IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

The Employer

-and-

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

The Union

AWARD

Grievance re:Kevin Wallace - Lieu Leave Deduction

BEFORE:	Tom Jolliffe
FOR THE EMPLOYER:	George Rontiris
FOR THE UNION:	Abe Rosner
HEARING LOCATION:	Winnipeg, Manitoba
HEARING DATE:	February 3, 2003

Date Award Issued:
June 30, 2003

This matter raises the issue of whether the Employer has properly deducted credits from an operating employee's lieu leave bank in a situation where the fact of his being on approved parental leave without pay meant that he was not working on the day immediately preceding, or on the day immediately following a designated holiday. The

Union asserts in a situation where a holiday falls somewhere inside a period of unpaid leave that the affected operating employee is still entitled to his fully credited 93.17 hours of lieu leave for the year without deduction. The Employer contends that the link between lieu leave and the designated holidays is such that the limiting language contained in the collective agreement relative to one having to work one or other side of the holiday in order to be paid for it should apply so as to allow a lieu time deduction where this has not occurred. The legitimacy of the grievor's unpaid approved leave under art. 26 is not at issue. The pertinent art. 28 provisions of the collective agreement read as follows:

28.01 Designated Holidays

The following days shall be designated holidays for employees:

(a) New Year's Day;

(b) Good Friday;

(c) Easter Monday;

(d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;

(e) Canada Day;

(f) Labour Day;

(g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;

(h) Remembrance Day;

(i) Christmas Day;

(j) Boxing Day;

(k) One additional day in each year that, in the opinion of NAV CANADA, is recognized to be a provincial or civic holiday in the

area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August;

(l) Any other day that is proclaimed by law as a national holiday.

28.02 Holiday on Day of Rest

For non-operating employees, when a day designated as a holiday under 28.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first scheduled working day following his or her day of rest.

28.03 Work on Holiday (Non-Operating Employees)

When a non-operating employee works on a holiday the employee shall be paid in addition to the pay he or she would have received had he or she not worked on the holiday, one and one-half (1 ½) times his or her straight-time hourly rate for all regularly scheduled hours worked by him or her on the holiday.

An employee at his or her request, shall be granted time off in lieu of cash payment at that rate. 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. However, failing such agreement, such lieu time will be accumulated.

Where an employee requests time off in lieu of cash payment he or she must indicate this to his or her supervisor prior to the end of the month in which he or she worked on the holiday.

Where an employee has not utilized this accumulated time off by the end of the fiscal year, the unused portion will be paid off at the straight time rate in effect at that time.

28.04 Work on Holiday (Operating Employees)

Where an operating employee works on a holiday the employee shall be paid at one and one-half (1 ½) times his or her straight-time hourly rate for all regularly scheduled hours worked by the employee on the holiday.

28.05 Lieu Leave (Operating Employees)

For operating employees,

(a) (i) On September 1st, 1999 an employee shall be credited with an additional one point three (1.3) hours of lieu leave. (This is in addition to the hours that have been granted as of April 1, 1999.)

(ii) On April 1st of each year thereafter, an employee shall be credited with ninety three point one seven (93.17) hours of lieu leave.

(b) Lieu leave may be scheduled as an extension to vacation leave or as occasional leave and shall be charged against the lieu leave credits on an hour-for-hour basis.

(c) Consistent with operational requirements and subject to adequate notice, NAV CANADA shall make every effort to schedule lieu leave at times desired by the employee.

(d) Where in any vacation year an employee has not utilized all of the lieu leave credited to him or her, the employee may elect to carry forward into the next vacation year the unused portion of his or her lieu leave.

(e) Lieu leave earned in the vacation year will be utilized before lieu leave carried forward from the previous year.

(f) At the employee's option, any lieu leave which cannot be liquidated by the end of the vacation year in which it is earned will be paid off at the employee's straight-time rate of pay in effect at that time.

(g) In cases where lieu leave from the previous vacation year has not been fully utilized by the end of the current vacation year, any outstanding carry-over lieu leave credits will be paid off at the employee's straight-time rate of pay in effect at that time.

(h) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or after he or she becomes subject to clause 16.08 shall be subject to recovery of pay.

28.06 Absence on Qualifying Days

(a) An employee who is absent without pay on both the working day immediately preceding and the working day following the holiday shall not be paid for the holiday.

(b) An employee who is absent without permission and who is not on sick or special leave on a designated holiday, on which he or she is scheduled to work, shall not be entitled to be paid for the holiday.

At commencement of hearing the parties tabled an agreed statement of facts together with the exhibited grievance and reply documents, relevant work schedule, and the holidays provisions contract language through several collective agreements dating back to 1969. The old language was entered for comparison purposes and as background information in that neither counsel asserted there was an ambiguity requiring extrinsic evidence as an aid to interpretation; nor has either side asserted there to be an estoppel which somehow applies. Both counsel submitted in their arguments that properly it is a matter of giving reasonable effect to the current contractual language.

The agreed facts of the matter are set out below as follows:

1. **Mr. Kevin Wallace, the grievor, is a full-time air traffic controller and classified as an AI-OPR-05 working at the Employer's Winnipeg Area Control Centre, a facility which operates on a continuous 24-hour-per-day, year-round basis.**

2. **As an operating employee, the grievor's lieu leave bank was credited with 93.17 hours in accordance with article 28.05(a)(ii) of the collective agreement.**

3. **The grievor properly applied for and was granted Parental Leave Without Pay in accordance with article 26.10 of the collective agreement for the period commencing July 23, 2001 and ending August 15, 2001.**

4. **During the period of the grievor's absence the provincial civic holiday was**

recognized on August 6, 2001.

5. **The Employer deducted from the grievor's lieu leave bank 8.47 hours, taking the position that the grievor was absent without pay on both the working day immediately preceding and the working day following the holiday.**

6. **The Union filed a grievance, numbered 2001254 and dated October 16, 2001, on behalf of the grievor alleging that the Employer had improperly deducted the hours from the grievor's lieu bank.**

7. **The Employer's past practice, in situations similar to the instant one where a holiday falls within a period of Leave Without Pay, has been to deduct the value of that holiday from the employee's lieu leave bank. Prior to the filing of the instant grievance, however, the Union was not aware of this practice.**

Simply put, in denying the grievance, the Employer has held to the view that article 28.05(a)(ii) should be interpreted as recognizing that the 93.17 hours of "lieu leave" credited to operating employees on April 1 of each year are in lieu of something, meaning the collection of twelve designated holidays which they can anticipate having to work in the course of fulfilling their normal scheduling associated with the Employer's continuous 24 hours, seven days a week, operation. There being such a link between lieu leave and the designated holidays it replaces, then article 28.06 (a) should be seen to apply to the situation at hand to allow the deduction of credits to represent not being paid for a holiday occurring within a period of unpaid leave.

Mr. Rosner, on behalf of the Union, submitted that the current language in dealing with operating employees is clear and unambiguous. Nevertheless, having tabled the developed line of caselaw dating back to a series of Public Service Staff Relations Board decisions and Federal Court of Appeal judgments, he reviewed the previous contractual obligations under the differently worded expired provisions on banking lieu time. Through successive collective agreements from the 1970s to the contract expiring December 31, 1990, the earlier language provided for operating employees working a holiday to be paid at time

and one-half and to be provided with a day of leave with pay in lieu of the holiday, to be taken at a later time, whether worded as "be granted" which was the language through to the contract expiring at the end of 1986, or "be scheduled" which was the language from then through to the end of December 1990. The language in these earlier contracts also eventually provided for establishing anticipatory lieu day credits to replace designated holidays for the fiscal year, by 1989 being set at 7.5 hours for each designated holiday. There was always a requirement for employees to work either the day immediately preceding or immediately following the holiday in order to be paid for it. The language contained in the contract running January 1, 1989 through December 31, 1990 provided the last example of the negotiated holiday benefits scheme which the parties litigated during the 1980s. For comparison purposes, I note the pertinent language at that time read as follows:

16.01 Subject to 16.02 the following days shall be designated holidays for employees:

(a) New Year's Day;
(b) Good Friday;
(c) Easter Monday;
(d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;
(e) Canada Day;
(f) Labour Day;
(g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;
(h) Remembrance Day;
(i) Christmas Day;
(j) Boxing Day;
(k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August;
(l) Any other day that is proclaimed by law as a national holiday.

16.02 When a day designated as a holiday under 1601 coincides with an employee's day of rest, the holiday shall be moved to the employee's first

scheduled working day following the employee's day of rest.

16.04 Where an operating employee works on a holiday the employee shall:

(a) be paid at one and one-half (1 ½) times his or her straight-time hourly rate for all hours worked by the employee on the holiday,

and

(b) be scheduled a day of leave with pay at a later date in lieu of the holiday.

16.05 For operating employees,

(a) The designated holidays in a fiscal year shall be anticipated to the end of the year and lieu day credits established on the basis of seven decimal five (7.5) hours for each designated holiday.

(b) For the purpose of paragraph (a) above only, in those years wherein Good Friday and/or Easter Monday fall in the month of March they shall be deemed to fall in the month of April, except in any case where the application of this paragraph would cause an employee to lose credit for the holiday(s).

(c) Lieu days may be scheduled as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on a hour-for-hour basis.

(d) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to schedule lieu days at times desired by the employee.

(e) Where in any fiscal year an employee has not been granted all of the lieu days credited to him or her, the employee may elect to carry forward into the next fiscal year the unused portion of his or her lieu days.

(f) Lieu days earned in the fiscal year will be utilized before lieu days carried forward from the previous fiscal year.

(g) At the employee's option, any lieu days which cannot be liquidated by the end of the fiscal year in which they are earned will be paid off at the employee's straight-time rate of pay in effect at that time.

(h) In cases where lieu days from the previous fiscal year have not been fully utilized by the end of the current fiscal year, any outstanding carry-over lieu day credits will be paid off at the employee's straight-time rate of pay in effect at that time. This provision does not apply to lieu days accumulated prior to June 1, 1982.

(i) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or commencement of retiring leave or after he or she becomes subject to clause 13.09 shall be subject to recovery of pay.

16.06

(a) An employee who is absent without pay on both the working day immediately preceding and the working day following the holiday shall not be paid for the holiday.

(b) An employee who is absent without permission and who is not on sick or special leave on a designated holiday, or the day to which the holiday is moved by reason of clause 16.02 on which he or she is scheduled to work, shall not be entitled to be paid for the holiday.

Mr. Rosner, on behalf of the Union, in his explanation of the various distinctions between non-operating and operating employees applicable to their negotiated holiday benefit schemes, said that the current language of art. 28.05 employs a different concept altogether of "lieu leave" to the extent that 93.17 hours are now credited on April 1st of each year, presumably to compensate one for being without the ability to take the bundle of normal holidays, each holiday being just another day in one's usual scheduling. This entitlement has replaced the old program of accumulating lieu day credits representing specific missed holidays "anticipated to the end of the year". There is no longer any mention as there was under art. 16.04(b) of the old language that where an operating employee has worked a holiday, he gets "a day of leave with pay at a later date in lieu of the holiday". The old system was changed without there being any continuing reference to anticipated or accumulated lieu date credits able to be lost or, for that matter, any continuing concept of an

operating employee being paid anything extra for specific worked holidays outside of time and one-half for the day itself. The only "recovery of pay concept" currently contemplated relative to lieu leave comes under art. 28.05(h). It relates to leave having been granted in advance of holidays occurring after the date of an employee's actual separation or after becoming subject to a non-operating employee's hours under the current art. 16.08, which is to say leaving the ranks of the operating employees in those situations. The Union, he said, holds to the view that article 28.06(a) can only be seen to apply to employees who are being paid for all the designated holidays, in the usual sense of not normally working a holiday but being paid for it. Operating employees currently work in a scheme where every day of the year is subject to their regular hours scheduling. They are not actually "paid" for any holiday, whether or not absent on either side of it. They are only paid for a regular day of work. While it might well be said that the evolution of contract language has been tied to the caselaw decisions, the current language can be given its regular meaning and should be seen to have created 93.17 hours of lieu leave for the year commencing April 1st without any concept of deduction therefrom except as expressly provided by art. 28.05 (h).

Mr. Rosner illustrated his argument on the significance of the changed contract language as conveying the parties' negotiated intention of abandoning the earlier concept of lieu days replacing "anticipated" upcoming designated holidays to be taken at a later time, by reference to case law. In so doing, he submitted that the current language, providing as it does for 93.17 lieu leave hours as credited on April 1st under art. 28.05(a)(ii), should not be diminished unless on very clear wording set out in the collective agreement. The Union views the lieu leave as constituting an earned entitlement as of that moment able to be taken as thereafter delineated in the rest of art. 28.05. This principle, he said, is confirmed by such cases as Re Galco Food Products Ltd. and Allied Food Workers, (1978), 18 L.A.C. (2nd) 220 (Beck), where the express wording provided for entitlement to payment for a plant holiday on the basis of one having to work the full working day immediately preceding and the full working day immediately following the holiday, unless absent with management permission

or for reasons beyond his control. The language was found not to disentitle someone on layoff, obviously away from work for reasons beyond his control, and accordingly seen not to be holiday stretching which lies at the heart of this kind of provision. In applying the clause as he did, the arbitrator indicated that if the parties had intended for layoffs to limit the described earn benefit, they should have specifically stated as much. In the current circumstances, Mr. Rosner said, art. 28.06(a) does not provide for reducing an operating employee's lieu leave entitlement, which no longer has any stated connection with any specified or anticipated holiday. There can never be any issue of holiday stretching for operating employees inasmuch as their normal scheduling ignores holidays altogether, which, for them, is just another normal work day, albeit at time and one half pursuant to art. 28.04. It is quite unlike non-operating employees who pursuant to art. 28.02 could still have a holiday coinciding with their day of rest and thereby requiring it to be moved, and normally are not expected to be working on a holiday. Non-operating employees are paid for each designated holiday, and can accumulate days off in lieu of cash for any holidays actually worked. For operating employees there is no concept of being paid for holidays not worked, as they would simply be their normal days off.

By way of distinguishing the present situation from the old, Mr. Rosner tabled the caselaw between the parties dealing with the predecessor contractual language prior to the parties moving to the currently worded art. 28. The accepted view of the old art. 16.05 which allowed designated holidays to be anticipated to the end of the year and lieu day credits established on that basis is set out by the Public Service Staff Relations Board decision in Anderson and Treasury Board (Transport Canada), [1987] C.P.S.S.R.B. no. 339 where adjudicator Young in a sick leave situation ruled that by application of the language of the day (1985/86 collective agreement), an operating employee's failure to work a designated holiday due to being on sick leave disentitled him to the lieu day credit and allowed the employer to reduce his lieu day entitlements. The adjudicator remarked that the system of anticipated holidays and lieu day credits had been created because it was "presumed" that an

operating employee would be working on a holiday, which would lead to his "normally always earn(ing) his lieu days". Hence, the possibility of having to recover unearned lieu days was not needed to be contemplated except for art. 16.05(i) situations, as it was then numbered. However, with respect to employees ultimately having to earn their lieu day credits, he quoted from Mr. Justice Mahoney's Federal Court of Appeal decision in Justinein and Neilsen [1986] F.C.J. No. 674:

> **The entitlement to be paid at an overtime rate and to a lieu day of holiday arises under that provision only if the employee actually works on a holiday.**

One can see the tie to having to work the holiday under the old language as art. 16.04 had expressly stipulated that an operating employee working the holiday would receive time and one half, and a lieu day to be taken at a later time. Indeed, the adjudicator accepted that the situation had been fully decided by the Federal Court of Appeal in Canada (Treasury Board) v. Doheny (F.C.A.), [1987] F.C.J. No. 154 where the Court stated its disagreement with the position taken by the chief adjudicator E.B. Jolliffe in 1970 in Wood et al v. Treasury Board, P.S.S.R.B. No. 166-2-257 that lieu days were "neither earned nor unearned" based on the language of many years' duration which allowed for the establishing of a bank of lieu day credits in advance of "anticipated" holidays under the old art. 16.05 which could be drawn upon or liquidated in several ways. MacGuigan J., having observed that this provision provided for the anticipation of lieu days with the establishing of a bank of credits for the year, was of the opinion that the credits at the point of being established were not yet actual and would only become so when they were earned. With reference to the old art. 16 language, he stated "...they are in truth potential rather than actual credits, and will become actual only when 'earned', as the use of that verb in art. 16.05(f) and (g) should serve to remind us. What gives them the appearance of actuality is only the device of anticipation", and hence one's ultimately possessing the entitlement was still only a possibility at the moment of establishing these anticipatory credits.

By Mr. Rosner's argument, the 1980's decisions, ultimately rested on the now deleted/defunct language of the old art. 16.05 indicating that the designated holidays were to be anticipated to the end of the year, with the lieu date credits being established on that basis, thereby leaving the operating employee open to the same limiting provisos as with other employees including that in order to turn the anticipatory situation into an earned entitlement he must actually have worked the holiday, and be subject to a clawback in the event of holiday stretching. Mr. Rosner points out that parties have previously not litigated any case on this issue of earning the entitlement under the current language, and whether it is still subject to any clawback other than under art. 28.05(h).

Mr. Rosner also presented an alternative argument on behalf of the Union. He said that even if there was some vestigial concept of operating employees being paid for holidays, despite the clear contract language of their simply being credited with 93.17 lieu leave hours once per year in recognition of their existence but having no access to taking them by reason of their regular scheduling, then one would still be left with the difficulty of determining what the parties could have meant by an employee being "absent without pay on both the working day immediately preceding and the working day following the holiday." The Union sees the phrase as only having meaning for a non-operator in that any and every day of the year qualifies as a working day for operators. For example, had the grievor not been on unpaid leave, he would have normally worked on the holiday, August 6 at time and one half. Had it been his usual day off, he would have received no -pay for the day and would have claimed nothing. Neither of these possibilities affected his lieu leave credits. It is quite unlike non-operating employees who normally get the holiday off and are paid for it. There is no applicable concept of holiday stretching for operating employees in that taking named days off, as designated holidays, do not apply to their workplace situation. A person's regularly scheduled time off could include or be contiguous to a holiday, once one looks at an individual operating employee's scheduling which has no regard to the spacing of

holidays. In the grievor's case, it could be said that pursuant to his schedule, which included some unpaid leave, he actually was at work on the qualifier work days stipulated by art. 28.06(a), his last individualized work day. Mr. Rosner referred to such cases as Steeves and Lee v. Treasury Board (Transport Canada), P.S.S.R.B. file no. 166-2-17529, 17530, unreported September 20, 1988 (Lowden), where the adjudicator dealt with a situation where a designated holiday fell on the two grievors' scheduled day of rest. The union in that case argued that it should have been moved in such a fashion to recognize that one of them was on approved lieu days at the time and the other on annual leave. The adjudicator considered that the issue to be determined was when did the grievors' first scheduled working day occur following the holiday which fell on their day of rest noting the language of art. 16.02 at that time. In considering the issue, the adjudicator was mindful of the fact that granting such leave (annual or lieu time) automatically changed the shift schedule resulting in the period of leave not being considered a scheduled working day. Having observed the difference existing between shift cycle and shift schedule, the former meaning the recurring sequence of an employee's days of work and rest, and the latter meaning the advance posting of shifts worked by employees within their shift cycle, the adjudicator concluded "that where a day of work (shift) is not scheduled it cannot be considered as one". Hence the first scheduled working day following a day of rest could only occur after the leave period was over. Similarly, Mr. Rosner said, in the event that art. 28.06(a) can operate to diminish an operating employee's credited lieu leave, then it would not apply to the instant situation in any event in that according to the work schedule which accommodated the unpaid leave, the Employer would have to show that the grievor did not report for work on the first day following its conclusion. This was the "working day" immediately following the holiday. Simply put, he should not be considered as having missed a working day on which he was not scheduled to work in the first place.

Mr. Rontiris on behalf of the Employer said that if one were to accept the Union's argument based on its principal contention that operating employees are somehow

not being paid for their designated holidays, then why would they not have been specifically excepted from 28.01 which creates designated holidays. What would art. 28.05(a)(ii) mean in terms of crediting them with 93.17 hours of lieu leave? It must be in lieu of something contemplated as existing within the employment relationship, ie: taking their designated holidays. He said that the Union's argument can be seen as based on further weakening the link between these designated holidays and lieu time, but the link has been preserved and is still there, otherwise why allow them to bank any lieu leave credits at all. They, obviously, are being made available in anticipation that the operating employees' scheduling will have them working the various designated holidays with the 93.17 currently listed hours of lieu time representing eleven days at 8.47 average hours in recognition of the holidays they are expected to work during the upcoming fiscal year. Art. 28.05(h), indeed, supports the proposition that the banked lieu leave is still an anticipatory concept given that this provision specifically allows for a clawback of pay in situations where by separation or transfer, individuals cease to be operating employees during the year. In the event that the Union's position is successful and the yearly crediting of lieu leave occurs for all purposes on April 1st, not to be affected by anything happening thereafter except as delineated under 28.05(h), then one must ask what would occur in the event of an employee being hired later in that month. While the Employer takes the view that the yearly crediting of lieu leave hours should be pro-rated based on the number of designated holidays still left in the year, by the Union's view of the language, it may well be that with the person not yet employed on April 1, he misses that year's lieu leave credits which would seem an inequitable application of the language. Along those same lines, said to centre on providing reasonable meaning, Mr. Rontiris posed the question of what would occur in a situation of an employee having taken five years unpaid nurturing leave, while maintaining employee status. By the Union's view of the language, would it mean that the person should receive his full lieu leave's bank for each year of 93.17 hours in recognition of the designated holidays? Striving to apply the language fairly, he said, art. 28.06 does not require that one read the language any differently for operating and non-operating employees. In art. 28, where a particular provision is meant

to apply to one or other group, but not both, the language is written in that fashion. For example, art. 28.02 specifically refers to moving designated holidays for non-operating employees following their day of rest. Art. 28.03 specifically refers to non-operating employees working on the holiday. Art. 28.04 specifically refers to operating employees working on a holiday. Art. 28.05 specifically refers to lieu leave for operating employees. Notably, art. 28.06 in referring to absences occurring on qualifying days does not state any distinction existing as between operating and no-operating employees, certainly does not express any intention to be limited to non-operating employees only. Also notable, he said, the art. 28.06 (a) language has been maintained by the parties virtually unchanged from contract to contract, being included at 16.06(a) of the old language, despite the parties choosing to turn to a lieu leave system for operating employees consisting of banked hours established on April 1st of each year.

Mr. Rontiris said in his review of the jurisprudence tabled at hearing, granted, it deals with the predecessor language existent in the 1970s and 1980s. Nevertheless, there was never any indication from the PSSRB decisions or the Federal Court of Appeal judgments that art. 16.06(a) as it was then numbered, and being identical to the current wording of art. 28.06(a), could somehow exclude operating employees altogether from its application. If the parties had meant it not to apply to operating employees who found it necessary to be absence without pay both before the working day immediately preceding and the working day immediately following the holiday, they could have stated as much. There being no issue of ambiguity and no stated exclusion for operating employees from the provisions coverage, a reasonable inclusionary meaning must be given to its words. In the circumstances of operating employees having been credited with their 93.17 hours of lieu leave representing all those named holidays being subject to their usual schedule, it means that a deduction can occur in order that one “not be paid for the holiday” in circumstances covered by that provision. He pointed out that it is immaterial whether one considers it a harsh or difficult exercise to apply the language to operating employees pointing to such

cases as Canadian Union of Operating Engineers and General Workers v. Baffin Inc. (Vujic grievance), [2000] O.L.A.A. No. 302 (Novick). In that case the limiting language relative to being paid for the named statutory holidays expressly required employees to work the full regularly scheduled day both immediately preceding and immediately following the holiday, which the aggrieved employee was unable to accomplish by reason of a valid illness. The plant was closed over Christmas and New Years with the employee not returning to work as scheduled due to her illness occurring on January 3 and hence she was not paid for any of the three statutory holidays falling within the period when the plant was closed. Counsel for the union, while acknowledging that the language was clear and contained no exceptions to the requirements, nevertheless, said that as applied in the aggrieved employee's case, it led to a harsh result and unfairly penalized her by denying three days pay, which the parties could not have intended. The arbitrator nevertheless found the language clear and straight forward, containing no exceptions to the eligibility requirements, nor mentioning that they did not apply in cases of illness or circumstances beyond an employee's control, being phrases which have appeared in other agreements. As Mr. Rontiris would have me note, the arbitrator considered that he was constrained the clear language of the provision, whatever the unfairness perceived to exist by reason of her particular circumstances, leading to him finding no entitlement to the holiday pay for the three days. In that case, employer counsel made reference to the usual provision contained in the collective agreement that the arbitrator was not authorized to make any decision inconsistent with its provisions, nor add to, alter, modify or amend any part of it, being the kind of language contained at art.11.17(a) of the current collective agreement between these parties, which provides:

> **...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.**

Mr. Rontiris cited other cases on the significance of giving reasonable and ordinary meaning to qualifying or exclusionary language contained in collective agreements,

or as stated in Re Frank Heller and Co. Ltd. and UFCW, Local 0116, [1987] C.L.A.S.J. 4614448 (Jolliffe) to the effect that the guiding principle in such matters "is that the words of the collective agreement, as written by the parties, must be interpreted and applied, however unfortunate the result may seem to be. If the language is clear and unambiguous, the necessary result becomes clear." He said that considering the language of art. 28.06(a) it is a flawed approach to suggest that somehow operating employees are not being paid for the designated holidays, unlike other employees. By reason of their being credited with lieu leave, which can only be interpreted as amounting to being paid for the holidays. Just as art. 28.05 (h) subjects them to "recovery of pay for purposes set out therein", which the union acknowledges can affect their lieu leave bank credits, they are also subject to "not be(ing) paid for the holiday" when absent from work on both qualifying days, which should also naturally lead to a deduction from the lieu leave bank as operating employees are not excluded from the general operation of art. 28.06(a) unlike some other provisions of the collective agreement which apply either to operating employees or non-operating employees by specific reference

In his reply to the Union's alternative argument dealing with one's unpaid absence on a working day, Mr. Rontiris referred to it as a "cop out". He tabled Nanimo Shipyard Ltd. v. Nanimo Shipyard Employees Assn., [2002] B.C.C.A.A.A. No. 59 (Glass), where the limiting language, barring some exceptions, required that employees worked "their" regular shift both before and following the holiday. Hence, there was discussion of the caselaw distinguishing the qualifying possessive pronoun "his" as meaning one's own last shift before the holiday, from the word "the" meaning any shift being worked at the work site. Such distinguishing in the current circumstances would then mean that the reference in 28.06(a) to "the working day" preceding and following the holiday was supposedly any working day for air traffic controllers. The concept presents some difficulties in the case at hand given that the Employer's facilities are open 365 days per year, suggesting that "the working day" is closely identified with one's own individualized scheduling. Otherwise,

every day of the year is a work day for operators when taken as a group of employees.

Decision:

I am satisfied that this matter can be decided on the Union's principal argument dealing with the critical language change from the art. 16 language of the 1980s. Art. 28.05 under subparagraph (a) requires the Employer to set aside 93.17 hours of lieu leave on April 1st for operating employees. The remainder of art. 28.05 sets out the manner in which the lieu leave can be taken, for example as an extension of one's vacation leave; or at least on the basis that every effort should be given to schedule it at times desired by the employee within operational requirements; or possibly electing to carry forward the unused portion to the next vacation year; or possibly eventually having to be paid off at straight time. Under subparagraph (h) it is subject to "recovery of pay" for leave taken in the specific situations of them having left one's employment or going into a non-operator unit. There is no longer any mention of operating employees being granted or scheduled a day of leave with pay at a later date in lieu of the holiday; or that the various designated holidays in the fiscal year are somehow being anticipated to the end of the year by the lieu day credits. In the context of the current wording, it might well be said that the lieu leave system is now tied to the simple reality of the operating employees having no real access to the bundle of holidays stipulated by art. 28.01 as being designated for employees. Their ongoing, day-to-day normal scheduling prevents them from being able to take these days off as holidays, unlike their non-operating employee co-workers. They are, as a matter of usual course, denied these days as times of special celebration, or rest and relaxation, as days off. It is significant that the concept of anticipating these designated holidays to the end of the year and the concept of being granted a day with pay to be taken at a later date in lieu of each specifically designated day, has been removed from the collective agreement. These employees are left with the entitlement to 93.17 lieu leave without the kind of restrictions on which the P.S.S.R.B. decisions and the Federal Court of Appeal Judgments remarked upon

as stemming from the specific language of the old art. 16.

I accept that while art. 28.06(a) requires that an employee absent on both the day preceding, and following the holiday, "shall not be paid for the holiday", its application is entirely doubtful to the circumstances of the instant situation where the grievor, as an operating employee is not being paid for any designated holiday in the usual accepted sense of one receiving holiday pay for a day not worked. This situation can be contrasted with non-operating employees who are either paid for the unworked holiday at their usual rate, or on the chance of having worked it are paid for the holiday plus an extra time and one half or time off in lieu of the cash payment at that rate as set out under art. 28.03. I do not see how the lieu leave, credited on April 1st of each year, can be said to be any more connected to the anticipated loss of individual upcoming holidays, arguably unearned under the old defunct language unless those days were actually worked, as opposed to currently constituting a lieu leave system which simply recognizes and accepts that on an ongoing basis the usual negotiated bundle of designated holidays are not able to be taken by operating employees. In any event, I cannot find that art. 28.06(a) applies to the grievor's circumstance of having been on unpaid leave over a normal holiday period so as to reduce his leave credits. The current language does not contemplate any such deduction, clawback, from the lieu leave credits occurring. One would expect to see it addressed in art. 28.05(h), which it is not. Art. 28.06(a) addresses "paid" holidays, not the system of established lieu leave credits under which the grievor works.

I will refrain from saying much about the union's alternative argument, except that it again illustrates the difficulty in the Employer attempting to apply the concept of "paid" holidays in a situation where a component of its employees works all the designated holidays by operation of their individualized normal scheduling based on there being 365 scheduled work days each year. Under the new system created by the language of the collective agreement under review, unlike the situation facing the non-operators, it can well

be said that operating employees are not being "paid" for their unworked holidays in the first place. For the grievor, given his scheduling which altogether ignores the existence of specific holidays, one would expect that any reference to "the working day" would have to mean a day on which he was actually scheduled to work, even if art. 28.06(a) had some application to an operator's scheduling.

Accordingly, the grievance succeeds and I leave it up to the parties at this point to fashion the appropriate remedy, which I expect should include reinstating any diminution of the grievor's lieu leave bank resulting from the described leave of absence. I remained seized pending implementation and in the event that the parties are unable to completely resolve the remedy issue as it pertains to the grievor.

DATED this 30th day of June, 2003.

Tom Jolliffe