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 GRIEVANCE NO. 2003-881 (BOYMOOK ET AL. – HALIFAX TOWER SUPERVISORS)

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer: Jacques Emond, Counsel
Steve Cooper, Manager, Labour Relations
Steve Hunt, General Manager IFR, Moncton

For the Union: Abe Rosner, National Representative, CAW-Canada
Rob Thurger, President, CATCA
Greg Myles, Secretary-Treasurer, CATCA
Rob Allan, Regional Vice-President, Atlantic, CATCA

AWARD

A hearing in this matter was convened in Ottawa, Ontario on February 27, 2004, and adjourned. The hearing then began in Montreal, Quebec on April 29, 2004, and concluded in Ottawa, Ontario on July 8 and 12, 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 facts on which this arbitration is to be decided are not in any significant dispute. There is, however, a substantial disagreement between the parties as to the proper interpretation of the collective agreement based on those facts.

Fully-qualified operating air traffic controllers are paid on the pay scale at one of five "levels", AI-01 to AI-05. These levels are determined by the operational facility at which the air traffic controllers are employed. Area Control Centres and Terminal Control Units are at the AI-05 level, and airport tower facilities may be at any of the five levels, depending on what is referred to in some parts of the collective agreement as "density". As I understand it, the volume of air traffic movements is measured, and the tower is assigned to an appropriate level based on pre-established standards. There is also a process called workload final point rating, which determines the required staffing for the operational facility. As well as the number of operating air traffic controllers required to properly staff the facility, this process also generates the number of supervisory personnel required.

The airport control tower in Halifax, Nova Scotia is an AI-03 level facility. Until July 2003, the staffing profile for the tower, as set out in monthly operational staff reports (OSR), was for 21 air traffic controllers, five of whom were Supervisors. This status will be considerably elaborated below, but it involves supervisory duties as well as the performance of the same functions as an operational air traffic controller; the proportion of each kind of duties is apparently variable. For July 2003, however, the control requirements were reduced to 17, one of whom was to be a Unit Operations Specialist (UOS), which is a supervisory position with somewhat different status.

Considerable discussion then took place between the parties as to how this change in staffing requirement would be put into effect. This discussion took place for the most part between Mr. Rob Allen, Vice President for Atlantic Canada for the Union, and Mr. Steve Hunt, General Manager IFR in Moncton, who has line responsibility for Halifax Tower. Both Mr. Allen and Mr. Hunt testified at the hearing before me.

While Mr. Hunt may not have been clear at the outset as to exactly how the change would happen, after consultations with higher levels of management he took the position, on behalf of the Employer, that the actual number of controllers in Halifax would not be reduced by recourse to the employment security provisions of the collective agreement, but rather would take place through attrition. Based on the then current demographics at Halifax Tower, it was not anticipated that the overstaffing situation created by the new OSR would continue for very long.

On the other hand, it was decided that all supervisory duties would be removed from all of the five Supervisors, a move which would essentially leave them

with the same duties as an operational air traffic controller, and they would thereafter be assigned in that role. To complete the staffing reorganization, the UOS position would be posted and filled, and the supervisory differential would be removed from the pay rates of the five Supervisors. This finally occurred effective January 14, 2004.

The Union argued against this approach, at least insofar as it involved the unilateral removal by the Employer of supervisory duties from the supervisors, and the deduction of supervisory premiums from their pay rates. The Union does not contest that the Employer is entitled to reduce staffing to account for a decrease in traffic, nor that the Employer acted to do so in this case in good faith and for a proper purpose. It asserts, however, that action to achieve this must take place under Article 33, the employment security provision of the collective agreement.

To the best of everyone's knowledge, this precise set of circumstances has never arisen before. As will appear, there have been circumstances which one party or the other alleges are analogous to the present, and should therefore guide the interpretation of the collective agreement. But the situation that now faces the parties, and is required to be determined at arbitration, is apparently unique.

There is some history to the current collective agreement provisions dealing with supervisors that was discussed in the course of argument. In the 1989-90 collective agreement between Treasury Board, on behalf of Transport Canada, the predecessor employer, and the Union, Supervisors were treated somewhat differently than they were thereafter. Under that collective agreement, Supervisors were paid one level higher than what would be justified on the basis of the level assigned to the operational facility at which they worked. In negotiations for the 1991-1993 collective

agreement, the Union proposed to change this practice by introducing a supervisory differential, which would be added to the classification level which an air traffic controller at the same operational facility would carry. The Union proposed a 10% premium, but negotiations ultimately reduced that to 5%.

The provisions thus concluded remain those applicable in the present collective agreement. They are as follows:

ARTICLE 1

DEFINITIONS

Unless specified elsewhere in this Agreement, the following definitions will apply throughout this Agreement:

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(9) "Normal pay" means compensation for the performance of duties of a position including Supervisory Differential, but, exclusive of allowances, special remuneration, overtime, other compensation, and other gratuities.

…..

ARTICLE 17

PAY

17.01 Except as provided in this Article and relevant Letters of Understanding, the terms and conditions governing the application of pay to employees are not affected by this Agreement.

17.02 An employee is entitled to be paid for services rendered at the pay specified in Appendix "A" for the classification of the employee's substantive position.

17.03 (a) When an employee is required by NAV CANADA to perform the duties of a higher classification level for a period of at least four (4) consecutive working days, the employee shall be paid

the pay of the higher level, calculated from the date on which the employee commenced to perform the duties of the higher level.

(b) An employee required by NAV CANADA to assume the responsibility for air traffic control duties requiring the possession of a valid air traffic controller licence, or letter of authority, and which duties are the responsibility of a position classified at a higher level, shall be compensated as established in (a) above.

(c) An employee who is required to perform the duties of a higher classification level will not be arbitrarily assigned and reassigned between his or her substantive position and the acting position solely for the purpose of avoiding entitlement to acting pay in the higher level position.

17.04 The additional compensation for employees required to perform duties or assume responsibilities in accordance with clause 17.03 shall be calculated as follows:

(a) **Hours of work of the higher level position the same as those of the substantive position**

Determine the difference in the hourly rate between the employees' substantive position and the higher level position.

(b) **Hours of work of the higher level position different from those of the substantive position**

Establish the difference in annual rates between the employees' substantive and higher level position. Divide this difference by the standard number of hours per year in the higher level position.

Multiply the result of (a) or (b) by the number of hours in each calendar month that the employee performed the duties of the higher level position. NAV CANADA will endeavour to make cash payment of compensation for performing higher level duties in the month following the month in which the higher level duties were performed.

17.05 Where an employee, through no fault of his or her own, has been overpaid, NAV CANADA will, before recovery action is implemented, advise the employee of the intention to recover the overpayment. Where the amount of overpayment is in excess of fifty dollars ($50.00) and where the employee advises his or her local management that the stated recovery action will create a hardship, arrangements will be made by NAV CANADA to limit recovery action to not more than ten percent (10%) of the employee's pay each pay period until the entire amount is recovered.

17.06 NAV CANADA will notify the Union in writing thirty (30) days in advance of the creation of any new jobs within the bargaining unit.

17.07 The pay increment date for an employee assigned to a position in the bargaining unit on promotion, demotion, or from outside NAV CANADA shall be the day immediately following the completion of the pay increment period listed below as calculated from the date of the promotion, demotion, or assignment from outside NAV CANADA.

PAY INCREMENT PERIODS

Level	Full-Time Employees
AI-00	26 weeks
AI-1 to AI-7 (inclusive)	52 weeks

17.08 **On-the-Job Training Bonus**

When an operating controller in a control tower, terminal control unit or area control centre who is qualified to provide on-the-job training, is required to provide training to another controller or controller-in-training who is actively controlling air traffic, and the trainee is operating on the authority of the air traffic control licence of the trainer, the trainer shall be entitled to receive eight dollars and fifty cents ($8.50) for each hour so engaged. The duration for such on-the-job training will be in accordance with unit standards for such training.

ARTICLE 18

SUPERVISORY DIFFERENTIAL

18.01 A supervisory differential as established in Appendix “D”, shall be paid to employees in the bargaining unit who encumber positions which receive a supervisory rating under the classification standard and who perform supervisory duties.

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APPENDIX "D"

SUPERVISORY DIFFERENTIAL

Supervisory Degree	Percentage of Basic Rate
Operating Employees	
A	5.0%
B	5.0%
Non-Operating Employees	
A	2.0%
B	4.0%
C	5.0%
D	6.0%

The Supervisory Rates Table is to be used in the following manner:

(1) determine the non-supervisory rates according to the employee's sub-group, level and rate of pay;

(2) using the Supervisory Rates Table, find the row in the left-hand column where the rate determined in (1) is located;

(3) when the row is located, determine the column by the applicable supervisory differential degree;

(4) the point where column and row meet is the supervisory rate required.

[The detailed table of rates is omitted for clarity.]

There is one aspect of Appendix "D" which has changed since the 1991-1993 collective agreement. In that version, an example was given, after the current language quoted above, in the following terms:

> For example, an employee in the Operating Sub-group at Level 4, who is paid at the maximum of the AI-04 range on December 31, 1990, whose position is classified as of January 1, 1991 as AI-04, with a supervisory differential of

> Degree B, would receive the basic rate of pay of $65,960 effective January 1, 1991 as per Appendix "A". By locating $65,960 in the Supervisory Rates Table, then looking down column B, the appropriate supervisory rate of pay would be $69,258.

The Employer, in particular, places a great deal of weight on this change in the collective agreement language, and I shall return below to the arguments advanced on that basis.

There was also some discussion in the course of the hearing about previous occasions which were, as I have noted above, possibly analogous to what happened at Halifax Tower, but certainly not identical. One of these events took place at the Edmonton City Centre Airport Tower, and I received some documentary and oral evidence about what happened there. The situation is complicated, and is even more unclear because of the transition between Transport Canada and the current Employer in the course of the events in question. Ultimately, I do not understand the Union to be claiming that the Edmonton City Centre situation constituted extrinsic evidence which could assist me in interpreting the collective agreement, and I therefore leave that aside.

There was also evidence about two occasions on which Supervisors requested to be relieved of their supervisory functions, and to revert to an operating air traffic controller position. In one of these instances, the Employer purported to use the deployment provision, clause 32.04, to move the employee from supervisory duties to control duties, on the basis that this was "movement of employees at the same level in a location". Although the person involved held union office at the time, there is no suggestion that this instance was ever brought formally to the notice of the Union as the Employer's interpretation of clause 32.04. Even if it had been, however, the mere fact

that the word "level" is used in clause 32.04, and that clause was used to effect a voluntary surrender of a supervisory position, could hardly be seen as raising any binding effect against the Union when the Employer advances, as it does here, an argument that it has a unilateral right to remove supervisory duties and pay differential which also depends upon a similar interpretation of the word "level".

Similarly, the Union produced evidence of a situation where a Supervisor who asked to be relieved of supervisory duties was told that there were no vacant controller positions available at the same location, and therefore his request could only be treated as a resignation from employment. After some discussion, the request to be relieved was withdrawn. While the Union asserts that this may have some probative value as extrinsic evidence of the intentions of the parties in negotiating the collective agreement, I note that it appears to have occurred after the grievance was filed, and appears to have been resolved on the basis only of the impossibility, given staffing levels at the facility in question, of using the voluntary deployment technique described above.

Ultimately, I do not think the past practice is of any assistance. It is minimal in quantity, and often confusing in detail. It simply does not reach the level required to be persuasive in assisting in interpreting the language of the collective agreement, even were I first to determine that the language is ambiguous so as to permit such evidence to be used.

On that basis, therefore, I turn to the language itself. The Union's primary argument is that, in the circumstances of this case, the Employer was required to invoke the provisions of the employment security article, Article 33. The essential parts of that provision, for the purposes of understanding this dispute, are as follows:

ARTICLE 33

EMPLOYMENT SECURITY

33.01 **Early Identification of Surplus Situations**

In the event of a reduction in the workforce the following provisions shall apply for the early identification of a potential displacement situation:

(a) potential job displacement situations include lack of work, facility closure, economic downsizing, technological change, organizational change, contracting out, or any other action that may result in a job displacement situation; and

(b) where NAV CANADA identifies potential job displacement situations it shall notify in writing the Union at the national level at the earliest possible opportunity.

33.02 **Meaningful Union/NAV CANADA Consultation**

Meaningful Union/NAV CANADA consultation shall begin:

(a) following notice to the Union of potential job displacement and prior to any letters of vulnerability being given to any employee;

(b) with the intent to minimize adverse consequences of job displacement, and resolve surplus situations without layoff, through the development of a human resource transition plan if the number of employees affected is ten (10) or more or if all the employees in a location are affected. Any human resources plan so developed shall be provided to the Union. Areas of consideration by NAV CANADA shall include, but are not limited to the following:

(1) elimination of casuals and term or temporary employees;

(2) voluntary methods, including job exchange, transfers to vacant positions at equivalent levels, and retraining;

(3) alternate work arrangements, including job sharing and part-time;

(4) leaves of absence;

(5) seeking voluntary separation through NAV CANADA's departure incentive program;

(c) seniority shall be applied where possible when two (2) or more employees at the same level are qualified for an available position identified under paragraph (b) above.

The Union's secondary argument is based on clause 32.22, a part of the article relating to staffing.

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.

The question therefore is whether what occurred here was either a reduction in the workforce at Halifax Tower, or a level change for Supervisors at that location. The Employer's position is that the impact of the 1991 changes to the collective agreement is that, while previously Supervisors were at a higher classification level than the employees supervised, they were thereafter at the same classification level, and were in receipt only of a differential to recognize the performance of certain supervisory duties. The Employer thus asserts that it could remove those duties when their performance was no longer necessary, and remove the differential that is the agreed compensation for performing them, as a purely administrative act that does not engage either clause 32.22 or Article 33.

The Employer's argument depends, as already suggested, on the assertion that the word "level" means the same thing every place it is used in the collective agreement, and that it refers only to the level established for the operational facility itself, which therefore translates into the pay scale for operational employees at that facility. On this theory, both the operational controllers and the Supervisors at a facility are at the same level, and the Supervisors may be deployed to an operational controller position without their request or consent, being relieved of both supervisory duties and the pay differential in the process.

As the Union points out, however, the collective agreement is far from consistent in using the word "level" in that way. For example, clauses 17.03 and 17.04, which deal with the performance of work at "a higher classification level" remained unchanged in the 1991 amendments, but it is common ground that this provision has always been invoked where employees are assigned supervisory duties for a period of more than four days, to ensure that the employee thus assigned is paid at a rate reflective of the supervisory differential for that position.

The Employer explains this situation as simply arising from inadvertence of the parties at the time of making the amendments in 1991. Whether or not that is the case, an arbitrator is required to interpret the language of the collective agreement as the parties have used it, not as they might have used it had they thought more carefully, more than a decade ago, of the implications of that language for the present case.

Given the considerable inconsistency in the use of the word "level", which must serve to undermine the Employer's argument based on it, the fact is that the rest of the collective agreement very strongly argues against the Employer's interpretation.

Article 18 refers to the status of those who are entitled to supervisory differential as those "who encumber positions which receive a supervisory rating under the classification standard". When that is compared with the words used in clause 17.02, "the classification of the employee's substantive position", and with the use of the expression "higher classification level" or "position classified at a higher level" or "the duties of a higher classification level" as variously used in clause 17.03, the most compelling conclusion is that, leaving aside what the word "level" might mean all by itself, the classification of Supervisor was intended to be a higher classification than that applicable to the employees supervised at the same facility.

More compelling language, however, is found in clause 32.08, part of the staffing provisions of the collective agreement. Supervisory positions are staffed by competition, and the posting must set out the "position title, classification and location"; the postings for the Halifax Supervisor positions placed in evidence specified the position title as "Shift Supervisor" and the classification as AI-03B. Pursuant to clause 32.10(b), the candidate who "best meets the position requirements" is to be selected. It is true that clause 32.08(b), the eligibility provisions for competitions for supervisory positions, requires that the employee occupy a position "at the same or a lower level than the position posted", language which clearly reflects the Employer's argument as to the meaning of the word "level", but what is critically important is that the word "position" is used there both to describe where the applicant is at the time of applying for the supervisory position, and what is actually being applied for.

It would require, in my view, very clear language to provide that employees who had successfully bid in a competition for a supervisory position could

have their supervisory duties and the supervisory differential stripped away in a purely administrative action as an exercise of the Employer's management rights. There is no such clear language; indeed, what language there is to suggest that the benefits of a position obtained through a competition can simply be set aside, without the express request of the employee, is very unclear indeed, and depends on placing on a collective agreement amendment, negotiated more than a decade ago to achieve a specific result in relation to pay rates, more freight than it can reasonably bear.

The Employer also refers to LOU 15-03, which preserves the supervisory differential for non-operational supervisors who are undergoing operational training as a result of a seniority bid to an operational facility. This language is also aimed at producing a specific result, and is not capable of supporting the additional connotation which the Employer asserts.

In my view, when Supervisors successfully bid in a competition for their supervisory positions, they are not bidding for the assignment of duties for which a premium is paid which can be removed at any time as a matter of management discretion. They are bidding for a position, whether one refers to it by that word or by some such word as "classification", "classification level" or "supervisory rating under the classification standard", all of which expressions are used in the collective agreement to denote such a bundle of duties. Where, as here, the Employer changes the staffing of a workplace from five Supervisors and 16 controllers to one Unit Operation Specialist and 16 controllers, the irresistible inference is that there has been "a reduction in the workforce" within the meaning of Article 33, and that there is "a potential displacement situation", which must be addressed within the terms of that article.

The Employer relies on *Re Nova Scotia Power Inc. and International Brotherhood of Electrical Workers, Local 1928* (2000), 96 L.A.C. (4th) 257 (Outhouse) for the proposition that it cannot be said that a layoff has occurred where there has been no substantial reduction in hours of work or wages. Losing only the 5% differential is asserted not to meet the test of a substantial reduction. But the arbitrator there is discussing what constitutes a layoff, defined as a cessation of work. What Article 33 requires is not a layoff, but a reduction in the workforce that may potentially result in a layoff; the purpose of the article is to find ways to avoid a layoff. In my view the abolition of five supervisory positions clearly meets the test of a reduction in the workforce.

The Employer also relies on *Public Service Alliance of Canada v. Sydney Airport Authority,* [20001] C.L.A.D. No. 340 (North). While the facts of that case are similar, the language of the collective agreement suggests that what is called a "supervisory differential" there is in the nature of a responsibility allowance for duties assigned unilaterally by the Employer, rather than a higher pay rate for a different job attained through competition.

It may well be true, as the Employer points out, that there has been no actual reduction in total staffing numbers at Halifax Tower, and that therefore there is no actual displacement situation. That does not mean, however, that there is not, from the very start, a potential displacement situation that has been averted only by the unilateral action of the Employer. Article 33, as I read it, does not permit unilateral action by the Employer. It requires meaningful consultation as to how the impact of any reduction in the workforce is to be managed, and while there is no reason why the Union should

object to maintaining the employment of all of the controllers at Halifax Tower, the Union is entitled to that consultation before such a decision is taken.

On the other hand, the Union does object that there had previously been five supervisory positions, and those positions have ceased to exist. Once it is concluded, as I have already found, that supervisory assignments constitute independent positions based on all of the language of the collective agreement, it is clear that what happened at Halifax Tower is that those positions were all abolished. That, by itself, also constitutes a "reduction in the workforce", and triggers article 33. In these circumstances, the parties must again engage in meaningful consultation in order to decide how the abolition of those five positions is to be managed within the provisions of article 33.

Turning to clause 32.22(b), the language chosen there uses the word "level" without any modifiers. While I do not have to decide this issue finally for the purpose of this arbitration, it is a reasonable conclusion that it applies to cases where the level of the operational facility has changed, and the pay levels of the employees must be considered for adjustment. That could occur with or without any change in the staffing profile of the facility, including the staffing of supervisory positions.

However, although it may be that clause 32.22(b) does not precisely apply in the present circumstances, it is my view that what occurred at Halifax Tower was the abolition of five supervisory positions, and not merely the removal of supervisory duties, and incidentally the differential in pay, from five employees who are otherwise indistinguishable from the other operating air traffic controllers at Halifax Tower, as the Employer argues.

In the result, therefore, the grievance is allowed. It is impossible at this stage to provide any further remedy for the employees affected other than a declaration that article 33 applies to the staffing changes which are the subject of the grievance, and to direct the parties to invoke that provision. For the purposes of bringing this matter to a full and final conclusion, therefore, I retain such jurisdiction as may be required.

DATED AT TORONTO this 27th day of July, 2004.

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Kenneth P. Swan, Arbitrator