IN THE MATTER OF AN ARBITRATION

BETWEEN: NAV CANADA

AND CATCA CAW LOCAL 5454

AND IN THE MATTER OF A GRIEVANCE RELATING TO THE TAKING OF TIME OFF IN LIEU OF PAY FOR OVERTIME (GRIEVANCE # 2008-025)

ARBITRATOR: J.F.W. Weatherill

A hearing in this matter was held at Montréal on March 25, 2010.

A. Rosner, for the union.

R.M. Snyder, for the employer.

AWARD

The parties have referred to arbitration a question relating to the interpretation and application of article 20.02(a) of the collective agreement. The reference sets out three precise questions, and is as follows:

> *A dispute has arisen between the parties (NAV Canada and CATCA CAW Local 5454) as to the proper interpretation of Article 20.02(a) of the collective agreement, the text of which is attached hereto. The parties agree that no evidence shall be presented save for a Memorandum of Agreement between the parties dated 20 November 2002 and the associated Grievance Presentation form. The three (3)*

questions to be addressed are as follows:

1) Do employees who work overtime have a unilateral right, in all instances, to choose whether they will be compensated in pay or in "time off in lieu" ("TOIL")?

2) The parties agree that where an employee is prepared to accept TOIL only on a specified date that is not acceptable to the Employer, the Employer has no obligation to respond with alternative dates. However, must the employer, in all other instances, put forward alternative TOIL dates for the employee's consideration where the employee's suggested TOIL dates are not acceptable?

3) Does the language of Article 20.02(a) prohibit the Employer from offering or approving TOIL on a date or date(s) after the end of the current vacation year?

It is the union's position that questions 1) and 2) should be answered in the affirmative, and question 3) in the negative; the employer's position is that questions 1) and 2) are to be answered in the negative, and question 3) in the affirmative.

Article 20 of the collective agreement deals with the matter of overtime, which is described in article 20.01 as "time worked by an employee in excess or outside of his or her scheduled hours of work". Article 20.02(a) is as follows:

All employees shall be paid for overtime worked by them at two (2) times their straight-time hourly rate.

Employees are entitled to overtime compensation for each completed fifteen (15) minute period or overtime worked by the employee.

Employees at their request, shall be granted time off in lieu of overtime at the appropriate overtime rate. The employee and his or her supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated.

> *Where an employee requests time off in lieu of overtime, the employee must indicate this to his or her supervisor prior to the end of the month in which the overtime occurred.*
>
> *Employees who have accumulated time off in lieu of overtime shall, upon request, be paid out any portion of this accumulated time off in lieu. Where an employee has not utilized accumulated time off in lieu of overtime by the end of the vacation year, the unused portion will be paid off at the appropriate overtime rate.*

The dispute between the parties relates primarily to the "utilization" of accumulated time off in lieu by the end of the vacation year. The vacation year, it is agreed, expires on March 31 of each year. It may be noted that article 20, while it permits the accumulation of time off in lieu of overtime within the period of a vacation year, also requires that accumulated time off in lieu which has not been utilized by the end of the vacation year be paid off at that time. This provision may be contrasted with the provision in article 27.07(c), which permits, in certain circumstances, the carrying-forward of up to a maximum of ten days of unused vacation into the next vacation year.

It is the union's position that the entitlement to time off in lieu of overtime is an absolute one, and that it is possible for an employee with an entitlement to time off in lieu, to utilize that entitlement by agreeing (before the end of the calendar year) to take certain days off during the following calendar year. It is the employer's position that there are certain instances in which it is not possible, under the collective agreement, for employees to take time off in lieu of overtime, and that the collective agreement does not permit it to approve of any time off in lieu to be taken after the end of the vacation year.

I shall deal with the three questions in turn.

As to question 1), this question is governed by the third paragraph of article

20.02(a). From the first sentence of that paragraph, it would appear that the answer to the question must be "yes". The sentence reads "Employees at their request, shall be granted time off in lieu of overtime - - ". Indeed, reading the question as put quite literally, it would seem the answer to the question must be an absolute "yes". It is, clearly, the employees who, unilaterally, have the right to choose. The second and third sentences of the paragraph, however, relate, not strictly speaking to the *exercise* by way of *assertion* of the right, but rather to its practical application. The employee may choose time off in lieu of overtime, although he must make this choice prior to the end of the month in which the overtime occurs (see the fourth paragraph of article 20.02(a)), so that if the employee works overtime on the last day of a month, he or she must make the decision to request time off in lieu immediately. Further, the actual taking of the time off is subject to mutual agreement as to the particular time or times at which the lieu time off is to be taken. Failing such agreement, it is provided that the time off will be accumulated.

Having regard to the language of the collective agreement, it is clear that it is up to the employee to decide (perhaps quickly) whether or not to take time off in lieu of overtime. It also seems clear to me that that is a unilateral right. Question 1) of the questions before me, however, is whether or not this is a unilateral right *in all instances*, that is, may there be occasions when the employee working overtime may not be allowed to choose to take time off in lieu of the overtime payment? The employer suggests such an instance would occur on the last day or days of the vacation year, when lieu time off would necessarily occur during the following vacation year, and thus, so the employer argues, be in violation of the prohibition against accumulation of time off in lieu beyond the end of the vacation year, as set out in the fifth paragraph of article 20.02(a).

This argument is based on the term "utilized", as it appears in the fifth

paragraph. The most obvious meaning of the term would be that an entitlement to time off is utilized as time is in fact taken off. While that may seem natural enough, it is to be noted that the fifth paragraph of article 20.02(a) refers to the utilization of "accumulated" time off by the end of the vacation year. Under the third paragraph of article 20.02(a), time off is accumulated where time off in lieu had been requested and no mutual agreement with respect to the time at which the lieu time has been taken has been reached. It is agreed that there is an obligation both on the employer and on the employee to make a reasonable attempt to reach mutual agreement in that respect. As long as there is a proper and appropriate - and successful - attempt to reach such agreement, then the lieu time does not go into accumulation.

On my reading of the third paragraph of article 20.02(a), employees may, on any occasion on which they work overtime, request to be granted time off in lieu of overtime. The only limitation on the right to make this request appears in the fourth paragraph of the article, where it is provided, as has been noted above, that the request must be made before the end of the month in which the overtime occurs. That limitation, however, does not affect the general right to choose time off in lieu, as set out in the first sentence of article 20.02(a).

For the foregoing reasons, my answer to question 1) is, "yes".

As to question 2), the parties referred to a Memorandum of Agreement dated 20 November 2002, which resolved a grievance filed in 2001 and which related to the application of article 20.02(a) by the management at Winnipeg, where there was a specific policy with respect to time off in lieu. Paragraph (3) of the settlement is as follows:

> *The Winnipeg ACC unit TOIL policy and practice requires that the Manager shall, in good faith and without delay, attempt to approve TOIL*

on the dates requested by the employee or make a genuine search for alternative dates.

While both parties agree that what was set out in the Memorandum in resolving the grievance at Winnipeg was an expression of what was required under the collective agreement, the employer argued in the present case that "in all other instances" than that just set out in the first sentence of question 2) (where the employee is intransigent with respect to the date he or she wants), the employer is still not under an obligation to suggest alternative dates. More precisely, it was the employer's position that there are certain instances in which the obligation would not arise. In particular, reference was made to the case where an employee worked overtime on March 30, and requested time off in lieu on March 31. The employer, of course, is not obliged to agree to that, but if it does not, then it can only offer alternatives which fall within the succeeding vacation year. The employer argues not merely that it need not do that, but that it may not do that, since that, it is argued, would involve the prohibited carry-over of accumulated time off in lieu.

That argument is answered by what is said with respect to question 1). "As long as there is a proper and appropriate attempt to reach such agreement, then the lieu time does not go into accumulation". The carrying-over of accumulated time off in lieu is the "mischief" which is addressed by the second sentence of the fifth paragraph of article 20.02(a), as the contrast with article 27.02(c) suggests. It is my conclusion that managers are not prevented from putting forward dates for time off in lieu which may fall within the following vacation year. They must make a "genuine search" in a reasonable way, although the scope of that search need not be unlimited; it may be made bearing in mind the provision against accumulation as well, as always, operational considerations.

For the foregoing reasons, my answer to question 2) is "yes".

As to question 3), it will be clear that this question is answered by what has been said with respect to the first two questions. The parties are clearly required to make

reasonable efforts to reach mutual agreement with respect to lieu time off. It is only when such efforts have failed that the lieu time accumulates. It is, in my view, not reasonable to expect that such efforts must result in agreement or failure within a period of a few hours, and quite reasonable to expect that they continue for a certain period into a succeeding vacation year where the overtime, and the request, occur at the very end of a vacation year. This does not, as a practical matter, continue to any significant extent to the "mischief" to which the material portion of article 20.02(a) is addressed. More importantly, to refuse time off in lieu in such circumstances would derogate from the choice clearly granted to employees in the first sentence of the third paragraph of article 20.02(a).

For these reasons, my answer to question 3) is "no".

The foregoing constitutes the award in this matter.

DATED AT OTTAWA, this 9th day of April, 2010,

(signed) J.F.W. Weatherill
Arbitrator