IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(The Employer)

and

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION, CAW-CANADA LOCAL 5454

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF KRIS MacLEOD – ARTICLE 16.03(b)

ARBITRATOR:	Kenneth P. Swan
APPEARANCES:	
For the Employer:	Jacques Emond, Counsel George Donovan, Associate General Counsel, NAV Canada Steve Cooper, Manager, Labour Relations
For the Union:	Abe Rosner, National Representative Rob Allan, Vice-President, Atlantic Region

AWARD

A hearing in this matter was held in Ottawa, Ontario on March 23, 2010. At the outset of the hearing, the parties were agreed that the arbitrator had been properly appointed pursuant to the collective agreement, and that I had jurisdiction to hear and determine the matter at issue between them.

The present dispute arises from grievance 2009-035, filed on July 28, 2009 on behalf of Mr. Kris MacLeod. The essence of the dispute is set out in a joint statement of fact provided by the parties:

JOINT STATEMENT OF FACT
Re: Grievance of Kris MacLeod (File 2009-035)

1. The grievor, employed at the material times as an operating Air Traffic Controller at Gander Area Control Centre, was required to travel to Cornwall (which is located outside the grievor's headquarters area) to undergo training as a Data Systems Coordinator. His travel days were March 17 (outbound) and April 4 (return), 2009, and the training period was March 18 to April 3 inclusive.

2. The grievor's "17/11 shift cycle" (his regularly recurring sequence of days of work and days of rest) was that set out at Art. 16.02(a)(ii)(1) of the collective agreement, namely: six (6) days on, four (4) days off; six (6) days on, four (4) days off; five (5) days on, three (3) days off. One such cycle ran from February 24 to March 23 inclusive, and the following one ran from March 24 to April 20 inclusive. [See attached table.]

3. The employer invoked its right under Art. 16.03(b) to amend the grievor's above described shift cycle for the duration of his training period.

4. The grievor's regularly scheduled rest days falling on March 23, 30, and 31, and April 1 and 2, were converted into working days at Cornwall. His originally scheduled work days of March 28 and 29 were converted into rest days at Cornwall. Following his return to Gander, his originally scheduled work days of April 6, 7, and 8 were also converted into rest days.

5. The employer advised the union that the original rest day of March 23 was "reimbursed", within the meaning of Art. 16.03(a)(iii), via the

conversion of March 28 from a day of work to a day of rest, and likewise, that the original rest day of March 30 was reimbursed via the conversion of March 29 from a day of work to a day of rest.

The union submits that the employer's actions as described in paragraph 5 above did not satisfy the conditions for reimbursement of converted rest days. There is no dispute with respect to the other three converted rest days.

[The table referred to in paragraph 2 is omitted.]

For the purposes of this arbitration, the following provisions of the collective agreement are relevant:

ARTICLE 16

HOURS OF WORK

Operating Employees

16.01 **Hours of Work**

(a) Thirty-six (36) hours per week, averaged over a fifty-six (56) day period, shall constitute the workweek.

(b) The hours referred to in (a) above, are inclusive of a mandatory fifteen (15) minute briefing period in which the employee shall prepare himself or herself to assume his or her duties prior to the commencement of each shift.

16.02 **Shift Cycle**

Shift cycles for operating employees shall be as follows:

(a) The "17/11 shift cycle" for operational controllers shall conform to the following:

.....

(iii) days of rest shall be consecutive and not less than three (3);

.....

16.03 **Changes to an Employee's Shift Cycle**

(a) Where an employee is required to attend a training program inside of his or her headquarters area, NAV CANADA may amend the shift cycle applicable to an employee for the purpose of providing training to employees, provided that;

(i) such amendments shall not be made without at least fifteen (15) calendar days' notice to the employee affected and,

(ii) in any vacation year as defined in 27.07(a) not more than five (5) of each employee's days of rest may be converted to working days, and,

(iii) each day of rest converted to a working day in accordance with paragraph (ii) above shall be rescheduled as a day of rest to be contiguous to a period of days of rest. This reimbursement must be completed within sixty (60) days of the date the converted day of rest would have occurred had the shift cycle not been amended, and,

(iv) the employee shall be compensated for converted days of rest not scheduled in accordance with this Article or not rescheduled in accordance with paragraph (iii) at the overtime rate.

(b) Where an employee is required to attend a training program outside of his or her headquarters area, for a period of less than thirty (30) consecutive calendar days, NAV CANADA may amend the shift cycle applicable to the employee for the duration of the training period. No overtime shall be payable for such a change in shift cycle, except that overtime compensation shall be payable for all hours worked in excess of those stipulated under clause 16.01 as a result of the change. The days of rest converted to working days under this clause shall be in addition to the five (5) days specified in clause 16.03(a)(ii). For the purpose of this clause, meal and relief breaks are exclusive of the hours stipulated in Clause 16.01.

.....

This arbitration arises tangentially from the award of the present arbitrator in *Re NAV CANADA and Canadian Air Traffic Control Association, CAW-Canada, Local 5454, Dave Kelly et al.,* March 20, 2007 (Swan). In that case, the Union had argued that paragraph 16.03(b), relating to training outside of the headquarters area, provided only that the Employer could amend the shift cycle for the duration of the training period, and therefore there was no authority for converting working days to days of rest outside the training period. Although such conversion was specifically authorized in paragraph 16.03(a) for training inside the headquarters area, the Union argued that the absence of similar language in paragraph (b) meant that changes to the schedule either before or after the training period to "reimburse" rest days converted to working days during the training period was not permitted.

The conclusion reached in that award was as follows:

> While this is complex language, in my view the answer is relatively simple. The cases referred to by the Union, being based on the collective agreement language as it stood before the amendments made by the parties specifically to deal with the issue of amending shift schedules to accommodate training, can no longer be relied on as determinative of the issues. It is necessary to determine the nature of the bargain struck by the parties on this issue on the language which they have chosen to express it.
>
> In my view, the correct approach to clause 16.03 is to read paragraph (a) and (b) together, and not as separate watertight units as the Union's argument would require. It is clear that paragraph (b) requires parts of paragraph (a) to operate effectively, particularly subparagraph (i). There is implicit recognition that subparagraph (ii) has been considered in paragraph (b), since it is specified that the five day limitation in the former provision is not applicable in the latter. If those provisions of paragraph (a) apply in the operation of paragraph (b), there seems to be no reason why paragraph (iii) and (iv) should not apply also. If they do, the Employer would be required to convert working days to days of rest on a day-for-day basis to balance out days of rest converted to working days for the purposes of training, or pay overtime compensation. Certainly, there is nothing in the language that prohibits the Employer from making such conversions, whether inside or outside the training period, or not

making them and paying overtime compensation, at its discretion in order to meet its other operational needs.

Here, the Union does not dispute the conversion of days outside the training period, which is permitted by the *Kelly* award, but rather disputes the propriety of crediting the Employer with the two reimbursements described in paragraph 5 of the Joint Statement of Facts, which occurred entirely within the training period. It advances one argument in relation to both of the reimbursements, and an additional argument for the second.

The argument in common is that subparagraph 16.03(a)(iii) requires that a rescheduled day of rest must be "contiguous to a period of days of rest", and that subparagraph 16.02(a)(iii) requires that any such period of days of rest must be consecutive and not less than three. Thus, the Union argues, the Employer cannot use the rescheduled weekend days during the training period as reimbursement rest days because they are not contiguous to a period of days of rest, since such periods must be at least three consecutive days long.

The argument relating to the reimbursement of March 30 by rescheduling March 29 as a day of rest is based on the requirement that the reimbursement must take place "within sixty (60) days of the date the converted day of rest would have occurred had the shift cycle not been amended". While this language would not seem to be conclusive in prohibiting the anticipatory reimbursement of a day of rest, the French version, which by virtue of clause 40.01 has equal force and effect with the English version, reads: "dans les soixante (60) jours qui suivent la date...". Reading both versions together, the Union argues, clearly indicates that the reimbursement

contemplated by subparagraph 16.02(a)(iii) must happen after the conversion of a day of rest to a working day, and not before.

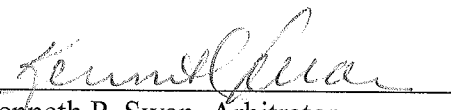
The union therefore argues that the reimbursements described in paragraph 5 of the Joint Statement of Fact do not meet the requirements of subparagraph 16.03(a)(iii), and that the grievor is entitled to compensation in the nature of overtime payments for those two rest days on which he worked during the training period.

The problem with the Union's argument is that, while I have found in the *Kelly* decision that paragraphs 16.03(a) and (b) must be read together, in the sense that paragraph (a) helps to explain the application of paragraph (b), both must be given their full meaning. Paragraph (b) clearly states that the employer "may amend the shift cycle... for the duration of the training period", and then provides that "[n]o overtime shall be payable for such a change in shift cycle", subject to an exception not applicable here. Reading those sentences with paragraph (a) does not render them void; the overriding rule is that for changes during the training period, no overtime is payable, whether they conform to the restrictions in paragraph (a) or not. It is only when the employee emerges from the training period with an overall deficit in days of rest that reference to paragraph (a) becomes necessary to determine how that deficit may be redressed without incurring overtime.

Therefore, while the argument based on the two official language versions is interesting, its resolution will have to await a situation like that in the *Kelly* case, where the Employer changed the shift cycle before the beginning of the training period to reimburse some of the rest days to be lost during that period.

In the result, the grievance must be dismissed.

DATED AT TORONTO, ONTARIO this 27th day of April, 2010.



Kenneth P. Swan, Arbitrator