IN THE MATTER OF AN ARBITRATION

BETWEEN: NAV CANADA

AND CANADIAN AIR TRAFFIC CONTROL ASSOCIATION
C.A.W., LOCAL 5454

AND IN THE MATTER OF A GRIEVANCE RELATING TO THE FAMILIARIZATION FLIGHT PROGRAM

SOLE ARBITRATOR: J.F.W. Weatherill

A hearing in this matter was held at Ottawa on June 21 and July 29, 2002.

A Rosner, for the union.

G. Rontiris, for the employer.

AWARD

This grievance, dated January 30, 2002, is a policy grievance relating to the decision of management to suspend the Familiarization Flight/Visit Program beyond the period which had been agreed to by the union. Familiarization flights are provided for in the collective agreement, and it is the employer=s position, essentially, that events beyond its control have frustrated its ability to meet the requirements of the provision.

Article 29 of the collective agreement deals generally with Atraining@, and articles 29.03 and

29.04, as well as the definitions in article 29.02, deal with familiarization flights, defined in article 29.02 as Aa flight during which an employee may be permitted to visit the cockpit of the aircraft during the flight@. Article 29.03 is as follows:

> *NAV CANADA shall provide familiarization flights to all employees having three (3) or more years= service as a licensed air traffic controller who are listed in Appendix C to this agreement except those employees who are in receipt of Short or Long Term Disability benefits.*

It may be noted that while the collective agreement provides that the employer Ashall provide@ such flights, eligible employees are not under an obligation to apply for or to take them. The evidence is that approximately one-third of eligible employees have availed themselves of this benefit, which has been provided for in the collective agreement and its predecessors for many years.

Employees are on duty during the flight and the associated unit visit (defined in article 29.02 as Aan on-site tour of an air traffic control facility during which the employee has the opportunity to observe all aspects of the operation@), and travel costs associated with these times on duty are paid by the employer for a maximum of two nights and three days (article 29.04(a)). In many instances, it seems, employees may schedule vacation time in connection with such a flight. There are certain restrictions on the frequency and the destinations of these flights set out in article 29 and in Appendix C, but these are not material to the issue to be determined here. It is, however, pertinent to set out articles 29.03(d) and (e), which are as follows:

> *(d) The destination chosen by the employee in accordance with this article shall normally be approved, except where NAV CANADA for operational reasons determines that a different destination is appropriate. Employees shall not normally be authorized to visit the same city on successive flight/visits.*
>
> *(e) The scheduling of requested familiarization flights and the determination of the flight(s) upon which the employee will travel are the responsibility of NAV CANADA. Canadian Flag Carriers will*

normally be used.

Following the attack on the World Trade Center on September 11, 2001, air traffic was, for a time, in a Achaotic@ condition. As a result of this, and of immediate concerns for increased security, access to aircraft cockpits and to air traffic control facilities was drastically restricted. It was, in effect, impossible for the employer to arrange and provide for familiarization flight/visits during this period. The union recognized this, and by agreement between the parties such flights were suspended for a period of ninety days. When, however, following this period, and following the period of Ablackout@ over the holiday season, the program was not restored, this grievance was filed.

The positions of the parties with respect to the significance of the events of the time for the implementation of the familiarization flight program appear from an exchange of correspondence which preceded the filing of the grievance. The material portions of that correspondence may be set out as follows. On December 19, 2001, Mr. Vasarins, Vice President, Operations, wrote to Mr. Thurgur, President of the union:

> *As you are aware, the Familiarization Flight Program was suspended in the aftermath of the September 11, 2001 crises, and it was intended to resume the program early in the New Year.*
>
> *Unfortunately, Air Canada will not permit flight deck access to non-employees on any flights. This measure, among others, has been introduced for security reasons and remains in effect until further notice. Since a familiarization flight by definition under Article 29.02 means AA flight during which an employee may be permitted to visit the cockpit of the aircraft during a flight@, this security measure will affect NAV CANADA=s Familiarization Flight Program.*
>
> *Consequently, until such time as these restrictions are changed, familiarization flights are not possible for European or United States destinations. In the case of U.S. destinations, the FAA will not accept visits to any of their sites, which means that Unit visits to the U.S. are not possible at this time either.*
>
> *We are continuing to work with West Jet to determine if flight deck access can be arranged for their flights, which in turn may permit resumption of the program domestically, where applicable. I will keep you informed of any*

changes to these imposed restrictions either domestically or internationally as they may occur.

To this Mr. Thurgur replied on January 8, 2002, as follows:

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In your second paragraph you refer to the definition in Article 29.02 definitions. The operative word in the quote is the word Amay@. It does not say shall. We are well aware that the word Amay@ was used in this section very specifically to recognize the ultimate authority of the airline and pilot in command to determine if a cockpit visit was to be permitted in any or all flights. This limitation has always been in place was not intended to circumvent the right to access an article 29 benefit but in fact to permit it even if a cockpit visit was not allowed.

Your third paragraph states that until the cockpit visit restrictions are changed the program will not be allowed to Europe or the U.S. destinations. There is no mandatory requirement for a cockpit visit.

I also wish to point out that the contract does not require exclusive use of Air Canada, nor for that matter Canadian Carriers. As set out in Article 29.03(e) the final sentence states, ACanadian Flag Carriers will <u>normally</u> be used.@ Once again the permissive word is used to allow you flexibility.

You allude to facility access and we assure you that our information is that our membership would be welcomed to Eurocontrol facilities. I have also just finished speaking with NATCA representatives in the US and they assure me that although some of the procedures have changed, our controllers would be more than welcome in their facilities.

Your final paragraph states that should WestJet agree to cockpit access then domestic fam/visits may resume. This indicates to us that you have also arbitrarily suspended domestic fam flight/visits. This is unacceptable as surely access to facilities in Canada are not in question and of course while cockpit access is a valuable aspect of a fam flight/visit it is secondary and recognized historically as unnecessary.

Mr. Vasarins= response to this, on January 14, 2002, was as follows:

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You dispute the requirements to have access to the flight deck as a necessary part of the Familiarization Flight/Visit. I would like to refer you to the purposes and objectives of the Familiarization Flights/Visit Program which are set out in the Program Guidelines and which are a component of the

training of air traffic controllers, and they are as follows:

A*1.2 The objects of the program are:*

- *to enhance controller awareness of the Air Traffic Services (ATS) system both nationally and internationally (where appropriate) in order to develop a global understanding of the organization, system process and control techniques;*

- *to enhance controller awareness of the operation and needs of the aviation community;*

- *to foster a positive relationship between NAV CANADA and participating airlines; and*

- *to facilitate inter-unit communication and cooperation and stimulate constructive ideas for improvements in the quality and efficiency of the service being provided.*@

We recognize that the ability to visit the flight decks has always been at the discretion of the Captain but, historically, this admission has been allowed only subject to severe weather conditions or other matters such as pilot training that would deny such access. In our view, the cooperation of the airlines in allowing such visits on the way to and returning from a facility visit has been fundamental to the purposes and objectives of the Program.

With respect to your issues of the utilization of the Canadian Carriers, I again refer you to sections of the Guidelines:

A*6.1 Scheduling requirements are listed in Article 29.03(e) of the Collective Agreement.*

6.2 In addition, the following applies:

- *NAV CANADA is responsible to schedule requested fam flights and to determine the flight upon which the controller will travel.*
- *Air Transportation Association of Canada (ATAC) carriers shall be used except where the destination airport is not [served] by an ATAC carrier.*
- *where ATAC carriers do not serve the destination airport, an*

ATAC carrier is to be used to the transfer point closest to the destination and a non-ATAC carrier from that point to/from the destination airport.

- *controllers will not have access to the cockpit of non-ATAC carriers@.*

When the Program was initiated, there was more than one Canadian international scheduled carrier. Unfortunately, due to several circumstances, at the present time, that has been reduced to one and, as such, we are bound by the Air Canada Directives as to access to the flight decks. With respect to site visits, we have again confirmed with the FAA that site visits are still not permitted but they have assured us that they will be reviewing this matter in the near future.

We are further waiting for confirmation from Westjet as to their position in regard to flight deck visits and hope that domestic familiarization flight/visits will be able to resume shortly.

We appreciate your frustration in this matter, but want to assure you that NAV CANADA has not instigated any of these restrictions but we are only trying to deal with post September 11 events in a reasonable and fair manner and look forward to things returning to normal as quickly as possible.

Finally, Mr. Thurgur=s response to Mr. Vasarins=letter was sent on January 31, 2002, as follows:

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In your letter and in many of the responses that members have been receiving across Canada, the company has taken the position that because access to the cockpit is no longer available the Fam Flight program must be put on hold.

In many cases in the past, access to the flight cockpit has been unavailable due to some of the following reasons:

- *Company policy - Canada 3000*
- *Controllers with facial hair*

Yet despite these previously known denials of cockpit access the individual members were still permitted to enjoy the Fam Flight program negotiated in our collective agreement.

In questioning members across Canada we have been unable to find any practice of Nav Canada refusing a Fam Flight due to a Controllers inability to access the cockpit, prior to September 11th 2001. Could you please

explain why since September 11th 2001 Nav Canada has implemented these restrictions on the Fam Flight Program?

The evidence establishes that, at present, controllers are not being permitted access to the cockpits of Air Canada, nor of United States Carriers. There is no evidence respecting such access on flights of any other major carriers operating from Canada. The evidence also suggests that, at present, controllers are not being permitted to visit air traffic control sites in the United States, although while the employer has raised the matter with appropriate authorities in a general way, it is not clear from the more recent American directives that such requests would necessarily be refused. The evidence has not established that such visits are not permitted at air traffic control sites in Canada or in Europe.

The evidence is conflicting as to the relative importance of cockpit visits and of site visits. Mr. Vasarins, himself a former controller who had taken familiarization flights, considered the cockpit visit clearly more important than the site visit, for reasons that are set out in the correspondence above. It was Mr. Thurgur=s view that the site visit was the moreimportant aspect of the program. However this may be, the collective agreement does not characterize one aspect of the program as more important than the other, although it is contemplated that a cockpit visit may not occur in some circumstances, and the evidence is that there have been instances where such visits did not in fact occur and where there were no repercussions.

The familiarization flight program surely enhances the professional experience of those who elect to take it. While Mr. Vasarins would prefer that it not be considered as a Aperk@, it is clear that it is not an essential element of a controller=s training, and that for some employees at least it is considered to have desirable features beyond those relating to their work. It is a negotiated benefit set out in the collective agreement, and imposes obligations on the employer for the benefit of those employees who wish to take advantage of them. Where, for some reason, it is impossible for the employer to meet these obligations, or some of them, the onus is on the employer to establish that fact.

In the instant case, the evidence establishes that, at least at the time the grievance was filed, it

was not possible for the employer to arrange for controllers seeking to take advantage of the familiarization flight program to have access to the cockpits of the aircraft on which they were flying to a site visit. Having in mind the several aspects of the benefit negotiated for in article 29, I do not consider that this, while regrettable, would be fatal to the application of the program. Further, the evidence establishes that at certain destinations, and in particular those in the United States, visits to air traffic control sites were (whether or not this is still the case), impossible. While this geographical limitation would no doubt render the familiarization flight program less attractive to some employees, it certainly has not been shown that it was necessarily or even very substantially deprived of its value. It is, I think, appropriate to conclude that in the circumstances certain of the purposes for which article29 was intended have been frustrated, at least for an indeterminate period of time. It must also be concluded that not all of those purposes have been frustrated, and that it would in fact be open to the employer to provide familiarization flights to a reduced number of destinations, even although such flights may not involve access to the cockpit.

That is, a partial, and in my view significant degree of compliance with the requirements of the collective agreement remains possible. In refusing to provide any familiarization flights at all, the employer is, I find, in violation of its obligations under article 29 of the collective agreement. When familiarization flights are not provided, employees are deprived of a negotiated benefit, and the employer obtains an unexpected windfall. Where this situation involves, as here, a violation of the collective agreement by the employer, then some form of remedy must be provided.

It was argued for the employer that the doctrine of frustration of contract applied. For the principle that an arbitrator under a collective agreement would have jurisdiction to apply the doctrine of frustration, it referred to the recent case of *Public Service Alliance of Canada v. Nav Canada*, a decision of the Ontario Court of Appeal dated April 19, 2002. In that case the Court of Appeal concluded that the relevant jurisprudence has advanced to the point where arbitrators have the power to grant the remedy of rectification in adjudicating disputes arising out of a collective agreement. To Arectify@ the written terms of a document in order to determine what in fact are the terms of a collective agreement is one thing, and arbitrators have been doing so, in appropriate cases, for some time (see *Alcan Canada Products,* (1982) 5 L.A.C.(3d) 1, cited by the Court of

Appeal, and *Hoover Co. Ltd.,* (1982) 7 L.A.C.(3d) 157). That the jurisdiction of an arbitrator might include granting of relief in cases of Afrustration@ or partial frustration of a collective agreement is another thing, although it might be inferred from the broad language of the Court of Appeal in setting out its conclusion, following its analysis of the Aattenuation@ by the Supreme Court of Canada of the *Metro Police* case, [1972] 2 O.R. 793.

The Court of Appeal stated that,

> *More recent decisions - - have concluded that arbitrators have exclusive jurisdiction to resolve disputes arising under a collective agreement and that, in resolving those disputes, arbitrators have the power and the duty to apply Athe law of the land@, both jurisprudential and statutory. One of the elements of the law of the land is the power to grant the remedy of rectification, and, in my view, the jurisprudence has now advanced to the point where arbitrators have the power to grant that remedy in adjudicating disputes arising out of a collective agreement.*

Even although I have found that the employer is, to a degree, in violation of the provisions of the collective agreement, it would be improper, in my view, and indeed, I consider, beyond my jurisdiction simply to order the employer to comply with the provisions of the collective agreement and to reinstate the familiarization flight program in its entirety. In the present circumstances, such an award might require the employer to act illegally, and I do not consider that an arbitrator has jurisdiction to require a party to perform an illegal act. See *Peterborough County Board of Education*, (1983) 10 L.A.C. (3d) 409.

Whether or not it be considered that the purposes of the collective agreement have been, in part, frustrated by events beyond the control of the parties it remains that, in the instant case, I have determined that the employer is, to the extent indicated, in violation of its obligations under the agreement, and has benefitted from a windfall proportionate, more or less, to the lost benefits of

employees. The situation calls for a remedy, and the parties are invited to address that matter before a final award is made.

For all of the foregoing reasons, it is declared that the employer is in violation of the collective agreement. If the parties are unable to agree between themselves on an appropriate remedy, either party may request that I convoke a further hearing for the purpose of dealing with that outstanding issue and completing the award.

DATED AT OTTAWA, this 7th day of August, 2002,

_____,
Arbitrator