IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

(The Employer)

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF BARRY GREEN

ARBITRATOR:

Kenneth P. Swan

APPEARANCES:

For the Employer:
Charles E. Hurdon, Counsel
Janice Schick, Counsel
Sheila Taylor, Director, Labour Negotiating

For the Union:

Peter Barnacle, Counsel
Benoit Girard, Ontario Regional Director
Barry Green, Grievor

A W A R D

A first day's hearing in this matter took place in Ottawa, Ontario on May 10, 1999. Thereafter, I issued a preliminary award dated May 27, 1999, in which I took jurisdiction over the matter at issue between the parties, whether the grievor, Barry Green, should be declared to be an employee of NAV CANADA pursuant to a Memorandum of Agreement dated November 6, 1997.

The facts on which this matter is to be determined were largely set out in an agreed statement of facts which is quoted in the preliminary award, but which it is convenient to quote again here:

1. The Grievor, Barry Green, was first employed as an air traffic controller with Transport Canada on May 3, 1971. Mr. Green had worked as an air traffic controller at the Sudbury Control Tower since June, 1982.

2. Mr. Green's employment was terminated for cause an May 29, 1995. At that time, Mr. Green was an operational air traffic controller at the Sudbury Control Tower (AI-02 classification level).

3. Mr. Green filed a grievance, which was denied by the employer (Appendix "A"). Subsequently, Rosemary Simpson, member of the Public Service Staff Relations Board, heard the matter. The PSSRB had jurisdiction to adjudicate all grievances in the Federal Public Service.

4. In a decision dated June 14, 1996, Ms. Simpson dismissed the grievance (Appendix "B"). The union filed for judicial review on July 18, 1996 to the Federal Court Trial Division.

5. Mr. Justice Cullen, in a decision dated July 8, 1997, allowed the application for judicial review and directed the matter back to the PSSRB to be heard before a new adjudicator on the sole issue of appropriate penalty (Appendix "C"). Treasury Board, the employer party in the application, filed an appeal to the Federal Court of Appeal.

6. In the interim, the civil air navigation system, including air traffic services, was transferred from the Public Service to NAV CANADA, a not-for-profit corporation under the Canada Corporations Act, Part II, as of November 1st, 1996. (Civil Air Navigation Services Commercialization Act, S.C. 1996, c-20, Appendix "D").

7. Following this transfer, the employer took the position it was not responsible for any

grievances arising from terminations, disciplinary or non-disciplinary, by Transport Canada that were outstanding at the date of transfer, as these employees were not included on the list prepared by Transport Canada of designated employees for transfer to NAV CANADA. A total of twelve cases were affected, including Mr. Green's. The union presented a motion in the first of these cases to reach the PSSRB after transfer to add the employer as a party. A settlement was subsequently reached for that case and all others, including that of the Grievor (Appendix "E").

8. Following the Agreement in Appendix "E", the case was then heard for the second time by PSSRB Vice-Chairperson, Phillip Chodos, sitting as an adjudicator under the Public Service Staff Relations Act. In a decision dated April 6, 1998, he reinstated Mr. Green with a substituted penalty of three months suspension, plus a further three months without pay (Appendix "F"). Treasury Board applied for judicial review of the Chodos decision.

9. Neither the Federal Court of Appeal (appeal of the Cullen decision to remit the case back to the PSSRB) or the Federal Court Trial Division (judicial review application with respect to the Chodos decision to reinstate) have been heard to this date. Requisitions for dates have been filed for both matters. As of this date, CATCA is advised that the appeal of the Cullen decision will likely be heard some time in the late Fall or early 2000, and the judicial review will likely be heard some time this Fall.

10. In the interim, Treasury Board has reinstated the Grievor to the Public Service and CATCA and Treasury Board have resolved the compensation issues arising from the reinstatement. Mr. Green remains an employee today in the Public Service but with no actual job, given that all operational controllers and facilities were transferred to the employer on November 1st, 1996, including the Sudbury Control Tower.

11. Following the Chodos decision, the parties held discussions with respect to the implementation of the Agreement in Appendix "E". Following which, a formal demand was presented by the union to return Mr. Green to the Sudbury Tower as an employee of NAV CANADA. The employer refused (see correspondence, Appendix "G").

12. The union filed a grievance on behalf of Mr. Green on November 23, 1998 (Appendix "H") and, in due course, the present arbitration proceeding was scheduled. The employer has objected on the jurisdiction of the arbitrator to hear the matter. (See Appendix "I")

13. The parties agree that the preliminary issue of jurisdiction should first be determined, following which the parties may assess their position as required.

The document which I am required to interpret and, in the Union’s submission,

enforce, is the Memorandum of Agreement referred to in paragraph 7 of the agreed statement of facts as Appendix "E", dated November 6, 1997. That document is as follows:

> WHEREAS Barry Green grieved the termination of employment by Transport Canada;
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> WHEREAS CATCA sought to add NAV CANADA as a party to this grievance;
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> WHEREAS Barry Green, through his bargaining agent CATCA, CATCA and NAV CANADA wish to come to a full and final resolution of the issue in dispute;
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> NOW THEREFORE THE PARTIES agree as follows on a without publicity basis:
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> 1. In the event that Barry Green is reinstated to the Public Service by an adjudicator of the Public Service Staff Relations Board as a result of the hearing of his grievance, he shall be offered employment as a new hire by NAV CANADA under the following terms and conditions:
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> (a) he shall be returned to the position that he held at the time of his termination; and
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> (b) his pay, service and seniority shall be determined and applied as if he had never left Air Traffic Services, but had transferred over to NAV CANADA as a continued employee.
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> 2. NAV CANADA shall not be liable for and Barry Green shall not seek from Nav Canada any compensation, benefits, pension, leave or other cost arising from any order of reinstatement of Barry Green by the Public Service Staff Relations Board. No leave bank, including sick leave credits, shall be rolled over to NAV CANADA on rehire.
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> 3. In consideration of the offer of employment by Nav Canada to Barry Green pursuant to the terms of para. 1 and 2 and on execution of this Agreement, CATCA, on behalf of Barry Green, will withdraw the motion to add NAV CANADA as a party to the grievance. Further, Barry Green and CATCA agree not to seek to add NAV CANADA as a party in the future, subject to completion of the terms of this Agreement.
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> 4. This Agreement is between Nav Canada, CATCA and Barry Green and in no way is intended to effect the rights and entitlements of Barry Green or the Public Service (Transport Canada) in their relations with one another.

Following the release of my preliminary award dated May 27, 1999, I issued a notice

of hearing for July 5, 1999, a date previously agreed upon with the parties for the continuation of this matter should that become necessary. On June 22, 1999, I received a letter by telecopier from counsel for the Employer in the following terms:

> This will acknowledge receipt of your Notice of Hearing for July 5, 1999.
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> My clients have instructed me to file a Judicial Review Application with respect to your award dated May 27, 1999. As part of the application we will be seeking a stay of your award pending disposition of the Judicial Review proceeding. In light of this we will be making representations to you seeking an adjournment of the hearing. I have advised Mr. Barnacle [counsel for the Union] of our intentions.
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> We will of course be guided by your wishes in terms of procedure for dealing with our request.

Upon receipt of this letter, I contacted counsel for the parties and proposed that we deal with the question of an adjournment by telephone conference call, which was ultimately scheduled for July 2, 1999. By that time, I had been served with an application for Judicial Review filed on June 25, 1999 under court file No. 99-DV-348. The application seeks an order quashing and setting aside my award dated May 27, 1999 on the basis of an excess of jurisdiction, and also seeks an order staying the arbitration before me pending disposition of the Judicial Review proceeding. On this basis, the Employer sought an adjournment of the hearing scheduled for July 5, 1999. The Union adamantly opposed any such adjournment.

The Employer's submissions in support of an adjournment were twofold. First, I was urged to adjourn pending the outcome of the Judicial Review proceedings in relation to my preliminary award of May 27, 1999, on the basis that to do otherwise would be exercising a jurisdiction which had been cast into doubt by the Judicial Review application. Second, I was asked to adjourn any hearing on the merits of the Union's grievance pending the outcome of proceedings in the Federal Court of Appeal and the Federal Court Trial Division as described in the agreed

statement of facts, since to do otherwise would be to proceed on the basis of an order of reinstatement which had been cast into doubt by those proceedings.

The Employer further argued that the balance of convenience was clearly in its favour. It noted that Mr. Green has been reinstated by Transport Canada in employment pursuant to the order of Vice-Chair Chodos, and that he had been paid certain amounts of compensation, and continued to be paid his regular salary, although no position was available for him in Transport Canada in an operational Air Traffic Control role. On the other side of the equation, given the time Mr. Green has been away from regular operational Air Traffic Control duties, there would be a requirement for retraining and a "check-out" before he could resume regular duties. While there is no direct evidence before me, the parties appear to be agreed that this process would be a matter of months. The Employer argues that if it is required to employ Mr. Green prior to the outcome of the three judicial proceedings now underway, it may be that it will have to incur the expense of the retraining and check-out for no purpose, since that expense will have been wasted if any of the three judicial proceedings results in a decision unfavourable to Mr. Green.

Finally, in order to avoid the possibility of any change in the balance of convenience, for example by Treasury Board taking steps to terminate Mr. Green's employment, the Employer undertook to bring the matter before me on the merits on an expedited basis in any such event.

Having heard the submissions of the parties, I declined to grant an adjournment of the hearing scheduled for July 5, 1999. It is well established law that an administrative tribunal is not required to suspend its own proceedings merely because an application for Judicial Review has been brought, even where that application for Judicial Review directly attacks the jurisdiction of the tribunal to proceed: see *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971) 22 D.L.R. (3d) 40, [1971] 3 O.R. 832 (Ont. C.A.). Moreover,

there appears to be an evolving view in the Divisional Court that there is a preference to deal with the decisions of administrative tribunals only when those decisions are final. This obviously has a certain appeal for efficiency, since whatever interim decisions may be made may have only a theoretical impact if the final decision on the merits goes in favour of the party seeking Judicial Review of the interim decision.

While the situation may be different where an arbitrator has declined jurisdiction, and the Judicial Review proceedings are in the nature of *mandamus* to compel the arbitrator to exercise jurisdiction, it is my view that the more efficient course where an arbitrator has asserted jurisdiction is to proceed to exercise that jurisdiction despite any application for Judicial Review, absent special circumstances. By so doing, the arbitrator presents to the reviewing court a complete record and a final decision for consideration if the final decision goes against the party seeking Judicial Review, and avoids the need for the court's involvement entirely if the final decision goes in favour of the party seeking Judicial Review.

As to the Employer's second argument, concerning the effect of the two proceedings pending in the Federal Court, precisely the same arguments could be made by the Employer in relation to the merits of this matter, both in respect of the proper interpretation of the Memorandum of Agreement, and as to whether any order which I might issue in favour of the Union should be the subject of any delay or stay imposed by me in the exercise of my remedial authority.

On the basis of that oral disposition, therefore, the hearing continued in Ottawa, Ontario on July 5, 1999. The Union now argued, in support of the merits of its grievance, that the condition precedent in the Memorandum of Agreement for the employment of Mr. Green had been met, and that the proper course was to issue a declaration that Mr. Green was entitled to be treated as an employee of NAV CANADA forthwith. In the Union's submission, no further delay should be

considered, given the considerable length of the proceedings so far in relation to a termination more than four years ago.

The Employer argued, again in a twofold submission, that on the proper interpretation of the Memorandum of Agreement the condition precedent had not yet been fulfilled, and was still in doubt because of the outstanding judicial proceedings in the Federal Court. In the alternative, the Employer argued that if the condition precedent has been met, I should delay the effect of any order enforcing the Memorandum of Agreement pending the outcome of those judicial proceedings on the basis of the balance of convenience submissions similar to those made in the course of the telephone conference call and already set out above.

As to the Employer's first argument, the Union points out that the chronological relationship of the Memorandum of Agreement in relation to other events must be considered. The decision of Cullen J. of the Federal Court Trial Division allowing the initial application for Judicial Review and directing the matter back to the Public Service Staff Relations Board for a new hearing on the issue of the appropriate penalty was dated July 8, 1997; at that time, therefore, the jurisdiction of the Public Service Staff Relations Board to reconsider the penalty was established. The notice of appeal to the Federal Court of Appeal filed by Treasury Board against the decision of Cullen J. was dated in August 1997, although the precise date is not before me. As a result, when the Memorandum of Agreement was concluded on November 6, 1997, the parties were aware of the existence of the appeal, and their failure to make their agreement contingent upon either the outcome of that appeal, or the possibility of subsequent judicial proceedings in relation to the continuing Public Service Staff Relations Board hearings, must indicate that they intended the Memorandum of Agreement to operate notwithstanding those possibilities.

The wording of the Memorandum of Agreement is particularly important. The

condition precedent which would trigger the offer of "employment as a new hire" of Mr. Green is "in the event that Barry Green is reinstated to the Public Service by an adjudicator of the Public Service Staff Relations Board as a result of the hearing of his grievance". This is unequivocal language, which appears to attorn to the jurisdiction of the PSSRB to resolve the grievance, and to be prepared to act upon that decision in order to produce what the recitals in the Memorandum of Agreement call "a full and final resolution of the issue in dispute". The Employer was not a party to the Federal Court appeal, nor would it have any standing to take Judicial Review proceedings of any further decision of the PSSRB. It must be taken to have known about the filing of the appeal, and of the possibility of further judicial review proceedings, but there is no mention of any of those contingencies in the Memorandum of Agreement. In my view, the obligation of the Employer crystallized upon the decision of Vice-Chair Chodos on April 6, 1998 which reinstated Mr. Green to the Public Service. The obligation was not contingent, and arose forthwith. In my view, the language of the Memorandum of Agreement will not support any other interpretation.

As to the Employer's proposal that, having come to such a conclusion, I should delay the implementation of any decision based on that conclusion pending the outcome of the Federal Court proceedings, presumably as a matter of arbitral discretion, I have concluded that this argument must also be rejected. On the balance of convenience, there is certainly some apparent prejudice possible to the Employer should any of the Judicial Review proceedings be unfavourable to Mr. Green. On the other hand, the Union argues strenuously that there is prejudice to Mr. Green as well, in that he is being kept from working in his long-standing occupation for the only employer in this country for whom he might perform operational air traffic control duties. He has been held out of that employment for a very considerable period of time now, and any further delay will simply exacerbate the effect of his detachment from regular exposure to air traffic control operations. In

my view, there is some force to this argument, and the balance of convenience in the Employer's favour, while real, is not as strong as might first appear.

More important, however, while arbitrators have a great deal of discretion because of the statutory dispositions in the Canada Labour Code, it is not clear to me that there is a discretion to delay the enforcement of a legally binding agreement. I have taken jurisdiction to interpret that agreement as a part of my jurisdiction as an arbitrator established under the collective agreement between the parties, for reasons set out in my preliminary award. That does not give me any general equitable jurisdiction to avoid or delay the enforcement of an otherwise legally binding undertaking.

As to the impact of the Federal Court proceedings, I observe that no steps seem to have been taken to stay either the order of Cullen J. or the decision of Vice-Chair Chodos by Treasury Board, although the cumulative effect of those two decisions was to fix Treasury Board with a considerable amount of financial liability. As to the effect of the judicial review applications against my preliminary award, the jurisdiction to stay my decision for whatever reason rests properly with the Court. The Court is best able to make such determinations, and indeed has an statutory jurisdiction to do so under section 4 of the *Judicial Review Procedure Act*.

In the result, I declare that the condition precedent for the offer of employment to Mr. Green in the Memorandum of Agreement dated November 6, 1997 has been met, and he is entitled to be treated as an employee pursuant to the collective agreement between the parties, subject only to the exceptions set out in the Memorandum of Agreement. I also find that, even if I have jurisdiction to delay the enforcement of this obligation, on a balance of convenience I should not do so. I therefore order that the declaration set out above be implemented as soon as possible. Obviously, in making such an order I neither have the ability nor the intention of precluding a delay imposed by a stay ordered by the Ontario Divisional Court.

To whatever extent it may be necessary to bring this matter to a final conclusion, I retain jurisdiction over the implementation of this award.

DATED AT TORONTO this 9th day of July, 1999.

Kenneth P. Swan, Arbitrator