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 PATRICK TUPPERT

ARBITRATOR: Kenneth P. Swan

For the Employer: Jacques Emond, Counsel
Steve Cooper, Manager, Labour Relations

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

AWARD

A hearing in this matter was held in Ottawa, Ontario on July 13, 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 grievance is dated November 29, 2001, and is in the following terms:

> Under LOU 6-99 of the collective agreement, NAV Canada made me utilize 154.052 of my earned leave credits (vacations art. 27 and holidays art. 28). While utilizing those leave credits, NAV Canada failed to pay the appropriate operational facility premium (OFP) as per article 19.01.

The facts of this matter are not in dispute, but they are best understood in the context of the collective agreement provisions applicable to this grievance. The grievance refers to LOU 6-99 of the collective agreement. That letter of understanding refers to what is commonly called Maintenance of Salary (MOS), which is now covered by LOU 4-03 in the current collective agreement. There are no material changes between LOU 6-99 and LOU 4-03, which is as follows:

LETTER OF UNDERSTANDING (4-03)

> Mr. Rob Thurgur
> CATCA / CAW Local 5454
> 162 Cleopatra Drive
> Nepean, Ontario
> K2G 5X2
>
> Dear Mr. Thurgur:
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> This is to confirm an understanding reached during the current negotiations in respect of removal from active control duties for medical reasons.
>
> Provided a controller has performed active control duties for NAV CANADA (or in the case of a "continued employee" for NAV CANADA and Transport Canada) for a period of five (5) years and is no longer able to perform active control duties

> due to medical reasons, it was agreed that the individual involved would suffer no loss of his or her normal pay for a minimum of one (1) year. Subject to paragraph 4 this one (1) year period will commence on the date on which the medical endorsement of his or her air traffic controller licence is revoked or sixty (60) days following the first day that the employee ceased to exercise active control duties as a result of being on sick leave, whichever is earlier. This maintenance of salary would be conditional upon the employee first performing other duties related to his or her technical background and/or experience as assigned by NAV CANADA for which the employee is medically qualified. If the employee is unable to perform such duties because of medical reasons or if no alternate duties are available then he or she must utilize all earned leave credits during the maintenance of salary period referred to above.
>
> The total maintenance of salary provided under this letter shall not exceed one (1) year during an employee's total period of employment within NAV CANADA and its predecessor the Public Service unless, through consultation on individual cases, the parties agree to an extension of salary maintenance.
>
> An employee will not be placed on maintenance of salary if the employee has sufficient sick leave credits to cover the period of his or her absence and the employee's LVC is not affected.

LOU 4-03 protects employees, in certain circumstances, from a loss of "normal pay" for a period of one year. That expression is the subject of a definition in Article 1 of the collective agreement:

ARTICLE 1

DEFINITIONS

> Unless specified elsewhere in this Agreement, the following definitions will apply throughout this Agreement:
>
> …..
>
> (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.

LOU 4-03 also refers to a requirement by an employee on MOS to "utilize all earned leave credits". There is no dispute between the parties that such earned leave credits include those referred to in the grievance, specifically vacation credits under Article 27 and holidays under Article 28; these provisions bear the same numbers in the current collective agreement.

Finally, there is reference in the grievance to a failure to pay Operational Facility Premium (OFP) in accordance with article 19.01. That provision, which also still bears the same number in the current collective agreement, is as follows:

ARTICLE 19

OPERATIONAL FACILITY PREMIUM

19.01 In addition to all other entitlements the employee may be eligible to receive, each operating employee employed in an Area Control Centre, a Control Tower, or a Terminal Control Unit, shall be paid a premium for each calendar month in which the employee has earned at least ten (10) days' pay while subject to this clause, based on the formula

Annual Operational Facility Premium as specified in Appendix B to this agreement for the facility in which the employee is employed, divided by twelve (12).

NOTE:

An employee undergoing training (ab initio) will not be entitled to the Operational Facility Premium (OFP) until qualified (initial checkout) at his or her first location. On check-out at that location, the employee shall be entitled to the OFP of that location.

Any other employee who is entitled to OFP at a location and who moves to another location for the purposes of training will retain the OFP for his or her originating location until qualification (checkout) at his or her new location, at which time he or she will be entitled to the OFP corresponding to the new location.

Such premium shall not constitute a part of rates of pay for the purposes of this agreement.

> 19.02 Operating employees in an ATC facility that comes into operation during the life of this agreement shall be paid an annual premium in an amount mutually agreed to by the parties.
>
> Such amount will be paid on an interim basis pending the assignment of that facility to Appendix B.

As is the case for much of the relationship between these parties, this dispute has a considerable history. For the purposes of interpreting the collective agreement, however, that history has been truncated by events which took place during the negotiation for the 1998-2000 collective agreement. Those events are described as follows in the award of the present Arbitrator in *Re NAV Canada and Canadian Air Traffic Control Association* (Policy Grievance re Sick Leave and MOS), [2001] C.L.A.D. No. 338, June 28, 2001 (Swan):

> ¶ 6 These provisions have been in the collective agreement for some time, and have been reproduced without amendment through several sets of negotiations. In the course of the transfer of civil air navigation services from the Public Service to NAV CANADA, the provisions underwent editorial changes to reflect the change in employer, but there were no material changes relevant to the issues involved in this arbitration.
>
> ¶ 7 In the negotiations which led to the collective agreement in effect at the time of the hearing, there were no changes to these provisions either. However, late in those negotiations, specifically on June 5 and 8, 1999, there were discussions among the negotiators of the parties in the course of which NAV CANADA put the Association on notice that it would only agree to the continued presence of Letter of Understanding 6-99 (LOU 6-99) in the collective agreement on the basis that all past practices in relation to the interpretation of that provision would cease, and that it would henceforth be applied strictly in accordance with its language. There is no dispute between the parties that the result of this demand by NAV CANADA, and the acceptance of it by the Association, means that the language of LOU 6-99 must now be interpreted as a matter of first impression. The dispute, of course, is about what that language really means.
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> ¶ 8 NAV CANADA introduced its interpretation of the language in a presentation to management and representatives of all of the unions in January 2000, and subsequently to CATCA in February 2000, by Ms. Marie-Josée Guérer,

> Director of Pension Benefits and Employee Health Programs. Inherent in this presentation were a number of interpretations of the sick leave and Maintenance of Salary (MOS) policies which departed from the past practices between the parties. These interpretations also resulted in a document entitled "Management Guidelines for the M.O.S. and R & R Programs". The grievance was subsequently filed, and following discussions between the parties already referred to, the guidelines were amended on August 23, 2000 to reflect those discussions. While the guidelines continue to contain the interpretations which are described in the four questions quoted above, the rest of the guidelines are not really in dispute. Against this historical background, therefore, I shall proceed to the evidence and argument in relation to each of the four issues in the order in which they were presented.

Both parties were agreed at the hearing that the effect of the event described above was to terminate the application of any past practice or *estoppel* which might have arisen in relation to the language of the letter of understanding on MOS. It was also agreed that this was a mutual termination; while clause 4.02 of the previous collective agreement protected the Employer from the effect of past practices, customs or agreements not specifically renewed, the agreement reached in relation to the letter of understanding on MOS worked both ways, and protected the Union as well.

The award of June 28, 2001 quoted above also deals, because it was at issue in that case, with the use of accrued leave credits. The specific issue then before me was whether leave credits could be used during the 60-day waiting period referred to under LOU 6-99, rather than using leave credits during the ensuing MOS period of one year. Nevertheless, because some argument was made in relation to that part of the award in the course of the hearing, I set out my observations on that subject for ease of reference:

> ¶ 36 The management guidelines provide that, where a controller has insufficient sick leave to cover the period of absence during the 60 day waiting period under LOU 6-99, the controller may not use other accrued paid leave solely for the purposes of ensuring income continuity during that waiting period.

Pre-authorized vacation leave may be taken, but that counts toward the 60 day waiting period. NAV CANADA has instructed its managers not to approve other paid leave for the purposes of providing pay for days which would not otherwise be covered by sick leave.

¶ 37 The Association argues that this interpretation has the effect of depriving employees of previously earned and accrued rights and benefits, and doing so only on the basis that the employee is disabled from work by reason of illness or disability. This, it claims, is discriminatory with the meaning of Ontario Nurses' Association v. Orillia Soldiers' Memorial Hospital et al. (1999), 42 O.R. (3d) 692 (Ont. C.A.), leave to appeal denied, [1999] S.C.C.A. No. 118, December 9, 1999 (S.C.C.). NAV CANADA argues that this is an appropriate interpretation of LOU 6-99. To some extent, the interpretation is bound up with NAV CANADA's interpretation in relation to the fourth paragraph of LOU 6-99, which I have already rejected as not supported by the language of that provision. I propose, however, to treat this issue as independent for the purposes of assessing the meaning of the language.

¶ 38 It is clear, and not in dispute, that one of the conditions of the payment of MOS under LOU 6-99 is that, if an employee is unable to perform the alternate duties already discussed or if no alternate duties are available, then all earned leave credits remaining are "burned off" during the one year MOS period. Thus, a controller who reaches the beginning of the MOS period with accrued leave credits is effectively required to contribute those credits toward the MOS period, with the remainder of the MOS period falling to the responsibility of NAV CANADA. The kinds of credits which are involved are any remaining sick leave credits, any lieu day credits, and any unused vacation.

¶ 39 In my view, it is not necessary to enter into the complexities of the law in relation to discrimination on the basis of disability in order to resolve this matter. The language of LOU 6-99 does not cancel all earned leave credits. It only requires that such credits be used during the Maintenance of Salary period if the employee is unable to perform alternate duties or if no alternate duties are available. I have described that above as a contribution to the MOS period of unused credits, but there is no effect on those credits unless and until the MOS period actually begins.

¶ 40 If the controller's licence is affected, of course, the MOS period begins immediately. Otherwise, however, the MOS period begins after a 60 day waiting period, or, as I have found above, after the exhaustion of sick leave credits.

¶ 41 In my view, the effect of the second paragraph and the fourth paragraph of LOU 6-99 for controllers whose licence is not affected is that the MOS period begins after 60 days, unless the employee has sufficient sick leave credits to cover the period of the absence. There is nothing in this language which would permit augmenting that period by taking other kinds of leave, provided that sick leave

> credits continue to be available. NAV CANADA has conceded that pre-scheduled vacation may be taken, but otherwise I agree that the scheme of LOU 6-99 is that, as long as sick leave credits are available, those credits may not be converted into other kinds of paid leave. An employee who is on sick leave is entitled to that form of income replacement, and not to any other.
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> ¶ 42 However, there is nothing in this letter of understanding to prevent an employee whose sick leave credits run out before the 60 day waiting period has expired from using accrued paid leave credits during the rest of the waiting period. Those credits belong to the employee, they have been previously earned, and there is nothing in the language chosen to the effect that they are forfeited unless and until the specific provisions of the LOU are met. Those provisions require that the MOS period begin, and that the employee is either unable to perform alternate duties or such duties are unavailable. Until that time, it would take very clear language to divest employees of benefits already earned and accrued.

To make precise the ambit of the present issue, it is not in dispute that employees who are on paid vacation leave or paid leave in lieu of holidays for the entirety of a calendar month are nevertheless considered to have "earned at least ten (10) days' pay" during that month, for the purposes of receiving OFP under article 19. It is also not in dispute that employees who are receiving maintenance of salary pursuant to LOU 4-03, during the period when they are receiving payment to ensure no loss of normal pay from the Employer, do not receive OFP; that result flows from the expression of the guarantee as related to normal salary, and the definition of normal salary is agreed to exclude OFP. The dispute is simply whether an employee is entitled to OFP during the period when the employee is required to "utilize all earned leave credits during the maintenance of salary period".

The Employer asserts that, once the maintenance of salary period has begun, the employee is entitled only to a protection against loss of normal pay, and that excludes OFP even if the employee is utilizing leave credits. The Union argues that an employee who is utilizing leave credits is entitled to the same pay as he or she would be

entitled to receive if those leave credits were being utilized in the normal course of events. The Employer argues that past practice, both before and after the termination of the impact of past practice in 1999, supports its position in this regard. The Union denies that there was ever a practice which would have any binding effect on the Union, and in particular that any such practice exists after the 1999 negotiations.

For the purpose of completeness, I propose to review all of the extrinsic evidence advanced by the Employer, recognizing that it was all received subject to the objection of the Union that it was neither admissible nor relevant to the issues before me. A considered response to that objection is not possible except in light of the evidence offered.

The Employer first offered a document dated April 13, 1989, entitled "Revised Interpretation" of the letter of understanding which is now LOU 4-3. The Employer recognized that this document, to whatever extent it might once have been binding, would have had that effect terminated in 1999; nevertheless, the Employer argued that it indicated consistency in the interpretation of the language now before me.

On the face of it, this document is susceptible of an interpretation like that now argued for by the Employer. It is not, however, absolutely determinative of the very narrow question which I must answer. It specifies that the "protection against loss of … normal pay" does not include the OFP, but it does not deal specifically with the rate of pay applicable when accumulated leave credits are being utilized during the period of salary maintenance. In any event, as the parties have agreed, whatever interpretive impact that document might have had was terminated by the agreement in the 1999 negotiations.

The post-negotiation evidence begins with a letter dated May 24, 2000, from Mr. Brent Clary, Manager, Labour Relations for the Employer, to Mr. Fazal Bhimji, then President of the Union. The letter refers to certain "mutual understandings" which were reached between the parties in discussions about the meaning of LOU 6-99 in the course of dealing with the policy grievance from which my award of June 28, 2001 arose. The following was stated to have been a mutual understanding:

> While on MOS, an employee maintains his/her operational pay without OFP.

There is no evidence that the contents of this letter were ever contested by the Union in respect of this asserted mutual understanding, and indeed the Union does not now say that no such understanding was reached. It simply argues that the understanding as described does not go so far as to specify the rate of pay while an employee is utilizing accrued leave credits, but only when the employee is receiving salary maintenance payments from the Employer. When only salary maintenance payments are being received, there is no dispute between the parties that OFP is not part of the payments.

The next piece of evidence is a draft of Management Guidelines in relation to MOS and other matters prepared by the Employer and sent to the Union in response to the discussions referred to in the letter of May 24, 2000, and prior to the award of June 28, 2001, purporting to set out the undisputed interpretations of LOU 6-99, as well as the management interpretations which were known to be in dispute, and which were to go to arbitration and be settled by the June 28, 2001 award. The Employer points to two parts of this document as supporting its interpretation:

1. **<u>If Controller's Medical Certificate has been affected:</u>**

…

- accumulated leave, in the order listed, (sick leave, vacation leave, lieu leave, including leave carried over from previous year) is to be used concurrently with MOS. While the employee will continue to earn leave while on MOS, this too is utilized concurrently with MOS, once previously accumulated leave is exhausted. However, if other duties are being performed for NAV CANADA, all leave credits are earned and retained (unless utilized) in the normal fashion.

...

Pay while on MOS:

- Normal operational pay only – no OFP; no allowances e.g. IPA. [isolated post allowance]

These guidelines were revised once again on December 12, 2001 following the receipt of the June 28, 2001 award. In the revised version, there is no substantive change to the two excerpts quoted above.

This completes the evidence surrounding the 1999 negotiations, and the attempts of the parties to clarify the proper interpretation of LOU 6-99 in the context of the termination of all past practices and understandings. I propose to deal with the impact of these transactions before considering the rest of the evidence.

While it is certainly possible to infer from the language used by the Employer in preparing its guidelines, both before and after the award of June 28, 2001, that it intended to apply the letter of understanding in the way for which it now argues, it is also clear that the casual reader of this document might miss the implication that the

Employer intended to deny payment of OFP both during the period of time when the employee is supported by MOS payments, and during the period of time when the employee is utilizing accrued leave credits. In short, while the language certainly suggests the Employer's present argument, it is not so perfectly clear that it could be said to be a direct challenge to the Union about the interpretation that had to be answered, or would be deemed to be accepted. Moreover, both of the two versions of the guidelines issued during this period were unilateral management acts, with no indication of concurrence by the Union except silence. Both of the documents are also described as drafts, and there was no evidence before me that firmly established that a final document was promulgated by the Employer and served on the Union.

The effect of unilaterally promulgated management guidelines on collective agreement interpretation seems to me to be somewhat troubled in any event. For one party to be able to force its interpretation of collective agreement language on the other, it seems to me that the particular issue on which the Union is said to be bound by the Employer's interpretation must be set out so clearly that there can be no dispute that by taking no action to contest it the Union is accepting the Employer's interpretation precisely as written. Here, where the expression of the intended interpretation is only inferential, there is no definitive statement that the Employer intends to interpret the language as it now asserts it is entitled to. In my view, this is not sufficient to establish an *estoppel* against the Union.

Finally, there is the problem that the latest version of the draft guidelines is dated December 12, 2001. At the time it was sent to the Union, therefore, the present

grievance had already been filed and was being processed through the grievance procedure. Whatever might be said about the failure of the Union to infer the interpretation intended by the Employer from earlier correspondence, by this time that interpretation was clearly under challenge.

The other evidence advanced by the Employer is in relation to two employees, each of whom had issues in relation to MOS, and one of whom filed a grievance, while the other was apparently prepared to do so. A Mr. Charles Benstead filed a grievance on December 1, 1998 raising precisely the issue which is in dispute in the Tuppert grievance now before me. In a reply dated December 3, 1999, the Employer denied the grievance, and advanced the argument which the Employer advances in the present arbitration, but only in the alternative. In its main response, the Employer raises the timeliness of the grievance, which the Employer is clearly intending to use as an argument that the grievance is not arbitrable.

By letter dated March 30, 2000, the Union advised the Employer that it was withdrawing the grievance, which had already been referred to arbitration.

The Employer asserts that this constitutes an *estoppel*. The Union argues that, given that two reasons were given for denying the grievance by the Employer, one of which, the timeliness issue, appears to be particularly powerful, the Union cannot be taken to have withdrawn the grievance as a concession on the merits, but must merely be understood to have withdrawn it because the timeliness issue made it a sufficiently weak vehicle for advancing the interpretation issue that it did not wish to pursue the question at that time. In the absence of stronger evidence as to the motivation prompting the Union to

withdraw the grievance, I am unable to find that this evidence raises an *estoppel* to bind the Union to an interpretation now advanced by the Employer.

Finally, there is an exchange of correspondence in relation to a Mr. Wayne Perry. Mr. Perry began the one-year period of MOS on August 25, 1998. Mr. Perry spent the entire year of his MOS protection utilizing his accrued leave credits, of which he had a very considerable amount. With the additional days earned during the MOS period, he had a total of 263.81 days to utilize, while the actual number of working days during the MOS period was 262. Therefore, he was entitled to retain an amount of unused leave, albeit much less than he had thought, and after correspondence between the Union and the Employer, his remaining leave was reinstated and paid out.

The significance of all of this is that the concluding correspondence in relation to this matter, in August and September, 2001, was with Mr. Rob Thurgur, the current President of the Union. It appears from the documentation that Mr. Perry was told from the outset that he would not be paid OFP during the time when he was utilizing his accrued sick leave. He seems never to have raised this as an issue with the Employer or with the Union, and Mr. Thurgur seems not to have recognized that this issue was alive in relation to Mr. Perry's case, as it is in the grievance now before me. Again, the Employer argues that this raises an *estoppel* against the Union, which conclusion the Union contests.

Once again, I am of the view that this evidence is insufficient to raise an *estoppel* against the Union. A party to a collective agreement does not lose its right to insist on the strict meaning of the words negotiated by inadvertence to a possible

infringement of that meaning by the other party. The jurisprudence is clear that, in order for past practice to be effective as evidence of the intention of the parties, there has to be an overt recognition of the interpretation being proposed, and an acceptance of that interpretation. In this case, neither the employee concerned, nor Mr. Thurgur, appears to have turned their minds to the question of payment or non-payment of OFP. The only issue under discussion was whether there had been an incorrect calculation of the amount of leave to which the employee was entitled, and that question appears to have been resolved to the satisfaction of all concerned.

Finally, although this question is also confused by the circumstances, I note that both the denial of OFP to Mr. Perry and that to Mr. Benstead took place prior to the agreement between the parties in 1999 to terminate the effect of any past practice on the interpretation of LOU 6-99. It is at least arguable, therefore, that whatever happened afterwards, these transactions related only to grievances filed at a time when there may have been a practice which had subsequently been terminated by agreement of the parties.

I therefore turn to the collective agreement itself. The Employer argues that the effect of what is now LOU 4-03 is that, in return for receiving a one-year guarantee of normal pay, an employee agrees to forego, day for day, all of the accrued leave credits which remain to his or her account from the day on which the MOS protection starts. In other words, the Employer says that, even though the employee would otherwise be entitled to take all of the accrued leave, and receive OFP while doing

so, the effect of the bargain made in respect of MOS is that the employee is both prevented from taking the leave, and required to forego it.

On the face of the language used, this is a strained interpretation at best. The LOU does not use the expression “forego” or any of the synonyms used in argument, such as “contribute” or “burn off”. It uses the word “utilize”, a word which appears in several other places in the collective agreement, always in context meaning to take the time off work, while receiving full pay for the day, including OFP for operational employees. Most critically, both article 27 and article 28 use the word in precisely that meaning, and those are the very provisions under which the leave which is here in question was accrued.

On the face of LOU 4-03, therefore, there is nothing to indicate that what is intended is that employees will utilize their accrued leave credits in any other way than they would under any of the other provisions of the collective agreement. In particular, there is no disentitling language in the LOU. It says that an employee will be entitled not to suffer a loss of normal pay, but on its face that does not suggest any express limitation to normal pay when, under other provisions of the collective agreement, an employee would be entitled to more than normal pay, specifically to payment of OFP.

The payment of OFP itself is specified in article 19, which states that the premium will be paid for each calendar month in which the employee has “earned” at least ten days’ pay. The practice, however, which was agreed to by both parties, is to pay the OFP even in a month where an employee is entirely off work while utilizing leave credits, such as a month of annual vacation, or of vacation plus holiday credits. This

practice is in line with the only jurisprudence on the topic, *Roncali and Treasury Board (Transport Canada)* [1985] C.P.S.S.R.B. No. 31, December 20, 1985 (Brown). In that case, the adjudicator found that, for the purposes of OFP, there was no distinction to be made between "earning" pay and "receiving" pay.

In my view, therefore, on the plain language of the collective agreement, what the parties have agreed is that an employee who is covered by the MOS letter of understanding is required to "utilize" accrued leave credits before the Employer is required to step in to ensure that there is no loss of normal pay for the employee when there are no such credits left to utilize. There is nothing in the language to suggest that the employee is required to relinquish those credits, or abandon them, or forego them. The requirement is to utilize them, and that is a word which the collective agreement consistently uses to describe taking the earned leave in the normal way.

In the absence of some express disentitling language in the letter of understanding, there is nothing to suggest that the parties intended that the credits thus earned would somehow be lost. To require the forfeiture of earned credits is by itself unusual, and there is nothing to suggest any intention to do so in the language used.

I therefore find that the grievance should be allowed. I understand that the Employer position is that it has interpreted the language differently in the past, consistently for many years. Some of that experience is not available to me because of the agreement in 1999 to terminate the impact of past practice, and what evidence is available to me since then is not conclusive of a Union acceptance of the Employer's interpretation. Indeed, it appears that that interpretation has been in some dispute,

although perhaps not as vigorously pursued as it might have been, for some years both prior to and after the agreement of 1999. Certainly, throughout the negotiations for the current collective agreement, where the same language was maintained in LOU 4-03, the present grievance was outstanding, clearly raising the issue of the interpretation of the language.

The grievance is therefore allowed, and I retain jurisdiction over this matter to whatever extent is necessary to bring it to a full and final conclusion.

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

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Kenneth P. Swan, Arbitrator