IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE CANADIAN AIR TRAFFIC CONTROL ASSOCIATION (C.A.T.C.A.)
(The Union)

and

NAV CANADA
(The Employer)

RE: *Union Grievance – Gander – Summer Leave Program;*
C.A.T.C.A. File No. 98-999; Nav Can File No. 98-A-188

BEFORE: Innis Christie, Arbitrator

HEARING DATES: July 20 and 21, 1998

AT: Gander, Newfoundland

FOR THE UNION:
Peter Barnacle, Legal Counsel C.A.T.C.A.
Fazal Bhimji, Vice-President, Labour Relations C.A.T.C.A.
Dean Baker, Newfoundland Regional Director C.A.T.C.A.
Shelley Goulding, Gander Area Control Centre Branch Chair
Tony Oliver, Gander Area Control Centre Branch Treasurer

FOR THE EMPLOYER:
Harold M. Smith, Legal Counsel
Brian Kinney, Labour Relations Advisor, NAV Canada-Atlantic Region
David Soucy, Shift Manager Gander Area Control Centre

DATE OF PRELIMINARY AWARD: July 28, 1998 - the parties were advised of the result by e-mail, in a preliminary decision without full reasons

DATE OF AWARD: November 23, 1998

Union grievance alleging breach of the Collective Agreement between The Treasury Board of Canada and The Canadian Air Traffic Control Association, signed August 30, 1991 for the period January 1, 1991 - December 31, 1993, as amended by the Memoranda of Understanding between The Canadian Air Traffic Control Association and NAV Canada dated December 13, 1996, which the parties agreed is the Collective Agreement that governs this matter, and in particular of Articles 16 and 17, in that the Employer advised that only two controllers would be permitted to be on leave during each shift cycle under the 1998 summer leave program. Subsequently the Employer proceeded to implement the summer leave program on that basis. At the hearing the Union requested an order that Employer immediately cease and desist from the alleged violation and return the summer leave program to what the Union alleged was "its previous allocation of leave for up to three controllers per cycle". The Union also requested damages.

At the outset of the hearing counsel agreed that I am properly seized of this grievance, that I should remain seized for 90 days after the issue of this award to deal with any matters arising from its application, other than any issue of the quantum of any damages arising from this award, of which they agreed I am seized without any time limit, and that all other time limits, either pre- or post-hearing, are waived, subject to the request by Counsel for the Union for a preliminary decision without full reasons.

AWARD

This arbitration concerns air traffic controllers working at the Gander Area Control Centre. It is about whether the Employer's announced plans with respect to the scheduling of leave during the period June 15 to September 15 breached its obligations under Articles 16.04 (c) and 17.06(b) of the Collective Agreement.

The relevant provisions of the Collective Agreement are:

> 3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service including, but not limited to, the following:
> …
> (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,
>
> and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive right and responsibility of the Employer.
>
> 17.06 (a) The vacation year extends for April 1 to March 31 and vacation may be scheduled by the employer at any time during the period.
>
> (b) Local representatives of the Association shall be given the opportunity to consult with representatives of the Employer on vacation schedules. Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

Article 16.04 provides for the crediting of 82.5 hours of "lieu days" to each employee in the bargaining unit to which it applies. By paragraph 16.04(b) these lieu days are to be "scheduled as an extension to vacation leave or as occasional days". In this context Article 16.04(c) provides;

> 16.04 For operating employees …
>
> (c) consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to schedule lieu days at times desired by the employee.

Thus the Employer's obligation under Article 17.06(b) is to "make every reasonable effort to schedule vacations in a manner acceptable to employees ", "[c]onsistent

with efficient operating requirements…", and Article 16.04(c) imposes a similar obligation with respect to lieu days.

This award, therefore, involves the interpretation of the relevant provisions of the Collective Agreement and their application to the facts, using such contextual and extrinsic aids to interpretation as are appropriate.

A somewhat unusual aspect of this arbitration is that within a week of the hearing I rendered an interim award without full written reasons, because to have delayed longer would have precluded my fashioning what the Union submitted, and I agree, was the most appropriate remedy, although the Union's request for a preliminary award had been opposed by the Employer. The context is significant.

The Employer's April 15, 1998, alleged change from three to two as the number of air traffic controllers per crew who would be allowed to take annual leave simultaneously during the summer leave period occurred in the context of ongoing collective bargaining between the parties to make a new collective agreement. On April 30, 1998, a proposed new Collective Agreement was rejected by the membership of the Union. On May 1 this grievance was filed. On June 5 the Union filed an application with the Canada Labour Relations Board alleging violation of the *Canada Labour Code* s.50(b) duty not to change any term of condition of employment until a strike has become timely under Section 89(1). The Board requires consent of the Minister of Labour to proceed with such a complaint, and as of the date of the hearing of this arbitration before me that consent had not been given. I mention the Canada :Labour Board proceedings only as a matter of context because counsel agreed that they are of no concern to me here.

The Union's grievance was referred to arbitration on June 23. By letter dated July 9, I advised the parties that "further to discussions by telephone … and a fax to [counsel for the Union] from Patricia Brethour [Legal Counsel, Labour Relations of the Employer] I [was] pleased to act as arbitrator in this matter" and set the hearing dates as July 20 and 21, in Gander.

Previous to that, in July, the Union applied to the Supreme Court of Newfoundland for an injunction to prohibit the Employer from implementing what it claimed to be a change in the summer leave arrangement pending the completion of this arbitration procedure and the complaint to the Canada Labour Relations Board. By order dated July 7, 1998, Schwartz J. of the Court dismissed the application because the Union failed

> without adequate reason given, to file an Undertaking to be responsible for damages suffered by the Defendant/Respondent as the result of the granting of an injunction if it should ultimately turn out that the Plaintiff/Applicant is unable to make out its claim.

Against this background, a week after the hearing, on July 28, 1998, using e-mail as had been agreed, I advised counsel that the Grievance was "allowed in part". I stated in my e-mail to counsel:

> **Union Grievance – summer leave; Decision and Order**
> **CATCA File # 98-018; Nav Can File # 98-A-188,**
>
> This Grievance is allowed in part. The Employer's obligation under Articles 16.04(c) and 17.06(b) is not simply to behave reasonably. Rather, "Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees ". That is, the Employer must demonstrate, on the evidence, that it has "made every [such]

reasonable effort". Although I accept that the Employer is in the best position to assess operational requirements, I find that it did not meet that requirement in the days prior to the filing of the Grievance. Clearly, adjudicators under this Collective Agreement have not simply deferred to the Employer's judgement on the issue of what is required for efficient operating requirements, particularly where avoidance of the use of overtime is the basis of the Employer's judgement.

There is no guarantee in this Collective Agreement, or my interpretation of it in light of the practice of the parties at Gander, of two rounds of leave per summer for each member of the bargaining unit. The evidence does not demonstrate a practice that means that nothing less two rounds of leave per summer for each member of the bargaining unit can constitute "every reasonable effort", nor is estoppel in the accepted legal sense established on the evidence. However, in April of 1998 there were "reasonable efforts" that the Employer could have made to schedule summer leave "in a manner acceptable to employees" that it did not make. In fact, it is clear that at the April 15 consultation, except for leaving it to the crews to work out the vacation scheduling, the Employer offered no special summer leave arrangements at all, despite having done so consistently since at least 1993. "Every reasonable effort to schedule vacations in a manner acceptable to employees " called for greater recognition that summer leave is different from lieu days and vacations scheduled at other times of the year.

For example, it would have been more reasonable for the Employer to have said on April 15 that, although, because of the uncertainties resulting from the new airspace it could not *guarantee* two rounds of leave per summer for each member of the bargaining unit by having three crew members off at a time, as the summer developed it would *try* to give two rounds to as many as possible. In other words the Employer could have said, as it did, that it could only guarantee a maximum of two rounds over the year for all, with two rounds of summer leave for about half of them, but it could have added that if individual crews could find a take-up rate and willingness to work overtime, including but not limited to shoulders, that allowed as many as possible on each crew who wanted it to take two rounds, that would be accepted. That way some controllers would have had their second round of summer leave without the desirable notice, and some might not have had it at all, but presumably that would have been better than half the controllers missing out altogether on the second round of summer leave. That sort of consultative approach, clearly contemplated by Article 17.05(b), would have constituted making "every reasonable effort".

The foregoing is only an example of the more flexible approach the Employer was required by Articles 16.04(c) and 17.05(b) to take. Because the Employer took the position it did on April 15 the Grievance is allowed.

The remedy is that Employer has to give as many additional controllers summer leave as can be accommodated between now and September 15 provided there are

> people willing to volunteer for overtime to allow for that to be done. Who volunteers and who gets the additional summer leave is to be determined by the crews in accordance with their practice. To the extent that they cannot settle those issues, the Employer need not grant additional summer leave.
>
> There will be no remedy in damages.
>
> Full reasons will follow.

The Facts. The unit of some 135 air traffic controllers at Gander Area Control Centre is divided into 9 crews of approximately 14 employees each. These controllers work in four different specialties: planning, oceanic, high altitude and low altitude. Under the Canadian Air Regulations each has to have an endorsement on his or her license of training in the specialty in which he or she is working for the Gander air space. Most have endorsements to work in more than one specialty.

Each crew is scheduled to work a 27 day cycle of three "rounds", consisting of: (i) five days on duty, four off; (ii) five days on, three off; (iii) six days on four off. While there is no mention of it in the Collective Agreement, June 15 to September 15, the relatively short period of good weather in Gander, is known to both parties as the summer leave period . There are between ten and eleven rounds in the summer leave period. That is, there are 92 days in that period and rounds consist of 8, 9 or 10 days, the average being, of course 9. This means that, leaving vacations aside, each air traffic controller would work 10.2 rounds per summer.

Effective February 26, 1998, the Employer transferred control of high level air space operations from its Moncton Air Control Centre to Gander A.C.C. This was Phase I of a two phase transfer of the control of the high air space. At the time of the hearing Phase II was scheduled to be completed December 3, 1998. The

Employer's position is that this transfer significantly increased the workload at the Gander A.C.C.

On April 15, 1998, the Employer informed the Union that for the upcoming summer leave period it would allow only two air traffic controllers per crew to take annual leave simultaneously. The effect of this was that many controllers would be unable to take two rounds of annual leave during the summer leave period. The Employer's position is that, with the increased work load, to have allowed three air traffic controllers per crew to take annual leave simultaneously as in the past would have increased overtime demands and resulted in burnout. The Union's allegation is that in the past the Employer had always recognized the short summer season in Gander and had put in place a system that ensured that each employee in the unit was able to take two rounds of his or her annual leave during the summer leave period.

Employer objection to the admission of evidence of past practice. Counsel for the Employer objected to the admission of evidence of past practice with respect to the summer leave period, on the basis that there is no ambiguity in Article 17.06(a) and (b) of the Collective Agreement on the scheduling of vacations.

Counsel for the Union submitted, in effect, that both the phrases "consistent with efficient operating requirements" and "every reasonable effort" are ambiguous. He also submitted that, in this context, I could not properly assess what constituted "every reasonable effort" without understanding what the past practice had been, in terms of both the "opportunity to consult" that had been given in the past and the change that had occurred from summer leave programs in previous years.

Alternatively, he submitted that the Employer was estopped from changing what the Union alleged was its practice of allowing each air traffic controller at two rounds of vacation in the summer leave period.

I admitted the evidence of past practice called by the Union on the basis that the phrases "consistent with efficient operating requirements" and "every reasonable effort" are sufficiently indeterminate that evidence of what the parties had done in previous years was relevant in determining what the parties must be taken to have intended by them. Also, I could not determine whether the legal elements of promissory estoppel could be established without admitting the evidence to which counsel for the Employer objected.

Past practice. The approach to summer leave has always been for the Employer to allow the crews to work out who takes leave when, provided that the necessary specialties are available on each shift, provided that the number of air traffic controllers on leave from any one crew does not exceed a specified number and provided that a specified total number of rounds of leave for the summer leave period is not exceeded.

As a matter of practice, which is not mentioned anywhere in the Collective Agreement, the crews at Gander A.C.C. have used a rotational crew list selection process, which most commonly allows the first person on the list in any year first choice of two rounds of summer leave and so on down the list, with that person going to the bottom of the list the next year. Once the crews have worked out the summer leave schedule it is given to David Soucy, Shift Manager for the Gander Area Control Centre, who then takes it into account in posting the shift schedules for

the summer months. Shift schedules are routinely posted by the 10th of the preceding month.

Prior to 1993 there were about 90 air traffic controllers at Gander A.C.C. in 9 crews of 10 air traffic controllers per crew. Two air traffic controllers per crew were allowed to take leave simultaneously, which meant that over the summer period, the calculation would be that there could be 20.4 rounds of leave taken per crew, if every air traffic controller took summer leave. 20 rounds of summer leave per crew were made available, which was perfectly adequate. In the summers between 1992 and 1998 the numbers of air traffic controllers at Gander A.C.C. increased to the current approximately 135 and, in fact, each employee who wished to do so continued to be able to take two rounds of summer leave.
On March 31,1983, the "Chief, Gander A.C.C." and the "Branch Chairman, CATCA" signed a Memorandum of Understanding the stated purpose of which was "to outline, in general terms", the proposal governing utilization of operational supervisors and controllers in Gander A.C.C." It stated in its second paragraph;

> Nothing in this memorandum supercedes or is meant to restrict the rights of either ACC Management or CATCA , Gander under the TB [Treasury Board]/CATCA Collective Agreement.

The Employer submits that para. 4C is of continued relevance to the issues here. It stated;

> The summer leave period is approximately June 15 – September 15. In this period each team may have two of their complement on scheduled leave simultaneously to a maximum of two rounds for any one individual.

Stressing the phrase “to a maximum of”, Counsel for the Employer submitted that this is the root of the Union's claim to two rounds of summer leave per individual; and that rather than giving rise to any such right the MOU makes it clear both that the Collective Agreement governs, and that two rounds was set as a maximum. The current representatives of the Union did not know of this document until it was presented in Court in support of the Employer's opposition to the injunction application, although it was not disputed that it was probably somewhere in the Union's files. When Mr. Snow had been asked earlier by Shelly Goulding, Branch Chairperson of the Union, for any such documentation of which he was aware he had stated that he knew of none. I will return to this document in my reasons for decision below.

In 1993 there were about 100 air traffic controllers at Gander A.C.C.; about 11 per crew. 23 rounds of leave per crew were made available by allowing three employees per crew to take leave simultaneously during the month of July, and allowing two during the rest of the summer leave period. Each employee in the unit was thus able to take two rounds of leave during the summer leave period.

In 1994 there were about 108 air traffic controllers at Gander A.C.C.; 12 per crew. 23 rounds of leave were again made available, by allowing three employees per crew to take leave simultaneously during the month of August, and allowing two employees per crew to take leave simultaneously during the rest of the summer leave period. Each employee in the unit was able to take two rounds of leave during the summer leave period.

In 1995 there were still about 108 air traffic controllers at Gander A.C.C.; 12 per crew. 30 rounds of leave were made available, by allowing three employees per crew to take leave simultaneously during any month in the summer leave period. Each employee in the unit was able to take two rounds of leave during the summer leave period.

In 1996 there were still about 120 air traffic controllers at Gander A.C.C.; 13-14 per crew. 30 rounds of leave were made available, by allowing three employees per crew to take leave simultaneously during any month in the summer leave period. Each employee in the unit was again able to take two rounds of leave during the summer leave period.

In 1997 there were still about 120 air traffic controllers at Gander A.C.C.; 13-14 per crew. According to the affidavit of Earle Snow, General Manager IFR for the Employer at Gander, sworn for purposes of the injunction application to Schwartz J. of the Supreme Court of Newfoundland, there were approximately 128, but he also states that there were approximately 13-14 per crew, so I have found that the number I must work with is 120. Mr. Snow's statement is that there was a unit requirement of 111.8 operational controllers or 53.5 controllers per day, which, with approximately 128 controllers on hand made it possible for the Employer to allow three employees per crew to simultaneously to a round of leave during the summer leave period without an scheduled overtime. In any event, 30 rounds of leave were made available. Each employee in the unit was again able to take two rounds of leave during the summer leave period.

The evidence is that the local representative of the Union who conducted the consultations about summer leave on its behalf during the years that the Employer allowed three employees per crew to take leave simultaneously, Ewan Newhook, knew that this was done on the basis that on each of those occasions there was a staff surplus, and was told in 1997 that the same arrangement might well not be available in 1998 because of the transfer to Gander A.C.C. of the Moncton airspace.

David Soucy, the Employer's Scheduling Manager, whose testimony I found to be very fair and carefully considered, was emphatic that over the period of his experience, from 1985 to the present, the rounds of leave available for each year's summer leave program had been determined by the Employer on the basis of the staffing available in the context of consultation in accordance with Article 17.06(b) of the Collective Agreement. He pointed out that in 1995, 1996 the number of rounds of vacation provided had been short of the number required to absolutely ensure every member of the bargaining unit two rounds, but predictably not everyone wanted two rounds in the summer, so those who wanted the two rounds got them.

Employer objection to the admission of evidence of consultations, conversations and other events after the date of the Grievance. As I have said, this Grievance was filed on May 1, 1998, grieving the Employer's announcement on April 15, 1998, that there would not be two rounds of leave that summer. The reply to the Grievance is dated May 1. Counsel for the Employer, Mr. Smith, objected to the admission of testimony about events, mainly consultations and conversations, that occurred after May 1 on the basis that they were irrelevant to

the issue before me, which he said is whether the Employer's policy announced on April 15 was a breach of the Collective Agreement. He referred to paragraph 6 of the "Grievance and Arbitration Procedure" in Appendix "B" to the 1996 *Memorandum of Understanding Between the Canadian Air Traffic Control Association and NAV Canada*, dated December 13, 1996, which the parties agreed governs the grievance and arbitration procedure under which they are before me here. Paragraph 6 states:

> 6. Abbreviated Procedure
>
> Any Bargaining Agent grievance, Employer grievance or a grievance involving the termination of an employee's employment or a staffing grievance shall be submitted directly at Step 2 to the authorized representative within twenty (20) days of the incident giving rise to the grievance or when the Bargaining Agent, Employer of the employee ought to have reasonably been aware of the incident giving rise to the grievance.

The references to "the incident giving rise to the grievance" Mr. Smith submitted, made it clear that the parties contemplated a particular event at an identifiable time. He emphasized that the Grievance letter states;

> This is a union grievance.
>
> The Canadian Air traffic Control Association grieves the violation of Article 16 and 17 of the Collective Agreement at the Gander Area Control Centre with respect to the implementation by local management of the 1998 summer leave program (June 15th – September 15th).
>
> Three controllers have been scheduled off per cycle during the entire summer leave period of the past two summers. We are aware of no operational requirements that would restrict the application of a similar leave program this summer.

> The employer has now advised Gander branch during local consultation that only two controllers would be permitted to be on leave during each shift cycle under the 1998 summer leave program.
>
> The union submits that the employer's policy is a violation of the leave provisions of the Collective Agreement in Article 16 and 17. We request that the employer immediately cease and desist from such violation and return the summer leave program at Gander to its previous allocation of leave for up to three controllers per cycle. …

Counsel for the Union, Mr. Barnacle, submitted that this was a Union policy grievance about a continuing violation of the Collective Agreement. The Union, he submitted, was neither required to wait until June 15 to grieve nor was it confined in the evidence it could proffer to what had occurred at or prior to the date of the Grievance. Evidence of events subsequent to the announcement of, and to the implementation of, what he characterized as the Employer's changed summer leave policy was also relevant, Mr. Barnacle submitted, to the remedies requested by the Union, which were a speedy cease and desist order and damages.

I ruled that the mere fact that events testified about occurred after the date of Grievance did not make the evidence inadmissible, but to be relevant it had to relate to the events which were the subject of the grievance, in the sense that it assisted in understanding them. Evidence that shed light on what the Employer's approach to summer leave had in fact been, or on whether there were operational requirements justifying it, would be admitted. I reserved on the issue of what the appropriate remedy might be, and admitted evidence relevant to the remedy subject to that reservation.

Consultations. In accordance with Article 17.06(b), set out above, representatives of the Employer had traditionally met with representatives of the Union in the

Spring to consult on vacation schedules for the upcoming summer leave period. According to paragraphs 18 and 19 of the Affidavit of Earle Snow, General Manager IFR for the Employer at Gander, sworn for purposes of the injunction application to Schwartz J. of the Supreme Court of Newfoundland, which was admitted in evidence here;

> 18. The details of the upcoming summer leave period, including the number of employees per crew who could simultaneously take leave, and the number of rounds per leave that would be made available during the summer leave period, have always been decided on an annual basis by the Employer following/during the Spring consultation between representatives of the Employer and the local representatives of the [Union].
>
> 19. In deciding the number of employees per crew who could simultaneously take leave, and the number of rounds per leave that would be made available during the summer leave period, the Employer has traditionally considered a number of factors relating to the efficient operating requirements of the Unit, including: operational requirements for the upcoming year, expected air traffic levels for the upcoming year, current staffing levels, maintaining overtime to a reasonable level, and ensuring that there would be sufficient employees available for call-in during unscheduled absenteeism, such as sick-leave, bereavement leave, and other leave.

Because Mr. Snow was not a witness I accord relatively little weight to this document. However, the facts stated in it were also testified to by David Soucy.

As stated above, on April 15, 1998, at the scheduled consultation meeting the Employer informed the air traffic controllers' bargaining unit that for the upcoming summer leave period it would allow only two air traffic controllers per crew to take annual leave simultaneously. There was considerable evidence about how the Employer representative, Mr. Bowers, put its position on this matter to the

employees. It is clear on the evidence that he opened by explaining that it would not be consistent with efficient operating requirements to allow more than two employees per crew to simultaneously take a round of vacation during the coming summer leave period. Even on that basis the Employer would have to schedule mandatory overtime.

David Soucy, the Scheduling Manager, testified that the representatives of the Employer "wanted the best possible leave program but had to be sure they could meet the operational requirements with healthy employees prepared to work." He testified that at that point they were still unsure just what the requirements would be. He acknowledged in cross-examination that the normal leave policy throughout the year contemplated two crew members being off at any time, which was what the Employer's representatives said was all that could be expected for the 1998 summer leave period.

Shelley Goulding, who assumed the position of Branch Chairperson in January 1998, led the Union's representatives in the April Unit/Management consultation, having been briefed on what was involved by Ewan Newhook, who had filled that role in the preceding years. It was in that briefing that she was first told that there was, and had been the previous year, some thought on the part of management that the summer leave program could not continue to accomodate on two rounds per employee.

Ms. Goulding had attended her first Unit/Management consultation on February 5, 1998. Her testimony was that at that meeting, which was attended by Earle Snow, the General Manager, Brian Bowers, MACCO, and David Soucy, the Scheduling

Manager, indicated to her that there would be no change from the summer leave program of the preceding years because of the new air space, and told her there would be a final answer by March 30. No meeting on the subject was held until April 15.

Shelley Goulding testified that at the April 15 meeting, Mr. Bowers presented the arrangement for the 1998 summer leave program as involving “no change”, on the basis that the governing principle had always been “no more than two off simultaneously from a shift”, not “two rounds per employee in the summer leave period”. I find that no promise of “two rounds per employee in the summer leave period” had been made at the February meeting,

The Employer's position then was, and is, that with the increased work load to have allowed three air traffic controllers per crew to take annual leave simultaneously as in the past would have increased overtime demands and resulted in burnout. Under that limitation there would not be two rounds of summer leave for each member of the bargaining unit. The consultation lasted for 20-30 minutes. The Union representatives were convinced that the Employer's decision was “set in stone”. Shelley Goulding testified that when they tried to raise for discussion ways of ensuring two rounds of summer leave for each member of the bargaining unit “it turned into a lecture”. David Soucy confirmed in his testimony that Ms. Goulding had suggested that people were prepared to work overtime to ensure two rounds of summer leave. However, he said, there were no specifics, no actual numbers, with specialties and shifts. On the other hand, he testified, neither he nor Mr. Bowers nor Mr. Snow asked for any of those specifics.

There were no further consultations before the Grievance was filed on May 1st. I return below, under the heading "Operations" to the failure of the parties, in this context, to explore the feasibility of voluntary overtime as a means of allowing three air traffic controllers per crew to take annual leave simultaneously.

Even though two rounds of summer leave would not be available to the majority of the members of the bargaining unit, the crews agreed among themselves to continue using the rotational crew list selection process, but with the person at the top of the list picking only one round for summer leave before passing on to the next person and then back to the top of the list for the choice of second round of summer leave. With only two employees per crew allowed to take annual leave simultaneously, this resulted in only the top five air traffic controllers on each crew list being able to take two rounds of their annual leave during the summer leave period in 1998, and in those two rounds not being contiguous. The effect was that 72 people got two rounds of summer leave and 61 got only one.

Operations. David Soucy, the only witness called by the Employer, has been a Shift Manager at Gander A.C.C. since 1985. He has been scheduling for the operations controllers, the bargaining unit involved here, since 1985. Through him the Employer introduced in to evidence a Staff Memo on "Staffing Guidelines Effective - June 06, 1996", which spells out the numbers and qualifications of controllers required hourly at Gander A.C.C..

When the Employer informed the air traffic controllers' bargaining unit on April 15, 1998, that for the upcoming summer leave period it would allow only two air traffic controllers per crew to take annual leave simultaneously it claimed to do so

on the basis of the increased work load resulting from the transfer of control of high level air space operations from Moncton to Gander. David Soucy testified that as management viewed the situation on April 15 additional overtime would not solve the problem. The first 4 people off each day would not require backfilling by the use of overtime but every person beyond that would. If annual vacations were spread over the year there would not have to be more than 8 people off per day. The Employer thought on April 15 that it could not guarantee being able to allow more than 2 people per crew off at a time. With 18 people off per day, 14 of them would have to be replaced by overtime.

At any time, Mr. Soucy testified, there are assumed to be 51 controllers on rest days, with 8 scheduled for overtime, leaving 43 available for unscheduled overtime. If a third crew member were scheduled for vacation 14 rather than 8 would have needed to be scheduled for overtime, leaving 37 for unscheduled overtime.

The Union's characterization of the Employer's testimony was that the average daily requirement in July, August and September would be 150.6 operational controllers, or 72.1 per shift, which would require 1.7 overtime shifts, or 15 hours, per month per employee. This would increase to 3 overtime shifts, or 24 hours, per month per employee if the Employer allowed the three controllers per crew to take annual leave simultaneously that would be required to enable everyone to get two rounds of summer leave.

In April and May 1998 the Employer dealt with an average of 5 and 4.5 sick calls per days, which is roughly indicative of the number of employees who would have

to be called for unscheduled overtime each day, in addition to the 3 shifts per month of scheduled overtime. David Soucy testified that historically increased overtime generates more sick leave.

The Employer's position was that to have allowed three air traffic controllers per crew to take annual leave simultaneously would have increased overtime demands and resulted in burnout. The Employer put in evidence and purported to have relied on a memo dated March 16, 1998, from Dean Baker, the Union's Regional Director for Newfoundland, who is a controller at Gander A.C.C., to Jacques Chamberland, at the Employer's headquarters complaining that air traffic controllers at Gander A.C.C. were seriously overworked and requesting more staff. He was also requesting better breaks for those working overtime. The Union's position before me was that not having a second round of leave during the summer period would cause more burnout than any additional work pressure or overtime that might be required to make it available. For whatever difference it makes, I do not find that the Union, or Mr. Baker personally, is taking mutually contradictory positions here and in its representations to Mr. Chamberland.

Under cross-examination Dean Baker agreed that, taking the transfer of airspace from Moncton as an accomplished fact, the Employer's only options to meet the Union's demand for increased summer leave would be to use overtime or to implement "flow control". Flow control involves refusing aircraft access to the Gander airspace at certain times; flattening out the peaks and valleys. That is regarded as a last resort and has never been utilized at Gander, because of its international responsibilities, although it has be implemented elsewhere across the country.

The evidence is that as a result of the transfer from February 26, 1998, to May 1998 employees in the bargaining unit were required to work 30 additional overtime hours per month, on average, some of this resulting from assignment to training and refresher courses and special projects. In past summers these courses and special projects have been held to the required minimum. That is, generally only refreshers required for the maintenance of specialty qualifications have proceeded. The Union's calculation was that to allow 3 employees per crew on leave simultaneously would increase the average overtime hours per person from about 15 to 24; less than the members of the bargaining unit had demonstrated they could handle over the March-April period. Under cross-examination David Soucy agreed with the Union's calculation.

I took it from Mr. Baker's testimony under cross-examination that the Union accepts that a necessary condition of the employer allowing three employees per crew to take annual leave simultaneously would be some assurance, presumably given through consultation, that staff would be available to work overtime. Shelley Goulding testified that, based on meetings with the majority of the controllers in the bargaining unit, she believed that they would be willing and able to work the overtime necessary to ensure that all who wanted it would have two rounds of annual leave during the 1998 summer leave period.

However, David Soucy testified that when a sample of the crews were surveyed as to whether they would be willing to work their "shoulder" time off as overtime to make resources available to staff a summer leave program as sought here by the Union 90% said "no". He also testified that the Employer's experience with getting

people to work overtime in the summer period up to the date of the hearing had been poor. Nevertheless, Ms. Goulding's testimony was that consultation was cut short by the Employer before the employees had an opportunity to take steps such as formalizing a list of controllers willing to work overtime to allow for each to have two rounds of summer leave.

I am satisfied on the evidence that the Employer's "obligation" under Article 15.03 to "endeavour to keep overtime work to a minimum" was not the reason the Employer failed to explore the possibilities for voluntary overtime during the summer leave period in 1998.

Conversations and other events subsequent to the filing of the Grievance on May 1st, 1998. Shelly Goulding testified that in early June she met with Brian Bowers to see if the Employer would reconsider its decision with respect to the summer leave program. He told her that things had improved, from an operational point of view, and that he would discuss the issue with David Soucy. On June 9 she sent him an e-mail asking if there was any word on her request that the Employer reconsider its decision with respect to the summer leave program. He replied on June 10, as follows;

> The subject is currently in the grievance process and further discussion may be inappropriate. However Dave and I briefly discussed it and nothing has changed that would allow more staff on scheduled summer leave. There may be days this summer when overtime is not excessive but I have to balance the availability of summer leave with the penalty of working too much overtime. Contractually (and as a manager) I am required to try and keep overtime to a minimum. We are going to be in an overtime situation for 3 – 5 years and it would not be prudent to "burn out" all the resources early in the process. The overstaff situation of previous years has disappeared and we have to operate with the resources available.

Ms. Goulding had no further discussion with Mr. Bowers on this subject. She did, however, have some informal discussion with General Manager Earle Snow at the court house on the day of the injunction hearing in the course of which he indicated to her that the summer leave program could no longer be reconsidered because, due to the Grievance, it had reached the desk of Pierre Proulx, Vice-president Operations.

Tony Oliver, Branch Treasurer, was not a participant in the April 15 consultation meeting but testified, over the objections of counsel for the Employer, about subsequent private discussions on the summer leave issue with David Soucy, the Employer's Scheduling Manager. I admitted this evidence and summarize it here because it is relevant to the issue of whether the Employer had made "every reasonable effort" "consistent with efficient operating requirements" "to schedule vacations in a manner acceptable to employees " as required by Article 17.06(b) of the Collective Agreement.

Mr. Oliver testified that on June 15 when he saw the July work schedule he thought it demonstrated that the Employer's projections were "off", and that it could have allowed for summer leave as in the past; that there were enough people with the required specialties available to work overtime to allow it. David Soucy confirmed in cross-examination that overtime usage dropped in June because of increased familiarity with the new air space, and because there were fewer people on projects and training. In fact, he said, the Employer had scheduled 15 hours of overtime per member of the bargaining unit for July and 18 for August. Oliver raised this change from the projections informally with Soucy on June 23, which led to a meeting of the two of them with Earle Snow on June 24.

Mr. Oliver had no authority to deal with the Employer on this issue, but checked with Shelley Goulding, the Branch Chairperson and she said to go ahead with the meeting. According to Oliver's testimony, in the course of that discussion Soucy said that if the matter had not become a policy issue for headquarters summer leave could have been reconsidered in Gander in light of the then current understanding of staffing needs, and still could be "if Earle could get authority from Ottawa". Subsequently, Mr. Oliver was party to the conversation between Shelley Goulding and Earle Snow recounted above.

The Issues: The most relevant parts of the Union's letter of Grievance of May 1st, which has already been quoted above, are:

> Three controllers have been scheduled off per cycle during the entire summer leave period for the past two summers. We are aware of no operational requirements that would restrict the application of a similar summer leave program this summer. …
>
> The union submits that the employer's policy is a violation of the leave provisions of the Collective Agreement in Article 16 and 17. We request that the employer immediately cease and desist from such violation and return the summer leave cycle at Gander to its previous allocation of leave for up to three controllers per cycle.

The Employer's final level reply, dated June 15, was:

> …Annually, local NAV Canada management consults with the CATCA representative regarding the summer leave program at Gander Area Control Centre.
>
> In the spring of 1997, the consultations involved Ewan Newhook (CATCA branch chairman) and Earl Snow (GM-IFR). At that time Gander had a surplus of staff at the ACC. As a result of that surplus, up to three controllers were

> permitted to be scheduled off per crew, for two rounds of annual leave each. As always the understanding was that the arrangement was relevant only for that year and the leave program would be revisited the following year.
>
> The staffing situation in 1996 was similar to that in 1997. The result was the same summer leave program was implemented, which allowed for up to three controllers to be scheduled off per crew, of two rounds of annual leave each.
>
> With respect to the vacation schedule for 1998, in accordance with Article 17.06(b), local management provided an opportunity on April 15, 1998 for the local CATCA to consult on the vacation schedule.
>
> At that time local management explained that, due to increased traffic at the Gander ACC, and the amalgamation of the Atlantic High Level Domestic Airspace, changed circumstances would only permit the scheduling of two domestic controllers on leave per crew.
>
> Accordingly, there is no violation of Article 16 or 17 of the Collective Agreement and your grievance is denied.

With respect to the remedy requested before me, under date of July 17, 1998, counsel for the Union wrote to counsel for the Employer as follows:

> …the remedial request expressly set out in the grievance was for the employer to cease and desist implementing the new [summer leave] program. …
>
> As you are aware, the Employer did implement the new policy on June 15th. In its affidavit material filed with the Supreme Court of Newfoundland in our injunction application, the employer states that the application of the old policy would increase overtime shifts per controller at the Gander Area Control Centre from 1.7 to 3 shifts per month. Further the cost of that overtime over total three month summer period was estimated to be $275,000 to $300,000 (See *Affidavit of Earle Snow*, July 3rd, 1998 at para. 27(viii) and para. 38(iii). …
>
> The purpose in writing this letter is to put you on notice that, while the union is seeking a cease and desist order and order for compliance, we *may* also seek damages in the amount of last overtime. Such a claim would be part of the appropriate remedy resulting form denial of leave for the period from June 15th, 1998 to the effective date of any reinstatement of the former leave program at Gander. …
>
> In the event we do proceed to claim damages on behalf of the controllers affected, we would be relying upon *Blouin Drywall Contractors Lt. and United*

> *Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (Ont. C.A.)

In a second letter of the same date to counsel for the Employer counsel for the Union stated;

> I can now confirm that we will be claiming damages at the hearing equivalent to the overtime losses for controllers at Gander Area Control Centre during the full length of the summer leave program as instituted June 15th, 1998.

The issues therefore were:

1. Did the Employer breach Article 17.06(b) of the Collective Agreement by failing to make "every reasonable effort" "consistent with efficient operating requirements" "to schedule vacations in a manner acceptable to employees ", considering that Article 17.06(b) also specifically requires that local representatives of the Union "be given the opportunity to consult with representatives of the Employer on vacation schedules"?

2. Was there any guarantee in this Collective Agreement, interpreted in light of the practice of the parties at Gander, of two rounds of leave per summer for each member of the bargaining unit, which was breached by the Employer?

3. Was the Employer estopped from denying two rounds of leave per summer for each member of the bargaining unit?

4. If the Employer was in breach of the Collective Agreement on any of these three bases, did the appropriate remedy involve a cease and desist or compliance order?

If a cease and desist or compliance order was appropriate should I act on the Union's request, opposed by the Employer, to issue an interim order with full reasons to follow?

5. In all the circumstances, is the Union entitled to damages, and, if so, on what basis?

Decision.

1. Did the Employer breach Article 17.06(b) of the Collective Agreement by failing to make "every reasonable effort" "consistent with efficient operating requirements" "to schedule vacations in a manner acceptable to employees". The Grievance here alleges breach of Article 16.04(c) with respect to lieu days as well as of Article 17.06(b) with respect to vacations. However, both specifically require that the Employer make every reasonable effort to schedule in accordance with what the employees want, Article 17.06(b) adding that local representatives of the Union "be given the opportunity to consult with representatives of the Employer on vacation schedules". I do not think, therefore, nor did counsel take the position, that Article 16.04(c) introduces any different issues with respect to lieu days. If Article 17.06(b) was breached so was Article 16.04(c) and if Article 17.06(b) was not breached neither was Article 16.04(c), so I do not explicitly address Article 16.04(c) in what follows.

The Employer's obligation under Article 17.06(b) is not simply to behave reasonably. Rather, "Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to

employees ". Obviously, on the evidence, and perhaps from the very fact of the filing of the Grievance, the Employer has not scheduled vacations "in a manner acceptable to the employees", but has it made a reasonable effort to do so? The evidence is that the Employer came in to the April 15 consultation meeting with a fixed position that for the 1998 summer leave period no more than two controllers could be on annual leave simultaneously. That is, the ordinary year-round rule applied. Except for leaving it to the crews to work out the vacation scheduling, the Employer offered no special summer leave arrangements at all, despite having done so consistently since at least 1993. "Every reasonable effort to schedule vacations in a manner acceptable to employees " called at least for some greater recognition that summer leave is different from lieu days and vacations scheduled at other times of the year.

That evidence would lead me to think that the Employer did not, "make every reasonable effort to schedule vacations in a manner acceptable to the employees", unless the Employer could demonstrate, on the evidence, that it has "made every [such] reasonable effort".

The Employer's obligation to make these reasonable efforts is not open ended. It is only to make every reasonable effort "consistent with efficient operating requirements". I accept that the Employer is in the best position to assess operational requirements, but it is for the Employer to satisfy me that this limitation on its obligation has been reached. On Mr. Soucy's testimony I am prepared to believe that in April of 1998 Mr. Snow, Mr. Bowers and Mr. Soucy himself were inclined to the view that, with additional air space to handle, they would be unwise to lead the employees to count on having two rounds of summer leave in 1998, but

I am unclear on the grounds upon which they reached that conclusion. Was it because of the cost of overtime, or because they feared burnout on the part of the members of the bargaining unit?

Clearly from the awards put before me, adjudicators under this Collective Agreement have not simply deferred to the Employer's judgement on the issue of what is required for efficient operating requirements, particularly where simple avoidance of the use of overtime for reasons of cost is the basis of the Employer's judgement. I note that Article 15.03 of the Collective Agreement says the Employer "shall endeavour to keep overtime work to a minimum", but the Union, the party to which this obligation is owed, has not grieved or suggested that the amount of overtime work would be an obstacle to allowing everybody two rounds of summer leave. Since only the Employer is interested in keeping the amount of overtime down, probably to avoid costs, Article 15.03 is not appropriately invoked here. That is not to say that keeping overtime costs down is not a legitimate management objective.

If the fear of burnout was the real issue I think "every reasonable effort" would have required a real attempt on the Employer's part to ascertain the employees' willingness and ability to work overtime in order to make two rounds of summer leave available. Reliance on Mr. Baker's memo of March 16 to Jacques Chamberland seemed to me to trivialize the issue. Given that Article 17.06(b) puts an obligation to consult side-by-side with the obligation to make every reasonable effort to satisfy the employees, I would have thought that every reasonable effort would have involved discussion with the employees of the burnout effects of likely overtime requirements compared to the loss to two rounds of summer leave.

Indeed, the Union submitted that the danger of stress, anxiety and burnout from denial of the leave counted on by the air traffic controllers and their families was much greater than the danger of burnout from the overtime hours required to allow three summer leaves simultaneously per crew.

There were “reasonable efforts” that the Employer could have made to schedule summer leave “in a manner acceptable to employees” that it did not make. For example, it would have been more reasonable for the Employer to have said on April 15 that, although, because of the uncertainties resulting from the new airspace it could not *guarantee* two rounds of leave per summer for each member of the bargaining unit by having three crew members off at a time, as the summer developed it would *try* to give two rounds to as many as possible. In other words the Employer could have said, as it did, that it could only guarantee a maximum of two rounds over the year for all, with two rounds of summer leave for about half of them, but it could have added that if individual crews could find a take-up rate and willingness to work overtime, including but not limited to shoulders, that allowed as many as possible on each crew who wanted it to take two rounds, that would be accepted. That way some controllers would have had their second round of summer leave without the desirable notice, and some might not have had it at all, but presumably that would have been better than half the controllers missing out altogether on the second round of summer leave. That sort of consultative approach, clearly contemplated by Article 17.05(b), would have constituted making “every reasonable effort”.

The foregoing is only an example of the more flexible approach the Employer was required by Articles 16.04(c) and 17.05(b) to take. In short, the Employer's

evidence does not satisfy me that it met the requirement that it "make every reasonable effort to schedule vacations in a manner acceptable to the employees", in the days prior to the filing of the Grievance. Having reached this conclusion I find it unnecessary to rely on the evidence that Mr. Soucy and Mr. Snow seemed subsequently to recognize that the scheduling of summer leave could have been changed, implying perhaps that it could have been done differently in April. That evidence does, however, tend to buttress my conclusion.

Because the Employer took the position it did on April 15, the Grievance is allowed.

2. Was there any guarantee in this Collective Agreement, interpreted in light of the practice of the parties at Gander, of two rounds of leave per summer for each member of the bargaining unit which was breached by the Employer?
There is no guarantee in this Collective Agreement, or in my interpretation of it in light of the practice of the parties at Gander, of two rounds of leave per summer for each member of the bargaining unit. The only obligations stated in the relevant provisions of the Collective Agreement are to "make every reasonable effort" to satisfy the employees and to consult. The evidence does not show any practice that causes or entitles me to read Article 17.06(b) as meaning that nothing less than granting two rounds of leave per summer for each member of the bargaining unit can constitute "every reasonable effort to schedule vacations in a manner acceptable to the employees", "consistent with efficient operating requirements".

The evidence is that for the preceding summers that Employer's focus was on the number of rounds of leave that could be covered by surplus staff or by overtime,

not on ensuring that every controller got two rounds of summer leave. Whatever the results, and however it might have appeared to uninvolved members of the bargaining unit, the evidence is that each year was approached afresh, with no holding out by management that there was a continuing policy of ensuring two rounds of summer leave to each of them. Indeed, the uncontradicted evidence is the Union's representative in the consultations of 1997, Ewan Newhook, had been told explicitly that two rounds of summer leave for all members of the bargaining unit might be unlikely in 1998.

3. Was the Employer estopped from denying two rounds of leave per summer for each member of the bargaining unit? Estoppel in the accepted legal sense was not established on the evidence. There is not evidence that the Employer made a promise, express or implied, to forego its pre-existing legal right to schedule annual vacation leave in accordance with Article 17.06 (a) ,

> The vacation year extends for April 1 to March 31 and vacation may be scheduled by the employer at any time during the period.

subject only to its obligations in Article 17.06(b) to "make every reasonable effort" to satisfy the employees and to consult. Indeed, as I stated above, the uncontradicted evidence is the Union's representative in the consultations of 1997, Ewan Newhook, had been told explicitly that two rounds of summer leave for all members of the bargaining unit might be unlikely in 1998. It may be that some of the members of the bargaining unit who were not directly involved in the consultations had come to rely on there being two rounds of leave in each summer period, but that was not the Employer's doing.

I agree with counsel for the Employer that the March 31,1983, Memorandum of Understanding makes it clear both that the Collective Agreement governs, and that paragraph 4C, which stated;

> The summer leave period is approximately June 15 – September 15. In this period each team may have two of their complement on scheduled leave simultaneously to a maximum of two rounds for any one individual.

rather than giving rise to any such right shows that two rounds was set as a maximum. Accepting that the current representatives of the Union did not know of this document, its existence tends at least to negative any suggestion of estoppel arising from reliance on practice.

4. If the Employer was in breach of the Collective Agreement on any of these three bases, did the appropriate remedy involve a cease and desist or compliance order? If a cease and desist or compliance order was appropriate should I act on the Union's request, opposed by the Employer, to issue an interim order with full reasons to follow? It goes without saying that I decided that I should act on the Union's request to issue an interim order. I did so because of the nature of the breach of the Collective Agreement established by the evidence; that the Employer had failed to make "every reasonable effort" "consistent with efficient operating requirements" "to schedule vacations in a manner acceptable to employees ". Damages can be assessed, but the calculation of the financial loss to the employees flowing from any such failure to make reasonable efforts is inherently highly speculative, so a compliance order is a far more effective remedy. With the summer season fast disappearing it seemed to me that my opportunity to fashion a more appropriate remedy than damages was

dependant on complying with the Union's request that I proceed by way of interim order.

I ordered this remedy because it seemed to me consistent with the Employer's obligation, which it had breached, and no more pre-emptive than necessary of the Employer's judgement of what was "consistent with efficient operating requirements". The Employer having been found in breach, it did not seem appropriate to me to simply direct the Employer to "consult" and "make every reasonable effort", with the probable result that the summer leave period would be gone before any change was made in the leaves scheduled.

Counsel for the Employer emphasized the need for speed in issuing the order, but opposed the request for an interim order because in his opinion the final order with full reasons was what was needed speedily. I attempted to meet his concerns by giving the main thrust of my reasons for this award in my interim decision. I regret the delay in providing the parties with these full reasons, but perhaps it does vindicate my decision to issue the interim award with partial reasons.

5. In all the circumstances, is the Union entitled to damages, and, if so, on what basis? I ruled in my interim award that there will be no remedy in damages. I did so because, as I have already stated, the calculation of the financial loss to the employees flowing from any such failure as the Employer's here, to make reasonable efforts, is inherently highly speculative. That is to say that any damages ordered paid would have had to be based on the chance that if the Employer had "consult[ed]" and "ma[d]e every reasonable effort". "consistent with efficient operating requirements" it would have granted a second round of summer leave to

the claimant. How would the chance that such would have been the result have been valued? Because I was able to make a compliance order reasonably quickly such damages did not seem appropriate.

Counsel for the Union requested that I order any such damages to be paid to the Union for disbursement on a *pro rata* basis to the members of the bargaining unit who the Union considered had lost income by virtue of the Employer's breach of the Collective Agreement, as was done in *Blouin Drywall Contractors Lt. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (Ont. C.A.). There are cases where such an order is the appropriate way to remedy a breach of a collective agreement, but clearly such a process can give rise to difficulties, and I would order it very rarely. By ordering compliance in the way that I did I was able to avoid a *Blouin Drywall* order to pay damages, which, in any event, would have been so speculative that they would have not amounted to very much.

Having reached this conclusion it is unnecessary for me to deal with the submission by counsel for the Employer that, damages not having been requested in the Grievance document, I have no jurisdiction to order them in any event.

Summary and conclusion. For all of these reasons the Grievance is allowed in part, on the basis that the Employer failed to "make every reasonable effort to schedule vacations in a manner acceptable to the employees", in the days prior to the filing of the Grievance, as required by Article 17.06(b). Similarly the Employer was in breach of Article 16.04(c). However, the Employer was not obliged by either of those provisions of the Collective Agreement, or by the doctrine of

estoppel to provide two rounds of leave per summer for each member of the bargaining unit.

In an interim order on July 28, 1998, using e-mail as had been agreed, I ordered that Employer to give as many additional controllers summer leave as could be accommodated between the date of the order and September 15 by allowing up to three controllers off per crew, provided there were people willing to volunteer for overtime to allow for that to be done. Who volunteered and who got the additional summer leave was to be determined by the crews in accordance with their practice. To the extent that the crews could not settle those issues, the Employer did not have to grant additional summer leave. The Employer was not ordered to pay damages.

Innis Christie
Arbitrator