File: 166-2-25920

No. 28

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

STANLEY A. MARTIN

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Louis M. Tenace, Vice-Chairperson

For the Grievor: Peter Barnacle, Counsel, Canadian Air Traffic Control Association

For the Employer: André Carneau, Counsel

Heard at Vancouver, British Columbia,
February 1-3, 1995.

The grievor, Stanley A. Martin, has been employed by Transport Canada in its Air Navigation System since 1970. Since 1974, he has been an Air Traffic Controller (AI-2) at Abbotsford, British Columbia. On May 12, 1993, without any apparent warning, he was overcome by severe anxiety and depression and he has not returned to work since that date. At the time, the grievor had more than one hundred days of unused sick leave. On July 11, 1993, the employer placed the grievor on what is referred to as Maintenance of Salary (MOS) pursuant to Letter of Understanding 3-91 (LOU 3-91) of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (CATCA), Code 402/91. Briefly, this provision allows for a controller who has performed active control duties for five years and who is removed from such control duties for medical reasons to continue to receive normal pay for a minimum period of one year.

The issue in this case centers around the date on which the employer placed the grievor on MOS. The employer alleges that it should be triggered sixty days following the first day that the grievor ceased to exercise active control duties; in this case, the employer placed the grievor on MOS effective July 11, 1993. The grievor alleges that the MOS provision should not have been triggered until the medical endorsement of his air traffic control licence was revoked; that date was November 1, 1993.

During the course of the grievance procedure, the employer had objected to the grievance on the basis that it was untimely. Counsel for the employer waived that objection at the start of this hearing.

Counsel for the grievor noted that the decision in this case would depend to a large extent on the meaning of the word "affected" in the last paragraph of LOU 3-91. In his submission, the word is used ambiguously. Consequently, he sought to use extrinsic evidence as an aid to interpretation. Counsel for the employer submitted that the meaning of the word "affected" in the context of LOU 3-91 was clear and that the provision should be interpreted without recourse to extrinsic evidence. I informed the parties that I would permit the introduction of extrinsic evidence subject to a later determination of what weight, if any, I would accord it.

SUMMARY OF THE EVIDENCE

Apart from the grievor, several witnesses testified on his behalf. These included: Fazal Bhimji, Vice President of Labour Relations (CATCA); Dean McDonald, Pacific Regional Director (CATCA); Carl Fisher, former President (CATCA); Judy Rach, employee (Transport Canada).

Witnesses testifying on behalf of the employer were: Dr. Kenneth Douglas Boyd, Regional Aviation Medical Officer (RAMO); Dick Schumacher, Negotiator, Treasury Board; Anne Campbell, Superintendent of Training and Human Resource Development, Pacific Region, Transport Canada.

The grievor testified that after he became ill and was absent from work, on several occasions he had spoken to his supervisors and other officials in Transport Canada about his absence and, on each occasion, he was simply told to "get better" and "not to worry" about anything as all was being looked after. This testimony was not disputed.

Fazal Bhimji explained the licensing system for air traffic controllers. Briefly, it consists of two aspects: one relates to the licence and is concerned with the qualifications required for the job; also, it is endorsed for a specific place (site specific). The second aspect deals with a medical endorsement which relates to the validation process (see Licence Validation Certificate - exhibit G-6). This certificate validates the air traffic controller's licence to the date shown thereon and also specifies any limitations or conditions that are attached to that particular licence. Licences are renewed annually for category 2 controllers (such as the grievor). After a certain age, more frequent renewals are required. The licence is renewed by a separate licensing branch of Transport Canada following a recommendation made by the RAMO.

Mr. Bhimji testified that LOU 3-91 is meant to deal with a situation where a controller, for medical reasons, is unable to perform his or her duties. It is intended to protect salary for a minimum of one year. According to Mr. Bhimji, it would commence at the point the Licence Validation Certificate (LVC) is revoked or after the controller has run out of sick leave. He gave examples of several instances in the past where the MOS

commenced only after the LVC was revoked or the employee's sick leave had run out. In most cases, however, it results from a revocation of the LVC.

During cross examination, the witness testified that not all medical reasons affected a controller's LVC. For example, a broken leg or other injury might have no impact on an LVC.

Dean McDonald was on the CATCA negotiating team during the 1989 negotiations involving LOU 3-91. He explained that the issue came to the bargaining table as an employer proposal resulting from a decision of the Federal Court of Appeal (Federal Court of Appeal, File No. A-1228-87, unreported) which set aside the original adjudication decision of the then Vice-Chairman, J. Maurice Cantin, in Summers (Board File 166-2-17146). The issue in that case was whether a controller was entitled to MOS for a minimum of one year, on a cumulative basis throughout his or her entire career for up to one year in total, or whether the entitlement renewed itself for a minimum of one year on each occasion there was a loss of licence. CATCA's position was the latter. Because CATCA's position was ultimately upheld, the employer had served notice on CATCA that this was a high priority item and that the language would have to be changed. According to Mr. McDonald, it was one of the last issues settled during that round of bargaining.

Mr. McDonald also provided several examples of MOS situations where the employer consistently interpreted LOU 3-91 in accordance with the interpretation being put forth by the grievor. Mention was made of a few instances where the employer had not originally done so but quickly rectified the situation as soon as it was brought to the attention of management.

Judy Rach has been employed by Transport Canada for the last sixteen years. She is classified at the CR-4 level and her function includes the recording and processing of leave and other related matters. She testified that management's original decision was to leave the grievor on sick leave because his licence had not been affected. On September 3, 1993, she sent a note to Al Tully, Superintendent of Training and Human Resource Development at that time, asking whether the grievor should be put on MOS (exhibit G-4). Following an exchange of telephone calls with the regional office by

Mr. Tully and Bert Bourke, the Tower Chief, it was ultimately decided to place the grievor on MOS sixty calendar days from the date his absence from duty began and a letter to this effect was sent to him (exhibit G-7). This meant that the action would have to be backdated to July 10, 1994 and that the employer would institute recovery action for an Operational Facility Premium paid to the grievor for a portion of this period after July 10, 1994.

During cross examination, Judy Rach acknowledged that she has never been clear on how the MOS worked. Sometimes, employees were placed on MOS immediately and at other times they were not.

Carl Fisher was CATCA's Chief Negotiator for the 1989 round of collective bargaining. He confirmed that LOU 3-91 became an item of discussion because the employer had lost the application for judicial review of Summers (supra) to the Federal Court of Appeal and was now seeking to delete or amend the provision. He testified that LOU 3-91 had been in the preceding collective agreement as LOU 3-85 and that the provision had been in previous collective agreements for the last fifteen or twenty years. In his experience, there had never been any real problem with the interpretation of the provision. The employer had always interpreted it in a manner consistent with the position put forward by CATCA. The Board's decision in Summers (supra) and that of the Federal Court of Appeal concerned the issue of whether MOS was cumulative and not when it came into effect. That had never been a problem before.

Mr. Fisher testified that LOU 3-91 modified its predecessor (LOU 3-85) by the addition of the last two paragraphs and the words "subject to paragraph 4" at the start of the second sentence of the second paragraph. According to him, Louis Desmarais, Chief of Air Space and Procedures, was the Chief Spokesperson for the employer on this issue and he seemed to be in full agreement with CATCA's position that sick leave would be used before MOS was applied, except where the LVC was affected.

Mr. Fisher also provided examples of situations where the employer interpreted LOU 3-91 in a manner consistent with the CATCA position. In particular, he referred to the situation of two Winnipeg controllers (Sanders in June 1994 and Dicksen in

September 1994) who first went on sick leave and later had their LVC's revoked. In both cases, they were placed on MOS without any backdating.

During cross examination, Mr. Fisher testified that he did not question an interpretation document put out by management on April 13, 1989 (exhibit E-1) because his understanding of the matter had been clear and, until the instant grievance, there had never been a problem with it.

Dr. Kenneth Douglas Boyd is employed in Civil Aviation Medicine, Health and Welfare Canada, Pacific Region. He is the Regional Aviation Medical Officer (RAMO). Dr. Boyd explained that his role is to advise the appropriate licensing branch of Transport Canada whether an employee meets or does not meet the standard. Effectively, he makes a recommendation to the licensing branch which is free to accept or reject it. In the case of the grievor, he wrote to the grievor's physician, Arthur Phillip-Stewart, on September 20, 1993, seeking information. He received a reply dated September 30, 1993. Dr. Boyd decided to wait for another report that he knew was being prepared by a specialist. Dr. Boyd testified that he was also aware that the grievor's licence was about to expire. He received that report which was dated November 8, 1993 and it confirmed that the grievor had been unfit since May 12, 1993.

Dick Schumacher is a negotiator for the Treasury Board. He has been the Chief Spokesperson on the employer's side for the last two rounds of negotiations with CATCA. He confirmed that the employer's negotiating position was to delete LOU 3-91 because of the adverse decision of the Federal Court of Appeal in Summers (supra). He testified that the addition of paragraph three of LOU 3-91 provided the relief sought by the employer, while paragraph four, together with the addition of the words "subject to paragraph 4" being added as an introduction to the second sentence of paragraph two provided some relief to CATCA. Mr. Schumacher referred to notes he had made on two documents during the discussion of LOU 3-91 (see exhibits E-5 and E-6). Counsel for the grievor objected to the introduction of these documents as exhibits on the basis that they only represented part of the documents and that all the notes would have to be tendered for examination as an exhibit if the employer wished to make use of them. After examining the documents in question, I agreed to permit their introduction as exhibits.

I considered these notes made on the documents by Mr. Schumacher as representing his version of what was said and not, in any sense, an official record or transcript of decisions taken. No useful purpose would be served by excluding them.

It was Mr. Schumacher's testimony that he did not recall Mr. Desmarais ever stating that a controller's sick leave would be used before MOS kicked in, except where the LVC was affected. In this, his testimony differed from that of Carl Fisher, his negotiating counterpart. In fact, Mr. Schumacher's recollection was that he could not recall any of that discussion having taken place.

During cross examination, Mr. Schumacher acknowledged that for this part of the negotiations, Mr. Desmarais was acting as the employer spokesperson and that he was the person with expertise in the area in question.

Ann Campbell has been the Superintendent of Training and Human Resource Development, Pacific Region, since February of 1992. She testified that she was concerned about the application of LOU 3-91 after she received information from the Abbotsford Tower in September of 1993 concerning the grievor. She was concerned about whether the grievor should be on MOS because, as of that moment, his licence had not been revoked. In her mind, the use of the word "affected" in paragraph four of LOU 3-91 was not synonymous with "revoked". The grievor's licence was affected because he did not renew it. The licence was not revoked.

During cross examination, she disagreed with counsel for the employer who suggested to her that MOS is triggered at the moment a licence is affected and the action cannot be backdated.

ARGUMENT

Counsel for the grievor submitted that pursuant to the Aeronautics Act, the Minister has the authority "to suspend, cancel or refuse to renew a Canadian aviation document on medical grounds".

The Aeronautics Act also refers to a "holder of a Canadian aviation document ... who is affected by a decision of the Minister referred to in subsection (1)" (my emphasis). Thus, the meaning of the word "affected" in paragraph four of LOU 3-91 must be that the decision of the Licensing Branch of Transport Canada can only be to suspend, cancel or renew an air traffic controller's licence and nothing else. In Counsel's submission, the word "affected" must have a prospective application and not a retroactive one. Benefits are not applied retroactively unless there is an express provision in the collective agreement to do so. It was further submitted by Counsel for the grievor that the use of the word "compromis" which means "compromised", in the French-language version of the collective agreement, is consistent with the interpretation being put forward by the grievor.

In terms of using extrinsic evidence pertaining to the negotiating history surrounding LOU 3-91, it was submitted by Counsel for the grievor that the issue here in dispute revolves around a patent ambiguity about the meaning of the word "affected" as used in paragraph four of LOU 3-91. In this regard, Counsel referred me to the text Canadian Labour Arbitration, Third Edition, Brown and Beatty, Chapter 3:4400 and Yates and Tudge (Board Files 166-2-14300 and 14398) as legal authority to permit the use of extrinsic evidence as an aid to interpretation of the collective agreement. As a consequence of the extrinsic evidence adduced, Counsel for the grievor submitted that the meaning of the word "affected" in paragraph four of LOU 3-91 was clearly established as referring to a situation where the controller's LVC was lost or revoked. This is consistent with the positions taken by the parties at the bargaining table: the employer wished to eliminate the LOU in its entirety; CATCA wished to permit the use of sick leave in all cases until MOS was triggered, regardless of the status of the LVC. The employer ultimately agreed to a limited use of sick leave beyond sixty days as long as the controller's licence was not "affected". Thus, CATCA had achieved an extension of the sixty-day period of sick leave use until some date in the future when the controller's LVC was "affected".

Counsel for the grievor submitted that the testimony of witnesses on behalf of the grievor established that there had never been any real problem with this issue until the instant grievance. The employer had always applied the LOU in a manner consistent with

the position being put forward by CATCA. The only conclusion is that CATCA's position was the common intention of the parties. The employer should not be permitted to claw back something it gave away at the bargaining table. The employer should not be permitted to go merrily along for some four or five months and then take back retroactively monies it has paid out. CATCA gave up a huge benefit in agreeing to the cumulative application of MOS. It only did so because of the guarantee of being able to make more use of a controller's accumulated sick leave. The employer wants to have it both ways.

Counsel for the grievor requested, if I find in favour of the grievor, that I remain seized in the event that the parties are unable to agree on compensation.

Counsel for the employer submitted that the evidence established that there was no question that the grievor's medical condition was one which had a bearing on the endorsement of his LVC. Because of this, the employer took the position that paragraph four of LOU 3-91 had no application and that one had to turn to paragraph two which prescribed using the earlier of two possible dates. This is precisely what the employer did. The employer agreed that the delay in obtaining the RAMO's recommendation was not attributable to the grievor but that was not the issue. The grievor was not penalized in any way. If anything, the grievor's LVC could have been revoked at an earlier date. Counsel for the employer submitted that the issue to be determined is whether the wording of LOU 3-91 agrees with the employer's actions vis-à-vis the grievor. In this connection, the burden of proof fell upon the grievor. In Counsel's view, that burden has not been met.

Counsel for the employer submitted that the accepted rules of construction of the terms of a collective agreement require the arbitrator to discover the intention of the parties who made the agreement. In so doing, the fundamental assumption must be that the parties meant exactly what they said and that the words used must be given their ordinary meaning. Only if the words lead to some absurdity or inconsistency when viewed in the context of the entire collective agreement should the arbitrator be prepared to consider extrinsic evidence as an aid to interpretation. In the instant grievance, the common ordinary meaning of words of LOU 3-91 is as follows: if the employee's medical

condition is one that would not have an impact on the medical endorsement of a controller's LVC and if the controller has sufficient sick leave credits to cover the period of absence, then paragraph four applies; if the medical condition does have an effect on the controller's LVC, then paragraph two applies. In terms of the French-language version of the collective agreement, it was submitted that the use of the term "compromis" in paragraph four of LOU 3-91 has the same meaning as the term "affected".

As for the negotiating history, Counsel for the employer submitted that there was a basic disagreement between the evidence of Messrs Fisher and Schumacher about the meaning of the word "affected". In terms of "past practice", it was submitted by Counsel for the employer that no such case has been made out. The few examples submitted on behalf of the grievor are not sufficient to establish a practice on the part of the employer.

In support of his submission, Counsel for the employer referred me to the following:

Canadian Labour Arbitration, Third Edition, Brown and Beatty, Chapter 4:2100 and 3:4420;

Legare, Board File 166-2-15018;

Legare v. Canada (Treasury Board), (1983), 76 N.R. 353, 87 C.L.L.C. 14, 028 (F.C.A.);

Sittig, Board File 166-2-24117.

In reply, Counsel for the grievor submitted that the employer's counsel is trying to equate the word "affected" with "having some bearing on". Such a definition leads nowhere and does nothing to assist in the determining of its meaning. At some point, it becomes necessary to determine exactly what the word "affected" means in terms of its application to the instant grievance. The interpretation sought by the grievor is consistent with the use of that same term in the Aeronautics Act. The relevant date has to be when the controller is notified of the fact that the LVC is lost or not renewed or at the moment that the LVC is lost or not renewed.

REASONS FOR DECISION

Before addressing the issue of whether or not extrinsic evidence is required for me to discover the intention of the parties in crafting and agreeing to LOU 3-91, I shall first attempt to "parse" that document to determine whether, in my opinion, the language is clear or ambiguous. In so doing, I am guided by the maxims of construction set out in Canadian Labour Arbitration (supra), at Chapter 4:2000 and excerpted below:

> 1. *Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.*
>
> 2. *In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense.*
>
> 3. *Furthermore, where there are French and English versions the interpretation to be sought is one which is coherent in both texts.*
>
> 4. *It has been stated, however, that where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement, notwithstanding that the result may be unfair or oppressive, or that they were deliberately vague to permit continuing consensual adjustments.*
>
> 5. *The context in which words are found is also a primary source of their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole.*
>
> 6. *As another general guide to interpretation, it is accepted that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning, and that they were not intended to conflict. However, if the only permissible construction leads to that result, the resolution of the resulting conflict may be made by applying the following presumptions or principles of interpretation:*

a) special or specific provisions will prevail over general provisions;

b) where a definition conflicts with an operative provision, the operative provision prevails;

c) where an incorporated document conflicts with an incorporating document, the conflicting provision of the incorporated document will not be incorporated by reference;

d) in the case of conflict between an earlier and a later clause, "that part of the contract which is written first overrides that which is written later, and it is only otherwise when the later clause clearly spells out the overriding effect intended".

For ease of reference, LOU 3-91 is reproduced below in its entirety in both the English and French versions:

LETTER OF UNDERSTANDING (3-91)

Dear Mr. Fisher:

This is to confirm an understanding reached during the current negotiations in respect of removal from active control duties for medical reasons.

Provided a controller has performed active control duties for the Employer for a period of five (5) years and is no longer able to perform active control duties due to medical reasons, it was agreed that the individual involved would suffer no loss of his or her normal pay for a minimum of one (1) year. Subject to paragraph 4 this one (1) year period will commence on the date on which the medical endorsement of his or her air traffic controller licence is revoked or sixty (60) days following the first day that the employee ceased to exercise active control duties as a result of being on sick leave, whichever is earlier. This maintenance of salary would be conditional upon the employee first performing other duties related to his or her technical background and/or experience as assigned by the Employer for which the employee is medically qualified. If the employee is unable to perform such duties because of medical reasons or if no alternate duties are available then he or she must utilize all earned leave credits during the maintenance of salary period referred to above.

The total maintenance of salary provided under this letter shall not exceed one (1) year during an employee's total period of employment in the Public Service unless, through consultation on individual cases, the parties agree to an extension of salary maintenance.

An employee will not be placed on maintenance of salary if the employee has sufficient sick leave credits to cover the period of his absence and the employee's LVC is not affected.

Yours sincerely,

R. Schumacher,
Negotiator,
Staff Relations Division.

Received and accepted this 30th day of August, 1991 by

A.C. Fisher,
Chief Negotiator,
Canadian Air Traffic
Control Association.

LETTRE D'ENTENTE (3-91)

Monsieur,

La présente confirme l'accord conclu pendant les négociations en cours au sujet de la cessation des fonctions de contrôle pour des raisons médicales.

Il a été convenu que le contrôleur qui a rempli des fonctions de contrôle, pour l'employeur, pendant une période de cinq (5) ans et qui n'en est plus capable pour des raisons médicales continuera de toucher son traitement normal pendant une période minimale d'un (1) an. Sous réserve du paragraphe 4, cette période d'un (1) an commencera à la date de l'annulation de l'autorisation médicale de sa licence de contrôleur de la circulation aérienne ou soixante (60) jours suivant le premier jour où l'employé a cessé de remplir des fonctions de contrôle du fait d'être en congé de maladie, selon la première de ces deux éventualités. Ce maintien du traitement serait subordonné à ce que l'employé remplisse d'abord d'autres fonctions reliées à ses connaissances techniques ou à son expérience, que lui confie l'employeur et pour lesquelles il est médicalement apte. Si l'employé est incapable de remplir ces fonctions pour des raisons médicales

ou s'il n'existe pas d'autres fonctions de remplacement, il doit alors utiliser tous ses crédits de congé acquis pendant la période de maintien du traitement dont il est question ci-dessus.

La période totale de maintien du traitement prévue dans la présente lettre est d'un an pour la totalité de la période d'emploi dans la fonction publique sauf si, à la suite de consultations au sujet de cas particuliers, les parties s'entendent sur une prolongation de cette période.

L'employé ne bénéficiera pas du maintien du traitement s'il possède suffisamment de crédits de congé de maladie pour couvrir sa période d'absence et si son certificat de validation n'est pas compromis.

Je vous prie d'agréer, Monsieur, l'expression de ma considération distinguée.

Négociateur,
Division des relations de travail

R. Schumacher

Reçue et acceptée ce 30e jour d'août 1991, par

A.C. Fisher
Négociateur en chef
Association canadienne du contrôle du trafic aérien

Both Counsel have agreed that the outcome of this grievance will turn on the interpretation to be given to the words "affected" and "compromis" as they are used in the fourth paragraph of LOU 3-91.

The sole purpose of LOU 3-91 is to set out the conditions under which a controller who is removed from active control duties for medical reasons will be placed on MOS.

It is noted that if one reads the second sentence of paragraph two without the words "subject to paragraph 4", the meaning is as follows: the one-year period of MOS

will begin on the earlier of the date on which the controller's licence was revoked or sixty days after the first day that the controller ceased to perform active control duties as a result of being on sick leave. By making these conditions subject to paragraph four, one has to assume that the parties to the agreement intended to modify the conditions by whatever was included in paragraph four.

Paragraph four sets out two conditions under which an employee will not be placed on MOS: these are if the controller has sufficient leave credits to cover the period of his absence and if the controller's LVC is not affected. If the controller meets both these conditions, the controller will not be placed on MOS. Thus, the controller will use up sick credits to the extent that he or she has any, until such time as the controller's LVC is affected.

The parties have made reference in paragraph two to the "medical endorsement" of the controller's licence being "revoked". In paragraph four, they have referred to "the employee's LVC" not being "affected". If one refers to the grievor's LVC (exhibit G-6), one can readily see that the grievor's medical endorsement was validated up to November 1, 1993.

Pursuant to the Aeronautics Act, the LVC may be "affected" in a number of ways, as the following excerpts from the Aeronautics Act will illustrate:

> *7.1 (1) Where the Minister decides*
>
> *(a) to suspend, cancel or refuse to renew a Canadian aviation document on medical grounds,*
>
> *(b) to suspend or cancel a Canadian aviation document on the grounds that the holder of the document is incompetent or the holder or any aircraft, airport or other facility in respect of which the document was issued ceases to have the qualifications necessary for the issuance of the document or to meet or comply with the conditions subject to which the document was issued, or*

> *(c) to suspend or cancel a Canadian aviation document because the Minister is of the opinion that the public interest and, in particular, the record in relation to aviation of the holder of the Canadian aviation document or of any principal of the holder, as defined in regulations made under subsection 6.71(2), warrant it,*
>
> *the Minister shall, by personal service or by registered mail sent to the holder or to the owner or operator of the aircraft, airport or facility, as the case may be, at the latest known address of the holder, owner or operator, notify the holder, owner or operator of the Minister's decision.*
>
> *(2) ...*
>
> *(3) Where the holder of a Canadian aviation document or the owner or operator of any aircraft, airport or other facility in respect of which a Canadian aviation document is issued who is affected* (my emphasis) *by a decision of the Minister referred to in subsection (1) wishes to have the decision reviewed, he shall, on or before the date that is thirty days after the notice is served on him or sent to him under that subsection or within such further time as the Tribunal, on application by the holder, owner or operator, may allow, in writing file with the Tribunal at the address set out in the notice a request for a review of the decision.*

As can be readily seen, the Aeronautics Act refers to an aviation document being "affected" by a decision of the Minister "to suspend, cancel or renew". In my opinion, the use of the word "affected" in paragraph four of LOU 3-91 is entirely consistent with the meaning of the word "affected" in the Aeronautics Act. I find no ambiguity in LOU 3-91 English or French version. Even if I had found that the language of LOU 3-91 contained a latent ambiguity, I am satisfied that the testimony of the two Chief Spokespersons, Messrs. Fisher and Schumacher, does not provide much assistance in that I am unable to prefer the testimony of one over the other. Both testified in a direct and candid manner about their recollection of events. In terms of the "past practice", I do not believe that the examples referred to by the various witnesses are sufficient to constitute a "past practice" on the part of the employer. In any event, the mere existence of a "past practice", even if one existed, is not sufficient to preclude the employer from altering it, particularly if the employer believes that it is not supported by the language of the

collective agreement. Depending upon how this is done and the circumstances surrounding it, the employer might be "estopped" from taking such action, but that was not raised as an issue in this case. Furthermore, in this case, LOU 3-91 differed from its predecessor by the addition of certain key words as well as two new paragraphs, one of which formed the very basis for the instant grievance.

It is my opinion that the grievor's LVC was not affected until November 1, 1993. Up to that point, he was entitled to use his sick leave credits to cover his absence.

For all of the reasons outlined above, the grievance is allowed. In accordance with a request made by Counsel for the grievor, I shall remain seized of this grievance in the event the parties are unable to agree on the issue of compensation.

Louis M. Tenace,
Vice-Chairperson

OTTAWA, March 10, 1995.