'an amount equal to the most economical airfare including the normal airport limousine fares' or the actual expense incurred, 'whichever is the least' [article 28.08(f)]. That cap does not apply where the Employer has requested under article 28.03(c) that the employee use privately owned transportation. Sub-paragraphs (d) & (e) of article 28.03 limit the compensation to

which an employee would otherwise be entitled under article 28.02 should the employee elect to use privately-owned transportation pursuant to article 28.03 (b) or (c). Ordinarily such compensation is limited to 'the time normally required to travel portal to portal by air carrier' (d), but in the case of long haul travel from the Newfoundland, the Pacific or Western Regions to or from Ottawa an additional day or two days of compensation as the case may be is stipulated (e).

35. For CATCA Mr. Barnacle argues first that car pooling whether by way of rental or privately owned transportation is not a 'method of travel' for the purposes of article 28.01. It is not addressed whatsoever in the article or in the TB Travel Directive which enumerates several modes of transportation. Nor, prior to the directive to car pool given to the grievors in February 1997, had there been such a directive given across the entire enterprise of the Employer. As to reimbursement for travel expenses should an employee elect to use privately owned transportation, the formula contained at article 28.03 (c) (f) applies whenever such an election is made in the context of an article 28.01 directive: reimbursement is to be made at the higher ownership costs rate subject to a cap equivalent to the most economical airfare including normal airport limousine fares, whichever is the least. This is regardless of the method of travel originally directed by the Employer. The stricture that the method of travel chosen by the employee 'does not entail additional costs' beyond that originally determined by the Employer as contained at article 28.01, does not apply to limit entitlement to the reimbursement formula set out in article 28.03.

36. For the Employer, Ms. Brethour submits that there is no limitation on the Employer's right to determine the method of travel required of an employee, whether as to mode or manner of use. The mere absence of car pooling whether by rental or privately-owned transportation from the enumerated list of transportation options contained in the TB Travel Directive cannot fetter the Employer's managerial right to issue such a direction even if, as counsel concedes, such has never been its practice. There are references within the TB Travel Directive to multiple drivers and passengers in rental vehicles [ex. No. 4, art. 2.9.4; 2.9.7] as well as to employee passengers in a private vehicle [ex. No. 4, art. 2.14] which is a indicative of a broad discretion given to the Employer to direct car pooling. In any event, for an employee election to use privately-owned transportation rather than the method of travel determined by the Employer, reimbursement is always subject to the proviso at article 28.01 that it 'does not entail additional costs'. This is the effect of the phrase 'in accordance with paragraph 28.01' found in the introductory provisions to article 28.03 which acts as a prior limitation on the formula contained at paragraphs(c) & (f) thereof. Had the Employer originally directed travel by train or bus, then reimbursement to an employee who elects to travel by personal vehicle would be limited to the cost of travel by train or bus. In the instant case, this means that the reimbursement of the grievors for use of their privately-owned vehicles in lieu of Employer directed rental van car pool should be limited to the cost of the rental divided equally among them.

INTERPRETATIVE APPROACH

37. Contextuality is the keystone to any interpretative undertaking. In *Québec Inc. v. Québec (Regie des permis d'alcool)* (1997), 205 NR 1 (SCC), where the meaning of a statutory enactment was at issue, Justice L'Heureux-Dubé admonished that we eschew 'a Humpty-Dumpty-like interpretation exercise'[at p. 112] in favour of the modern interpretation method i.e. one rooted in a contextual reading of the statute so as to uncover Parliament's intent. She accepted as authoritative the reformulation of that interpretative method made by Professor R. Sullivan in *Driedger on the Construction of Statutes* (3d) (1994) at p. 131.

> *The Modern Rule*. 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. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one than can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.
>
> [NR p. 108]

Although articulated within the context of statutory interpretation, the same rubric applies in the arbitral forum with the necessary substitution of the collective agreement fashioned by the parties for legislation fashioned by Parliament. It is in this spirit that an arbitrator must approach the intepretative task.

METHOD OF TRAVEL

38. Viewed in the abstract, the term 'method of travel' can be said to embrace both the means of travel i.e. a particular mode of conveyance, and the manner of travel i.e. the utilization of that means. As such 'method of travel' could arguably be said to include car pooling whether by way of rental vehicle or privately-owned transportation, as it comprises a manner of utilizing particular modes of transportation. But the phrase does not exist in the abstract; it is found in the terms of a Collective Agreement which itself incorporates by reference a TB Travel Directive of great detail and consideration of these is critical in determining whether or not the parties intended that the phrase be given such wide ambit. I have concluded on both structural and policy ground that they did not. Method of travel does not include car pooling whether by rental or privately-owned vehicle. First, the structural grounds.

39. That 'method of travel' references modes of transportation or types of vehicles can be drawn from the provisions of the TB Travel Directive. The table of contents of Part II thereof identifies two broad classifications of transportation: commercial transportation and traveller driven vehicles. Under commercial transportation are enumerated travel by air, by train, by bus, by taxi and by watercraft. Common to that enumerated list is that travel is by publicly available commercial transportation operated by an individual licensed to operate the particular vehicle, and in which the employee is conveyed as a passenger. Car pooling, by way of contrast, apart from falling outside of the classification of commercial transportation, entails the employee being conveyed as a passenger in a vehicle operated by one not professionally licensed to convey that person.

Under traveller driven vehicle are enumerated government vehicles, non-government [i.e. rental] vehicles, privately-owned vehicles, private aircraft, motorcycles and other purpose vehicles. The very enumeration indicates that the mode or type of vehicle, rather than the method of utilization eg. by car pooling, is the identifying feature of this sub-classification of transportation to be authorized under the TB Travel Directive. The otherwise broad ambit of the phrase 'method of travel' under the Collective Agreement is limited to modes of transportation and types of vehicle as enumerated in the Travel Directive. Utilization of a particular mode or vehicle by way of car pooling does not fall within that enumeration. *Expressio unius est exclusio alterius.* In my view, the fact that minor references are made to passengers in traveller driven vehicles [eg. para. 2.7.1, 2.9.4, 2.9.7, 2.10.2] does not detract from this analysis. It is merely indicative that where employees so travel of their own accord, certain rights and obligations ensue. This is made even more clear by the provisions at s. 2.14 governing reimbursements for 'an employee as a passenger in a private vehicle'. The use of any privately-owned vehicle for travel purposes can only be on agreement of the traveller [s. 2.12.1]. The explicit provision for reimbursement of employee passengers in the case of a private vehicle, always subject to traveller consent, and its absence from those provisions at section 2.9 governing non-government rental vehicles, strengthen my view that car pooling is not a 'method of travel' open to the Employer to direct under article 28.01 without employee consent.

40. There are policy reasons as well which lead to this conclusion. Car pooling raises important safety and liability concerns. Two of the grievors – Allan and Randall -

explicitly raised safety concerns in their decision to use their own privately-owned vehicles rather than to travel by way of car pool rental van as directed by the Employer. Such was a legitimate and reasonable issue to raise. In the case of commercial vehicles, an employee directed to travel as a passenger can be assured that the operator of the vehicle or craft meets a standard of ability set for one engaged to operate a public means of conveyance. The same is not so in the case of a private individual designated to drive a car pool rental vehicle. I am simply not prepared to accept the proposition that the Employer's right to determine an employee 'method of travel' under article 28.01 subsumes the inherent right of the employee to make his or her own decision as to safety risks by other than commercial transportation i.e. by traveller driven vehicle whether rental or privately-owned. Furthermore, on the part of the designated driver in such circumstances, serious questions of liability arise. That this is so generally is indeed recognized in the provisions of the TB Travel Directive addressed to insurance coverage in the case both of rental vehicles [s. 2.9.8] and as well privately-owned vehicles [s. 2.10-.4]. In particular, the provisions of s. 2.10.4 recognize the possibility of liability in a civil action taken against an employee operator of a privately-owned vehicle and the mechanism for obtaining legal services in such an event. As earlier noted under s. 2.12.1 the employee must agree when the Employer requests that he or she use a privately-owned vehicle. Again, I am simply not prepared to accept that the right of the Employer to determine an employee's 'method of travel' under article 28.01 would subsume the employee's right to determine whether or not he or she wishes to assume liability towards third party passengers in the event of a civil action arising out of a motor vehicle accident while operating a car pool rental vehicle.

41. Finally, I note that, on the evidence before me, there is no example in the history of the relationship between these parties of an Employer direction to travel by way of car pool rental vehicle prior to the events giving rise to these grievances. This would be consistent with my view that the provisions of article 28.01 read in tandem with those of the Treasury Board Travel Directive prescribe it from doing so. Accordingly, for all of the foregoing reasons I conclude that travelling together by way of car pool rental vehicle is not a 'method of travel' for the purposes of article 28.01 of the Collective Agreement. It follows in mid-February 1997 that the Employer had no authority to issue the directive to that effect which precipitated the within grievances.

REIMBURSEMENT

42. Were the grievors entitled to be reimbursed in the amounts claimed which in each case were calculated in accordance with the formula at article 28.03 (c)(f). That in turn requires one to determine in what circumstances an employee who 'wishes to use a different method' from the Employer's directive under article 28.01, and so elects to use privately-owned transportation, is entitled to be reimbursed at the rates stipulated under article 28.03. In other words what is the relationship between article 28.03, which establishes a reimbursement formula in particular circumstances, to the general caveat found at article 28.01 that the different method chosen by the employee 'does not entail additional costs'. Key to a determination of the issue is the meaning of the phrase 'in accordance with paragraph 28.01 above' found in the introductory paragraph to article 28.03, which confers an election upon the employee as to method of travel when required by the Employer to travel. For CATCA Mr. Barnacle contends that within the context of

the clause the phrase should be understood to mean that under its terms the employee is deemed to be acting in accordance with paragraph 28.01. The practical effect of that reading is to entitle an employee to be reimbursed for travel expenses when using privately-owned transportation in accordance with the formula contained at article 28.03 (c) (f), even if such would entail additional costs over and above the method of travel originally determined by the employer under article 28.01. The *quid pro quo* is the reduced entitlement to compensation under article 28.03 (d)(e). For NAV CAN, Ms. Brethour contends that the critical phrase in article 28.03 'in accordance with paragraph 28.01' above - should be read as a condition precedent to the employee's elections. The practical effect of that reading would be to limit the article 28.03 (c) (f) formula for reimbursement upon the use of privately-owned transportation to circumstances where the original method of travel directed by the Employer was by air. Otherwise, the election of the employee to travel by way of privately-owned transportation will entail additional costs over and above the method of travel originally determined by the Employer whether by way of commercial transportation [train, bus, taxi], or traveller driven rental vehicle. I agree.

43. Although the broader view of CATCA is superficially attractive, when viewed more carefully within the setting of the entire article the formula contained at article 28.03 (c) (f) can only be seen to be applicable where air was the original method of travel directed by the Employer. To adopt the position of the union would in effect strip the Employer entirely of its right to determine a method of travel. I say this because of the

framing of article 28.03 as an employee election. Three options are given to an employee required by the Employer to travel to or from the headquarters area:

> 28.03 When an employee is required by the Employer to travel to or from the employee's headquarters area as normally defined by the Employer, the employee may in accordance with paragraph 28.01 above:
>
> (a) **Elect** to travel via scheduled air carrier at the most economical air fare or its equivalent; or
>
> (b)**Elect** to use privately-owned transportation and be reimbursed at the rate shown in paragraph 4.5.3 of the Treasury Board Travel Directive; or
>
> (c) Be requested by the Employer, or **elect** to use privately-owned transportation and be reimbursed at the rate shown in paragraph 4.5.2 of the Treasury Board Travel Directive.

44. If one is to read the article as proposed by CATCA then, regardless of the method of travel directed by the Employer, [eg. train, bus] an employee would have the absolute right to elect to travel by a scheduled air carrier under subparagraph (a) irrespective of additional costs, which could be substantial. This is in effect to read out the phrase 'in accordance with paragraph 28.01 above' found at the introductory paragraph to article 28.03 and to strip the Employer of its principal managerial right under the Travel Article. Surely this cannot be. The article 28.03 threefold election including as it does an election to travel via a scheduled air carrier only makes sense when that is the method of travel originally directed by the Employer. The elections to use privately-owned transportation are an alternative to the election to travel by scheduled air carrier as originally directed by the Employer. Such an approach allows for a much more integrated reading of the article, preserving as it does the right of the Employer to direct a method of travel subject only to an employee election which does not entail additional costs.

45. Thus, where the employee elects to travel via a scheduled air carrier under article 28.03(a) as originally directed, compensation is governed by article 28.02 and reimbursement by the provisions of the TB Travel Directive as per article 28.05. On the other hand, employees who elect to use privately-owned transportation, whether under sub-paragraph 28.03 (b) or (c) forego their normal entitlement to compensation in favour of compensation tied to 'the time normally required to travel portal to portal by air carrier' as provided at article 28.03 (d). An additional allowance for one or two days compensation is provided for long distance travel at article 28.03(e). What is important to note is that compensation in these circumstances is tied to the compensation ordinarily payable were the employee to travel by a scheduled air carrier as originally directed by the Employer as the method of travel. It would make no sense at all to tie compensation to the air travel timeframe were this not the original method of travel directed by the Employer. Finally, under sub-paragraph (f) the cap placed on the mileage allowed at the higher ownership cost rate is likewise set at the most economical airfare including normal airport limousine fare, as this would have been the cost to the Employer had the employee elected to travel via a scheduled air carrier as originally directed. Again, it would make no sense at all to tie the cap to the cost of airfare were this not the original method of travel directed by the Employer. Moreover, it is noteworthy that the cap is not applicable when the Employer requests that the employee travel by privately-owned transportation, in which case the employee is entitled to be reimbursed in full as per the TD Travel Directive. Reading the article in this fashion allows one to integrate the phrase 'in accordance with paragraph 28.01 above' in a manner consistent with the provisions of article 28.01 and so preserve the principal managerial right of the Employer

to determine the method of travel, and at the same time give full scope to the employee elections provided for at article 28.03. Simply put where the original mode of travel directed by the Employer is by traveller driven rental vehicle or by commercial transportation other than by air, the provisions of article 28.03 are not engaged - although the employee still retains of course his or her entitlement to use a different method under article 28.01.

46. The extrinsic evidence adduced to support the Union's contention to the contrary simply does not reach that level of cogency required to convince me that the provisions of article 28 should be read other than as I have articulated. To the contrary that evidence is consistent with such a reading. James Livingstone, a man of forty years experience as an air traffic controller in various bargaining unit and managerial positions with the Employer, was president of CATCA at the time the provisions of article 28 as they now stand were bargained in 1978. Although not a member of the bargaining team, he was familiar with the positions taken at the table. He characterized the union's objective as one which would allow greater flexibility to the employee to choose another method of travel than that originally determined, and the Employer's concern to be cost control. Although his view was that the bargain struck with the inclusion of article 28.03 was that it overrides the provisions of article 28.01, this cannot be established on the evidence. Indeed, CATCA's minutes of those meetings [ex. 5] shows an exchange between the two negotiators - Peter Dawson for Treasury Board and Bill Robinson for CATCA - in which the former raises the Employer's concern as to the increased time which would be required were the employee given an absolute right to elect travel by personal vehicle.

Such a concern could only arise in the case of air versus land travel. Further references in the exchange to the mileage reimbursement cap being tied to the cost of the airfare would also support a reading of the article as focusing on an election to travel by privately-owned transportation where air is the original method of travel determined by the Employer. Throughout the Minutes preservation of the Employer's entitlement to determine method of travel is a given, as is recognition of the Employer's concerns as to increased costs.

47. As to past practice, the testimony of Livingstone only establishes that travel by air between Halifax and Moncton has always been the norm i.e. the method of travel determined by the Employer for employees required to travel between the two places of work. This of course triggers the employee election under article 28.03, but it says nothing as to entitlement to reimbursement for travel expenses and compensation where a method of travel other than air between the two cities is directed by the Employer. Likewise, the testimony of Dean Baker, an air traffic controller of twenty years standing and CATCA Regional Director for Newfoundland, addresses similar circumstances on the West Coast. He testified that the practice of the Employer where travel between Victoria and Vancouver is required of an employee is to give an option as between air, commercial vehicle or personally owned vehicle. Again the Employer directive, including as it does air as a method of travel, triggers the election under article 28.03. In neither the East Coast or the West Coast examples can this be said to be conduct which is based 'unambiguously' on the broader meaning attributed to article 28.03 by CATCA –

and so it fails to meet the stringent standard for extrinsic evidence in the form of past practice articulated by Arbitrator Weiler in the *John Bertram case supra*.

48. This leaves for consideration the grievors' particular entitlement to reimbursement for expenses incurred by each when travelling by their own privately-owned vehicles between Halifax and Moncton rather than by the car pool rental van as originally directed by their supervisor. The Employer has already paid out the amounts claimed, all of which were calculated pursuant to the provisions of article 28.03. In my view, in the peculiar circumstances of this case, the grievors were entitled to such reimbursement. Here the Employer directed a method of travel falling outside the range of discretion given to it under article 28.01. That directive was a nullity. This put employees in a position in which they themselves had to determine their own method of travel. It was natural that they would assume they could elect to travel by personally owned vehicle under article 28.03, as it had been their consistent experience in the past that such an election was open to them, the Employer routinely having directed travel between the two cities by air. Indeed in the case of Randall, as detailed in his grievance, an original directive to travel by air was given. In the case of Allan and of Rousselle one must conclude that a similar directive would have been given, and that notionally such was given. Thus in the case of all three grievors their election and subsequent entitlement to reimbursement under article 28.03 was triggered.

CONCLUSION

49. In the event, these grievances are sustained. The Employer, by directing the grievors to travel by car pool rental vehicle in a group from Halifax to Moncton and return breached article 28.01 of the Collective Agreement, such not being a 'method of travel' for the purposes of that article. Moreover, the grievors having at least notionally, if not actually been put to their election under article 28.03 of the Collective Agreement to travel by privately-owned transportation, each is entitled to reimbursement in accordance with the formula stipulated at article 28.03(c)(f). Declaration accordingly.

Dated at Fredericton, New Brunswick, this day of April, 2000.

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THOMAS S. KUTTNER
ARBITRATOR