CANADA

PROVINCE OF NEWFOUNDLAND AND LABRADOR

In the matter of the *Canada Labour Code*, Part I

- and –

In the matter of a Reference to Arbitration

Between

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

- AND-

NAV CANADA

Paul Hansen grievance [99-086]

Appearances

For the Association: For the Employer	Peter Barnacle George Rontiris
Before:	Thomas Kuttner, QC, Arbitrator
Date of Hearing:	6 September 2000 at Gander, NFLD
Date of Award:	28 February 2002

AWARD

ISSUE

1. Ought the risk of illness which befalls an employee during a scheduled vacation leave fall upon him or upon his Employer? That is the question engaged in this grievance which arises under the terms of a collective agreement binding between Canadian Air Traffic Control Association [CATCA] and NAV Canada [NAV CAN] effective September 1999 – 31 March 2001. The Grievor, Paul Hansen, is engaged as an Air Traffic Controller [ATC] at the Employer's enterprise located in Gander, NFLD, and at the time of hearing had been so engaged for approximately 33 years at one of the two operational units there located – Gander Tower and Gander Air Control Center. These had been operated continuously for the greater part of that time period by Transport Canada prior to their statutory transfer to NAV CAN in the mid 1990's pursuant to the *Civil Air Navigation Services Commercialization Act*, 1996 SC c 20.

2. Hansen had scheduled 30 and 31 October 1999 as vacation leave days pursuant to article 27 of the collective agreement. On 29 October he had been scheduled for the 4:00 p.m. shift, but at noon that day he called in sick in accordance with normal procedures. Upon examination by his physician later that day, he was advised that he had a "legitimate medical reason for being absent from work" from 29 through to 31 October inclusive, an official disability certificate to that effect subsequently having been issued by the doctor [Exhibit # 5]. On his return home from that examination, Hansen called in to the Tower cab, reported that he was ill and advised that he would cancel his two day vacation leave and substitute therefore certified sick leave pursuant to the provisions of

article 24 of the collective agreement. Several weeks later Hansen filed for three days sick leave, again in accordance with the ordinary practice, and in response to a query from his supervisor Andrew Penney, as to the basis upon which he was seeking to convert the originally scheduled vacation leave of 30 – 31 October to sick leave, he responded that this was in accordance with the past practice on cancellation of scheduled leave in extraordinary circumstances as stipulated in a 1998 staff memo [Exhibit #4]. In response Penney advised that "all past practices were thrown out when the new contract was signed", approved the sick leave request for 29 October and denied the request for conversion of October 30 – 31 vacation leave to sick leave [Exhibit #3]. There is no dispute as to the *bona fides* of Hansen's claim for sick leave. What is in dispute is his entitlement to sick leave on 30 – 31 October 1999 in the circumstances of this case.

SUBMISSIONS

3. For the Grievor, counsel argues that this matter has been definitively determined between the parties in a grievance arising under the predecessor collective agreement binding between CATCA and Transport Canada. That was in *Re Regis Richard* [1994] CPSSRB No. 153, in which PSSRB Member Galipeau held, in circumstances on all fours with those here present, that the Employer had improperly refused to grant sick leave to an employee claiming same by way of substitution for vacation leave earlier granted. Counsel submits that the principle of *res judicata*, whereby arbitrators consider themselves bound by previous awards between the same parties interpreting the identical terms of a collective agreement binding between them, ought to apply here inasmuch as

by Act of Parliament NAV CAN became the successor employer to Transport Canada following commercialization of civil air navigation services. The parties ought to be able to rely upon previous arbitral jurisprudence interpreting clauses of the collective agreement unchanged in the transition from the public to the private sector, rather than be required to re-litigate them once again. In that sense, the practice of the parties as to implementation of collective agreement terms continues to be binding upon them and the Employer is estopped from resiling from that practice. In any event, the interpretation of the agreement advanced by Board Member Galipeau in *Re Richard* is supported by the jurisprudence and should be reaffirmed in the instant case. Reference was made to several arbitral decisions including *Serge J. N. Nault v. Treasury Board (Transport Canada)* [1990] CPSSRB No. 86 (D'Avignon); *Nova Scotia (Department of Human Resources) [Re Hewitt]* (1998), 81 L.A.C. (4th) 236 (Archibald); *Atlas Steels Co.* (1972), 24 L.A.C. 171 (Weatherill); *Government of Province of Alberta [Re Conroy-Rossall]* (1991), 20 L.A.C. (4th) 318 (McFetridge); *Unisource Canada Inc.* (1995), 47 L.A.C. (4th) 435 (Blasina).

4. For the Employer, counsel acknowledges that the practice of the parties as to vacation leave displacement by subsequent sick leave claim, both before and following commercialization of civil air navigation services, has been in accord with the adjudication decision of Board Member Galipeau in *Re Richard.* However, such cannot be determinative of the matter before me given the agreement between the parties that NAV CAN was not to be bound by past practices formerly obtaining between CATCA and Transport Canada unless expressly renewed. Rather, the matter falls to be

determined solely upon its merits in the context of the governing provisions of the collective agreement. Acknowledging the principle of *res judicata*, counsel stressed that the authorities are in agreement that it is inapplicable where the earlier arbitral decision is clearly wrong. That is precisely the situation here. Board Member Galipeau's interpretation of the governing language does not bear close scrutiny and ought not to be followed. The Grievor clearly was not eligible for sick leave with pay within the meaning of article 24.02 as he had no duties to perform on the days for which he sought such sick leave, having already been granted vacation leave for those very days. In such circumstances, neither the language of the collective agreement nor the arbitral jurisprudence could support the outcome in *Re Richard,* nor does it sustain the claim of the Grievor here which ought to be dismissed. Counsel made reference to much of the same jurisprudence earlier noted, and in addition relied on the decision in *Re Scarborough (City) Public Utilities Commission and UWC, Local 1 Unit 1* (1989) 6 LAC (4th) 170 (Jolliffe); *Re British Columbia (Government Personnel Services Division) and BCGEU* [*Podger*] (1990), 14 LAC (4th) 308 (Chertkow); and as well *NAV CANADA v. CATCA* (unreported, issued 24 November 2000), a decision of arbitrator Hope between these same two parties addressing sick pay on overtime, handed down following the hearing of this matter and subsequently filed with me.

DECISION

Past Practice

5. To the extent that this case could be said to have been argued on the basis of estoppel by way of past practice, I must agree with counsel for the Employer that such simply is not open to CATCA in the circumstances of this case. Pleading of the doctrine of estoppel and its application by boards of arbitration has now become well entrenched in the jurisprudence, as has its foundation in past practice, whether unambiguous or manifested solely by silence or acquiescence in a course of conduct. See for example *Re Consolidated Bathurst Inc.* (1985) 19 LAC (3rd) 231 where much of the jurisprudence is canvassed. However, an estoppel binds only so long as there is reliance upon it, and it is a commonplace that even where one is said to have arisen within the context of a collective agreement, it can been exhausted by the simple expedient of serving notice to the party in reliance that, upon renewal of the agreement, the party upon whom reliance has been placed intends to exercise its strict rights under the provisions of the agreement. That is precisely what has occurred here, the parties having provided at article 4.02 that:

> 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. [Exhibit #1]

Correspondence between F. Bhimji, CATCA President and Tor Veltheim, NAV CAN Labour Relations Director, immediately following upon ratification of the collective agreement, confirms that following a review of the practices, customs and past

agreements in effect between the parties, NAV CAN determined that, apart from those included in letters of understanding appended thereto, it would renew none others which may up to that point in time have been in effect between them [Exhibit #6]. That being the case, this grievance lies to be determined on the rights of parties as stipulated in the language of the governing collective agreement.

The effect of the Galipeau Award

6. The parties disagree as to the effect which the Award of Board Member Galipeau in *Re Richard* should have on the instant case: Ought it to be applied or discarded? Although it has long been established that the doctrine of *res judicata* or issue estoppel is not integral to the system of grievance arbitration, to deny the overriding persuasive force of previous decisions made in similar fact circumstances calling for the interpretation of the same collective agreement, would wholly undermine those values universally accepted as essential to any rational system of third party dispute resolution: certainty, uniformity, stability and predictability. Of course neither justice nor equity is to be sacrificed to these values and an arbitration board is statutorily bound to adjudicate the dispute before it on its merits. Indeed, to do otherwise and blindly adopt the reasons for decision given in a previous dispute could arguably be viewed as a declining of jurisdiction. The view of Judge Lane - "Irrespective of what an arbitrator may think that the proper ruling may be on the merits of an individual case as between the same parties during the term of the same agreement, he is bound to follow even a wrong decision of a former arbitrator" - has long been discredited. See *Re United Automobile Workers and L.A. Young Industries Ltd.* (1958) 8 L.A.C. 196 at 197. Even prior to the articulation of

this discarded view we find then Professor Laskin addressing this issue in the following terms:

> "It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable."

See Re *Brewer's Warehouse Co. Ltd. and International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink and Distillery Workers, Local 278c* (1954) 5 L.A.C. 1797 at 1798.

7. This entire subject has been much discussed by arbitrators for many years now in decisions which are often difficult to reconcile with one another. Two discussions are particularly helpful. The first is that of Arbitrator Weatherill included in a note entitled "The Binding Force of Arbitration Awards" and found at 8 L.A.C. 323. The second is that of Arbitrator, then Professor Swan in *Re Phillips Cables Ltd. and United Electrical, Radio and Machine Workers, Local 410* (1978) 16 L.A.C. (2d) 225. There, arbitral deference to the doctrine is aptly stated to rest in "comity" rather than in some immutable principle of law. That term epitomizes the true nature of the doctrine – that it is to guide but never dictate in arbitral decision-making. There is no doubt that arbitrators are reluctant to reject outright the interpretation of a collective agreement term expounded by a previous arbitral tribunal. This reluctance is grounded in public policy rather than in legal principle and I would agree with the view expressed in *Re Phillips Cables* that:

> "To permit every question of construction to arise again and again would destroy any finality in the arbitration process, and would lead to a situation in which arbitration awards on the interpretation of a collective agreement would be written on water, good only for the resolution of a specific grievance, and of no value to the parties whatsoever in ordering their ongoing relationship" [at p. 232].

8. In the *Brewers' Warehousing* case, Professor Laskin spoke of an earlier award "in a similar dispute between the same parties arising out of the same Agreement" and arbitrator Swan in re *Phillips Cables* speaks of the "ongoing relationship" between the parties. That language reflects an important distinction between a collective agreement and the ordinary commercial contract. The latter encompasses the totality of the relationship between the parties to it. But in the case of the former, the relationship whether rooted in a certificate or a voluntary recognition agreement, exists over and above the four corners of the collective agreement itself, indeed whether or not there is in place a collective agreement between the parties at all. The concept of a collective bargaining relationship as a dynamic and continually developing one is well captured by the concept of a "continuous cycle" of successive collective agreements articulated by Justice Henry in *Bradburn v. Wentworth Arms Hotel Ltd.* (1975), 56 DLR (3d) 168 at p. 176-177, rev'd *aliter* [1979] 1 SCR 846. Inasmuch as the doctrine of arbitral comity is rooted in the dynamic of an ongoing collective bargaining relationship, it is fair to ask whether it is applicable at all where, as here, there is a change in the identity of the parties to that relationship.

9. A review of the jurisprudence on successor rights legislation, which is common to all Canadian jurisdictions, demands an affirmative answer to that query. In its decision

WW Lester (1978) Ltd. v. UA Local 740 91 CLLC case no. 14,002, the Supreme Court of Canada recognized that the purpose of statutory successorship provisions is to protect the permanence of bargaining rights and preserve these as manifested in collective agreements, regardless of the legal form in which they may be put into jeopardy. It adopted as its own [at p. 12,016] the rationale for such legislative provisions articulated by Professor Weiler in *Kelly Douglas & Co. Ltd. and W.H. Malkin Ltd.* [1974] 1 CLRBR 77 as follows:

> "When an employer exercises this legal freedom to dispose of its business, this can have serious consequences for the situation of its employees. They may have struggled to become organized and achieve collective bargaining and then to arrive at a collective agreement. Once that agreement is finally settled, the employees naturally expect that its terms will be fulfilled in the conduct of the enterprise. The trouble is that these expectations could be set at naught by a simple change in corporate ownership. The employees may find themselves still working at the same plant, at the same machine, under the same working conditions, under the same supervisions, doing exactly the same job as before, but for a different employer. The result of the sale of a business of which the employees may not even be aware is that the collective bargaining rights of the employees may have disappeared.
>
> Realistically, one cannot expect these interests of the employees and their union to be at the forefront of the business negotiations which employers are free to engage in. Accordingly, the legislature adopted a very straightforward protection. Certification and other orders under the Code follow the business in the hands of the transferee. The legislature went even further to impose the collective agreement on a person who didn't sign it. It is up to the prospective purchaser to investigate the terms of the bargain which its predecessor has made with the trade union and see that this is taken account of in the purchase price of the takeover before it steps into the shoes of the old employer" [at pp 81-82]

10. Here, that general public policy is buttressed by a very specific and focussed Act of Parliament, the *Civil Air Navigation Services Commercialization Act*, the terms of

which provide for the smooth transition of those services from the public to the private sphere. The Act ensures the continued vibrancy of the bargaining rights formerly held by CATCA vis-a-vis Transport Canada pursuant to the *Public Service Staff Relations Act* by mandating that they attach to NAV CAN pursuant to Part I of the *Canada Labour Code* governing Industrial Relations. Indeed, Part IV of the *Civil Air Navigation Services Commercialization Act*, which takes up some ten pages in the statute books, includes at sections 62 through to 68 an exhaustive exposition of the binding effect upon NAV CAN of the collective agreements in effect between CATCA and Transport Canada from the transfer date of civil air navigation services, deeming NAV CAN to be a party thereto [s. 62(3)(a)] for all purposes including grievance arbitration [s. 62(8)(9)]; and the same holds true with respect to such collective agreements which may have expired prior to the transfer date [s. 63]. In either case the employment of those employees covered by such agreements is deemed to be continuous as between Transport Canada and NAV CAN [s. 67(1)], in short, a statutory bridging clause. In an earlier arbitral award, which I gave as between these parties, I summarized the nature of the successorship as follows:

> "By the terms of the [*Civil Air Navigation Services Commercialization] 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 agreement 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." [at pp 2-3].

That was in *CATCA and Nav Canada [Re Robert Allan et al]*, unreported decision issued 11 April 2000.

11. All of this leads me to conclude that, as with case of an on-going collective bargaining relationship between a single employer and a trade union, so too here in the case of a collective bargaining relationship arising by way of explicit successor rights legislation, that relationship must be viewed as continuous and ongoing. Thus, the collective agreement entered into between them in September 1999 under which this grievance arises, even if perceived by the uninformed observer as the first agreement between the parties, is within the context of the governing legislation and the world of industrial relations, a renewal agreement. As such it was negotiated within the context of two climatic factors: the macro-climate of the practice and theory of collective bargaining and the interpretation of collective agreements found in the broad sweep of arbitral jurisprudence; and the micro-climate of the particular bargaining relationship between CATCA and the predecessor employer, Transport Canada, including the body of arbitral decisions interpreting the terms of the cycle of collective agreements binding between then. It is within that context that my interpretative task must be here undertaken.

The macro-climate: pyramiding of leave benefits

12. A review of the arbitral jurisprudence reveals several themes when boards are called upon to interpret sick leave entitlement during a vacation period under the terms of a collective agreement. Perhaps a good starting point is to look at the purpose behind these two types of benefits. Vacation leave is said to be an earned benefit which an employee is entitled to take and enjoy. Professor Simmons put it this way in *Re RCA Ltd. and International Union of Electrical Workers, Local 542* (1972) 1 LAC (2d) 28:

> "… an employee earns an annual vacation by working continuously the previous year (or perhaps a portion thereof). Therefore, he has earned a right which becomes vested annually. In other words, having earned a vacation he entitled to enjoy it in any manner he chooses because its his vested right to do so. It is primarily a period when an employee can relax and spend leisure hours without the cares or responsibilities he lives with during the other weeks in the year when he must attend at work." [p. 286]

He contrasts this with sick leave benefits which are intended to indemnify an employee for inability to work as follows:

> "While illness is also covered by the collective agreement in that certain benefits flow to employees while on sick leave, the benefits are not, as a general rule, taken on a regular annual basis, nor does an employee covet the receipt of such benefits at all. Indeed some employees may work their entire career without having to resort to receiving sick benefits. Therefore, we are of the opinion that the illness benefits provisions are more closely analogous to a form of insurance …" [at p. 287]

13. Most would agree that illness interferes with the enjoyment of one's vacation entitlement. The question for arbitrators is whether in the face of such illness, an

employee should be entitled to claim sick leave benefits accrued, rather than expend vacation benefits the enjoyment of which has been 'lost'. One line of cases focuses upon the indemnification aspect of sick leave benefits under a collective agreement, so that a grievor in receipt of full wages while on paid vacation leave, cannot to be said to have suffered financial loss requiring indemnification for the illness suffered. This is whether the vacation leave has actually commenced or not. Not having been scheduled to work it cannot be said that such a grievor has lost wages during the period of illness. See for example *Re Cottage Hospital Uxbridge and OPSEU, Local 302,* unreported decision issued 13 February 1987 which is addressed by Professor Archibald in *Re Hewitt supra*. However, a second line of cases takes a less stringent approach. Although acknowledging that an already vacationing employee bears the risk of lost enjoyment should illness strike, these arbitrators would shift the burden of that loss in the case of illness occurring prior to the commencement of a vacation already scheduled. This is the so-called 'fundamental and primary reason for absence' doctrine generally traced to arbitrator Weatherill's decision in *Re Atlas Steels Co. supra*. That was a case in which an employee sought to have a period of time during which he was on sick leave deemed to be vacation leave, in which he held "Rather, we think it is the fundamental reason for the employee's absence from work which must govern the characterization of that period of absence" [at p. 174].

14. Professor Archibald in *Re Hewitt* reviews both lines of cases and acknowledges that they are not unanimous, but then perhaps this is but a manifestation of what Lord Wilberforce once said in another context that "to plead for complete uniformity may be to

cry for the moon." See *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] All ER 556 at 562 (HL). Nevertheless there exists an approach to the issue and a body of case law to support it which would allow for illness leave benefits to trump vacation leave granted where, because the latter leave has not yet commenced, one can characterize the earlier occurring illness as the 'initial, primary and fundamental cause' of the employee's absence. Needless to say, that jurisprudence and its approach must be compatible with the language of the governing collective agreement which is always determinative. This then is the macro-climate within which this matter must be determined. I turn now to consider the micro-climate, i.e. the manner in which the issue has been dealt with in the past by arbitrators called upon to resolve disputes of this sort between these two parties.

The micro climate: Board Member Galipeau's award in *Re Richard*

15. Adherence to the intention of the parties must be central to any inquiry of this nature. This is accomplished by fitting the language of the collective agreement to the governing principles as developed in the arbitral jurisprudence and reconciling conflicting themes by careful analysis of the particular wording, phrasing and terminology chosen by the parties in crafting their agreement. How did Board Member Galipeau go about undertaking this task? Although she did not specifically reference the 'fundamental and primary reason for absence' line of cases, they were cited to her in argument and it is clear that she relied upon them in interpreting the governing provisions of the collective agreement then in force. Although renumbered, they are identical to those here engaged in the agreement now in force. These read as follows:

24.02 An employee is eligible for sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:

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

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

27.07 (b) Local representatives of the Association shall be given the opportunity to consult with representatives of NAV CANADA on vacation schedules. Consistent with efficient operating requirements NAV Canada shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

27.08 Where, in respect of any period of vacation leave, an employee is granted bereavement leave, the period of vacation leave so displaced shall either be added to the vacation period, if requested by the employee and approved by NAV CANADA, or reinstated for use at a later date.

16. As Board Member Galipeau's reasons for decision are brief I cite them here in full.

DECISION

In this case, the burden of proof was on the grievor. I believe that he discharged this burden.

The grievor became ill a few days (on February 15, 1993) before February 18 and 19, 1993, the dates on which he was scheduled to take two days' vacation leave. On the same day as he visited his doctor (February 14, 1993), he notified his employer that he was ill and that, on his doctor's orders, he had to be absent from work for a few days (from February 16 to 19 inclusive) owing to illness. Upon his return to work (on February 23, 1993), he presented his employer with a medical certificate (Exhibit A-2)

certifying his illness on the days in question. The employer, through the unit manager, refused to grant him sick leave for February 18 and 19, 1993, not because he did not meet the requirements of clause 9.02 (Sick Leave) [= current Article 24.02], but rather because there was no provision authorizing substitution of sick leave for vacation leave scheduled for these dates (i.e. February 18 and 19, 1993).

It seems to me that sick leave should have been granted for February 18 and 19, 1993 for the following reasons.

First, I believe that the grievor met the conditions set down in clause 9.02. Neither the genuineness of his illness nor the validity of the medical certificate (Exhibit A-2) were contested. First he had "the necessary sick leave credits" (paragraph 9.02(1)) and, second, he satisfied his employer of his illness (paragraph 9.02(b)). Had February 18 and 19, 1993 been scheduled as working days instead of vacation leave, it is clear that the grievor would have been entitled to sick leave for these two days because he met the conditions set down in clause 9.02 for the granting of sick leave.

Does the fact that he was scheduled to be on vacation leave instead of at work preclude his being entitled to sick leave?

The employer argues that since, following a request from the grievor, he was originally scheduled to be absent for two days on vacation leave, he could not subsequently require that he be granted these two days as sick leave because there was no clause in the collective agreement that authorized substitution.

Were I to accept this argument, then it would also follow that were an employee is scheduled to work on a given day, and is absent from work owing to illness, he is not entitled to sick leave , even if he meets the sick leave requirements of clause 9.02, unless a clause authorizes the substitution of a sick leave day for a workday.

It is implicit that where an employee meets the requirements of clause 9.02 and establishes his entitlement to sick leave, the employer may substitute sick leave for the workday without there being any need for a provision expressly authorizing the employer to make the substitution. The substitution is implicit and follows naturally from the right to sick leave.

This being the case, I note that, in the present case, the grievor became ill before the vacation leave that he had originally requested began.

Before the vacation leave that he had been granted began, the employee notified his employer that he was ill and would be away for the next few days “on sick leave”.

In my opinion, as soon as the grievor notified the employer that he was ill and would be absent “on sick leave” for the next few days, he served notice on his employer that his situation had changed.

Upon his return to work, the grievor made an application for sick leave.

The employer itself acknowledged that the grievor’s situation had changed because it granted him sick leave for February 15, 16 and 17. The illness continued on February 18 and 19. However, for these two days, the employer did not take this fact into account.

In the case of these two days, it seems to me that the employer should have taken a number of factors into consideration. First, when the grievor first requested vacation leave, he could not know that a few days before he was to go on vacation leave, he would fall ill. This new circumstance (i.e. illness), which arose prior to the vacation leave, changed the reason for the grievor’s scheduled absence on February 18 and 19, 1993 and the grievor’s wishes to take vacation leave. Since the primary reason for his absence was now illness, it seems to me that the leave granted should have reflected this reality, especially since the grievor met the sick leave requirements of clause 9.02. Moreover, since “efficient operating requirements” were not a bar to the grievor’s absence, the employer should have “made every reasonable effort” to reinstate the vacation leave in accordance with the wishes” of the grievor (clause 17.06) [- current article 27.07(b)], in order to enable him to take sick leave, which more accurately reflected the factual situation. It should be noted that the circumstance (i.e. illness) that changed the grievor'’ wish to take vacation leave arose before the vacation began and was brought to the employer'’ attention before this leave could begin.

Finally, it should be noted, as counsel for the grievor pointed out, that clause 17.07 [= current article 27.08] deals with a very different situation, i.e. the granting of bereavement leave during vacation leave.

Moreover, the collective agreement is silent regarding the situation that arose here, namely, where the employee becomes ill before vacation leave that has already been authorized begins. Under clause 17.06, once vacation leave is granted, the employee does not have an absolute right to postponement of this leave. Operational requirements limit this right and, furthermore, the employer has an obligation only to “make every reasonable effort” to schedule vacation leave in a manner acceptable to the employee. However, as I stated above, there is no evidence that

> operational requirements were a bar to the grievor's absence. Moreover, it seems to me that the fact that the grievor became ill before the vacation leave began was a fundamental reason that obliged the employer to "make every reasonable effort" to accommodate the grievor's wish to reinstate the vacation leave, especially since the grievor had the necessary sick leave credits to cover this absence.
>
> For these reasons, the grievance is allowed and the employer is ordered to reinstate the two days of vacation leave and to deduct from the grievor's sick leave credits two days of sick leave to cover February 18 and 19, 1993."

Applying the 'clear conviction of error' test

17. Can it be said that Board Member Galipeau was 'clearly wrong' in the *Brewers' Warehousing* sense such that I should refuse to follow her award? In applying the 'clear conviction of error' test it is important to recognize that it is premised on the doctrine of arbitral comity which is but an instantiation of the juridical concept of deference. Although some arbitrators have gone so far as to elevate the test to the 'patently unreasonable' standard found in the jurisprudence on judicial review of specialized boards and tribunals, I am in agreement with Arbitrator Chertkow in *Re Podger* [p 321] that such assimilation of the curial doctrine into the arbitral forum risks deflecting an arbitrator from his principle task. I am statutorily mandated to determine mandated to determine the matter in dispute before me and do so within the framework of the developed body of arbitral doctrine and principles of interpretation as they apply in the setting of this collective agreement and the bargaining relationship which it embodies.

18. Nevertheless, it is clear that the principle of arbitral comity as expressed in the idea that a second Board must have "the clear conviction that the first award is wrong"

does call for some degree of deference to the earlier Board and its understanding of the wording of the collective agreement. Helpful in this regard are the comments of Justice Iacobucci in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 SCR 748; [1996] SCJ No. 116. There, in determining that reasonableness is the standard of review on a statutory appeal from the decision of an administrative tribunal to a Court, he wrote:

> "59. The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In *Stein v. "Kathy K" (The Ship),* [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:
>
> > . . .the accepted approach of a court of appeal is to test the findings [of fact] made at trial *on the basis of whether or not they were clearly wrong* rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]
>
> 60. Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter."

19. So too it serves as a guide to me here. Does the Galipeau award pass muster on the reasonableness standard? Counsel for the Employer argues that it does not, placing

great reliance on the fact that the condition precedent to eligibility for sick leave namely, that the employee be "unable to perform his or her duties because of illness or . . . ", cannot be said to have been met where an employee is not scheduled to work in any event due to vacation leave already granted. Secondly, counsel notes that in several other collective agreements binding between NAVCAN and other bargaining agents, and indeed in earlier versions of the collective agreement binding between CATCA and Treasury Board, the provisions of Article 27.08 were more broadly framed, providing for the displacement of vacation leave not only in the case of bereavement leave subsequently granted, but also in the case of subsequent grant of sick leave. [CATCA Book of Authorities tabs 1-4; Exhibit 7(a), (b), (c)].

20. I do not find the latter argument particularly persuasive. Arguing from a negative i.e. the absence of the inclusion of sick leave in the displacement article 27.08 even highlighted by the fact that earlier versions of the article in the predecessor collective agreements between these two parties included sick leave within its terms, does not lead to the conclusion that the grievor is disentitled to sick leave in the circumstances of the instant case. I read article 27.08 somewhat differently. There, "in respect of any period of vacation" an employee granted bereavement leave is entitled to have the vacation leave so displaced rescheduled irrespective of whether or not a scheduled vacation leave had already commenced. The effect of article 27.08 is to override the 'fundamental and primary reason for absence' doctrine which leads to differing outcomes depending upon whether or not the employee had actually commenced a vacation leave subsequently interrupted by intervening events, in favour of an absolute entitlement to a

rescheduling of that leave when interrupted, whether commenced or otherwise. The fact that the precipitating event for the article 27.08 displacement entitlement is limited to bereavement leave cannot be determinative of whether the grievor is entitled to the benefit of the 'fundamental and primary reason for absence' doctrine as developed in the arbitral jurisprudence.

21. Nor, in my view does the argument based on failure to meet the condition precedent for eligibility for sick leave with pay under article 24.02 bear close scrutiny. I am being asked to read article 24.02 as if it stipulated that 'the employee is unable to perform his or her *scheduled* duties because of illness', in which case it could be said to engage the provisions of article 16 governing hours of work, shift cycles and scheduling of specific duties. But it does not explicitly do so. Just as reasonable a reading of the phrase ' unable to perform his or her duties because of illness' is to view the concept of duties generically i.e. that range of tasks associated with his or her position which are ordinarily performed by the sick employee. This is the sense in which the term is used at article 17.03(a) addressing pay when an employee is asked 'to perform the duties of a higher classification'; and again at article 3.07 distinguishing 'regular' or 'normal' duties performed by employees in connection with their work from the duties carried out by a shop steward. The sick pay on overtime award of Arbitrator Hope is of no assistance given the requirement that overtime actually be worked to be entitled to any compensation whatsoever [Art. 20].

22. The core of Board Member Galipeau's finding that a grievor in circumstances such as those here present is entitled to have vacation leave rescheduled when displaced by sick leave on the 'fundamental and primary reason for absence' test, is found in the article 27.07(b) obligation placed upon the Employer to "make every reasonable effort to schedule vacations in a manner acceptable to employees." She concluded that inasmuch as (i) the grievor met the sick leave requirements of article 24.02; (ii) brought the fact of intervening illness to the attention of the Employer prior to commencing vacation; and (iii) efficient operating requirements were not a bar to the grievor's absence, the Employer ought to have made every reasonable effort to reschedule the vacation leave in a manner acceptable to the employee as per article 27.07(b) and had failed to do. Not only am I not of 'the clear conviction the award is wrong', I find it to have been an eminently reasonable interpretation of the governing provisions of the collective agreement within the context of the applicable arbitral jurisprudence, and would concur with it.

AWARD

23. For all of the foregoing reasons, this grievance is sustained, the circumstances being on all fours with those arising before Board Member Galipeau in *Re Richard*. The Employer is directed to compensate the Grievor for the two days wages lost by reason of failure to grant him sick leave to which he was entitled under article 24.02. I remain seized of this matter for purposes of implementation.

ISSUED at Fredericton, New Brunswick, this 28th day of February 2002.

Thomas Kuttner, QC
Arbitrator