IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(hereinafter referred to as the "Employer")

AND:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

(hereinafter referred to as the "Union")

(George Syrotuck)

Arbitrator:	H. Allan Hope, Q.C.
Counsel for the Employer:	Colin G.M. Gibson
Counsel for the Union:	Peter J. Barnacle
Place of Hearing:	Richmond, B.C.
Date of Hearing:	June 22, 2000

A W A R D

I - The Dispute

The Grievor, George Syrotuck, is an operational air traffic controller in Victoria, B.C. On March 21, 2000 his application for "care and nurturing leave" was denied on the basis that his children were not "pre-school age" as required in the collective agreement. The application was for seven weeks leave commencing July 18 and ending September 4, 2000. The Union's position was that the youngest of the Grievor's children, Jason, was pre-school age. The Grievor filed a grievance challenging the decision on March 22, 2000. The language at issue reads as follows:

> 26.09 Leave Without Pay for the Care and Nurturing of Pre-School Age Children
>
> An employee shall be granted leave without pay for the care and nurturing of the employee's pre-school age children in accordance with the following conditions ...

Following the preamble there were five conditions, none of which were in contest in this dispute. The position of the Union was that the Grievor met all of the criteria defined in that provision and was therefore entitled to the leave. The Employer's position was that Jason was not of "pre-school age" as required in the provision and the Grievor was therefore ineligible to claim entitlement to the leave. The interpretive issue, which appears to have arisen between these parties, for the first time, related to the mutual intention to be imputed to the parties with respect to the term, "pre-school age children". The application issue is whether the facts draw the Grievor's son outside of that term on the basis of elections he made with respect to his son's education.

II - The Facts

Jason was born on April 20, 1994. On or before September 1, 1999, he was enrolled and began attending a kindergarten class in the public school system in Victoria. He was five years of age at the time, having reached his fifth birthday on April 20, 1999. His kindergarten class occupied 2.5 hours each afternoon of the school week. His status under the School Act was defined in the following provisions:

> "school age" means the age between the date on which a person is permitted under section 3(1) to enroll in an educational program provided by a board and the end of the school year in which the person reaches the age of 19 years;
>
> "student" means a person enrolled in an educational program provided by a board and, if a section or subsection refers to a Provincial school, includes a person enrolled in the Provincial school for the purpose of that section or subsection;
>
> s.2 A person is entitled to enroll in an educational program provided by the board of a school district if the person
>
> (a) is of school age, and
> (b) is resident in that school district.
>
> s.3(1) Subject to subsections (2) and (3), a person who is resident in British Columbia must
>
> (a) enroll in an educational program provided by a board on the first school day of September of a school year if, on or before December 31 of that school year, the person will have reached the age of 5 years, and
>
> (b) participate in an educational program provided by a board until

> he or she reaches the age of 16 years.
>
> s.3(2) A parent of a child referred to in subsection (1)(a) may defer the enrollment of his or her child until the first school day of September of the next school year. (emphasis added)

In the context of those provisions, the Grievor did not avail himself of the option recorded in s. 3(2) of the Act. Hence, he was obligated to enroll Jason in a kindergarten class under s. 3(1)(a) of the Act. Jason was enrolled and began attending kindergarten in September of 1999. As such, he was attending school as the term, "school", is defined in s. 1 of the Act. The fact that "school" includes programs from kindergarten through Grade 12 is confirmed in the following extract from the Ministry of Educations's Web Page:

> The Ministry of Education is responsible for setting the overall funding and broad policy directions for education in British Columbia in Kindergarten through to Grade 12 (K-12) ...

The response of the Union, in effect, was that Jason was not attending school in the context contemplated in the collective agreement, he was attending kindergarten. It first pointed out that kindergarten in British Columbia is part-time and is voluntary in the sense that parents, under s. 3(2) of the Act, are not obligated to enroll students in school until, to paraphrase s. 3(1)(a), "the first school day of September" of the year the child, "will have reached the age of [six] years".

III - Submissions of the Parties

(i) The Union

The Union relied on the decision in Lachapelle and Treasury Board, [1997] C.P.S.A.R.B. No. 2 (Turner) as support for the proposition that the interpretation of language equivalent to Article 26.09 cannot be governed by provincial legislation. On p. 5, paragraph 25, Board Member Turner wrote:

> I can not rely on the provisions of any provincial education act, Ontario or otherwise, since none are referred to in the Master Agreement. The ordinary meaning of pre-school age is a time before a child attends school. I believe the clear intent of the parties is to provide for care and nurturing leave for a pre-school child who is in need of such care when not in a regular full time school situation. This is not the case before me. Mr. Lachapelle's daughter was no longer of pre-school age as she was at school full-time.

In that dispute, the issue was whether a child, who was five years old, was to be considered a pre-school age child despite the fact that she was actually attending school. The decision was that the parties intended the interpretation and application of the provision to be governed by the facts rather than by recourse to definitions in provincial legislation. Those facts, as recited in paragraph 7 of the decision, are as follows:

> [The grievor] had been on care and nurturing leave Thursdays and Fridays of his normal work week attending to his daughter's needs for two years prior to October 1993. His daughter was born October 7, 1987. The employer refused to extend the leave in the fall of 1993 because his daughter, although only five years old in September 1993, was then attending school full-time, that is, Monday through Friday in Grade

> one. She had already been in Junior and Senior kindergarten.

The governing legislation in that dispute was not recited in the decision or filed in these proceedings. However, by necessary implication, the child in that case was deemed to be of pre-school age while attending kindergarten, a fact implicit in the findings cited above. The distinction was the child was "attending school full-time", that "she had already been in Junior and Senior kindergarten", and that the Grievor "had been on care and nurturing leave ... for two years prior to October 1993, [being the year his application was rejected]. In short, during that period the child was seen as meeting the definition of "pre-school age" despite the fact that she was attending "Junior and Senior kindergarten". She lost that status only after she had completed kindergarten and was attending regular school full-time under an exception available under the legislation of that Province.

In this dispute the Union urged that the same reasoning applied. Jason was not attending school, said the Union, he was attending a kindergarten class which was an optional course available "pre-school". The submission of the Union was that the provision in dispute could not be read as implying a mutual intention in the parties to have the question of when a child will be presumed to be of "pre-school age" determined by reference to provincial legislation. It noted in that regard that when the parties did intend such a result, they expressed their intention in clear language. The Union recited Article 25 as an example of express language. It reads:

> 25.01
>
> Subject to clause 25.02 when an employee is injured in the performance of his or her duties, NAV CANADA shall grant the employee paid leave for such reasonable period as may be determined by NAV CANADA provided that:

(a) a claim has been filed with the appropriate worker's compensation authority;

(b) NAV CANADA has been notified by that workers' compensation authority that the employee's claim has been granted;

(c) the employee agrees to remit to NAV CANADA any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease, providing, however, that such amount does not stem from a personal liability policy for which the employee or the employee's agent has paid the premium.

22.02

Paid injury on duty leave shall not be granted in any province where it is prohibited by provincial legislation, nor for any period of time or in any amount which would limit compensation payments under any provincial workers' compensation legislation.

The Union also adopted the same submission with respect to a provision relied on by the Employer. The provision, Article 28.01, reads as follows:

28.01 Designated Holidays

The following days shall be designated holidays for employees ...

(k) One additional day in each year that, in the opinion of NAV CANADA, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August ...

In order for the Employer to be correct in its interpretation, said the Union, it would be necessary to assume that the parties intended to have a benefit available in one Province which could be

denied to employees in another Province. That inconsistency in application, at the least, said the Union, would require a clear expression of intention. In support of that submission the Union filed copies of legislation from other provinces that revealed a range of approaches with respect to the issue of school age.

(ii) **The Employer**

The Employer argued that arbitrators have jurisdiction to interpret statutes that have application to disputes upon which they are required to adjudicate. This dispute, said the Employer, is governed by the terms of the School Act of this Province. That is so, said the Employer, because it is decreed in the Constitution Act that provincial legislatures have exclusive jurisdiction to make laws with respect to education. It relied on the decision in Lachapelle and Treasury Board for the same proposition advanced by the Union. It read the extract previously cited as standing for the principle that when a child is actually attending school, they cannot be seen as a "pre-school age" child. In this Province, said the Employer, a child attending kindergarten is, by statutory enactment, attending school.

The Employer also cited Messier and the Treasury Board, [1987] C.D.S.S.R.B. No. 84, in which Vice-Chair Cantin addressed similar language with respect to a Correctional Service collective agreement. That decision turned on different facts and a different issue. Finally, the Employer relied on Canada Post Corp. v. Smith, (1998) 40 O.R. (3d) 97, where the Ontario Court of Appeal wrote in part as follows:

> While Canada Post suggested that an acknowledgement of interpretative primacy over the GECA to provincial boards creates a patchwork of rights for injured federal employees depending on the laws of the province in which they usually

> work, such a result is neither inequitable nor inconsistent with the principles of federalism. Making different administrative arrangements with different provinces is not unconstitutional. Rather than leaving injured or disabled federal workers with no recourse, the federal government passed the GECA so that every federal employee had the right to whatever compensation other injured workers in the same province could claim.

It can be seen that the decision related to the application of provincial workers compensation legislation to federal employees falling within its terms. The Employer saw that same reasoning as having application to the School Act of this Province.

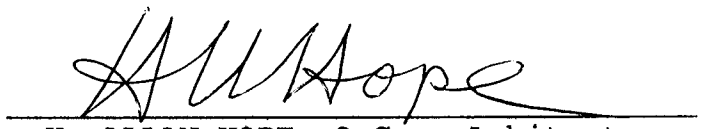
IV - Decision

In my view the position of the Union reflects a correct interpretation of the collective agreement. The principles of interpretation require that benefit provisions in collective agreements receive consistent application unless a distinction is invited on the basis of clear language. The language in dispute does not contain any such language. In fact, as submitted by the Union, when read in the context of the collective agreement as a whole, no such intention can be read into the provision.

Applying the reasoning in Lachapelle and Treasury Board, I conclude that the question of whether a child is a pre-school child is a question of fact to be answered on the basis of whether the child is attending school. The child in this case will not be attending school until after the leave expires in September of this year. Attending kindergarten in a half-day voluntary program is not the equivalent of attending school in the sense I take to have been intended by the parties in the disputed language. Hence, while the child, in a strict interpretation of the School Act, may be said to have been attending school while volunteering to attend kindergarten,

was not attending school. In the result, the grievance is granted and the Employer is directed to approve the Grievor's leave application.

DATED at the City of Prince George, in the Province of British Columbia, this 28th day of June, 2000.



H. ALLAN HOPE, Q.C. - Arbitrator