IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(The Employer)

and

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION, CAW-CANADA LOCAL 54-54

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF DAVE KELLY ET AL. – 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 Kevin West, Labour Relations Officer John Urban, Manager of ACC Operations, Toronto
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 November 30, 2006. 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 here and determine the matter at issue between them.

This dispute arises from a grievance filed on July 24, 2006 by the Union on behalf of several employees, including Mr. Dave Kelly, a Data Systems Coordinator (DSC) at Gander ACC in Gander, Newfoundland. The substance of the grievance is as follows:

> On ten (10) occasions from March 2005 to June 2006 (see attached details), the grievor, Mr. Dave Kelly of Gander ACC, was assigned to DSC training at NCTI for periods of less than 30 days' each. On all those occasions, he was scheduled to work a 5-2 cycle, namely Monday to Friday, with Saturday/Sunday as rest days, at straight time rates of pay.
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> Before and/or after each training period, management converted a number of his scheduled work days to unpaid rest days allegedly in order to restore his 36 hour per week average (see attached details). When it was learned that other bargaining unit employees involved in the same courses were assigned an operational cycle during the training period (4/3 4/3 4/3 4/3 5/2, with three Fridays paid at overtime rates), the matter was made the subject of complaint.
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> The Union contends that the above-described practice in respect of Mr. Kelly is in violation of article 16.03(b) of the collective agreement. The Union submits the conversion of work days to rest days constitutes an amendment of Mr. Kelly's shift cycle outside the training period, which is not permitted by the clause.

By way of redress it is requested that the Company acknowledge having violated Art 16.03(b), cease and desist from further such violations, and make the grievor whole.

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.

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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.

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Clause 16.02 of the collective agreement, which is not quoted above, provides for what appears, to the uninitiated, to be a dizzying array of possible shift cycles. For the purposes of this award, it is sufficient to note that for the period chosen by the parties as an example of the Employer action complained of in the grievance, Mr. Kelly was assigned to work on a schedule that was five days on, three days off, six days on, four days off, six days on, and four days off. That 28 day cycle would then be repeated to make up the 56 day period described in clause 16.01.

In March and April, 2005, Mr. Kelly was assigned two individual days of training locally on Tuesday, March 22, and Thursday, March 24. He was then required to report to the NAV CANADA Training Institute (NTCI) in Cornwall, Ontario for a nine day training program. He traveled on Monday, March 28, attended training on the Tuesday through Friday of that week, had the two weekend days off, attended further training Monday through Friday of the following week, and traveled back to Gander on Saturday, April 9.

The two travel days, March 28 and April 9, were both rest days that were converted to work days in order to permit him to travel to the course, and they were both paid at overtime rates pursuant to a grievance settlement that recognized that, whatever else clause 16.03(b) means, scheduled days of rest cannot be converted to working days under the protection of the "no overtime" provision in that clause other than for the "duration of the training period", which does not include travel before or after.

During the training period, March 29, 30, 31 and April 7 and 8, which would have been days of rest on his shift schedule, were all converted to working days for the purposes of the training. Saturday, April 2 and Sunday, April 3, which would have been work days, were converted to days of rest, since NCTI operates on a 5/2 schedule, Monday through Friday. The Union does not complain about any of the changes implemented by the Employer as set out in this paragraph, since they are clearly authorized by clause 16.03(b) without overtime payments.

However, before Mr. Kelly left Gander, three days, March 25, 26 and 27, which were scheduled work days, were all converted unilaterally by the Employer into days of rest. After his return, the same conversion was implemented in relation to April

11, 12, 13, 14 and 15, which would have been work days, but were converted unilaterally into days of rest.

The Union's argument is that, on the language of paragraph 16.03(b), the Employer is entitled to amend the shift cycle only for the duration of the training period, and thus it may not amend the cycle outside of the training period without incurring overtime costs.

The Union argues that converting a work day into a day of rest is equally an amendment of the shift schedule as is converting a day of rest into a work day, and refers to some older cases, prior to an amendment to the collective agreement with the Employer's predecessor employer that introduced the exceptions for training now found in clause 16.03, where arbitrators suggested that an employee would be entitled to pay for a day which had been scheduled as work and was unilaterally converted by the Employer into a day of rest.

The Employer's position is that it is entitled to modify shift cycles associated with training, and then re-allocate days of work to days of rest within the same 56 day averaging period specified in clause 16.01, in order to avoid payment of overtime pursuant to the exception in paragraph 16.03(b) which requires overtime to be payable for all hours worked in excess of those stipulated under clause 16.01.

The Employer argues that clause 16.03 must be read as a whole, and that reading paragraph (a) with paragraph (b) makes it clear that the Employer has a discretion either to convert working days to days of rest on a one-for-one basis to balance the number of days of rest converted to working days, or to pay overtime compensation instead. The Employer agrees that it does not always exercise this discretion in the way

in which it was done for Mr. Kelly, since sometimes account has to be taken of the possibility of replacing the employee on scheduled working days upon his or her return to the headquarters area. That is likely the reason why some of the employees attending the same course as Mr. Kelly were treated, for the purposes of overtime, differently from him.

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.

In the result, the grievance must be denied.

DATED AT TORONTO, ONTARIO this 20th day of March, 2007.

Kenneth P. Swan, Arbitrator