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")

AND:

PETER DUFFEY

(THE "GRIEVOR")

GRIEVANCE: IN LIEU OF OVERTIME LEAVE
COLLECTIVE AGREEMENT: ARTICLE 20.02(a)

AWARD

Sole Arbitrator:	Mr. Serge Brault
Appearances for the Employer:	Mr. George Rontiris, Counsel, assisted by: Ms Patricia Beck, Labour Relations Advisor Stan Roy, MACCO Doug Craven, Shift Manager
Appearances for the Union:	Mr. Sean T. McGee, Counsel, assisted by: Mr. John Clark, Regional Director, CATCA Mr. Peter Duffey, grievor
Place of Hearing:	Toronto (Ontario)
Dates of Hearing:	December 11 and 12, 2000
Date of Award:	January 30, 2001

I

INTRODUCTION

This award concerns the grievance of Peter Duffey, (the "grievor"), a controller at the Toronto Centre. The grievor alleges that NAV Canada, the Employer, failed to comply with article 20.02(a) of the collective agreement when it turned down his request for time off in lieu of the payment of overtime for work done on May 13, 2000.

The grievance reads as follows:

> *" The employer is not attempting to reach « mutual agreement" in the granting of time off in lieu of payment of overtime. By not doing so the employer is in violation of article 20.02(a) and all other relevant parts of the collective agreement. The employers current policy of denying such leave requests based solely on the requirement to pay backfill overtime makes it impossible for me utilize time off in lieu of payment of overtime as intended in the collective agreement.*
>
> *[ ]*
>
> *That the employer be directed to make a reasonable effort to accommodate employee requests for time off in lieu of payment for overtime worked. That such requests not be unreasonably withheld and that they be granted in circumstances that will not lead to short staffing situations. That the employer be directed to backfill such leave requests with overtime where circumstances dictate. That the employer be directed to cease and desist from its current practice of denying such requests based solely on the requirement to pay overtime. I otherwise request to be made whole.*
> *[sic]*

The parties agree that the arbitrator is duly seized and, in the event the grievance is allowed, should remain so if they are unable to reach an amicable resolution of the matter.

The relevant provisions of the collective agreement are as follows:

> *"ARTICLE 1 DEFINITIONS*
>
> *(11) "Will" and "shall" in this agreement have the same meaning.*

ARTICLE 4 MANAGEMENT RIGHTS

4.01 The Association recognizes and acknowledges that NAV CANADA has and shall retain the exclusive right and responsibility to manage and operate NAV CANADA's business 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 NAV CANADA's business, 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 modifier by this Agreement shall remain that exclusive rights and responsibilities of NAV CANADA.

4.02 The management rights of NAV CANADA shall not be restricted in any way by any practice, custom or past agreement not specifically renewed.

ARTICLE 11 GRIEVANCE AND ARBITRATION PROCEDURE

11.10 Powers of an Arbitrator

A grievance referred to arbitration shall be determined by a mutually acceptable arbitrator/Board of Arbitration who shall have all the powers described in Part I of the Canada Labour Code.

11.17 Decision

(a) (...) The decision of the Board of Arbitration shall be final and binding and enforceable on all parties, but in no event shall the arbitrator/Board of Arbitration have the power to change the Collective Agreement or to alter, modify or amend any of its provisions.

ARTICLE 20 OVERTIME

20.02 (a) (...)

An employee at his or her request, shall be granted time off in lieu of overtime at the appropriate overtime rate. <u>The employee and his or her supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off.</u> However, failing such agreement, such lieu time will be accumulated.

Where an employee requests time off in lieu of overtime, the employee must indicate this to his or her supervisor prior to the end of the month in which the overtime occurred.

Where an employee has not utilized accumulated time off in lieu of overtime by the end of the fiscal year, the unused portion will be paid off at the appropriate overtime rate.

(b) Except as provided in clause 20.02(a) NAV CANADA will endeavour to make cash payment for overtime in the month following the month in which the overtime was worked."

(Emphasis added)

II

THE EVIDENCE

The grievor was the only witness heard. He explained the circumstances, which in May of last year led to his request for time off in lieu of overtime, or TOIL as the parties commonly refer to it. Right after his overtime shift of May 13, 2000, the grievor sent his shift supervisor the following memo:

"I have comped [sic] the overtime shift I am working today (May 13). I request June 21 and 22 off in lieu of the pay. I am making this request as per article 20.02(a) of the collective agreement. If this is not approved please explain why. Thanks. (...)"

Overtime being compensated at double rate under the agreement, the grievor explained that he wanted to take both June 21 and 22 off as compensation. The Manager, Area Control Centre Operations (MACCO), replied to his request in the following terms:

" I do not agree to approving a day of compensation leave that requires an O.T. [overtime] shift to cover. The contract is clear, if we do not agree as to when the compensation accumulated time off in lieu can be used, it will be accumulated until mutually agreed time is presented or paid out at the end of the year."

In the days following, the grievor discussed the issue with his shift manager Doug Craven. According to the grievor, the conversation, which took place in the latter's office, left him with a sense that the position of management, as expressed, would render impossible the approval of any in lieu leave, and would not consider in any event allowing him TOIL. Notwithstanding the fact that Mr. Craven did not give any specific response and remained non-committal during their discussion, the grievor felt, based on the written reply received earlier from the MACCO, and specifically the reference to sub-section 20.02(a)(4) highlighted above, that that his request would not be granted. When asked whether Mr. Craven should have inferred from his remarks at the meeting that he was in effect seeking alternate dates for his in lieu time, the grievor merely reiterated his belief that the Employer's written reply was an all out denial with nothing else to discuss.

A few days after this meeting, a second one took place but this time with Stan Roy, the MACCO. This conversation basically echoed the first one according to the grievor. His evidence is that he drew attention to the TOIL part of the agreement and the related requirement for parties to attempt to reach mutual agreement as to when an employee should take his in lieu time off. His understanding of Mr. Roy's response was that, because management disagreed with any of the dates suggested, it felt entitled to pay the overtime instead of granting leave.

In cross-examination, the grievor recognized that the point of the conversation was not for him to request any specific date for his in lieu time but, instead, to try to ascertain with his superior what conditions were required for him to be granted time off. Similarly, he did not feel that his manager was actually attempting to agree on dates when time off could be taken. He said Mr. Roy, when asked as to what a suitable time might be, replied : "Bring me a date with three or four spares on and I will grant it to you". In his view, no such possibility could be realistically envisaged in his specialty.

There was some evidence adduced suggesting that, at least on one occasion in the months following the grievance, the roster showed three spares on duty in the grievor's specialty. As it

turned out, this was a scheduling error, and one that was corrected prior to the beginning of that particular shift.

In cross-examination, the grievor did not dispute that he never had suggested alternate dates for taking his TOIL, and that his discussions with his superiors were of a general nature. He reiterated his understanding that, by imposing that that no overtime should result in such circumstances, management was in effect denying his request as there was no way to prevent such an outcome.

Finally, the grievor did apply for and, indeed, was granted in lieu time in November 2000. Regarding his earlier request, he testified never asking either Mr. Craven, nor Mr. Roy, to grant him TOIL on alternate dates as he felt his request could only be denied given the position expressed by management.

III

ARGUMENT

Union

According to Mr. McGee, the matter before the arbitrator is whether, once a request for TOIL has been made and denied for a specific date, it is still the Employer's obligation to go the extra step in trying to find a suitable alternate solution from the employee's standpoint. In his opinion, a careful review of the evidence regarding the Employer's response and comments to the grievor's initial demand for in lieu time suggests that management had actually all but denied any possibility of leave time alternatives without actually attempting to find any. Referring to an expected argument from his colleague, Mr. McGee pointed out that in the circumstances of the case there is no onus on the employee to be more specific, or to suggest alternatives, once his request is denied. In Counsel's view, to suggest otherwise would not be in keeping with the requirements identified in the relevant provisions of the collective agreement, i.e. that both sides "attempt to reach mutual agreement" and that a practical and concrete approach be used. This does not go as far as requiring management to actually provide suggestions of alternate dates.

Employer

The issue, as characterized by Mr. Rontiris, is whether a request for TOIL was actually made. What the evidence reveals is that the grievor knew that his discussions with management were general and hypothetical, and that they dealt only with the terms and conditions of TOIL, not with actual dates. In Mr. Rontiris' mind, the closest analogy is to an individual walking into a restaurant and asking what is on the menu without ever choosing any specific meal item. It follows that what needs to be determined is not what Mr. Craven or Mr. Roy thought, but rather whether the grievor actually believed he was making and discussing a request during his conversations with them. In Counsel's view, the grievor's own admission that he had an hypothetical discussion with management should lead us to conclude that no specifics were ever addressed and, in the end, that no expectation existed that they would be because nothing precise was ever asked. Counsel further submits that, because the grievor knew that the issues of spares on a given day and overtime were related, it was presumptuous on his part to assume that he would never be granted TOIL. This consideration, coupled with the fact that the grievor was eventually granted leave on November 8, 2000 under the same provision, supports the conclusion that circumstances did exist for the parties to reach agreement on an appropriate date for his in lieu time.

Reply

In reply to the restaurant analogy, Counsel McGee considers that a more appropriate one is that of a client walking into a restaurant and asking whether they carried vegetarian dishes, only to be told that meat is the sole item served, that his order should be more specific, and that in any event it could not be filled.

Neither counsel submitted authorities or jurisprudence.

IV

ANALYSIS AND DECISION

The present case raises an issue of fact to the extent that, once turned down, the grievor' initial request for TOIL never went any further. In our view, both the subject and the timing of the grievor's initial request comply with section 20.02 and with the provisions requiring that it be done " ... *prior to the end of the month in which the overtime occurred."* (20.02(a) sub.5). Also un-contradicted is the evidence that the grievor's request was denied in writing on May 18. For reasons not fully explained in the course of the hearing, management felt that the employee's request should be denied on the basis that granting it would require "*an O.T. [overtime] shift to cover."*

In addition, there is no evidence to suggest that further discussions took place between the parties on how to accommodate Mr. Duffey's request for in lieu time instead of overtime payment. Sub-paragraph 20.02(a)(6) sets out the conditions that attach to that type of requests: the employee must indicate to management " ... *prior to the end of the month in which the overtime occurred"* his preference for in lieu time, and « t*he employee and his [ ]supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off."* We consider that, once judgment was made by management that the dates initially requested were not suitable, there was a need for genuine discussions to take place to determine alternate solutions. There is little point here in dwelling at length on what the relevant factors might have been under the collective agreement as the matter never reached that point in the instant case. Instead, the whole case turns in our judgment on the refusal of the dates initially suggested by the grievor and the subsequent absence of any attention to the matter of alternate dates. As convinced as it seemed to have been that they were impossible to find, management made no "*attempt [was ever made] to reach mutual agreement*", nor did it try to discourage the grievor to think otherwise. It is on that basis, and to that extent, that we conclude that the grievance is founded.

V

CONCLUSION

For all the reasons set out above, the grievance is allowed. Consequently, the grievor and management are hereby directed to actively turn their minds to a mutually satisfactory resolution

of the issue of when he would be allowed to take in lieu time off for the overtime done on May 13th, 2000.

We further reserve jurisdiction as to any dispute arising from the instant award.

OTTAWA, this 30th day of January 2001.

Serge Brault
Sole Arbitrator

Adjudex inc.
012-885-FPO
S/A 330-01