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 THE GRIEVANCE OF DAVID DOHENY, KELOWNA TOWER

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer: George Rontiris, Counsel
Raquel Chisholm, Student-at-law
Steve Cooper, Manager, Labour Relations
Derek Clement, Manager, Pensions and Benefits Policy
Val Lewis, Manager, Disability Management
Louise Hickey, Case Manager, Disability Management

For the Union: Abe Rosner, National Representative, CAW-Canada
Greg Myles, National Secretary-Treasurer, CATCA
Joanne Donovan, Labour Relations Assistant, CATCA

AWARD

A hearing in this matter was held in Ottawa on April 20, 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 matters at issue between them.

The present dispute arises from Grievance 2003-502, dated July 10, 2003. The grievance alleges that the termination of Mr. David Doheny, an Air Traffic Controller at Kelowna Tower, was improper and without justification.

There are no facts in dispute in respect of this matter; the only issue is the propriety of the termination for medical incapacity of an employee who is receiving benefits under the long-term disability plan.

In the case of the grievor, he began sick leave on January 26, 2000, and continued until his benefits were exhausted on May 2, 2000, with a brief period of re-employment on non-operational duties breaking the sick leave. After a 60-day waiting period, he began receiving Maintenance of Salary (MOS), pursuant to Letter of Understanding 6-99, on May 27, 2000. Those benefits expired on May 26, 2001. The following day, he began receiving long-term disability payments pursuant to a plan administered by Great-West Life.

That plan provides for two years of benefits for an employee disabled from performing his or her own occupation, and continues beyond that period for employees disabled from performing the duties of “any occupation”. So long as the employee remains disabled, benefits continue until normal retirement age. It is common ground between the parties that the continuation of benefits does not depend on

employment status, and that the termination of Mr. Doheny does not affect his entitlements under this plan. In fact, his benefits still continue after the expiry of the initial two-year term, since the carrier has determined that he is unfit to perform any work in the foreseeable future.

By e-mail dated June 24, 2003, Mr. Steve Cooper, Manager, Labour Relations for the Employer, notified Mr. Greg Myles, National Secretary-Treasurer for the Union, of its intention to terminate the employment of Mr. Doheny effective July 14, 2003 for "medical incapacity". Through its National Representative, Mr. Abe Rosner, the Union responded on June 30, 2003, asking four questions:

(1) Is it standard practice to terminate an employee in such situations? How long has this been the practice?

(2) Will this have any effect on his LTD entitlement?

(3) Does this mean he can no longer accrue pensionable earnings?

(4) Are there any other benefits of employment which he will lose as a result of his termination?

I have already noted that the termination of Mr. Doheny's employment would have no effect on his LTD entitlement, and advice to that effect was provided by the Employer to the Union. There are, however, effects on a number of employment benefits, such as life insurance coverage, dental plan, and health care plan, which would be affected by termination. As will appear, however, the most significant impact is on the right to continue to accrue pensionable earnings under the NAV Canada pension plan.

In addition to this information, the Employer also advised the Union that terminations of employees on long-term disability because of medical incapacity have

taken place from time to time over the years. The direct records maintained by the Employer indicate seven cases since 2000, details of which were provided to the Union pursuant to Mr. Rosner's request, although apparently not at the time of the actual terminations, until the case of Mr. Doheny. There is no information before me as to what was the triggering event in each case, or as to whether the time of the termination in relation to the various stages of sick leave, MOS and LTD was similar to that in the case of Mr. Doheny.

Finally, because of other events in relation to the negotiation of a new collective agreement, the termination of Mr. Doheny effectively denied him retroactive salary increases resulting from the successful negotiation of a new collective agreement which was signed after his termination, but is not applicable to an employee who was terminated before the signing date.

As I have observed, the most critical implication of the termination is its effect on the right to continue to accrue pensionable service pursuant to the NAV Canada pension plan. That plan is not expressly incorporated into the collective agreement, but clause 35.01 provides that members of the bargaining unit "are entitled to the benefits" of the plan.

Section 3.5 of the plan expressly deals with the status for pension purposes of employees on long-term disability in paragraph (d). I set out the paragraph here in its entirety:

> A Member who is absent from work due to a disability and who is in receipt of benefits under the Employer's long-term disability insurance program shall be deemed to be in receipt of Pensionable Earnings and such period shall be added to the Member's Pensionable Service and Operational Service, if applicable, provided the Member agrees in

writing to make contributions, as described below, on behalf of the period of the leave.

The maximum period which may be credited in accordance with this Section 3.5(d) in respect of any one such period of leave is five years less the period immediately prior to the leave, if any, during which the Member was accruing benefits pursuant to Section 3.5(f), in respect of a period of illness or injury prior to eligibility for benefits under the Employer's long-term disability insurance program, which is not covered under the Employer's sick leave plan and/or Section 3.5(b).

A Member who commences a disability leave in accordance with this Section 3.5(d) and who agrees in writing to contribute in respect of the leave shall make contributions in accordance with Section 4.1 in respect of such leave.

The contribution shall be based on the level of Pensionable Earnings the Member would have received had the Member not been on such leave. Such contributions shall be remitted to the Plan either in a lump sum within 30 days of returning to work with the Employer or in approximately equal installments through payroll deduction over a period commencing when the Member returns to work with the Employer and ending when the period equal to twice the period of the leave has passed.

A Member who is on a disability leave in accordance with this Section 3.5(d) shall accrue benefits under the Plan based on the Pensionable Earnings the Member would have received had the Member not been on such leave.

If the Member does not remit such required contributions in respect of such period of leave in accordance with the terms of this Section 3.5(d), then the Pensionable Service, and Operational Service, if applicable, as described in this Section 3.5(d) shall not be credited to the Member in respect of the leave. If the Member does not make required contributions in accordance with this Section 3.5(d), Best Average Earnings shall be determined as at the date Pensionable or Operational Service, if applicable, ceases to accrue.

Upon the expiry of the maximum period which may be credited in accordance with this Section 3.5(d), or such earlier time as may be mutually agreed upon by the Member and the Employer, such Member may qualify for an immediate disability retirement pension, as set out in Section 9.1, or may elect to receive a termination benefit in accordance with Article 7, at his Date of Cessation of Employment.

There is also a definition of the expression "Date of Cessation of Employment", which appears in the last line of this provision. It is found in Section 1.15, as follows:

> "**Date of Cessation of Employment**" means, in respect of a Member, the day following the last day on which the Member receives Pensionable Earnings in respect of employment with the Employer.
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> Notwithstanding the foregoing, if the Member receives a benefit in respect of a previous period of employment which is based on Best Average Earnings which take into account Pensionable Earnings in respect of the most recent period of employment, as set out in Section 3.5, the Date of Cessation of Employment in respect of benefits under the previous period of employment shall be the day following the last day on which the Member receives Pensionable Earnings in respect of the most recent period of employment with the Employer.
>
> Notwithstanding the foregoing, if the Member is on a leave of absence without pay in accordance with Section 3.5, the Date of Cessation of Employment is the day following the effective date that the Employer determines that the Member ceases to be employed.
>
> Notwithstanding the foregoing, if the Member dies while still in the active service of the Employer or on a leave of absence without pay in accordance with Section 3.5, the Date of Cessation of Employment is the date following the date of death.

The reason that this provision is central to the outcome of this grievance is related to the arbitral jurisprudence on termination for innocent incapacity. The general rule, found in *Re City of Sudbury and CUPE, Local 207* (1981), 2 L.A.C. (3d) 161 (P.C. Picher), is that when it is unlikely, on the basis of all of the facts reasonably available at the time, that an employee would be capable of regular attendance in the foreseeable future, the employee may be terminated. A number of awards, however, have limited that general rule in circumstances where one of the effects of the termination would be to deny the employee benefits under a sick leave or disability plan. In general, arbitrators have held that such plans are specifically bargained to protect employees who become

incapable of work, and that no employer action which denies access to those plans, or in some cases access to their proper administration and adjudication, can be permitted: see *Re DeHavilland Aircraft of Canada Ltd. and United Automobile Workers, Local 112* (1982), 9 L.A.C. (3d) 271 (Rayner); *Re Queensway General Hospital and Ontario Nurses' Association* (1984), 17 L.A.C. (3d) 9 (Swan); *Re Government of the Province of Alberta and Alberta Union of Provincial Employees* (1987), 29 L.A.C. (3d) 218 (Tadman); *Re Harris Rebar Inc. and International Association of Bridge, Structural and Ornamental Iron Workers, Local 734* (1988), 35 L.A.C. (3d) 348 (Dunn); *Re Welland County General Hospital and Service Employees International Union, Local 204* (1996), 57 L.A.C. (4th) 324 (Thorne); and see also *Re Manalta Coal Ltd. and Alberta Strip Miners Union, Local 1595* (1984), 20 L.A.C. (3d) 58 (Sychuk).

On the other hand, arbitrators have attempted to distinguish between a general entitlement to benefits on the same basis as employees who are actively at work, and those benefits which directly flow from the disability. Perhaps the most important case is *Re Atomic Energy of Canada Ltd. and Communications, Energy and Paperworkers Union of Canada, Local 896* (2000), 89 L.A.C. (4th) 296 (R.M. Brown), where the awards on both sides of the issue were collected and assessed by the arbitrator. He ultimately concluded that the prevailing opinion was that the only implicit limitation arising from the existence of benefit plans is one prohibiting the dismissal of an employee during the course of an injury or illness, which would have grounded a claim to sick pay or benefits but for the termination, if discharge would adversely affect this entitlement (at page 310). See also *Re Emrich Plastics, a division of Windsor Mold Inc. and Canadian Automobile Workers, Local 195* (1992), 25 L.A.C. (4th) 19 (O'Shea); and *Re Maple Leaf*

Meats and United Food and Commercial Workers International Union, Local 175 and 636 (2001), 98 L.A.C. (4th) 40 (Whitaker).

Although based on somewhat different considerations, the decision of the Ontario Court of Appeal in *Re Ontario Nurses' Association and Orillia Soldiers Memorial Hospital et al.,* (1999) 169 D.L.R. (4th) 489, appears to justify, in the context of human rights legislation, a distinction between benefits which are payable to an employee because of active performance of work, which may be withheld from those on sick or disability leave, and those which flow from a disability, the denial to which would constitute discrimination.

Based on this discussion, therefore, it remains to determine into which category the provision of the pension plan permitting continued accrual of pensionable service during absence on long-term disability fits. This analysis must be undertaken having regard to all of the provisions of the collective agreement, and to the implications of what appears to have been an Employer policy of assessing its right to terminate the employment of employees who are no longer likely to be able to attend at work without regard to the implications in respect of pensionable service.

First, it must be observed that the collective agreement does deal, albeit indirectly, with the issue of release for incapacity. Clause 24.07 is as follows:

> NAV CANADA agrees that in the event of an employer initiated release for incapacity by reason of ill health, an employee may exhaust any remaining accumulated sick leave credits prior to his or her release.

The inclusion of that provision in the collective agreement has, as I read it, two implications. The first is that there is an implied recognition that release for incapacity is appropriately within the rights of the Employer, albeit subject to the

restrictions that are set out in this clause. In that regard, the Union's general argument that the very practice of the Employer in reviewing employees on long-term disability for possible release was improper, and ought to be prohibited, cannot stand. The clear implication of Clause 24.07 is that the parties have recognized that such action may be appropriate in some circumstances, but have placed a limitation on the exercise of that right.

The second implication is that, because the parties have only placed one restriction on that right, namely that it may not occur until an employee has exhausted any remaining sick leave credits, there are no other implied limitations in the collective agreement to the exercise, in the appropriate circumstances, of the right to release for incapacity. There may, of course, be other express limitations, such as the provision for maintenance of salary in LOU 6-99, but in respect of any of the other benefits which would flow to an employee actively at work, or to an employee on LTD benefits prior to termination that would be lost by termination, the inescapable inference is that the parties have decided not to protect those benefits. Therefore, the only real issue before me, as I see the language of the collective agreement and the arbitral jurisprudence, is whether the pension plan provision quoted above operates to impose a further limitation on the Employer's right to terminate for incapacity. That requires a careful review of the language of the pension plan.

I note that, as I have observed, the language of the pension plan does not appear to have been directly adopted as a part of the collective agreement. Presumably, that is because the pension plan covers employees in other bargaining units as well, and possibly those not in any bargaining unit. Nevertheless, there is some enforceability of

the pension plan provisions flowing from clause 35.01. If employees are entitled to the benefits of the pension plan, as a matter of right set out in the collective agreement, then an arbitrator must be authorized, at least for the limited purpose of protecting those benefits, to consider and construe the provisions of the pension plan.

It appears, from the provisions of section 3.5(d) set out above, that whatever the benefits established by that section may be, they accrue only to persons who are "members" of the plan. That concept is defined in section 1.26 as follows:

> "**Member**" means an Employee who has joined the Plan in accordance with Article 2, and whose membership has not been terminated as a result of reaching his Date of Cessation of Employment.

The obvious impact of termination, therefore, is to end any rights which a former employee would have had under section 3.5(d). Those rights appear to include a right to be deemed to be in receipt of pensionable earnings, and to have such periods added to the member's pensionable service and operational service, for a maximum period of five years, while on long-term disability insurance benefits.

It appears, although I do not have to decide this, and may not even have the jurisdiction to do so, that this is not an unfettered right to accrue pensionable service, but is contingent upon the member returning to work after the period of long-term disability leave. The mechanism for remitting contributions to the plan, set out in the fourth paragraph of the section, appears to be triggered by a return to work; there is no suggestion that these contributions can be paid under any other circumstances. Nevertheless, whether or not the right is contingent on an eventual return to work, it is expressed to be contingent throughout the maximum period of five years.

What is most important for present purposes is the final provision of the section. This establishes the time at which the member may qualify for an immediate disability retirement pension, or may elect to receive a termination benefit. The language is quite clear; that time is the earlier of a date mutually agreed upon between the member and the Employer, or upon the expiry of the maximum period which may be credited in accordance with the section, which is five years less the periods described in the second paragraph. The final paragraph suggests that the termination benefit is to be received at the member's "Date of Cessation of Employment", but that that can only occur, in the absence of agreement, upon the expiry of the maximum period which may be credited.

In my view, this creates an ongoing right, albeit possibly contingent upon a return to work, which is directly related to, or to use the words of Arbitrator Brown in the *AECL* case, grounded in, the long-term disability. While the right is only contingent, and in the case of Mr. Doheny is unlikely to actually materialize, it is nevertheless a right which is kept open pending the final determination of the contingency. In my view, therefore, it operates as a restriction on the designation by the Employer of the Date of Cessation of Employment pursuant to the third paragraph of section 1.15, and must therefore also operate as a restriction on the Employer's right to terminate employment for incapacity.

In short, if an employee is entitled to the benefits of the pension plan, and one of those benefits is a benefit grounded in a long-term disability and available to the employee for a five-year period of long-term disability, that is a benefit which may not be removed by unilateral employer action.

Therefore, while I respectfully reject all of the Union's other arguments in relation to this dispute, I have found that the Employer's right to terminate Mr. Doheny must be suspended for the duration of the period as specified in section 3.5(d) of the pension plan, which establishes rights to which Mr. Doheny remains entitled pursuant to the collective agreement, but which would be denied to him if the termination of his employment is valid.

On that basis, therefore, I uphold the grievance, and order that Mr. Doheny be reinstated in employment, and that he be made whole for any loss of earnings or benefits flowing from the termination of his employment. I recognize that this will give him entitlements which the arbitration jurisprudence would not ordinarily protect, but in my view the protection flows from the provisions of the collective agreement and the pension plan read together, and there are incidental benefits which accrue to him because his employment may not be terminated at the present time. At the end of the period specified in section 3.5(d) of the pension plan, however, the Employer will, once again, have its right to terminate for incapacity untrammeled except by the general law.

I retain jurisdiction over this award in case there should be any dispute arising between the parties in relation to its implementation.

DATED AT TORONTO, Ontario this 2nd day of June, 2004.

Kenneth P. Swan, Arbitrator