

Files: 166-2-13869  
and 166-2-13870

No. 74

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

BETWEEN:

REGINALD DONALD ERNST

grievor,

AND:

TREASURY BOARD  
(Transport Canada)

employer.

INTERIM  
DECISION

Before: C. Brian Williams, Board Member and Adjudicator.

For the Grievor: Ms. Catherine H. MacLean, Counsel.

For the Employer: Ms. Sheila Ray, Counsel.

Heard at Edmonton, Alberta, on May 3, 1983.

*copy / 27/7/83  
RETURN RAM  
27/7/83  
CODE 402/82  
RETROACTIVE  
REMUNERATION*

INTERIM  
DECISION

Nature of Grievances

Reginald Donald Ernst commenced employment with Transport Canada in July, 1966. Subsequently, he held a number of postings in a number of centres and in November of 1981 was serving in the Area Control Centre at Edmonton International Airport. He was classified as an AI-4, paid at the maximum increment, and received an annual salary of \$36,876.00 as provided at page A-2 following page 56 of an "Agreement between the Treasury Board and the Canadian Air Traffic Control Association. Group: Air Traffic Control (all employees). January 1, 1979 - December 31, 1980. Code: 402/79." (Exhibit #2 and hereafter referred to as the old agreement). Effective December 9, 1981 he voluntarily resigned his position in favour of a controller posting with the International Civil Aviation Organization in Saudi Arabia. His letter of resignation reads in part:

I am hereby submitting my resignation  
effective December 9, 1981.

This posting proved unsatisfactory to Ernst and on March 5, 1982 he returned to Edmonton and to his former position. On May 28, 1982 the parties entered into a new agreement titled "Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association. January 1, 1981 - December 31, 1982. Code: 402/82 (Exhibit #1 and hereafter referred to as the new agreement). This agreement provided for salary increases as of January 1, 1981, June 29, 1981, and January 4, 1982 and a newly introduced Operational Facility Premium as of January 1, 1981. On August 11, 1982 Ernst filed the first of his two grievances. Grievance #1 reads in part as follows: (Exhibit #3).

With respect to details:

I resigned my position as an AI-4 (Max increment \$36876) on Dec. 7, 1981. I was hired back as an AI-4 after an absence of less than 3 months, at the max increment \$36876 on March 05 1982 with all leave previously earned credited back to me. I have been informed (documents attached) that I am not eligible to receive the full retroactivity of the new AI pay scale, i.e: I will not receive the AI-4 max increment. I submit that I am eligible to receive the AI-4 max increment of 45431 and that I am entitled to all retroactive payments to Jan. 1/81. This grievance is filed under articles 14, 30.01, 32 of the CATCA/Treasury Board agreement Code 402/82.

With respect to the corrective action requested:

That my current annual salary be readjusted to \$45431 and that all retroactive payments to Jan 1/81 be due in full to me.

On August 19, 1982 he entered his second grievance. Grievance #2 reads in part as follows: (Exhibit #4).

With respect to the details:

Upon receipt of my retroactive operational facility premium I found that even taking into account an under 3 month break in service it was less than it should have been. I feel that I should receive retro O.F.P. for 14 months out of the last approx 17 months as I have preformed (sic) my duties at EG ACC for that period of time. Received gross of 594.08 - net of 388.38.

With respect to the corrective action requested:

That the full retroactive operational facility premium pay be paid to me for the period of time I was present at EG ACC from Jan 5, 1981 to the present time.

Summary of Proceedings

A hearing into the above grievances was convened commencing at 10:00 a.m. on Tuesday, May 3, 1983 in Conference Room F, 10808 - 99 Avenue (IBM Building), Edmonton, Alberta. It was agreed by counsel that this adjudicator was in all respects properly appointed and that it was right and proper that he serve the parties in these matters. Counsel further acknowledged that both grievances were in all respects rightly and properly before me and I was with authority and jurisdiction to hear and dispose of them.

Subsequent to adjournment, counsel for grievor Ernst, Ms. Catherine H. MacLean, advised the Secretary/Registrar of the Board, Mr. Gary E. Plant, that due to "mistake" she had incorrectly characterized the retroactive relief sought by grievor Ernst with respect to retroactive salary benefits requested in grievance #1 as reproduced above. She followed up this advice with a letter dated May 4, 1983. In consultation with this adjudicator, Mr. Plant forwarded a copy of that letter to employer's counsel Ms. Sheila Ray. Her response is dated May 19, 1983. Ms. MacLean responded further on June 1, 1983. Copies of the letters of May 4, May 19, and June 1, are attached to this interim decision.

The purpose of this interim decision is to first, dispose

of certain issues arising from grievances #1 and #2 and second, dispose of matters arising from the May 4, 1983 letter of counsel MacLean.

With respect to the former purpose, the central issues framed by both grievances #1 and #2 are as follows:

- 1) What benefits are available to grievor Ernst as of the date of the respective grievances and as embraced by the said grievances, and
- 2) Having determined the benefits available, what are the right and proper claims to the retroactive application of these benefits to grievor Ernst. Having regard to the totality of counsel's representations, it appears to me that, having determined benefits, they agree on their retroactive application commencing with his return to employment on March 5, 1982. However, their retroactive application prior to March 5, 1982 is very much in dispute. Accordingly, this interim decision shall dispose of the question of what benefits are available to Ernst and their retroactive application to March 5, 1982.

With respect to the latter purpose, counsel MacLean specified at hearing that the retroactive application requested for benefits available in grievance #1 extended to March 5, 1982 only. Her letter of May 4, 1983 speaks to this "mistake." The retroactive application requested for benefits available in grievance #2 extended to January 5, 1981. Accordingly, this interim decision will not address the retroactive application of any benefits available in grievances #1 or #2 prior to March 5, 1982. At page 21 of this interim decision I speak to the procedures to be followed in the face of this "mistake."

Following a careful review of the totality of these proceedings, I have elected to proceed on this basis in part because of the severability of the benefit availability issue from the retroactive entitlement issue, and in part because of the desire that the adjudication process proceed as expeditiously as possible and without unnecessary delays.

Central Arguments: Grievance #1

With respect to the rate of pay entitlement issue in grievance #1 and its retroactive application to March 5, 1982 counsel for grievor Ernst argued as follows:

1. At the time of his resignation on December 9, 1981 and by virtue of section 51 of The Public Service Staff Relations Act the terms and conditions of his employment were set out in the collective agreement titled "Agreement between the Treasury Board and the Canadian Air Traffic Control Association. Group: Air Traffic Control (all employees). January 1, 1979 - December 31, 1980. Code: 402/79." (Exhibit #2).
2. His salary as an AI-4 at the maximum increment was set out at page A-2 as \$36,876 per annum.
3. During the mid-February 1982 telephone call to unit chief Parker Currie, Ernst was orally offered employment and terms of employment. He was offered an AI-4 position at the maximum increment salary. This is what he enjoyed when he resigned. He was told that his benefits would be unaffected. Ernst's testimony on this point was not contradicted nor placed in doubt.

4. The grievor accepted that oral offer of employment and its terms. Documents filed by the employer in these proceedings supported conclusions that the employer moved to implement the oral offer (Exhibits #4, #5, #7, and #13) i.e. AI-4 appointment at the maximum increment and at a salary of \$36,876 per annum.

5. We then have the execution of the new collective agreement on May 28, 1982 with a term of January 1, 1981 to December 31, 1982. At page A-2 it provides for salary adjustments retroactive to January 5, 1981, June 29, 1981, and January 4, 1982. It also states that an AI-4 at the maximum increment shall receive, as of January 4, 1982, a salary of \$45,431 per annum. His salary was to go from \$36,876 per annum to \$45,431 per annum. This is the basis for grievance #1. They increased his salary to \$37,764 per annum only and this was wrong.

6. In the alternative, we argue that the employer is estopped from denying the salary requested in the light of the representations made to him by unit chief Parker Currie in a telephone conversation of mid-February, 1982. All the classical elements of the estoppel argument are present in this case.

With respect to the rate of pay entitlement issue in grievance #1 and its retroactive application to March 5, 1982 counsel for the employer argued as follows:

1. The so called offer of employment was limited to an offer of employment and at the then maximum increment. Parker Currie could not have offered the maximum in the new agreement as it had not been established at that time.

2. The offer was really little more than a job offer. The details were to be worked out by the personnel people in the department.

3. Grievance #1 deals with two matters. First, the rate of pay on appointment and second, the retroactive pay entitlement. Counsel for the grievor has addressed the former but not the latter. (Adjudicator's note: It was at this time that counsel for grievor Ernst stated that the only retroactive application sought in grievance #1 was to March 5, 1982, the date of his return to the job. She stated: "The grievor did not ask for retroactivity for the earlier period." Counsel Ray responded: "Okay." She further concluded and stated that with this clarification, retroactivity prior to March 5, 1982 was not an issue in grievance #1.) This position taken by counsel for grievor Ernst subsequently became the subject of her May 4, 1982 letter discussed above at page 3 supra and as further discussed below at page 21.

4. The rate of pay on appointment is governed by section 36 of The Public Service Employment Act. She read section 36. The employer proceeded in accordance with this section.

5. Further, section 64 of the Public Service Terms and Conditions of Employment Regulations provide that:

RATE OF PAY ON APPOINTMENT  
(TB 672696, 13 September 1967)

64. Subject to these Regulations and any other enactment of the Treasury Board, the rate of pay of a person appointed to Schedule A Service shall be the minimum rate of the scale of rates applicable to the position held by him.



It has been upheld that the employer does have the right to make an appointment at the minimum salary within a salary range. That is, although the grievor left at his maximum rate of pay, the employer can select a minimum salary rate of pay for the classification upon his reappointment.

6. A salary payment uprange is governed by Treasury Board minute No. 732895 and it was the authority used for the completion of the employment documents as illustrated by Exhibits #13 and #14 and it was the authority which the employer's people used with respect to grievor Ernst's appointment.

7. The employer could have hired the grievor back at the minimum salary for his range but with his record counsel alleged that the employer was prepared to take him back at the higher rate. In doing so the employer resorted to section 65 of the Public Service Terms and Conditions of Employment Regulations. It reads as follows:

RATE OF PAY ON PROMOTION OR TRANSFER

65. (1) For the purposes of this Part, the appointment of an employee, a person in the Public Service, a member of the Royal Canadian Mounted Police or of the regular forces or the active service forces to a position to which these Regulations apply, constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed exceeds the maximum rate of pay applicable to the position held by him on a substantive basis immediately prior to that appointment by

- (a) an amount equal to at least the lowest pay increment for the position to which he is appointed,

where that position has more than one rate of pay; or

- (b) an amount equal to at least four per cent of the maximum rate of pay for the position held by him immediately prior to that appointment, where the position to which he is appointed has only one rate of pay.

(2) An employee is demoted where, because of his incompetence or incapacity, he is appointed to a position to which these Regulations apply that has a lower maximum rate of pay than the maximum rate applicable to his former position.

(3) A person described in subsection (1) is transferred where his appointment to a position to which these Regulations apply does not constitute a promotion or demotion. (TB 748696, 29 March 1977)

8. The above regulations apply to Ernst because of his break in service. The employer selected the \$37,764 salary figure under the new agreement because of the words used in section 64 and 65 of the Regulations as reproduced above.

9. When a new agreement is signed the employer resorts to the regulations in applying the new pay rates. To do this the employer looked to sections 64 and 65 above and sections 3 and 4 of the "Retroactive Remuneration Regulations." According to these sections, the rate of pay to be selected is the nearest highest salary on the new salary scale. They have application because Ernst was appointed during the retroactive

period that started on January 4, 1982. Sections 3 and 4 of the "Retroactive Remuneration Regulations" read as follows:

Retroactive Upward Revision

3. The Governor in Council or the Treasury Board may approve a retroactive upward revision in remuneration with an effective date of July 1, 1963 or later, which, subject to these Regulations, shall apply to

(a) a person who

(i) is an employee on the date of the approval notwithstanding that, during the retroactive period, his employment in a department or agency in which he was an employee may have been terminated in order to allow him to accept employment in another department or agency or part thereof, or

(ii) ceased to be an employee during the retroactive period because of

(A) lay-off,

(B) retirement, or

(C) death; or

(b) the estate of a person referred to in paragraph (a).

4.(1) Where a retroactive upward revision in remuneration is approved pursuant to section 3, remuneration shall, subject to these Regulations, be paid to or in respect of a person referred to in paragraph 3(a), in an amount equal to that which would have been paid to or in respect of such

person had the revision been approved  
on the effective date.

Benefits Available and Retroactive Application to March 5, 1982:  
Grievance #1 - Conclusion

Grievor Ernst's claim to a benefit is stated as follows:  
"I submit that I am eligible to receive the AI-4 maximum increment  
of \$45,431..." (Exhibit #3). According to Exhibit #1 "Collective  
agreement between the Treasury Board and the Canadian Air Traffic  
Control Association. January 1, 1981 - December 31, 1982.  
Code: 402/82," a salary of \$45,431 per annum represents the eleventh  
step of AI-4 classification. It was established in evidence that the  
salary actually paid was \$37,764 per annum. This figure appears as  
the fifth step. The salary upon his return to employment on March 5,  
1982 was the same as when he left on December 9, 1981, i.e. \$36,876  
per annum. In the implementation of the new collective agreement  
subsequent to May 28, 1982 and as the salary of \$36,876 per annum  
is not a grid figure, the employer selected the step immediately  
above the \$36,876 per annum figure. The result was the fifth step  
at a salary of \$37,764 per annum. Essentially, Ernst's claim is that  
in implementing the salary increases set out in the new collective  
agreement, the employer did not proceed properly.

The evidence dealing with Ernst's resignation and his  
subsequent return to employment reads as follows: Prior to December,  
1981 Ernst became interested in the work and activities of the  
International Civil Aviation Organization. He learned of a job  
opening in Saudi, Arabia. He applied for the position. He also  
wrote to his unit chief, Mr. Parker Currie, requesting a one year

leave of absence without pay. This request was denied. He decided to resign and take up the position with ICAO in Saudi, Arabia. In Saudi, Arabia he was posted to Riyadh and worked a Terminal Control Unit. His ICAO contract was for a one year duration and terminable by either party with 30 days notice. His salary was approximately \$70,000 Canadian per annum. He was not happy with the Saudi position in part because of safety conditions. He was aware of postings at other centres and within Canada. He also called an associate in Edmonton requesting that he inquire into the availability of positions in Edmonton. His associate spoke to unit chief Currie. As a result of a further contact from his associate, Ernst called Currie and asked about a return to the Edmonton Area Control Centre and the terms under which it could be done. Currie advised him that if he returned before a three month separation period "...he would be entitled to return at his old salary with no loss of benefits." Ernst was pleased with this news as he felt it was too good to pass up. He subsequently discarded the other options available to him. He elected to accept the "offer." He believed that if he accepted the "offer" he could expect to get his old salary, get back his accumulated sick benefits, and be eligible for additional leave benefits. It appeared to him, with respect to salary or leave, he would return to where he was when he resigned. He commenced to prepare for his return within the three month period. He travelled to Edmonton on March 1, 1982. As he had voluntarily terminated his ICAO contract, he was required to personally finance his return to Edmonton. He started work on March 5, 1982 (Exhibit #5). It is dated March 22, 1982 and reads in part as follows:

This will confirm your appointment to an AI-4 position at the Edmonton Area Control Centre effective the 5th of March, 1982.

I wish to point out that your appointment will be subject to the usual probationary period commencing the effective date of your appointment and continuing until check-out.

Your salary will be in accordance with the Public Service Terms and Conditions of Employment.

Your attention is invited to the attached guidelines on "Conflict of Interest" which all Public Servants are required to observe. Please read these guidelines and complete and return the enclosed form to the Regional Staffing Officer, Transport Canada, Federal Public Building, 9820-107 Street, Edmonton, Alberta, T5K 1G3. Please be assured that any disclosure will be accorded the strictest confidence.

Should you have any questions regarding the appointment, please feel free to contact the undersigned.

His salary upon return was \$36,876 per annum (Exhibit #6). He continued to be paid at this rate. In mid-July and following the new contract signing, he received a pay cheque dated July 16, 1982 showing an annual salary of \$36,876 plus an upward adjustment for a total annual salary of \$45,431. This annual salary corresponds with

the AI-4 maximum increment under the new agreement. He subsequently learned that his employer believed the payment to be in error and it proceeded to recover the overpayment. As there was no \$36,876 per annum salary within the AI-4 salary scale in the new agreement, the employer selected the grid figure immediately above it, i.e. \$37,764 per annum. Subsequently, he received a copy of a memorandum as an explanation of why he was not entitled to receive the new AI-4 maximum salary of \$45,431 per annum (Exhibit #9). It reads in part as follows:

Copy of page from Pay Admin Manual attached which defines Continuous Service for pay purposes. Ernst had a break of more than one day so for pay purposes, when he came back it was an initial appointment above minimum.

The page that tells how to revise his pay is attached. We are following the pay admin. manual & I hope he doesn't waste anymore of our time trying to tell us how he wants his pay revised. His only solution would be to re-write the manual.

The "...page from the Pay Administration Manual..." referenced above was not identified nor placed before me.

In cross-examination it was established that he spoke to unit chief Currie some time in the middle of February, 1982. He claims that Currie told him that he would return "...at the maximum salary." His telephone conversation lasted from 5 to 10 minutes. He confirmed that there was a position available to him in Edmonton. Currie said that "...if I return before the three month period of absence I could return at my old salary AI-4 maximum increment without any loss of

benefits, i.e., sick leave credits and long service leave after 10 years." We discussed the three month expiry date and he recalled it as March 6, 1982. I asked Currie if he had a job for me and he said "...yes we do." After talking to Currie, Ernst concluded that there was a job waiting for him and the terms were as set out above. This transaction, i.e., job offer and terms, was not confirmed in writing. He received a pleasant reception upon his return to work and was made most welcome. Upon his return to Edmonton he was advised by telephone to start work on March 5, 1982. He completed an application form for employment and other documents on the date of his return.

When Ernst resigned effective December 9, 1981 he was, in my view, subject to and employed under the terms of a collective agreement titled "Agreement between the Treasury Board and the Canadian Air Traffic Control Association. Group: Air Traffic Control (all employees). January 1, 1979 - December 31, 1980. Code: 402/79." (Old agreement). His then salary of \$36,876 per annum was the eleventh step in the AI-4 classification. This agreement provides in articles 31.02 and 31.04 as follows:

31.02 This Agreement shall be in effect from January 1, 1979 until midnight December 31, 1980 and, in the event that any law passed by Parliament renders null and void any provision of this Agreement, the remaining provisions of the Agreement shall remain in effect for the term of the Agreement.

31.04 Notwithstanding the provision of the term of this Agreement under 31.02, this Agreement shall remain in effect during the negotiations for its renewal and until a new Agreement becomes effective.



It is my view that the terms of this collective agreement remained in effect until May 27, 1982 and were replaced on May 28, 1982 with the terms set out in a new collective agreement titled "Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association. January 1, 1981 - December 31, 1982. Code: 402/82. (New agreement). This agreement provides that the \$36,876 salary per annum set out in the former agreement is to increase to \$39,826 per annum effective January 5, 1981, \$41,301 per annum effective June 29, 1981, and \$45,431 per annum effective January 4, 1982. In my opinion, when Ernst returned on March 5, 1982 his terms of employment were those set out in the old collective agreement which, by virtue of article 31.04, continued in effect. The salary of \$36,876 per annum was not only the salary received when he left but also a salary provided by this collective agreement.

Article 32.02 of the new collective agreement reads as follows:

32.02 Unless otherwise expressly stipulated, this Agreement shall become effective on the date it is signed and, in the event that any law passed by Parliament renders null and void any provision of this Agreement, the remaining provisions of the Agreement shall remain in effect until December 31, 1982.

At page 59 of this Agreement we learn that it was executed in the City of Ottawa on the 28th day of the month of May, 1982. In addition, in this new Agreement there is a specific provision providing for changes in the rates agreed to under the old Agreement. At page A-1 following page 59 it reads as follows:

APPENDIX "A"

AIR TRAFFIC CONTROL

RATES OF PAY

OPERATING EMPLOYEES

- A - Effective January 5, 1981
- B - Effective June 29, 1981
- C - Effective January 4, 1982
- . . . . .

AI-4

From: \$	26504	27541	28579	29616	30653	31690	
	32727	33764	34801	35838	36876		
To:	A	28624	29744	30865	31985	33105	34225
		35345	36465	37585	38705	39826	
	B	29684	30846	32008	33170	34331	35493
		36654	37816	38977	40139	41301	
	C	32652	33931	35209	36487	37764	39042
		40319	41598	42875	44153	45431	

By virtue of the words used and the application of A-I Appendix "A" as cited above (new agreement), the salary of \$36,876 per annum as provided by the old agreement increased to \$39,826 per annum effective January 5, 1981, \$41,301 per annum effective June 29, 1981, and to \$45,431 per annum effective January 4, 1982. The old salary ceased to exist as a matter of agreement language effective May 28, 1982 and was done so retroactively. While the employer, in applying the new agreement to Ernst, was quite correct in believing it had to select a salary figure as provided by the AI-4 salary grid in the new agreement, it could not adopt the \$36,876 per annum figure as a starting point under the new agreement, as it did,

as this salary figure no longer existed by virtue of the specific words of the new agreement itself. It ceased to exist as of January 5, 1981 because of the retroactive construction used in the new collective agreement in "Appendix-A" as cited above. In the face of the words used in "Appendix-A," in order to determine the salary value under the new agreement of a salary value under the old agreement, which I believe the employer is obliged to do, it is necessary to "track it" from the old agreement to the date of the application of the new agreement. In this case, this date of application was sometime after May 28, 1982. It is my view that as of August 11, 1982 the grievor's salary was \$45,431 per annum, a salary provided by the new agreement since January 4, 1982 and rooted in the old agreement as a salary of \$36,876 per annum. It is my view that this salary was available to grievor Ernst at least since his return to employment effective March 5, 1982 and he is entitled to it. The question of retroactive salary benefits prior to this date is not the subject of this interim decision. The disposition of this issue is discussed below at page 21.

In reaching this conclusion I have studied at length the argument placed before me by counsel for the employer. I can find nothing in this argument nor its supporting documentation to suggest that the determination of the salary benefit should be decided on grounds other than those stated above. Succinctly stated, the new collective agreement speaks to the question of the upward salary adjustment flowing to persons employed pursuant to it and as of the date of the new collective agreement application. I can find nothing in the representations of counsel to suggest otherwise.

Central Arguments: Grievance #2

With respect to the Operational Facility Premium entitlement in grievance #2 and its retroactive application to January 1, 1981 counsel for the grievor argued:

1. Article 31 of the new collective agreement reads as follows:

ARTICLE 31

OPERATIONAL FACILITY PREMIUM

31.01 Effective January 1, 1981 in addition to all other entitlements he may be eligible to receive, each operating employee employed in an Area Control Centre, the Airspace Reservation Unit, 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).

Such premium shall not constitute a part of rates of pay for the purposes of this agreement and the Public Service Superannuation Act.

31.02 Operating employees employed in an ATC facility that comes into operation during the life of this agreement shall be paid an annual premium, as above, in the following amount according to the level at which

the operational controller is classified.

AI 01	\$300.00
AI 02	\$600.00
AI 03	\$1100.00
AI 04	\$1600.00

Such amount will be paid on an interim basis pending the assignment of that facility to Appendix B.

2. Grievor Ernst is entitled to this benefit as he was an employee on January 1, 1981 and an employee again when the collective agreement was executed.

3. The only restriction of when an employee will not be paid the premium is the 10 day requirement as set out in the article. This rule would apply in his case during the months of December, 1981 and January and February of 1982. In all other months since January 1, 1981 he was an employee and because of the article's retroactive nature he should be paid the premium for all months eligible since January 1, 1981.

With respect to the Operational Facility Premium entitlement in grievance #2 and its retroactive application to January 1, 1981 counsel for the employer argued:

1. The premium is not pay and the principles applicable to monetary remuneration and its retroactivity should not apply to this article. It is not the same as pay and its retroactivity application is not the same. The premium pay is a bonus. Grievor Ernst is entitled to it but only since March 5, 1982 and certainly not prior to that time.

Benefits Available and Retroactive Application to March 5, 1982:  
Grievance #2 - Conclusion

It is apparent to me from a review of the totality of proceedings that the singular issue in dispute in grievance #2 is the retroactive application of the Operational Facility Premium prior to March 5, 1982. However, such a conclusion is not all that clear on a review of the words used in the grievance itself. In any case, and having regard to an abundance of caution, it is my view that article 31 of the new collective agreement as cited above confers the Operational Facility Premium to grievor Ernst and has done so at least since March 5, 1982. I shall make no further retroactive entitlement determinations at this time. The subject of further retroactive entitlement determinations in this grievance is set out below.

Retroactive Application Prior to March 5, 1982: Grievances #1 and #2

Finally, I would like to respond to the written comments set out in the May 4th letter of counsel MacLean with respect to the retroactive application of claims set out with respect to grievance #1. I have noted at page 7 supra the time and context in these proceedings that this issue arose. Her position was quite clear. i.e. The grievor's claim in grievance #1 with respect to retroactive salary entitlement did not go past his return to employment on March 5, 1982. She characterizes the position taken at hearing as a "mistake." A review of the originating grievance clearly sets out a claim of retroactive salary entitlement back to January 1, 1981.

It is my view that the circumstances require that the actions of counsel MacLean be characterized as a mistake arising from an act

of inadvertence. It is my view that after a study of the correspondence attached hereto, consideration of the May 4, 1983 acknowledgement, and the nature of the proceedings that we are part of, it is appropriate that the substantive content of the originating grievance be preserved and in a way that does not prejudice either of the parties before me. Accordingly, and having regard to the content of this interim decision with respect to both grievances #1 and #2, a hearing will be convened to give both counsel an opportunity to enter evidence and argument respecting the retroactive application of both benefits prior to March 5, 1982. Counsel shall be contacted shortly to establish a suitable date, time, and place. In doing so, I urge that all parties prepare to convene at the very earliest opportunity.

Grievance #1 will be allowed to the extent noted above at page 18 supra. Grievor Ernst's current salary is \$45,431.00 per annum representing the eleventh increment of the AI-4 salary grid set out at page A-2 of a collective agreement titled "Collective agreement between the Treasury Board and the Canadian Air Traffic Control Association. January 1, 1981 - December 31, 1982. Code: 402/82." He is entitled to its retroactive application to March 5, 1982. It is so ordered.

Grievance #2 will be allowed to the extent noted above at page 21 supra. Grievor Ernst is entitled to the appropriate **Operational** Facility Premium as provided at page 57 and "Appendix B" at page **B-1** of a collective agreement titled "Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association. January 1, 1981 - December 31, 1982. Code: 402/82." He is entitled to its retroactive application to March 5, 1982. It is so ordered.

I retain jurisdiction with respect to the implementation of the orders noted above and with respect to the retroactive application of both benefits prior to March 5, 1982.

All of which is respectfully submitted.

For the Board,

C. Brian Williams,  
Board Member and Adjudicator.

EDMONTON, July 12, 1983.