

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 54 54

(“the Union”)

AND IN THE MATTER OF GRIEVANCE 2003-869 RELATING TO DEEMED  
PENSIONABLE EARNINGS WHILE ON LONG-TERM DISABILITY LEAVE

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer:

Jacques Emond, Counsel  
Steve Cooper, Manager, Labour Relations  
Derek Clement, Manager, Pension Policy and Systems  
Andrew Hackland, Intern, Labour Relations

For the Union:

Abe Rosner, National Representative, CAW-Canada  
Greg Myles, National Secretary-Treasurer, CATCA  
Debbie Passmore, Labour Relations Assistant, CATCA

## AWARD

A hearing in this matter was held in Ottawa, Ontario on April 26, 2005. 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 in issue between them.

Grievance 2003-869 was filed on behalf of the Union on November 12, 2003 after an exchange of correspondence between the parties. The issue to which the grievance relates is fairly complex, and the grievance itself describes that issue in a way which would be clear to the parties following the earlier correspondence, but probably not to any uninitiated reader of this award. I therefore propose to describe the issue in more extensive detail.

In addition to the other pay and benefits provided by the collective agreement, “operating” air traffic controllers, generally those employed in area control centres, control towers or terminal control units, are paid an additional amount called an Operational Facility Premium (OFP). The OFP varies by location, and is paid according to rules established in Article 19 and Appendix B of the collective agreement. At some locations the OFP constitutes a substantial percentage of the total earnings of an operating air traffic controller. For present purposes, it is sufficient to note that OFP is only paid to an operating controller “for each calendar month in which the employee has earned at least ten (10) days’ pay”.

Article 24 of the collective agreement provides for a cumulative sick leave credit plan from which an employee may draw, provided he/she has credits remaining, during absence from work due to illness or injury. Where the employee does not have credits remaining, the employee will be on sick leave without pay when so prevented from working.

In addition, operating air traffic controllers who are absent from work for medical reasons in circumstances where their licence to work in air traffic control duties is “affected” are entitled, pursuant to Letter of Understanding (LOU) 4-03, to up to one year of Maintenance of Salary (MOS).

Finally, as a backstop income protection program, air traffic controllers are covered by a long-term disability (LTD) plan. This is a standard insured plan with a 13-week elimination or waiting period, a benefit set at 70% of salary, and a change in criteria from “own occupation” to “any occupation” after receipt of benefits for a two-year period.

Because of the interaction of the elimination period and the other forms of income protection, an employee who starts to receive LTD benefits may have been on sick leave with pay, sick leave without pay, or a combination of the two during the elimination period, and operating air traffic controllers may also have been on a period of MOS. There is no dispute between the parties as to how the long-term disability plan itself operates. The issue arises in relation to the level of pensionable earnings credited to an employee while in receipt of LTD benefits.

This issue is dealt with in the NAV CANADA Pension Plan document in section 3.5(d). The provision is as follows:

### **3.5 Leaves of Absence**

.....

#### **(d) Long-Term Disability**

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 periods 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 contributions 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 a 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 the 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 are a number of matters of interpretation of these various plans and benefits which are not in dispute between the parties. To assist in understanding the dispute, it is helpful to set out these matters of agreement for the record.

First, there is no dispute that, for an operating air traffic controller who is actively at work, the OFP is part of the "Pensionable Earnings" referred to in section 1.33 of the pension plan. This agreement, however, has not always been in place; it was only in 1990 that the Treasury Board, as predecessor employer, agreed to recognize OFP as pensionable earnings.

Second, it is agreed that, for purposes of calculation of LTD benefits, OFP is to be considered as part of the insurable earnings of an operating air traffic controller at the end of the elimination period, regardless of whether or not a period of MOS intervenes before the LTD payments begin. Again, this agreement was not always in place; it arose only after difficulties were discovered in the application of these programs in 1996, when the implications of counting OFP as part of pensionable earnings for pension entitlement, but not counting it as part of insurable earnings for LTD calculation,

led to difficulties in the application of the “set-off” provisions of the LTD plan whereby LTD payments are reduced by pension benefits received. By an exchange of letters in 1996, the parties agreed that, thereafter, OFP would be included as part of insurable earnings for the purposes of calculating entitlement to LTD benefits. As will appear, it remains a matter of dispute between the parties what else they agreed to at that point.

Third, while there are some exceptions to this proposition which need not be discussed here, the parties are agreed that an operating air traffic controller in receipt of MOS payments does not receive OFP payments as well. MOS is based on the payment of regular salary only, and the OFP is not part of the MOS entitlement. This agreement also arises from the discussions in 1996, and was a part of a compromise between the parties at that time in their dealings with the problems that had arisen between LTD benefits and pension benefits referred to in the previous paragraph.

What is in dispute between the parties is whether OFP is to be included for the purposes of pensionable earnings when an operating air traffic controller begins to receive LTD. As I have already observed above, because of the various kinds of income support available to operating air traffic controllers, a controller may, on the last day of the elimination period for LTD, be in receipt of paid sick leave, sick leave without pay, or MOS. In a letter dated August 8, 2003, from Mr. Tor Veltheim, Senior Director, Human Resources Services and Labour Relations, for the Employer, the Employer’s position was set out in detail. The Employer identified three situations, and the implications of those situations according to its interpretation of the Pension Plan, in the following terms:

1. Plan Member in receipt of OFP on the last day of the LTD elimination period.

Deemed pensionable earnings are calculated using the salary rate in effect immediately prior to the leave and includes OFP if the employee was in receipt of such allowance immediately prior to the commencement of the leave.

2. Plan Member not in receipt of OFP on the last day of the LTD elimination period.

Deemed pensionable earnings are calculated using the salary rate in effect immediately prior to the leave and excludes OFP as this premium was not in pay immediately prior to the commencement of the leave.

3. Plan Member not in receipt of earnings on the last day of the LTD elimination period.

Deemed pensionable earnings are calculated using the salary rate in effect immediately prior to the leave and includes OFP if this premium was in pay immediately prior to the commencement of the leave.

It is this letter which is expressly referred to in the grievance dated November 12, 2003, as the subject of the Union's difference with the Employer.

The Union's argument is relatively simple. The rules for the determination of pensionable earnings for persons absent from work due to a disability and in receipt of benefits under the Employer's long-term disability insurance program are found in section 3.5(d) of the Pension Plan, and nowhere else. Pursuant to that provision, the contributions are to be based on "the level of Pensionable Earnings the Member would have received had the Member not been on such leave". The Union argues that if the member now on long-term disability were not on "such leave", then that member would

be at work. In the case of an operating air traffic controller, that member would have been receiving pensionable earnings at the level of salary plus OFP. Therefore, the Union asserts, the pensionable earnings for a former operating air traffic controller while on LTD is salary plus OFP, whatever that member would have been earning immediately before the end of the elimination period for LTD.

There are certain arguments made by the parties which may be disposed of immediately for the purpose of focusing on the real issues in dispute. First, the Employer, in Mr. Veltheim's letter of August 8, 2003, but not in its argument before me, and the Union, in the course of argument, relied on a practice under the *Public Service Superannuation Act*, which was the pension document applicable to persons in this bargaining unit under the predecessor employer, the Treasury Board. I have no direct evidence about the administrative practices alleged to have operated under that legislation, but I agree with the argument made by the Employer at the hearing that interpretation of that legislation, which is not entirely identical to the relevant provisions of the NAV CANADA Pension Plan document, is essentially irrelevant to the matter before me. The parties have granted arbitrators a certain amount of jurisdiction to interpret the language of the Pension Plan in respect of issues relating that language to the present collective agreement, but the *Public Service Superannuation Act* is no part of that jurisdiction, and administrative practices developed under a predecessor but not identical pension structure are not part of the proper interpretative matter to which I may have resort.



Second, the Union argues that a comparison of the English and French versions of the NAV CANADA Pension Plan clearly support its interpretation of section 3.5(d) of that document. The Employer asserts, and I did not understand the Union to contradict this assertion, that the only authoritative version of the Pension Plan is the English language version, and that the French language version is provided for convenience and information only. Unlike the collective agreement itself, of which both English and French versions are authoritative pursuant to Article 40, the Pension Plan is authoritative only in its English version, which is that filed with the regulator.

Third, the Employer asserts that the dealings between the parties in 1996, partially described above, constitute the basis of a promissory estoppel against the Union, preventing it from now asserting that the pensionable earnings for an operating air traffic controller not in receipt of the OFP on the last day of the LTD elimination period are nevertheless to be calculated including the OFP. This requires a more detailed look at precisely what exchanges took place between the parties in 1996.

As outlined above, the decision in 1990 to include OFP as pensionable earnings for operating air traffic controllers actively at work required recalculation of pension benefits for many employees. When that recalculation was completed, as late as 1995, some air traffic controllers who were then on long-term disability received an increase in pension benefits, and the LTD insurer attempted to reclaim LTD benefits paid on the basis of the previous pension calculations, which would have been lower if OFP had not been counted for pension purposes, since OFP was not then counted towards

insurable earnings for LTD purposes. To avoid the hardships imposed by the recalculation, the parties discussed mechanisms for resolving the problem.

Initially, the Union proposed, in a letter dated April 19, 1996, from then Vice-President, Labour Relations, Mr. Fazal Bhimji, that MOS payments be based on both regular salary and OFP. If that were done, both the pensionable earnings for an air traffic controller and the insurable earnings for the purposes of LTD would be based on the aggregate of salary and OFP, and the problem of setting off pension benefits, where paid, against LTD entitlements would not create the same difficulty.

The Employer, in response, by letter of July 2, 1996, balked at increasing MOS payments by the amount of OFP, on the basis that "this would result in the payment of retroactive salary to all ATCs who had ever been on the salary maintenance program and would be costly. Furthermore, any such agreement would involve opening up the collective agreement". The latter concern was because of the existence of a federal government compensation restraint program which prohibited reopening collective agreements at the time. As a consequence, the Employer proposed to recalculate insurable earnings for LTD purposes by including the OFP, but not to actually pay the OFP to members on MOS. The Union agreed to accept this compromise in the circumstances.

The language used by the parties is of some interest. The Employer's offer was in the following terms:

... we propose that, *for the purposes of the long-term disability plans ONLY*, the OFP could be considered to form

part of salary at the end of the elimination period (either the normal elimination period in the case of ATCs who are not on salary maintenance or, in the case of those who are, at the end of salary maintenance). [emphasis in the original]

The Union's response, dated August 15, 1996, was in the following terms:

We are agreeable to your proposal for resolving inequities that have occurred as a result of the different treatment of the Operational Facility Premium (OFP) in the calculation of disability and pension benefits. Thus, OFP will be considered part of salary at the end of the elimination period (regardless of whether the elimination period expires while a controller is on MOS or not) for those negatively affected in the circumstances.

It is clear to me, on the whole of the correspondence at that time, that there was absolutely nothing said about the calculation of pensionable earnings under the *Public Service Superannuation Act*, which was then in effect, and certainly nothing which could have been said about the calculation of pensionable earnings while on LTD under the NAV CANADA pension plan which had not yet been created. The parties were discussing only an issue of resolving the problem which had arisen in respect of meshing long-term disability and pension benefits, and they dealt with that on the basis of a compromise which both of them were prepared to live with at the time. Both the Union proposal and the Employer counterproposal were aimed at increasing the insurable earning for LTD purposes; that was the only reason for discussion the OFP. Having not referred, however, to any issue of pensionable earnings while on LTD, this agreement

cannot be resurrected now to constitute an estoppel in respect of an issue of interpretation which was not then apparently even contemplated, much less actually discussed.

This leaves the interpretation of section 3.5(d) of the NAV CANADA Pension Plan on the basis of the language it contains. That language is included in a provision which is an exception to the basic definition of “pensionable earnings” found in section 1.33 of the Plan. That general definition provides that pensionable earnings is “the sum of basic salary and such allowances and extra pay which relate to the performance of the duties of the Member’s given position received by the Member and determined by the employer for purposes of the Plan during the Plan Year”, subject to some exclusions. For employees not in receipt of regular salary and allowances, section 1.33 refers the issue of pensionable earnings calculation to Article 3.

Article 3 includes sections dealing with (a) maternity, child care or adoption leave, (b) short-term sickness, (c) leave while in receipt of workers’ compensation benefits, (d) long-term disability, (e) service outside Canada, and (f) other leaves of absence. A final section, 3.5(g), deals with circumstances of termination, retirement or death prior to paying contributions in respect of a leave of absence dealt with in paragraphs (a) through (f).

It should be noted that section 3.5(d) deals with the calculation of pensionable service for a specific period of time, namely the period when the member is “absent from work due to a disability and ... is in receipt of benefits under the Employer’s long-term disability insurance program”. It does not refer to any period before or after the period thus defined, and during that period provides that the

contributions to be made by the member, which contributions are to be made after the fact at the member's option, are to be based on "the level of Pensionable Earnings the Member would have received had the Member not been on such leave".

The Employer points particularly to the use of the expression "such period" or "such leave", and says that it refers only to the leave specified as described above, and therefore the correct way to determine what is the appropriate level of pensionable earnings is to ask what the member would have been receiving on the day immediately prior to the commencement of "such leave". It is that interpretation that leads to the different approaches to the calculation of pensionable earnings depending on how the employee actually reached the end of the elimination period for LTD, as described in the Employer's letter of August 8, 2003. To bolster this argument, the Employer asserts that, because MOS is not specifically covered as a kind of leave subject to pensionable service anywhere else in section 3.5, then it must be covered under 3.5(b), absence from work as a result of "illness or injury under the Employer's sick leave plan". There, pensionable earnings are based on the amounts actually received by the employee, and not any deemed amount. Since, in most cases, operating air traffic controllers receiving MOS do not receive OFP, the pensionable earnings for those individuals must be calculated differently from those who, on the last day of the elimination period for LTD, are receiving OFP.

I note that there is nothing in section 3.5(b) to support the Employer's argument that MOS is included in short-term sick leave, and I also note that, at least as far as I can see, MOS is not covered anywhere else by any specific provision of the

Pension Plan. But even if the Employer is correct in its assertion, that would only be an answer to what would be the level of pensionable earnings for an employee for the period that the employee is receiving MOS, and I do not understand that to be in dispute between the parties. The Union argues that an employee on MOS is on a leave with pay, and, by implication, is therefore covered by the general definition of pensionable earnings in section 1.33, and receives pensionable earnings based on the basic salary received. But I am not concerned here with pensionable earnings for employees while they are on MOS, but with pensionable earnings for those employees the day after their MOS ceases, and they begin to receive benefits under the LTD program and begin to be covered by section 3.5(d).

The question, therefore, is what to be understood by the concept of what a member “would have received had the Member not been on such leave”. To be on “such leave”, the member must be both absent from work due to a disability, and in receipt of LTD benefits. Therefore, by virtue of the terms of the LTD plan, the employee must have exhausted all of the other available income support mechanisms, and must also have exhausted the elimination period under the LTD plan.

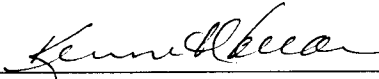
In my view, the better interpretation of the concept of what that person would have received had he or she “not been on such leave” is what he or she would have received if he or she were not disabled and were at work. In the case of an operating air traffic controller who is disabled and in receipt of LTD, that person would be receiving both salary and OFP if he or she were at work.

While the argument made by the Employer is not entirely unsupportable, I think it is the less convincing interpretation of the language. If what someone would have received had that person not been on "such leave" meant what that person was receiving on the last day of the end of the limitation period, the logically appropriate level of pensionable earnings for someone who had been on sick leave without pay because of the exhaustion of sick leave credits would, if the Employer's interpretation were applied strictly, be zero. The Employer's argument avoids this outcome by going back to the last day on which that employee was paid, but in doing so renders the interpretation it proposes awkward and unconvincing in all of the circumstances.

In the result, therefore, I find that the Union has satisfied me that the better interpretation of the Pension Plan, in light of the collective agreement, is that pensionable earnings for an operating air traffic controller on LTD, who if the controller were at work would have been receiving OFP, is a level of pensionable earnings that includes the OFP.

The grievance is therefore allowed. I retain jurisdiction to such extent as is required to bring this matter to a full and final conclusion, and I remit the matter to the parties for implementation subject to that reservation of jurisdiction.

DATED at TORONTO this 26<sup>th</sup> day of September, 2005.

  
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Kenneth P. Swan - Arbitrator