IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

Employer

-and-

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

Association

Grievance re: Doerksen
Article 13.01(b) Break Time

SECOND SUPPLEMENTARY AWARD

BEFORE:	Tom Jolliffe
FOR THE EMPLOYER:	Patricia Brethour
FOR THE ASSOCIATION:	Peter Barnacle
DATE OF HEARING:	December 13 & 14, 1999
LOCATION OF HEARING:	Toronto, Ontario

Date Second Supplementary Award Issued:
February 28, 2000

This second supplementary award is issued on the basis of my continuing to remain seized of the matter for purposes of issuing suitable directions to complete the award relative to the grievance filed by the Association's branch chairperson, David Doerkson. He successfully claimed a violation of article 13.01(b) of the collective agreement which reads as follows:

> **Where operational requirements permit, the Employer will provide operating employees with meal and relief breaks.**

The award was issued on April 10, 1998, followed by a first supplementary award providing further clarification and direction on September 9, 1998. The issues, evidence, conclusions and expectations for resolution of the Employer's obligations under article 13.01(b) respecting providing suitable break time are explored at some length in their texts.

The initial reconvening of the hearing on September 9, 1998 was on the basis of finding a suitable remedy following my conclusion that the monitoring structure currently in place at the Winnipeg ACC for covering single controller positions at any time during the night shifts when controllers were required to briefly leave for reasons of personal exigencies or to seek some rest, constituted an ongoing denial of the meal and relief break language under article 13.01(b). The language required the Employer to put acceptable methods in place in order to provide adequate breaks.

Thereafter, consultations were undertaken between the parties. The Association has always seen double staffing in each area specialty throughout the entirety of the night shift, no matter how low the traffic flow, as the only workable solution. In the Employer's view, double staffing without any consideration for low or non-existent traffic flow during some hours of the midnight shift was unacceptable. In the concluding paragraphs of the supplementary award I stated as follows:

> **As hereinbefore indicated, this hearing was reconvened on the basis of my have already ruled that the Employer must put some acceptable method in place to ensure that single controllers on midnight shifts are to be**

provided adequate meal and relief breaks as contemplated under the collective agreement. The solution to the Employer fulfilling its obligations under article 13.01(b) is not so straight forward as requiring a direction that the Employer simply double staff the entirety of every midnight shift whatever traffic flow requirements are perceived to exist. If that were the only solution, given the mounds of evidence presented at the main hearing, I would have made this direction without requiring the Employer to explore suitable solutions.

However strong the feelings of the Association and its membership over never wanting to be absent from their assigned work stations for a moment without ensuring fully trained continuing coverage, the grievance and eventual arbitration award does not discount the possibility of a controller having to work alone for some part of the midnight shift. My award does not impugn that approach just so long as the contract language of article 13.01(b), requiring meal and relief breaks during the shift, is respected. Further I should point out that the award does not limit the Employer's ability to make staffing or scheduling decisions as might normally be done as a matter of management rights, just so long as the employees' rights for appropriate break time are respected. Nor can I be overly concerned with doubts respecting the long term viability of any current solution given the availability of the consultative process and contract negotiations.

In terms of providing further clarification and direction, the Employer is obligated to respect article 13.01(b). At this point, in answer to the Association's first question, I am not prepared to declare that the implementation of a viable current solution precludes establishing a schedule on some or other midnight shifts which requires controllers to work alone for some period of time at their stations. There is as yet no compelling evidence that working alone for three hours, on its face, prevents a controller from having taken sufficient meal and relief breaks during the other hours of the shift when double coverage exists. With respect to the second question posed by the Association, whether the amended monitoring policy provides the kind of meaningful meal and relief breaks contemplated by the award, I do not yet see the relevance to the remedial issue at hand so long as the Employer maintains scheduled double coverage sufficient to allow for the breaks, with monitoring applicable only during the single controller gap times to cover for a person unexpectantly called away from his station. Thirdly, the issue of unreasonable gap time, I expect, would have to be addressed by evidence

on a case by case basis. Once again, the award speaks to the necessity of allowing reasonable breaks as contemplated by article 13.01(b) and not to the narrower issue of the Employer now seeking to utilize single controllers for some period of time during a scheduled shift as a matter of management rights. In my view the Employer is entitled to schedule meal and relief breaks on either side of a mid-shift gap. It is a separate issue from any monitoring concerns which might arise if unusual or unexpected circumstances serve to take a controller away from his work station momentarily during the gap period when there is no assigned double coverage.

I leave it up to the parties to advise whether there need be any delay in implementation as a result of the statutory freeze in working conditions arising from their current contract negotiations situation, which if becoming an issue can presumably be adequately addressed by way of telephone conferencing. I continue to remain seized of the matter for the purposes of issuing suitable directions to complete the award.

The hearing again reconvened in Toronto on December 13 & 14, 1999, with my acknowledging a continuation of my jurisdiction for purposes of determining whether the solution employed by the Employer was a suitable remedy in terms of reasonably fulfilling the award while not itself being in contravention of the collective agreement. There is no dispute that a new collective agreement has been in place since August 13, 1999 with no retroactive application to cover the remedy issue at hand arising under the old collective agreement which had been extended by legislation past its stipulated expiry date. The new language under article 16.01(b) provides for a mandatory 15 minute briefing period for employees to prepare themselves to assume their duties prior to commencement of each shift while 16.04(d) now requires the Employer not to schedule the commencement of the shift within ten hours of the completion of the previous shift and not to schedule regular shifts lasting less than six hours or more than eleven hours. One notes also that article 16.04(e) prevents the scheduling of split shifts as was the situation under the old 13.07. The Association accepts that the new language may well contemplate the possibility of utilizing variable shift lengths, although application of the new language is not the issue here.

The evidence indicates that with respect to finding a remedy under the old language, eventually, subsequent to a series of discussions between the parties and a RAP monitoring procedure carried out in Winnipeg concerned with instituting adequate staffing for traffic flow, the Employer's counsel Patricia Brethour, corresponded with the Association's counsel, Peter Barnacle on February 2, 1999. She explained therein the scheduling to be adopted in order to fulfill the requirements of the award. The Employer accepted that it had to ensure that single controllers on midnights were provided adequate meal and relief breaks during their shift for the normal purpose of taking some rest and relaxation away from their duties. This correspondence reads as follows:

> **As you may be aware, NAV CANADA Monitoring and Evaluation recently conducted an RAP in Winnipeg, with particular emphasis on the midnight shift.**
>
> **As a result, double staffing on the midnight shift will continue for the foreseeable future for 7 days a week in the North Specialty and 5 days a week in the Winnipeg EnRoute Specialty.**
>
> **In accordance with Mr. Jolliffe's decision, the other shifts will be staffed such that adequate meal and relief breaks will be provided through overlapping coverage during specific hours.**
>
> **I attach copies of the revised shift schedule for the Saskatchewan, Ontario, Winnipeg EnRoute and Terminal Specialties. We intend to implement the revised schedules effective April 1st, 1999.**
>
> **For the remaining specialties, schedules will be in accordance with the present shift coverage.**
>
> **As you know, schedules are not normally posted until March 15th. Given that the length of some of the shifts has been adjusted, I am providing these schedules to you now in order to provide sufficient time for consultation.**
>
> **We would like to arrange local consultations on the revised schedule as early as possible and are also prepared to consult nationally. The schedules have been revised to give effect to Mr. Jolliffe's decision an as**

such I am sending these schedules directly to yourself and will await initiating local consultations until I have heard from you.

Suffice to say that the schedules prepared for the Winnipeg EnRoute Specialty, Saskatchewan Specialty, Ontario Specialty and Terminal Specialty which the Employer had concluded did not require double staffing for midnight shift (excepting five days a week for Winnipeg EnRoute) included a system of variable length shifts ranging from seven hours to nine hours forty-five minutes in order for the "overlapping coverage during specific hours" to occur so as to facilitate scheduling the required break time.

The Association holds to the position that through well established past practice there was never any understanding between the parties that the old collective agreement could be interpreted to allow the Employer to utilize variable length shift scheduling, as opposed to just the traditional eight hours and fifteen minutes per day as representing the normal scheduled shift for every air traffic controller at the Winnipeg ACC. The shift cycles contemplated under that collective agreement had always been based on standard length shifts and any remedy requiring employees to de-regularize the length of their work days as a means for the Employer to avoid double staffing midnights was seen as contrary to their reasonable expectations protected by it. The first negotiated change respecting the make up of individual shifts is set down in the new article 16.04(d) which provides that they not be less than six hours or more than eleven hours duration.

The Employer takes the position that whether it declined in the past to schedule variable length shifts has more to do with the fact that it never needed them and did not have the computer software in place to effectively schedule them as opposed to recognizing any prohibition. It points to the language of the old article 13.06 applicable to the situation at hand which requires only that the Employer make every reasonable effort not to schedule commencement of a shift within eight hours of the completion of the previous shift and not to schedule shifts of less than seven hours duration. The only other language in the old collective agreement relative to shift length is article 15.04 stipulating that outside of an

emergency situation, no employee shall work more than twelve consecutive hours or more than nine consecutive days, which the Association does not view as a standard scheduling provision, but language meant to prevent excessive overtime.

The evidence in the matter indicated that during the most recent round of negotiations leading to the new collective agreement, which included a conciliator's report by arbitrator Kevin Burkett, the variable shift length language proposal had come from the Employer, presumably submitted in the context of the meal and relief break language being maintained as the new article 16.07.

The Association witnesses, its vice-president of labour relations Richard Nye and regional director for Winnipeg Kevin Wallace, testified with respect to its understanding of the collective bargaining situation and longstanding past practice on scheduling. A standard length of shifts was scheduled to fit the shift pattern, being normally eight hours and fifteen minutes in Winnipeg unless there were local consultations and agreements respecting different shift cycles. They had shift cycles of three periods of five days on and four days off followed by six days on and three off, resulting in a claw back of two shifts at the end of the year. Vancouver implemented a program of five days on and four days off for six periods, followed by one of six days on, three days off and then repeating. The length of the shift in that city was set at eight hours and thirty minutes resulting in a claw back at the end of the year of only two hours and twenty four minutes. In Toronto controllers were permitted to work a shift cycle consisting of a repeating five days on, four days off, also at eight hours and thirty minutes, which resulted in them being owed fifty-one hours and fifty-two minutes at the end of the fiscal year. The Association pointed out that the practice of local agreements on shift length and cycle found support in the form of the Langley Tower grievance settlement which confirmed that local agreements on shift cycles once reached were binding on the parties and not subject to view by a higher management authority. Note also Hill and Treasury Board (Transport Canada), P.S.S.R.B. File No. 166-2-22582, dealing with the requirement to implement a local agreement over a 5/4 shift cycle. Adjudicator

Burke determined in that case that local management had the authority to agree to a 5/4 shift cycle and had done so at the location in question following meetings with the Association's local representatives. It is interesting to note that the low level group of controllers had already been working the 5/4 shift cycle for some ten years prior to the local agreement being entered into, which is not to say that the adjudicator reached his conclusion on the basis of past practice, only that the shift cycle had apparently shown itself to be workable which played a role in local management having eventually agreed to implement it in the broader scope.

The Association witnesses acknowledged that prior to April 1999 the scheduling in Winnipeg, as elsewhere, was done largely manually for the approximate 190 controllers at the Winnipeg ACC working roughly 2,200 shifts per month. During April the Employer implemented a computerized scheduling tool known as the "shift logic program" which provided the technology to allow it to individually adjust the lengths of shifts by juggling the vast number of variables within the days on/days off scheduling format. Consultation meetings were held with the Association prior to implementing the variable length shifts where required in order to avoid double scheduling on midnights.

The Association tabled two cases on the significance of past practice between these parties being arbitrator Bird's decision in Letter of Understanding 4-91 (unreported, November 21, 1997) and arbitrator Swan's decision in Policy Grievance re: Requests for Medical Examinations (unreported July 10, 1998). In the earlier case the arbitrator observed that a mutually accepted practice which had endured could be the basis for granting an estoppel or used as an aid to interpret the collective agreement in appropriate circumstances where there was a national past practice, the agreement itself being national in scope. He nevertheless adopted what he took to be the plain meaning interpretation of a letter of understanding dealing with assignment of controllers' duties. In the latter case, a policy grievance concerning whether the employer had the authority to require the release of personal medical information to a physician retained by the employer and require medical

examination by this physician, the arbitrator considered using the past practice extrinsic evidence as a matter of resolving an ambiguity. He also accepted that it would have to be national in scope to be of any use. He noted on the evidence presented that acquiescence by one party to the other's interpretation had not been shown either as a matter of clear expression, nor accepted by those with real responsibility for administering the collective agreement.

The Employer here holds to the position that applying its management authority with respect to scheduling shift lengths, whether variable or not, and where not addressed by any limiting language of the collective agreement, does not create any rights or prerogatives for the Association, or allow employees to rely on a standardized eight hour and fifteen minute shift length as a matter of collective agreement interpretation. In the CATCA and Treasury Board (P.S.S.R.B. File No. 148-2-149) decision by adjudicator Kwavnick the Employer had moved away from a situation of using "call-in" overtime to "scheduled" overtime except in cases of short notice. It was a change in assignment method occurring after the notice to bargain and without any consultation between the parties prior to its implementation. The adjudicator determined that the Employer in having relied solely on one form of overtime had not created a term or condition of employment subject to the statutory freeze during bargaining. He stated his view at page 15 of the award that prerogatives under a collective agreement did not atrophy through disuse, otherwise "(it) would mean that during the life of a collective agreement, prior to the serving of notice to bargain collectively, the parties would be obliged to have regular recourse to every right or prerogative secured to them by the agreement, regardless of whether or not such recourse was warranted by circumstances, simply to keep that right or prerogative current in the event that it turned out to be needed during the freeze period." The Employer asserts that whether utilized or not, the Employer has always had the ability to schedule varying length shifts and that the collective agreement contained no limiting language.

On the evidence presented I agree with the Employer that the Association's

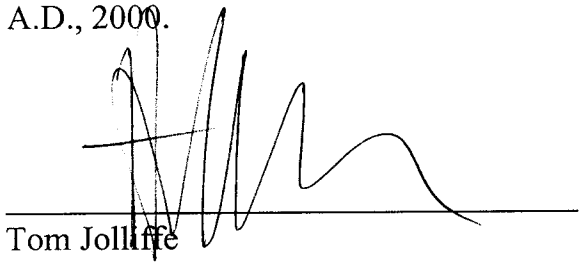
case for it having violated the relevant (old) collective agreement seems to rest entirely on the fact of the Employer never having previously introduced variable length shifts, as opposed to utilizing standardized eight hour and fifteen minute shifts in Winnipeg, prior to April 1999, without there being any language contained in the collective agreement specifically preventing this approach to its ongoing scheduling requirements. The collective agreement which applied at the time of this grievance provided that outside of an emergency situation no operating employee could work more than twelve consecutive hours or more than nine consecutive days. This provision can be seen to prevent excessive overtime, and does not refer to daily scheduling needs. It is a matter of whether to use extrinsic evidence as an aid to interpretation, there being no evidence of any detrimental reliance of the type to support an estoppel argument and indeed no such argument was advanced. However, in my view it was not so much an ambiguity in the language as the collective agreement being silent with respect to length of individual shifts for purposes of normal daily scheduling. It is apparent that the Employer did not have the technology to individualize shifts until April 1999 which is not say that it could not have legitimately done so previously, unless limited by the collective agreement, were this technology then available. Further, it is apparent that the past scheduling was not committed to by the Employer in the form of any concrete local agreements as spoken to by the case law, which if that had been the case would be binding on the Employer. I must conclude that the relevant collective agreement, although silent on the issue, is not ambiguous and that management rights can be seen to apply to the situation at hand during the months leading up to the new collective agreement. I would add that there might be any number of reasons why the parties dealt with the possibility of the Employer varying shift lengths during the new term, not the least of which could be to add some further clarity to the situation as opposed to it relying on management rights on a case by case basis.

In these circumstances I cannot conclude that the variable shift lengths implemented at Winnipeg ACC as a matter of removing the necessity to double staff some midnight shifts should be viewed as a breach of the relevant collective agreement. The

situation does not require any declaration from me at this point that it somehow amounted to an insufficient and inappropriate way to remedy the meal and relief break deficiency required by the award for that period of time until the new collective agreement provisions came into effect in August 1999.

Having regard to the new collective agreement now having taken effect, I see no reason to remain seized over this matter. The Employer having implemented an appropriate remedy for the time it was required to do so under the old language, I will refrain from remaining seized any further.

DATED this 28th day of February, A.D., 2000.



Tom Jolliffe