

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

(“the Employer”)

- and -

**CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,
CAW-CANADA, LOCAL 5454**

(“the Union”)

**AND IN THE MATTER OF A GRIEVANCE RELATING TO CHRISTIAN
LAMBERT AND DOMINIQUE ROY**

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer:

Jacques Emond, Counsel
Phil Valois, Labour Relations Officer
Arlene Yakely, Director, IFR Operations
Larry Lachance, General Manager, Montreal IFR Operations

For the Union:

Abe Rosner, National Representative, CAW-Canada
Rob Thurgur, President, CATCA

AWARD

The hearing in this matter was held in Ottawa, Ontario on April 27 and May 10, 2004. At the outset of the hearing, the parties were agreed that the Arbitrator had been properly appointed pursuant to the collective agreement, and that I had jurisdiction to hear and determine the matter at issue between them.

The dispute between the parties arises from a grievance filed by the Union on behalf of Mr. Christian Lambert and Ms. Dominique Roy on March 26, 2004. The grievance is as follows:

During our discussions surrounding the closure of the TCU facility in Ottawa and its relocation to Montreal, the grievors, who had been declared surplus, expressed a desire to be considered for priority placement at Calgary Tower.

Their request was denied by Mr. P. Valois, who stated that as the grievors “do not possess prior VFR training, they are not considered qualified employees for consideration for a position at Calgary tower” within the meaning of article 32.05, “Priority Placement”.

The Union contends that the employer is interpreting the words “qualified employees” in article 32.05(a) too narrowly. The Union further contends that the grievors meet the conditions as set out in that article to be accorded priority placement at Calgary Tower.

Accordingly, we request that you reconsider Mr. Valois’ decision and approve the grievors’ request, to include any classroom on-the-job training that may be required.

The sequence of events from which the grievance arises begins with the decision by the Employer to merge the functions of the Ottawa Terminal Control Unit (TCU) into the Montreal Area Control Centre (ACC). While the technicalities of this change are complex, the employment implications are that the work being performed in

the Ottawa TCU will, after August 2004, be performed in Montreal instead. A terminal control unit is responsible for aircraft movements within the close proximity of a major airport, but not the actual landings and takeoffs and immediate approaches to and from that airport. Those latter functions are performed by airport controllers working at the airport control tower.

Improvements in technology now permit the TCU functions for Ottawa to be performed remotely from Montreal, presumably with consequent administrative savings. As a result, the Employer gave notice that it intended to move the Ottawa TCU functions to Montreal, which involved moving the work locations of the Ottawa employees as well as all of their duties. The Employer's hope was that the employees in the Ottawa TCU would agree simply to move to Montreal, where they would effectively continue to perform their same functions, albeit in a different location.

It appears that the closing of one of NAV Canada's facilities is an unusual event. Although the collective agreement deals in article 33 with surplus situations, in fact the business of the Employer is largely one of growth for air traffic controllers, and surplus situations only rarely occur.

There is no dispute about the application of article 33 in the present situation. This was treated throughout as a facility closure, and the employees were treated as "vulnerable" pursuant to clause 33.03 and were given notice of that status on November 25, 2003. They were subsequently declared surplus by letter dated December 11, 2003. Throughout this process, discussions took place between the employees concerned, and the Union, with the management persons organizing the relocation.

While it was the Employer's hope that most, if not all, of the affected employees would simply follow their assignments to Montreal, there was to be no mandatory displacement from Ottawa to Montreal in these circumstances. For the purposes of this arbitration, the main implication of this is that clause 33.03(c) permits surplus employees who do not wish to follow their jobs to be reassigned, either under the provisions of article 33, or under clause 32.05, which deals with priority placements.

In the course of the discussions on how to implement the move, both employees indicated that their preference would be for a priority placement as an airport controller at the Calgary Tower. It is in light of that proposed resolution of their surplus status that the Employer determined, as is set out in the grievance, that the two employees concerned here are not "qualified" for the purposes of clause 32.05.

Understanding this dispute requires a degree of broader context. The function of air traffic control is to maintain separation between aircraft in controlled airspace. Fundamentally, this is done in two quite different ways. On the larger scale, aircraft movements into Canadian airspace from airspace under the control of other nations, and across Canadian airspace until, in some cases, departure therefrom, is managed under a process called Instrument Flight Rules (IFR). On the other hand, aircraft movements in the immediate vicinity of airports are controlled under Visual Flight Rules (VFR).

To a certain degree, the names of these two processes are self-explanatory. For the most part, IFR movements take place out of the direct sight range of controllers, and aircraft are often out of the sight of each other. Movements and separations are managed by the use of radar and other electronic communication mechanisms. On the

other hand, VFR control takes place within the sight of controllers in aircraft towers, and aircraft are generally within sight of each other, although there is still an array of electronic aids to assist in management of aircraft movements.

The evidence indicates that the two functions are distinctly different. One witness described VFR control as essentially tactical, while IFR control is essentially strategic in nature. On the other hand, the two functions also have a great number of common factors. Indeed, until 1997, the basic training for all new air traffic controllers (referred to as *ab initio* trainees) at NCTI, the Employer's training institute in Cornwall, Ontario, was a common program for both VFR and IFR control streams.

After that basic training, however, the *ab initio* trainee is really just beginning a long process of becoming finally competent to carry out a specific air traffic control assignment. The Civil Aviation Regulation manual, commonly referred to as "CARS", provides in Standard 422 for the issuance of an air traffic control "license" with a specific "rating". An air traffic controller with a license with an appropriate rating may then receive an "endorsement" for one or more specific operational locations. The prescribed ratings are airport control, terminal control, area control and oceanic control.

Only the first of these, airport control, generally uses VFR principles. Airport control is carried out in an airport tower, and the holder of an air traffic control license with an airport rating will have an endorsement for the specific tower for which he or she has been trained. The other three ratings are all for positions in area control centers, where IFR principles are used in air traffic control. The terminal control rating qualifies a controller to perform the kinds of duties which the grievors were performing at Ottawa TCU. An area control rating is given to controllers dealing with movements over

large areas of airspace, while oceanic ratings are assigned to controllers who deal with bringing aircraft into Canadian airspace from an oceanic area, or controlling the departure of an aircraft from Canadian airspace through an oceanic area.

The 42 airport towers across Canada are graded according to the annual total of aircraft movements at that airport. There are five grades, AI 1 to AI 5. Only Toronto, Vancouver and Calgary towers are graded at the AI 5 level. Because the complexity of air traffic control at a tower increases with the number of movements, controllers at an AI 5 tower are paid at the highest grade to compensate for this. The higher complexity level also translates into longer training periods, and higher failure rates for air traffic controllers moving into a more complex air traffic control situation.

On the other hand, all of the ACC locations are at the AI 5 level, and the Ottawa TCU, where the grievors are now employed, is also an AI 5. While the grade level for IFR locations is established differently from that at the airport towers, there is some recognition that the grievors had been performing their functions at a very high level, and apparently with complete success.

The next major contextual consideration against which this dispute must be resolved is the training structure by which air traffic controllers receive the license, rating and endorsement which permits them to perform operational duties. That training begins at the NCTI in Cornwall, Ontario, where since 1997 there are two streams of initial training. Currently, VFR training is a 4-1/2 month program, while IFR training is 5-1/2 months. *Ab initio* trainees go into this program after passing through a screening process operated by an outside contractor. At this point, they are not employees of NAV

Canada, and pay for their training themselves. They are also not bargaining unit members.

After this training, which is largely classroom study with some simulator training, the two groups continue to follow separate development streams. Trainees in the IFR stream go to an ACC, where the Employer operates regional schools for instruction, both theoretical and on simulators, with the content of the instruction and the time required varying according to the particular specialty for which they are being trained. Similarly, trainees in the VFR stream are assigned to a tower, typically at Grades AI 1 to AI 3, but occasionally to a higher level tower. There, they go directly to on-the-job training to qualify for a specialty.

A specialty, a concept which has not appeared before in this award, refers to the responsibility for air traffic control through a particular piece of airspace. A specialty may fall within any one of the four ratings referred to above, and may be at any of the geographical locations across Canada where air traffic controllers are employed. The critical feature of the specialty is that a controller who has been “checked out” for one specialty is entitled to exercise the privileges of an air traffic control license only in respect of that specialty, and only for long as currency is maintained in the specialty by working in it for a required number of hours per year, and passing periodic check-outs. To work as an air traffic controller in another specialty, even though the actual work station may only be a few feet away, requires retraining and a fresh check-out.

The period of time spent in training for a specialty can vary quite widely, depending on the complexity of the specialty, the previous training and experience, and the individual aptitudes of the trainee. In general, however, the time is measured in

months. Training time of that length is not unusual even for controllers who have considerable experience working in another specialty, and even where the change in specialties is within the same rating at the same establishment.

Minimum experience requirements are set out in CARS, and those minimum requirements vary depending upon the previous license status of the trainee. *Ab initio* trainees require not less than three months on-the-job experience under the supervision of a qualified controller for all of the ratings, while a lesser period of experience is required for trainees who already hold an air traffic control license. Generally, a licensed controller who is changing specialty within the same rating is not subject to a minimum period, but only to the period of time required to demonstrate competence. Controllers changing ratings as well as specialties are subject to specific minimum experience requirements. By regulation, the grievors would be required to serve not less than one month under the supervision of a qualified airport controller, but it appears to be common ground that the actual training and experience requirement would be significantly greater than the regulatory minimum.

Based on this background, I turn now to the language of the collective agreement. The specific provision involved here, as already observed, is clause 32.05. This provision, however, is best understood in the context of other parts of article 32, which I therefore set out in its entirety:

ARTICLE 32**STAFFING****32.01 Principles Applicable to Staffing Provisions**

The staffing provisions in this article apply to any new position within the bargaining unit and to any position within the bargaining unit that is vacant for a period in excess of nine (9) months. The following principles apply to the staffing process:

- (a) NAV CANADA shall fill any vacant position where it intends or seeks to have the duties and responsibilities of that position performed by any employee who is a member of the bargaining unit;
- (b) the staffing process to be used is limited to that provided for in the present collective agreement;
- (c) where practical, staffing of positions shall be from within the bargaining unit; and
- (d) subject to (c), any external hiring will be limited to entry level positions.

32.02 Determination of Position Requirements

NAV CANADA shall determine the position requirements for a position using reasonable selection standards, licensing requirements, medical requirements, security requirements, linguistic requirements, any bona fide occupational requirements and accreditation.

32.03 Temporary or Term Employee

Any temporary or term employee who has completed one term of nine (9) months or more or two consecutive terms adding up to nine (9) months or more of service shall if he or she is to remain in the service of NAV CANADA be subject to the probationary period provided for in the present collective agreement. Upon completion of the probationary period, the employee's seniority shall be retroactive to the last date of hire as a temporary employee. Consecutive terms shall include two (2) terms separated by a break in employment of one (1) month or less.

32.04 **Deployment**

The assignment of work and the movement of employees at the same level in a location, shall be at the discretion of NAV CANADA. However, NAV CANADA may transfer an employee into a location for an assignment to a position at the same or lower level if such action does not create a position vacancy to be staffed under the present Article in the employee's former location. In the case of transfer, the employee may refuse the assignment.

32.05 **Priority Placement**

Prior to the application of any selection process NAV CANADA shall seek to fill the vacant position by an employee eligible for priority placement.

NAV CANADA shall review each category in the order set out below and determine if at the location where the position vacancy occurs there is an eligible employee. If no eligible employee is identified, NAV CANADA shall apply the process on a regional basis. If the vacant position is non-supervisory operational AI level 4 or 5 and no eligible employee has been identified at the location or in the region, NAV CANADA shall apply subparagraphs (a) and (b) of the process on a national basis.

The order of categories is as follows:

- (a) Qualified employees who have received notices of lay off (surplus) or who have been declared vulnerable;
- (b) Qualified employees on lay-off and retaining recall rights;
- (c) Qualified employees returning from leaves of absence of 12 months or more;
- (d) Qualified employees who had previously applied for the same position and whose candidacy was accepted. The candidacy of these employees shall only be considered for 12 months.

Only employees at the same or higher level than the vacant position shall be considered under the present paragraph.

32.06 **Staffing of Non-Supervisory Operating Positions through the Transfer Down Program**

If following the application of paragraph 32.05 the non-supervisory operating position still remains to be filled, it shall be filled under the Transfer Down Program. The conditions of the program are as follows:

(a) Eligibility

Operating controllers and supervisors in High Density Operating Control Positions are eligible to participate in the Transfer Down Program, provided an applicant will have at least eight (8) years seniority at the date of application for the vacant position and the position applied for is a Lower Density Operating Control Position.

This program is intra regional only.

(b) Definitions

The following definitions apply in the application of the Transfer Down Program:

- (i) “Lower Density Operating Control Position” means any non-supervisory airport control positions at the AI-1, AI-2 or AI-3 level; and
- (ii) “High Density Operating Control Position” means any operating or non-supervisory position in air traffic control centres, terminal control units and Grade 4 and 5 towers; i.e., AI4 and AI5 positions.

(c) Single Use of Program During Career

Employees may undertake training at a lower density operating control position unit using the Transfer Down Program only once during their career with NAV CANADA including their employment with Transport Canada, if applicable.

(d) Timing for Requests

Eligible employees may request transfers under this program at any time and such requests shall be valid for a period of two (2) years.

(e) Knowledge Test

Applicants shall be required to pass a knowledge test with respect to tower control that is not specific to any one geographic location. The most senior applicant passing the test shall be offered the position.

(f) Salary Level Adjusted

On commencement of training, the salary level of the successful applicant shall be adjusted to reflect the level of the Lower Density Operating Control Position.

(g) Loss of Technical Proficiency

Failure to qualify in a lower density operating control position shall not be considered loss of technical proficiency.

(h) Position Not Protected

An employee's former position will not be protected during the training period.

(i) Alternate Position

In the event that the employee fails to qualify at the lower density unit, every effort will be made to place him or her in a suitable position.

32.07 Seniority Bid Program - Non-Supervisory Operating Positions

If following the application of paragraphs 32.05 and 32.06 the non-supervisory operating position still remains to be filled it shall be filled under the Seniority Bid Program. The conditions of the program are as follows:

(a) All non-supervisory air traffic controllers including those on the recall list may participate in the program provided that the position for which they will be training:

- (i) is at least one level higher than their current level; or
- (ii) is at their current level or higher, when moving from a tower position to an enroute or terminal position.
- (iii) is in the same region.

For the purposes of this subparagraph, the "current level" of a laid off employee is the level that the employee held at the time of his or her layoff.

(b) Shift Supervisors and Unit Operations Specialists and Instructors may participate in the program provided that the position for which they will be training is at their current level or higher.

(c) Non Eligible Employees

Absent the agreement of the parties, employees in the following situations shall not be eligible to apply:

- (i) when the training program will commence within three (3) years following the date:

- (a) the individual had withdrawn after being selected for a formal training offer; or
- (b) on which training was terminated for failing to successfully complete any portion of the “same” training program; or
- (ii) for the “same” training program which they have failed on more than one occasion;
 - (a) when dealing with airport training, “same” means any previously undertaken airport training program, at the same or lower level of tower classification;
 - (b) when referring to area or terminal training, “same” means any area control or terminal training program; or
- (iii) within three (3) years of commencement of a training program for a position at their former unit where they were unable to maintain unit standards; or
- (iv) Employees in the IFR Stream Training Program.

32.08 **Staffing of Supervisory and Non-Operating Positions through Competitive Staffing Provisions**

The following conditions apply to the staffing of supervisory and non-operating positions:

(a) **Contents of Posting**

A job posting for a supervisory and non-operating position shall include the following information:

- (1) position title, classification and location;
- (2) essential qualifications (including any medical, linguistic requirements or security clearance required), which shall be expressed in clear terminology;
- (3) area of selection;
- (4) salary range;
- (5) summary of duties of the position;
- (6) particular working conditions such as any shiftwork or need to travel;
- (7) closing date of competition;

- (8) name, address and phone number of person to whom the application should be directed; and
 - (9) that Statements of Qualifications for the position are available on request; and
 - (10) that applications must be transmitted by midnight on the closing date.
- (b) Eligible Employees

All employees in the bargaining unit and those persons on the recall list not eligible for priority placement are eligible to compete for positions where the Competitive Process applies where, absent agreement of the parties otherwise, the following conditions are met:

- (i) the employee occupies a position in the area of selection included on the posting;
- (ii) the employee occupies a position at the same or a lower level than the position posted;
- (iii) the employee has not refused or abandoned a non operational position at the same level during the preceding 36 months.

32.09 Employee Qualifications

An employee is deemed qualified in any staffing process if the employee meets the position requirements set out in Article 32.02.

32.10 Selection under Transfer Down Program, Seniority Bid and Competitive Staffing

- (a) In the case of a non-supervisory operational position, NAV CANADA shall select for training from among the candidates the senior qualified employee.
- (b) In the case of a supervisory and non-operational positions, the qualified candidate who best meets the position requirements shall be selected. When two (2) or more qualified candidates are relatively equal, the most senior will be selected.

32.11 Posting Requirements

Any postings for vacant positions shall be posted for at least fourteen (14) days in the case of supervisory and non-operating positions and thirty (30) days in the case of non-supervisory operating positions. The posting shall include any of the appropriate information referred to in paragraph 32.08 (a) above.

32.12 **Deferred Training**

- (a) A successful applicant shall be assigned to the training program for the position under the Transfer Down Program or Seniority Bid Program unless NAV CANADA determines that releasing the employee from his or her position will create an immediate staff shortage. A “staff shortage” is defined as a situation where the departure of the successful applicant from his or her unit would result in the number of qualified controllers, including Unit Operations Specialist (UOS), being reduced by more than:
 - (i) one controller, at units/specialties with a control requirement of eight (8) or less;
 - (ii) two controllers, at units/specialties with a control requirement of nine (9) to fourteen (14); or
 - (iii) three controllers, at units/specialties with a control requirement of fifteen (15) or more.

32.13 **Procedures in Event of Delay**

The following procedures shall apply in the event that the filling of a position is delayed:

- (a) NAV CANADA shall immediately notify the Union that it intends to rely on paragraph 32.12 to delay the employee’s entry into the training program and such notification shall include the facts demonstrating the staff shortage; and
- (b) the parties shall develop an action plan to permit the release of the affected employee at the earliest possible date.

32.14 **Training Period**

A successful applicant under either the Transfer Down Program or Seniority Bid Program shall be entitled to a reasonable training period in which to qualify.

32.15 **Return Rights**

- (a) A successful applicant under the Seniority Bid Program shall retain his or her position during training. Such “return rights” shall be extinguished at the date on which the successful applicant qualifies in the new position.
- (b) A successful candidate for supervisory and non-operating position shall have a sixty (60) day period of “return rights” following his or her report to the new position, subject to the following:

- (i) the return rights period may be extended by mutual agreement;
- (ii) no relocation expenses shall be paid during the return rights period unless mutually agreed otherwise. In the latter case the return rights shall be extinguished;
- (iii) the employee shall receive travel expenses in accordance with the NAV CANADA Joint Council Travel Guidelines during the return rights period.

32.16 Advice to and Response of Selected Employee

- (a) The selected applicant under the Staffing process shall be advised in writing of the following:
 - (i) the nature of the training program;
 - (ii) the commencement date and duration of any training or, in the absence of any training requirement, a familiarization period and the commencement date to begin performing the duties of the position;
 - (iii) description of the employee's return rights if any.
- (b) The employee shall have a maximum of fifteen (15) days to respond to the notice.

32.17 Travel and Relocation Expenses

Selected employees assigned to a position or training in a new location shall be eligible for authorized travel and relocation expenses in accordance with the NAV CANADA Joint Council Travel and Relocation policies and the special provision for air traffic controllers undergoing operational training.

32.18 Positions Not Subject to Staffing Procedures

Positions to be filled while the incumbents are absent for whatever reason and where they retain a return right shall not be subject to staffing procedure under the present article.

32.19 Projects and Temporary Positions

The positions referred to in paragraph 32.18 and temporary positions required for special projects and urgent temporary needs may be filled at NAV CANADA's discretion by regular or temporary employees.

32.20 Requalification

Employees exercising return rights shall be subject to the successful completion of any required training and endorsement.

32.21 Return Notice from Leave of Absence

Within sixty (60) days prior to the expiry of an authorized leave of absence of twelve (12) months or more, the employee shall advise NAV CANADA in writing of his or her desire to return to work.

32.22 Level Changes

- (a) In the event that a position at a given location is modified to the extent that an increase in level is required, the employee presently filling the position, if qualified, may be assigned to the higher level. If necessary, the employee may be provided with a familiarization period.
- (b) In the event that the modification results in a lower level, the employee presently filling the position may request to remain in the position at the lower level or be subject to the provision of Article 33 Employment Security. In the former case, the employee's salary shall be maintained if lower than the maximum of the new level, or move to the maximum of the new level whichever is greater.

32.23 Probationary Period

The employee shall be a probationary employee from the date he or she reports to his or her first unit until such time as the employee has been fully qualified at a unit.

32.24 Second Language Proficiency

Notwithstanding paragraph 32.23, an employee hired on the basis that he or she will acquire a second official language during employment will be deemed to be on probation until such time as the employee has successfully met the condition. In this case the probationary period may be extended by NAV CANADA by a period equivalent to the accumulated regular work time taken by the employee in language training.

32.25 Acquisition of Seniority

An employee shall not acquire seniority until such time as he or she has successfully completed the probationary period provided for in the present collective agreement.

32.26 Accumulation of Seniority

Once the probationary period is successfully completed, the employee's seniority shall be retroactive to the date the employee reports to his or her first unit following his or her successful completion of the course in air traffic control given by the NAV CANADA Training Institute.

32.27 Ab-initio Trainees

Ab-initio trainees who have not been issued a certificate of successful completion of a course in air traffic control given by the NAV CANADA Training Institute shall not be governed by the present collective agreement.

32.28 Definition of Regular Employee

A regular employee is an employee hired on an ongoing basis for an indeterminate period.

32.29 Definition of Location

A location, for the purpose of Article 32 Staffing and Article 33 Employment Security, is identified by the premises where the employee normally works or the organizational entity to which the employee is attached.

32.30 Training Opportunities

In the case of vacancies for ACC positions, NAV CANADA shall endeavor to provide fifty percent (50%) of the training opportunities to eligible employees on the seniority list.

It will be seen that, once an air traffic controller is licensed with a rating and checked out for a specialty, there are only four ways to move from one assignment to another: deployment, priority placement, transfer down, and seniority bids. Each of these mobility mechanisms has its own requirements, and its own procedures. This award is only concerned with the priority placement mechanism.

The specific provision which applies in the present case is paragraph 32.05(a). Each of the grievors had received a notice of layoff (surplus) by the time of the grievance. There are no other applicable disqualifying factors in the provision, and

therefore the only issue is whether the expression “qualified employees” in that paragraph can apply to the grievors.

The Union points out that a review of the collective agreement indicates that the word “qualified” is used in two quite different ways, to some extent depending on whether it is modified in some way by the surrounding text. The meaning not applicable here is used to describe a controller who is checked-out in a particular specialty, and is therefore currently entitled to perform operational duties at that assignment. For example, in clause 16.05(1), which refers to shift exchanges, the provision is that “equally qualified employees” may exchange shifts. Here, the meaning is obviously checked-out in a particular specialty, since an employee may only work in a specialty once the check-out has been successfully achieved. A similar meaning is found in article 19, where the word “qualified” is expressly modified by the words “(initial checkout)” or “(checkout)”. Similarly, Letter of Understanding 16-03 uses the expression “newly qualified employee” which, in the context, clearly means someone who has just completed the Unit Qualification Training Program and is being assigned a new shift cycle. In all of these examples, the word qualified is modified in some way both by context and by the express choice of words in the language used.

The other meaning of the word “qualified” is found where it appears, this time without modifiers, in Article 32, and particularly for the purposes of this award in clause 32.05, dealing with priority placement. The mirror image of that provision, clause 33.07, refers to recall, and says that employees should be recalled by order of seniority among the “qualified employees laid off from the same or higher level and in accordance

with Article 32.05 (priority placements)”. The result, therefore, is that whatever the expression means in clause 32.05, it must mean the same thing in clause 33.07.

Obviously, in these two provisions the expression cannot mean qualified in the sense of checked-out for a particular position. Both 32.05 and 33.07 refer to the possibility of being placed or recalled at another location, or at another level. Since it is virtually impossible for anyone to be qualified in the sense of checked-out anywhere except the assignment actually held at a particular time, the word qualified here must mean something different.

Indeed, from the entirety of the context of article 32, it appears that the only rational conclusion is that the word qualified in that provision is significantly different from the use of the word otherwise modified elsewhere in the collective agreement. If qualified in article 32 meant checked-out, article 32 would essentially be a nullity, since an employee could only move to the position which he or she already held. The difficulty, of course, is just what the word means in the context of article 32.

The Union argues that the meaning to be assigned to the word qualified in article 32 must be the minimal meaning of licensed as an air traffic controller. That interpretation would mean that the grievors would be qualified to train for Calgary Tower, even though they would have to return to NCTI to undertake basic training for the VFR stream before beginning specialized training. The problem with that argument is, as the Employer points out, that Article 32 includes its own definition of the word “qualified” in clause 32.09. That provision deems an employee qualified “if the employee meets the position requirements set out in Article 32.02”. Clause 32.02 provides that the Employer “shall determine the position requirements for a position”. Therefore, when an

employee is required to be qualified in order to participate in a particular program, which is the case for priority placement, the parties to the collective agreement have given to the Employer a discretion to establish the position requirement. Obviously, given the use of such words as “reasonable” and “*bona fide*” in clause 32.02, the exercise of that discretion is not completely unconstrained, but there is at least scope for the Employer to make a reasoned judgment on who is “qualified” for the purposes of paragraph 32.05(a).

The parties referred me to some jurisprudence, but it is fair to say that there is simply nothing in the decisions of other arbitrators under other collective agreements which can assist with the interpretation of the present, probably unique, collective agreement. The arbitral jurisprudence does, however, suggest that where an employee asserts a particular right to go to a particular place and to be trained for a particular job, that assertion must be founded in the express language of the collective agreement. It is not uncommon, as can be observed in the collective agreements discussed in the jurisprudence, for parties to choose different standards to provide job security for employees in a layoff situation from those which are used in promotion or seniority bidding situations. In any case, what is critically important is the language of the collective agreement itself.

While this language is not completely forthcoming as to the intention of the parties, it seems to me that adopting the Union’s interpretation of “qualified” for the purposes of article 32 would have the effect of nullifying the discretion conferred on the Employer in determining the meaning of that word in any particular situation; that is a discretion which the parties have bargained for. While there are no doubt some implications, particularly for the ability of controllers to cross from the IFR to the VFR

streams now that basic training is divided between those streams, the evidence put forward by the Employer suggests that the possibility of movement between the streams, at least from IFR to VFR, has always been limited by the sheer practicalities of re-qualifying.

Ultimately, while I recognize that there is scope for argument on both sides, I have concluded that only the meaning advanced by the Employer, namely that it has retained a discretion to determine the standards against which employees are to be determined as qualified for the purposes of clause 32.05, does justice to the language of the collective agreement.

As to the actual exercise of that discretion, based on the evidence which I have heard about success rates in achieving check-out status at Calgary Tower and elsewhere, I am unable to conclude that the discretion has been exercised either in bad faith or unreasonably in the present situation. While there is no direct evidence about success rates for persons with backgrounds similar to that of the grievors, that is because no such transfer as sought in the grievance has ever occurred. There have been employee movements across the IFR/VFR divide, but those have been under the seniority bid provisions, which do not specify that applicants have to be qualified.

Having regard to the lengthy additional basic training which the grievors would require before they could even begin to train for check-out at Calgary Tower, the considerable difficulty in qualifying for check-out directly at a grade AI 5 tower, which almost no trainees in the VFR stream ever attempt, and the significant possibility of failure in any requalification program, I am of the view that the Employer could conclude by a reasonable and *bona fide* exercise of the discretion conferred on it in clause 32.02

that having taken basic training in the VFR stream is a qualification for priority placement at Calgary Tower. While the Employer has expressed its position in somewhat different language in some of the communications put in evidence, that is the fundamental reason for its decision.

Therefore, in my view, the grievance must be denied.

DATED AT TORONTO this 25th day of June, 2004.

Kenneth P. Swan, Arbitrator