File Nos: 166-2-9252
166-2-9253

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

J.M. LIVINGSTON,

Grievor,

AND:

TREASURY BOARD,
(Transport Canada)

Employer.

FBE

## DECISION

Before: Leon Mitchell, Q.C., Deputy Chairman and Adjudicator

For the grievor: Ms. C.H. MacLean, counsel

For the employer: Pierre Hamel, counsel

ART 11

CODE 402/79

Heard at Ottawa, December 19, 1980.

ENTITLEMENT TO INCREMENTS
WHEN ON LEAVE OF ABSENCE

## DECISION

This is a reference to adjudication by the grievor, Mr. J.M. Livingston, of a grievance which alleges he was not paid the salary due to him upon his return to work from a lengthy leave of absence without pay. He filed another grievance objecting to the employer's claim that he was overpaid and the latter's intention to recover the alleged overpayment. Essentially the issue to be determined is the amount of salary and increments the grievor was entitled to receive since his return to work on July 16, 1979.

Mr. Livingston was elected to the position of full-time president of the Canadian Air Traffic Control Association in 1973 and continued to serve in that capacity for a period of 6 years until July 1979. His last request for leave without pay was made pursuant to Article 11.01 of the collective agreement when he was re-elected in 1977. Article 11.01 of the current collective agreement (Exhibit G-2) reads:

> 11.01 Where operational requirements permit, the Employer will grant leave of absence without pay to an employee who has been elected to a full-time office of the Association. The duration of such leave of absence without pay shall be for the period the employee is elected to hold office.

The employer granted the leave requested by letter dated July 12, 1977 (Exhibit G-5), the body of which reads:

> May I first offer my congratulations on your recent re-election as President of CATCA.

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> In response to your letter regarding extension of your leave of absence, I am enclosing a copy of the authorization signed by the Administrator, Canadian Air Transportation Administration.
>
> You will note that Mr. McLeish's approval includes the additional 15 days of overlap, up to July 14, 1979, which you had requested.

When Mr. Livingston first went on leave without pay in 1973 the position he filled was classified A1-4 and he was being paid at the maximum or 6th step. On January 27, 1978, the Canadian Air Traffic Control Association, and the Treasury Board of Canada entered into a collective agreement which provided, inter alia, for a reclassification of the A1 positions in that the previous levels A1-1 to A1-8 were converted to levels A1-00 to A1-7. As a result, the position classified as A1-4 that Mr. Livingston left in 1973 became on January 9, 1978 an A1-3 and the number of steps at each level A1-1 to A1-7 increased from 6 to 11 to reach the maximum salary. Appendix "A" of the 1978 collective agreement (Exhibit G-2) sets out the rates of pay under the new classification and the method by which the increments were to be integrated into the new pay rate structure. The relevant parts of Appendix "A" read as follows:

> Effective January 9, 1978, the following pay scales are to apply under the new classification standard:
>
> Level ...
>
> | | | | | | |
> |---|---|---|---|---|---|
> | A1-3 | 20800 | 21700 | 22600 | 23500 | 24400 |
> | | 25300 | 26200 | 27100 | 28000 | 28900 |
> | | 29800 | | | | |
>
> ...

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> The parties agree that the classification conversion will be effective January 9, 1978, and
>
> (1) it will not alter an employee's current increment date;
>
> (2) that those employees who are at the maximum increment of their grade level as of January 1, 1978, shall have as their first increment date following conversion January 1, 1979, and each January 1 thereafter, and
>
> (3) that all employees on conversion will be entitled to an increase in pay equal to at least one full increment for the position to which they are appointed.
>
> (Emphasis added)

The employer therefore advised Mr. Livingston by letter dated March 15, 1978, inter alia, that:

> Your position is changed from A1-4 to A1-3. Your personal classification is changed from A1-4 to A1-3. Your rate of pay is changed from $24,232 to 25,300 per annum.

It will be recalled that the maximum of the A1-4 level was reached at the 6th step. The increase in salary at each step was $900.00. The rate of $25,300 is the 6th step in the A1-3 level and is $1,068 above the maximum of the A1-4 level namely $24,232. The parties agree that effective January 9, 1978, the rate of $25,300 for employees who were at the maximum of the former A1-4 level is the correct salary.

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Mr. Livingston returned to work in his A1-3 position July 16, 1979 as arranged. On March 21, 1979, the parties entered into a revised collective agreement effective January 1, 1979, and expiring December 31, 1980. (Exhibit G-3). The terms of this agreement included revised rates of pay for employees at the A1-4 level which are set out in Appendix "A" as follows:

A: Effective January 8, 1979
B: Effective January 7, 1980

A1-3

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| From: | | 20800 | 21700 | 22600 | 23500 | 24400 | 25300 |
| | | 26200 | 27100 | 28000 | 28900 | 29800 | |
| To: | A | 22464 | 23436 | 24408 | 25380 | 26352 | 27324 |
| | | 28296 | 29268 | 30240 | 31212 | 32184 | |
| | B | 23969 | 25006 | 26043 | 27080 | 28118 | 29155 |
| | | 30192 | 31229 | 32266 | 33303 | 34340 | |

The three notes in Appendix "A" of the previous 1978 collective agreement were deleted.

On April 18, 1980, management received the first of two grievances from Mr. Livingston which reads:

> In a letter dated March 15, 1978, I was notified by the A/Regional Personnel Services offices of the Atlantic Region that my position had been reclassified effective January 9, 1978 from A1-4 to A1-3, and the salary of my position had been changed from the old A1-4 maximum rate of $24,232 to the new A1-3 sixth increment of $25,300 on the same date. In accordance with the Collective Agreement in effect at that time my next increment would become effective on January 1, 1979 and each January 1 thereafter.

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> Therefore, under the Collective Agreement presently in effect the salary of my position should have become $26,200 on January 1, 1979, $28,296 on January 8, 1979, $29,268 on January 1, 1980 and $31,229 on January 7, 1980. In reviewing my pay cheques I find this has not happened and it appears that my salary remained at $28,296 on January 1, 1980 and was raised to $30,192 on January 7, 1980.
>
> CORRECTIVE ACTION REQUESTED:
>
> That my salary be raised retroactively to $29,268 effective January 1, 1980 and to $31,229 effective January 7, 1980.

On the same day as the grievance was received Mr. C.I. McFarlane sent a lengthy letter to Mr. Scharf of the Treasury Board seeking assistance in determining the correct rate of pay payable to the grievor. That letter dated April 18, 1980 (Exhibit G-9) reads as follows:

> You may recall our previous discussions concerning Mr. J.M. Livingston who resumed his duties with this Department following the expiration of his leave of absence to serve as President of the Air Traffic Control Association.
>
> We have been attempting to establish when his first increment will become due following his return to duty and the dates on which all subsequent increments will become due. Our internal debate has focussed on the interpretation to be placed on the wording used in the "Pay Notes" included as Appendix "A" to the AI Collective Agreement signed on January 27, 1978. One interpretation, if correct, suggests that they take precedence over those sections of the

Public Service Terms and Conditions of Employment Regulations governing the granting of increments to employees during and after a period of leave of absence without pay and that they provide for the granting of increments in Mr. Livingston's case on dates other than those prescribed in the Regulations. As we have been unable to reach an agreement on this issue it is requested that a ruling be obtained from the appropriate officials of the Treasury Board Secretariat.

Background

Mr. Livingston's leave of absence without pay to serve with CATCA was approved pursuant to the provisions of Section 53(1) of the PSTCE Regs. His leave covered the period from June 14, 1973 to July 15, 1979 and on July 16, 1979 resumed the duties of the position from which he had been granted a leave of absence...

With the introduction of a new classification standard for the Al Group, his position was converted from A-14 and he was appointed to the A-13 level with effect from January 9, 1978 at a salary of $25,300. Prior to conversion while at the A-14 level he had been paid at the maximum of the scale of rate for his class and level since 1970.

While still on leave of absence he was granted an increment with effect from January 1, 1979 bringing his salary to $26,200 and his salary was resumed at this rate of pay upon his return to duty. Although no further increments have been granted he has received the general salary revisions awarded the Al Group.

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In summary, his rates of pay have been as follows:

A1-4 24,232.
A1-3 25,300. eff. 9/1/78 (conversion)
A1-3 26,200. eff. 1/1/79 (increment)
A1-3 28,296. eff. 8/1/79 (revision)
A1-3 30,192. eff. 7/1/80 (revision)

Application of PSTCE Regs.

It is our understanding that the provisions of Section 82 of the Regulations would apply in this case unless it can be established that they are in conflict with the provisions of the Collective Agreement (refer Clause 14.01 of Agreement singed 27/1/78). More specifically, because Mr. Livingston was first appointed effective January 9, 1978 to a position established as a result of the new classification standard, Section 82(b)(ii)(B) applies and his first increment following his return to duty would become due on October 1, 1980. The due date for all subsequent increments would be determined in accordance with Section 76.

In reaching the above conclusions we have made two assumptions. The first concerns the increment period which according to Clause 14.07 of the current AI Agreement would be 52 weeks in this case. It's stated in 14.07 that the increment period of 52 weeks would "continue" to apply to employees appointed prior to the signing date (21/3/79) of the collective agreement. Since we can find no reference to increment periods in any previous AI Collective Agreements, we can only conclude that the increment period for levels 1 to 7 in the AI Group was 52 weeks prior to collective bargaining. Whether the increment period in this case is 1 year, 12 months or 52 weeks, it does not appear to us that it would affect the final outcome.

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Our second assumption concerns the the definition of "period of employment" referred to in Section 82(a) of the Regulations. While this has always been interpreted to mean a period during which an employee is not on leave of absence without pay, the term "employment" is not defined in the Regulations. During his leave of absence, Mr. Livingston's employment was not terminated.

We must assume therefore that he remained an employee and relying solely on a dictionary definition of the word "employment" one could argue that the period covered by approved leave constitutes a "period of employment."

For our purposes we will assume that a correct application of the Regulations would result in the following entitlements:

AI-4 24,232
AI-3 25,300. eff. 9/1/78 (conversion)
AI-3 27,324. eff. 8/1/79 (revision)
AI-3 29,155. eff. 7/1/80 (revision)
AI-3 30,192. eff. 1/10/80 (increment)

(Increment date is Oct. 1st each year thereafter).

Application of AI Collective Agreement (signed 27/1/78)

It has been suggested that to grant Mr. Livingston his first increment on October 1, 1980 would be inconsistent with the provisions of Appendix "A" paragraph 2 in the 1978 Agreement (see attached) which sets his annual increment date upon conversion to the new classification standard at January 1, 1979 and each January 1 thereafter. Since the agreement is silent on whether a union official is entitled to an increment while on unpaid leave it has been agreed that the pay regulations should apply

and no increment would be paid on January 1, 1979 but it has been argued that he would receive an incremental pay increase on January 1, 1980. It has also been suggested that if the pay regulations only were followed and his 1980 increment were withheld until October 1980 because of the one year work requirement, there would still be the requirement to conform ultimately to the labour agreement by maintaining his right to the next increment on January 1, 1981.

Should either of these interpretations be supported they would result in one of the following salary progressions:

1. AI-4 24,232
   AI-3 25,300. eff. 9/1/78 (conversion)
   AI-3 27,324. eff. 8/1/79 (revision)
   AI-3 28,296. eff. 1/1/80 (increment)
   AI-3 30,192. eff. 7/1/80 (revision)

   (Increment date Jan. 1st each year thereafter).

2. AI-4 24,232.
   AI-3 25,300. eff. 9/1/78 (conversion)
   AI-3 27,324. eff. 8/1/79 (revision)
   AI-3 29,155. eff. 7/1/80 (revision)
   AI-3 30,192. eff. 1/10/80 (increment)
   AI-3 31,229. eff. 1/1/81 (increment)

   (Increment date Jan. 1st each year thereafter).

It is our basic contention that although the increment date is specified in the 1978 Agreement, Clause 14.01 permits the employer to apply the provisions of Sections 82 and 76 of the PSTCE Regs to determine in this case the date on which the first and all subsequent increments become due. Should this not prove to be the case we must then consider whether the provisions of Section 82 can be applied in the case of any other employee who is

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> subject to a collective agreement in which the method used to determine increment date is prescribed.
>
> We would appreciate receiving your advice on this matter.

Mr. Scharf responded to this request for advice by letter dated April 30, 1980 which reads:

> This is in reply to your letter of April 18, 1980 concerning salary increments for Mr. J.M. Livingston following his return to duty from leave without pay.
>
> The pay notes attached to the Al collective agreement which was signed on January 27, 1978 provided that increments are due on January 1 for those employees who were at their maximum of their level as of January 1, 1978. This will take precedence over section 82 of the P.S.T.C.E. Regulations only in so far as the date of the increment is concerned. An Air Traffic Controller at the maximum on January 1, 1978 and who has a period of leave without pay will remain subject to sections 81 and 82 of the P.S.T.C.E. Regulations. An increment will become due, after the return to duty, on the January 1 following the date on which he will have completed a period of employment equal to the pay increment period for the position held by him calculated from the date that the last increment became due or where no increment has become due from the date of his appointment.
>
> Since Mr. Livingston returned to duty on July 16, 1979 his first increment thereafter will become due on January 1, 1981, which is the January 1 following a period of employment equal to the pay increment period of one year following

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> the appointment as A1-3. Had Note 2 not stated "each January 1 thereafter" Mr. Livingston would have been entitled to an increment on October 1, 1980 and each October 1 thereafter.
>
> The correct rates of pay are:
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> | | | | |
> |---|---|---|---|
> | A1-4 - | May | 24232 | |
> | A1-3 - | 1/78 | 25300 | Conversion |
> | | 1/79 | 27324 | Rev. |
> | | 16/7/79 | 27324 | Re TOS |
> | | 7/1/80 | 29155 | Rev. |
> | | 1/1/81 | 30192 | Stat. |
>
> Should you require further information please contact me at 3-7511.

I have reproduced these letters in full because it reflects the uncertainty in the employer's mind as to the correct rate of pay and the conclusions reached as to the amounts payable.

Following the exchange of the above correspondence management sent the first level reply to the grievance dated May 13, 1980 which reads:

> The corrective action requested in your grievance relating to salary increments is denied.
>
> Due to the complexity of this item the A/APAB, Moncton, N.B. referred the matter to Treasury Board for a decision; a copy of the reply is attached.
>
> As noted on Page 2 of the attachment your current salary level should be $29,155.00. I have been advised that APAB will take immediate action to adjust your salary; DSS has been requested to determine the amount of overpayment

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> which will be recovered in accordance with Clause 14.05 of the AI Collective Agreement.
>
> (Emphasis added)

The final reply to this grievance is dated July 14, 1980 and reads:

> The background relating to your grievance of April 18, 1980 has been thoroughly reviewed and discussed with your Association representative.
>
> I find that I must concur with the reply given to you at the first level. That is, Section 82 of the Public Service Terms and Conditions of Employment Regulations apply in your case and in accordance with the pay notes of Appendix "A" attached to the AI collective agreement which was signed on January 27, 1978 your first salary increment since your return to duty on July 16, 1979 will become due on January 1, 1981.
>
> Therefore, I am unable to support the action you have requested.

As a result of the decision to recover the alleged but disputed overpayment contained in the first level reply to the grievance dated May 13, 1980 (reproduced above) Mr. Livingston filed a second grievance which was received by management May 22, 1980 and reads:

> In the first level reply to my grievance of April 18/80, I was advised that my salary for the period July 16, 1979 to December 31, 1979 would be retroactively

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> reduced to $27,324. In accordance with the Collective Agreement which expired on December 31, 1978 and the Collective Agreement presently in effect, my salary for the period July 16, 1979 to December 31, 1979 should be $28,296.

The reply to this grievance is dated July 14, 1980 and reads:

> The background relating to your grievance of May 22, 1980 has been thoroughly reviewed and discussed with your Association representative.
>
> While it is unfortunate that you were paid the wrong salary upon your return to duty on July 16, 1979, action had to be taken to recover the overpayment of salary. The correct salary you are entitled to was outlined on page 2 of the copy of the reply from Treasury Board attached to the first level reply to your grievance of April 18, 1980.
>
> Therefore, I am unable to support the action you have requested.
>
> (Emphasis added)

The uncertainty and confusion in the employer's view as to the "correct salary" payable to the grievor since his return to work is evident from the fact that by letter dated October 7, 1980 (Exhibit G-7) Treasury Board advised the Canadian Air Traffic Control Association Inc. inter alia, that:

> "... In accordance with these Regulations (P.S.T.C.E. Regulations) therefore, Jim Livingston's first increment became due 1 October, 1980, rather than as previously indicated 1 January, 1981."

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The essence of the difference between the grievor and the employer in this case is whether an employee on Leave of Absence Without Pay in excess of two months earns increments while on such leave. The other issue is the method to be used in determining the pay increment date of such an employee upon his return to duty and consequently also involves the pay increment period.

The basic premise advanced by counsel for the grievor is that the latter retained his status as an "employee" throughout his leave of absence without pay and therefore the grievor earned pay increments while on such leave in accordance with the provisions of the collective agreement effective January 1 to December 31, 1978 and the succeeding agreement effective January 1, 1979 to December 31, 1980. The grievor in his grievance dated April 18, 1980 expresses in part the same view as follows:

> ... In accordance with the Collective Agreement in effect at that time (i.e.: March 15, 1978) my next increment would become effective on January 1, 1979 and each January 1, thereafter.

This position relies on the view that the provision in the collective agreement effective January to December, 1978 regarding pay increment is applicable to an employee while on leave of absence without pay for a period in excess of two months. I do not agree. I agree with the contention of counsel for the employer that in the absence of an express provision in the collective agreement to the effect that employees on leave of absence without pay shall be deemed, or do, earn pay increments while on such leave the provisions of the Public Service Terms and Conditions of Employment Regulations (herein referred to as P.S.T.C.E.) govern the application of pay to employees.

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Furthermore I am of the opinion that the only collective agreement that is relevant to determine the rate of pay that the grievor was entitled to receive on July 16, 1979 when he returned to work and thereafter is the agreement in effect on that day. The only collective agreement that is relevant is therefore the one effective January 1, 1979 and expiring December 31, 1980 (Exhibit G-3). The reference to other collective agreements by the parties confuses the issue to be determined.

In my opinion Article 14.01 of the collective agreement in force between January 1, 1979 to December 31, 1980 clearly supports the conclusion that the P.S.T.C.E. Regulations govern the determination of this grievance.

> Article 14.01 reads:
>
> Except as provided in this Article, (Article 14) the terms and conditions governing the application of pay to employees are not affected by this Agreement.

Since the said collective agreement is silent regarding pay increments payable to employees while on leave of absence without pay section 82 of the P.S.T.C.E. Regulations under the Financial Administration Act apply. That section deals specifically with pay increments for such employees and reads as follows:

> 82. Where an employee has been granted leave of absence without pay for a period in excess of two months, otherwise than pursuant to section 47, 48, 54, 55, 57 or 58, a pay increment shall become due to that employee
> (a) on the date on which he will have completed a period of employment equal to the pay increment period for the position held by him, if that date is a quarterly date; or

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(b) on the quarterly date first following that date, if that date is not a quarterly date, calculated
  (i) from the date on which a pay increment last became due to him, or
  (ii) where no pay increment in that position has become due to him, from
    (A) the date of his appointment, if that date was a quarterly date, or
    (B) the quarterly date next following the date of his appointment, if he was not appointed on a quarterly date.

(My underline)

It is common ground that the leave of absence granted in this case is of a kind "otherwise than pursuant to sections 47, 48, 54 55, 57 and 58" of the Regulations. Section 82 of the Regulations provides that an employee on leave of absence without pay for a period in excess of two months shall be entitled to a pay increment on the date "he completes a period of employment equal to the pay increment period for the position held by him".

The first condition precedent to entitlement to a pay increment is therefore that he must be employed by the employer and not merely be an "employee". An employee is not employed by the Federal Government while on leave of absence and working for and being paid by another employer. The second condition is that he must be employed after his return to work for a time equal to the pay increment period for the position held by him before becoming entitled to an increment. In this case the relevant collective agreement provides that the pay increment period in 1979 et seq. shall be 52 weeks.

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Since the grievor returned to work on July 16, 1979 he met these conditions on July 14, 1980.

However Section 82(a) provides that the pay increment is payable only on a quarterly date. The quarterly dates are defined in section 71 of the P.S.T.C.E. Regulations as January 1, April 1, July 1, and October 1 of each year. Section 82(b) provides that if the pay increment period is not completed on a quarterly date then the increment is payable "on the quarterly date first following that date" which in this case is October 1st, 1980. Therefore I find that the grievor was entitled to his first pay increment after his return to work on October 1, 1980 i.e. the 7th step of the A1-3 level as at that date. That annual rate of pay was $30,192.

The parties agree that the correct annual rate of pay for the A1-3 classification in 1978 was $25,300. If the grievor had returned to work in his position during that year he would have been entitled to that annual pay. I think the sentence in the employer's letter to the grievor dated March 15, 1978 which reads: "Your rate of pay is changed from $24,232 to 25,300 per annum" may be misleading. The rate of pay applies to the classification of the position in which the employee performs work and not to the employee. The employee is entitled to the rate of pay for the classification of the position by virtue of performing the work therein. Strictly speaking the words "Your rate of pay" should read: "The rate of pay".

As stated above the grievor returned to work on July 16, 1979 and at that time the rate of pay for the classification of his position i.e. the 6th step of level A1-3 was 27,324 and not 28,296 as claimed by the grievor. The grievor's claim for the higher rate is based on

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the contention that he earned a pay increment on January 1, 1979 while on his leave of absence. The latter rate of 28,296 is the 7th step of the A1-3 classification as shown in the relevant collective agreement effective January 1, 1979 to December 31, 1980. In my view for the reasons outlined herein the grievor was entitled on July 16, 1979 to the rate of pay for the 6th step of A1-3 classification namely $27,324 and not to the 7th step because he had not earned any pay increment while on leave of absence without pay for a period in excess of two months. He began to earn a pay increment after his return to work and his first pay increment was payable on October 1, 1980.

In summary I have concluded that the grievor's correct rate of pay since his return to employment is as follows:

July 16, 1979 - 27,324 (See Appendix "A" of the relevant agreement)
January 7, 1980 - 29,155 (See Appendix "A" of the relevant agreement)
October 1, 1980 - 30,192 (the date the first pay increment becomes due and being the rate for the 7th step of level A1-3.

The first grievance regarding rates of pay to which the grievor is entitled is therefore dismissed.

The second grievance arises out of the notice from the employer to the grievor of the intention to recover the overpayment. The authority of the employer to recover overpayments is set out in Article 14.05 of the relevant collective agreement which reads as follows:

> 14.05 Where an employee, through no fault of his own, has been overpaid, the appropriate pay office 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 $50.00, and where the employee advises his local management that the stated recovery action will create a hardship, arrangements will be made by the Employer with the appropriate pay office to limit recovery action to not more than 10% of the employee's pay each pay period until the entire amount is recovered.

The right to recover an overpayment is not in dispute. The only question was whether an overpayment was made to the grievor. I have decided that he was overpaid. The employer may recover the amount of the overpayment in accordance with Article 14.05 of the collective agreement and the grievance relating thereto is also dismissed.

For the Board,

Leon Mitchell, Q.C.
Deputy Chairman and
Adjudicator.

DATED AT OTTAWA, this 24th day of February 1981.