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IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

The Employer

-and-

THE CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

The Association

Grievance re: Jerry Shieron - Seniority Bid (99-025)

AWARD

BEFORE:	Tom Jolliffe
FOR THE EMPLOYER:	Jacques Emond
FOR THE ASSOCIATION:	Sean McGee
DATE OF HEARING:	November 9, 2000
LOCATION OF HEARING:	Edmonton, Alberta

Date Award Issued:
March 20, 2001

This matter concerns the grievance filed on behalf of Jerry Shieron, an air traffic controller. The Employer is alleged to have contravened the selection by seniority requirement for the Air Traffic Control Operational Training Programme, and all other relevant procedures and practices, by having failed in May 1998 to include him in the list of prospective candidates for the Calgary Terminal course. By way of corrective action, the Association seeks an order directing the Employer to cease and desist from such action, to immediately add the grievor to the bidding list according to his seniority, to make him a training offer if he has the requisite seniority, to formally apologize to him and to the Association for its failure and to make him whole in all other respects.

It was agreed that the terms and conditions applicable at the time the grievance was filed in June 1998 were still those contained in the 1992 collective agreement between Transport Canada and CATCA. They were applicable by reason of NAV CANADA, the successor employer under the Canada Labour Code, still being in the process of negotiating the terms and conditions of a new collective agreement at that point.

The Employer takes the view that the grievor has been given numerous failed opportunities to be successfully trained in the instrument flight rules (IFR) area and that it was reasonable for management to limit the number of retries to be undertaken. It sees the resources being put into such training as both substantial and costly. Management, by its current description, being charged with the responsibility to make the best possible use of the Employer's resources, reasoned in this instance that he had not met the eligibility requirements set out in the operational training programme document, and that it was not obliged to exercise its discretion in his favor.

The stated purpose of the programme described in the currently applicable operational training programme document is "to provide direction and guidance in training for and staffing of non-supervisory operational air traffic control positions." Its objective is "to select personnel, who are currently employed as licenced controllers, in which to undertake training for non-supervisory control positions, based on a system of seniority".

The programme is said therein to have become effective on the signature date, August 25, 1997, and "only bypass and training which is commenced under the programme known as Selection By Seniority For Air Traffic Control Operational Training or for which offers for training have been made will remain in effect". In terms of limitations the programme "applies nationally for the accumulation of seniority and for selection of personnel to undertake training for area control centre positions, terminal control unit positions and grades 4 and 5 airport control positions. The programme is intra-regional for all other positions" and, further, "candidates will be restricted to consideration for two training opportunities at any time". It was to remain in effect until the new collective agreement was negotiated and could be amended by mutual agreement of the parties.

The relevant language used by the Employer to determine the grievor's ineligibility, he having previously failed IFR training, is contained in article 9 and article 10 of the operational training programme document. These articles read as follows:

Article 9

Subject to Article 10, Controllers in the following situations will not be eligible to bid:

a) when the training programme will commence within three (3) years following the date:

i) the individual had withdrawn after acceptance of a formal training offer, or,

ii) on which training was terminated for failing to successfully complete any portion of the SAME training programme, or,

b) for the SAME training programme which they have failed on more than one occasion;

c) within three (3) years of commencement of a training programme for a position at their former unit where they were unable to maintain unit standards and were

subsequently demoted;

d) Employees in the IFR Stream Training Programme;

e) Employees who have been removed from operational services in their former position and do not meet the requirements of the position being applied for.

Note: i) When dealing with Airport Training, SAME means any previously undertaken airport training programme, at the same or lower level of tower classification.

ii) When referring to Area/Terminal Training, SAME means any area control or any terminal training programme.

Article 10

The responsible ATS Manager may waive the restrictions outlined in Article 9. Waivers will be granted when it is deemed by management to be in the best interest of NAV CANADA or when management believes individual circumstances surrounding the ineligibility of a bidder warrant. All waives will be approved by the Director, ATS or his/her representative.

Interestingly, there is no indication in the initial response from the regional manager of technical training to the grievor's bid for inclusion, or in his follow-up memorandum, or in the first level grievance response, that any consideration was given by the Employer to any "individual circumstances surrounding the ineligibility" contemplated by article 10 of the operational training programme document. The Employer did however expressly refer to article 9 as having made him ineligible for consideration.

It is necessary to outline the history of the ineligibility finding and documents related thereto.

On November 19, 1996, the parties signed the Memorandum of Understanding on the formulation of interim procedures to apply during the transition period for the

takeover of operations by NAV CANADA from Transport Canada. It covered competitive staffing and promotion, grievance and arbitration, and job security, as set out in Appendix A of that document. There followed the above referenced operational training programme document executed the following August.

However, by the Association's submission the operational training programme document covering the grievor's situation cannot not be read in isolation. Notably, there had been a previous such document, effective March 1, 1992. It likewise had contained the same preliminary paragraph stating the purpose of the document being "to provide direction and guidance in training for and staffing of non-supervisory operational air traffic control positions". It called for termination of the programme on April 30, 1996. The document also contained a version of article 9 dealing with controllers losing their eligibility to bid for training and article 10 speaking to the waiver issue. These earlier provisions are set out below as follows:

Article 9

Controllers in the following situations will not normally be eligible to bid:

a) when the training programme will commence within three (3) years following the date:

i) the individual had withdrawn after acceptance of a formal training offer; or,

ii) on which training was terminated for failing to successfully complete any portion of the SAME training programme, or;

iii) on which training was terminated for failing to successfully complete the theory portion of a SIMILAR training programme;

b) if they have failed the SAME training programme or the theory portion of SIMILAR training programmes on more than one occasion;

c) within three (3) years of commencement of training programme for a position at their former unit where they were unable to maintain unit standards and were subsequently demoted;

d) when dealing with airport training:

SAME means training programmes at a specific unit level (e.g. all level 11 towers);

SIMILAR means any airport training programme.

e) When dealing with area/terminal training:

SAME means any area control training programme or any terminal training programme;

SIMILAR means any IFR training programme.

Article 10

The responsible ATS Manager may waive the restrictions outlined in Article 9, where appropriate.

The parties met in 1993 to discuss specific problems arising over the application of this earlier operational training document including the seniority bidding guidelines under article 9, and the waiver of restrictions by the responsible ATS Manager under article 10. As said by the Association to be relevant to the issue at hand, on May 19, 1993 the Director of Air Traffic Services for Transport Canada, L.J. Desmarais, corresponded with the Association's President at the time, John Redmond, to "confirm interpretations and agreements made concerning the application of the Seniority Bidding Guidelines Article 9". Mr. Redmond signed off the letter as "accepted". The confirmation letter included the following paragraph:

It was agreed that Article 9 b) shall be applied only if the training failures mentioned occurred within the eight (8) year period immediately preceding the date a training programme will commence. The training failures shall include same or similar training undertaken as part of the "Revised IFR Training Stream Programme".

Turning now to the grievor's particular circumstances, in November 1975 he received Edmonton ACC IFR training and was unsuccessful. In September 1981 he again received Edmonton ACC IFR training and was unsuccessful. In April 1990 he received Calgary Terminal IFR training and was unsuccessful. Given the agreement reached between the parties to modify the failed training opportunities restriction to mean twice within eight years, in October 1994 the grievor received Edmonton Terminal IFR training. He was unsuccessful. The newly revised seniority bid programme came into effect in August 1997 with its changes to article 9 and 10. In May 1998, the grievor again applied for Calgary Terminal training and was denied. With the parties having agreed to the new seniority bid programme, the Employer by then considered the old 1993 training modification letter to be without any force or effect. There was no re-written letter of agreement respecting the eight year stipulation. The grievor's subsequent seniority bid for Calgary terminal IFR training to commence November 1998 was screened out due to his ineligibility under article 9 for having had two previous unsuccessful IFR training attempts.

The Association holds to the view that there was either a patent or latent ambiguity in the language with respect to whether the eight year sunset clause should still apply to cover past unsuccessful training attempts; or, could even be found to have been clearly intended as a matter of the parties having the ongoing eight year clause continue unless specifically removed by clear language. Arguably, the Employer was even estopped as a matter of detrimental reliance on the new, similarly worded article 9 and 10, not being applied any differently. The Employer takes the position that the language does not disclose any patent or latent ambiguity. The relevant provisions of the operational training document were re-written in August 1997 to deal with the waiver possibility as a matter of exercising

management discretion. The document was entered into by NAV CANADA as the successor employer with there being no indication anywhere of the preservation of the previously established sunset clause. It superceded the old document which contained less discretion, but the severity of which had been mitigated to a degree by the agreement arising out of a May 1993 meeting declaring an eight year sunset clause. There was no ambiguity and estoppel should not be a consideration.

The Association called Robert Coté to testify. After some fifteen years as an air traffic controller, he took a human resources specialist position in 1983. By 1992 he had become Superintendent of Human Resources for Transport Canada in Ottawa moving into the position of Manager of Technical Training and Operational Resources between 1984 and 1998. He took a leadership role on the transition team assembled by NAV CANADA and briefly worked as the Regional Manager for Technical Training in Quebec before retiring in November 1999.

Mr. Coté took part on behalf of Transport Canada in the negotiations leading to the 1992 operational training programme document. To that point there had been no restrictions on applying for training programmes with employees being able to take them any number of times. The original article 9 introduced seniority bidding for such programmes while at the same time provided a limit for applications based on past unsuccessful attempts. He remarked that Transport Canada was not about to let individuals, by reason of long seniority, spend inordinate amounts of time taking training for programmes concerning which they repeatedly had been unsuccessful in the past. At the same time, he said, it was never Transport Canada's intention to disqualify a person for life. He began observing that article 10 was not considered particularly successful in that management persons exercising their discretion tended not to be concerned with individual circumstances. It became apparent, he said, that more likely than not they simply applied article 9 without enough thought given to the discretion aspect. He said also that a disparity developed over how the discretion was applied in different regions, with some managers applying more imagination and creativity

than others. Accordingly, the following year, in May 1993, Transport Canada and the Association entered into an agreement dealing with the interpretation of article 9 whereby it would be applied only if the training failures mentioned therein occurred within the eight year period immediately preceding the current training programme. He said in part it was an acknowledgment that there was an ongoing need to keep abreast of technical changes as they occurred which required that employees not be locked out altogether from future attempts. Ultimately, Transport Canada's willingness to negotiate a sunset clause of eight years was seen by him as a "safety net" for employees. He testified that to his knowledge the May 1993 agreement respecting the eight year sunset clause was never revoked.

Mr. Coté also testified that at the time of the legislated changeover in employment status from Transport Canada to NAV CANADA, he participated in the forum which created the new operational training programme document in August 1997. Having been designated to discuss the contractual issues arising during the changeover period involving the bargaining agent, he headed the Training Council for the Employer which was mandated to deal with seniority bidding issues. He remarked that in his discussions with the Association there were no specific limitations set although there also were no requirements for change unless deemed by the parties to be necessary. He testified that during the course of their discussions which resulted in some rewriting of the operational training programme document, including the changes to article 9 and 10 as hereinbefore set out, there was never any mention of eliminating the 1993 agreement dealing with the eight year sunset clause for past unsuccessful training attempts. He testified that as head of the Training Council it was his understanding that the sunset clause had not been changed but that the wording of the operational training programme document had been simplified to a degree with the changes to paragraphs 9 and 10. Being also the Human Resources Manager for Training Division during the changeover period he believed himself to be in a position to understand the issues which were discussed at that time and, in his mind, the only changes to the seniority bid training programme were those set out in articles 9 and 10.

In cross- examination, Mr. Coté agreed that the new operational training programme document contained some relevant rewording in that the preamble to article 9 on its face made it clear that the non-eligibility situations were subject to article 10 and article 10 itself provided added "consistency" in that management should consider "individual circumstances surrounding the ineligibility", in dealing with waiver requests. He said he could even agree at this point that the sunset clause was no longer needed in a situation where the facts fell within kind of individual circumstances to be considered. He also acknowledged that he had read and signed the Employer's explanation notice for the new operational training programme document wherein he had indicated that employees must meet the eligibility criteria contained in the agreement, without there being any expressed reference to the earlier commitment to apply a sunset clause for previous failed attempts outside the eight year period. Indeed, he agreed, there was no information ever provided by the Employer indicating that the sunset clause would be continued. Likewise a procedural document prepared by one of his staff members in September 1997 contained no specific reference to the sunset clause indicating as it did that individual applications would be examined "to ensure the applicant is eligible in all respects". He went on to indicate, nevertheless, that in his mind at that time as the Employer's team leader on seniority bidding issues during the transition period, the earlier sunset clause agreement continued to be in place, even without giving any specific directions to managers to that effect.

Mr. Coté also acknowledged that in October 1998, in the context of the grievor's developing situation over having been denied another seniority bid opportunity, a manager had asked for clarification. The individual had pointed out that the Association could have proposed language in the new operational training programme document consistent with its position that the sunset clause continued to be in effect. He responded in his reply memorandum to the manager that Mr. Bhimji of the Association had recently approached him to remind him of the agreement reached in 1993 with reference to the specific clause in the seniority bidding guidelines. He had acknowledged at the time that

they had had that agreement, while stating also that he could not provide any indication as to present status of this letter of agreement and that any formal interpretation would have to come from the manager's office. In his testimony, he agreed that by 1998 he did know whether the sunset clause was still in effect, remarking that that was the reason why the parties were at arbitration. He also indicated that by the time of receiving the request for clarification he was no longer the training manager, having moved on to other duties. He said that he responded as he did to the manager's request for clarification as, by then, he had no authority to determine the issue.

Richard Nye, a regional director for the Association in 1997 when the operational training programme document was negotiated testified that there was no indication at that time that the eight year sunset clause agreement dating from 1993 was being closed off. He said that had it ever been indicated that an employee could face a lifetime ban for any similar re-training for having twice failed, the Association would never have signed an agreement to that effect. He also acknowledged that he was not part of the Association's bargaining team for purposes of reviewing the proposed 1997 operational training programme document. He agreed that it did not make any express reference to a sunset clause within its provisions, although neither had the earlier 1992 agreement which was clarified the following year with the addition of the sunset clause.

In argument on behalf of the Association Mr. McGee submitted firstly that the letter from Transport Canada's Director of Air Traffic Services, confirming certain interpretations and agreements respecting articles 9 and 10 has never ceased to exist as a matter of expressing the parties' continuing intent and should be seen to apply equally to the 1997 re-write, just as it had applied for several years beforehand to the initial operational training programme language. The parties had clearly expressed their intention to apply an eight year sunset clause through a specific document which dealt with that issue which was not amended or ended by the 1997 re-write. Secondly, there might well be a latent ambiguity, which is to say one which was not clear on the face of the documentation

consisting of the 1993 confirmation letter and the 1997 article 9 and 10 re-write. The extrinsic evidence in the nature of Mr. Coté's evidence being necessary to both reveal it and also resolve the ambiguity, I should conclude that the evidence was admissible to assist me in interpreting the parties' true intent to have individual bidding rights relative to the operational training programme interpreted to include the eight year sunset clause. Reference was made to the Divisional Court's review of arbitrator Brunner's award in Canada Post Corporation and Canadian Union of Postal Workers [2000 O.J. #3590], where O'Driscoll, J. in finding that the arbitrator had exceeded his jurisdiction by failing to "follow the path of mutual interpretation adopted by the parties of a period of thirteen (13) years" had observed that it was unreasonable for him to have concluded anything but that the past practice was "unambiguous, consistent and longstanding". It thereby gave rise to the proper mutual interpretation of the document under review. In that case the arbitrator, having cited Consolidated Bathhurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co. [1980] 1 S.C.R. 888 and Manulife Bank of Canada v. Conlin et al (1986), 203 N.R. 81 (S.C.C.), had noted that the interpretation task presented to the arbitrator was to determine the intention of the parties through the words they had used in creating the document under review. He had also not found the past practice so clear and cogent as to amount to an express representation relied upon to its detriment, a seeming estoppel concept, but taken by the Divisional Court as another indication of him being patently unreasonable for having disregarded the overwhelming evidence of how the parties had mutually interpreted the document over many years. In the circumstances at hand the most recent occupational training programme document, with its re-write of articles 9 and 10, had only existed for a matter for months prior to the grievor challenging the Employer's seniority bidding obligation under the new wording, wanting to incorporate for interpretation purposes of the 1993 confirmation letter setting out the eight year sunset clause. In the Manulife Bank of Canada case, cited by arbitrator Brunner, Mr. Justice Iacobucci, while dissenting on the merits, at pages 121-122 had put the issue of arbitrators giving words their ordinary and natural meaning as follows:

> **"The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. As Estey, J., said in Consolidated-Bathurst export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888; 32 N.R. 488, at p. 899 S.C.R., quoting Meredith, J.A., in Pense v. Northern Life Assurance co. (1907), 15 O.L.R. 131, at p. 137: '[In all contracts], effect must be given to the intention of the parties, to be gathered from the words they have used.' The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is 'plainly repugnant to the intention of of the parties': McGuinness, supra, at p. 239; and see the reasons of Estey J., in Consolidated-Bathurst, supra, at p. 901 S.C.R."**

It is not unlike the position taken by arbitrator Christie in Re Strait Crossing Joint Venture and I.U.O.E. (1997) 64 L.A.C. (4th) 229, wherein his discussion of latent ambiguity cited *Brown & Beatty*, 3rd Edition., looseleaf, at Topic 3:4400 for its statement of the general rule at common law that "extrinsic evidence is not admissible to contradict, vary, add or subtract from the terms of an agreement reduced to writing, albeit extrinsic evidence may be admitted to disclose a latent ambiguity in either the language or its application to the facts", see also Re Ridge-Meadows Home Support Society and BCGEU (1996) 59 L.A.C. (4th) 94 (Munroe), where there was found to be no bonafide doubt about the intended meaning of the article under review in relation to the dispute at hand thereby leaving no room for extrinsic evidence to be considered. He also found that the extrinsic evidence had not disclosed any consensus between the parties as to interpretation in any event.

Thirdly, Mr. McGee submitted that the Employer should be estopped from discontinuing the eight year sunset clause on the basis of its representation in the form of the 1993 confirmation letter which thereafter continued to be relied upon to the obvious detriment of employees, including the grievor, and the Association itself. By Mr. Nye's evidence the Association never would have entered into a new operational training programme document in 1997 had the Employer ever indicated that it was eliminating the eight year sunset clause dealing with the issue of having twice failed the same training in the

past. Reference can be to the *Brown & Beatty* summary at Topic 2:2210 outlining the concept with the acceptance of the Combe v. Combe [1951] 1 All E.R. 767 (C.A.) explanation:

> **The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.**

In argument on behalf of the Employer, Mr. Emond said that however creative the Association might like to be in its argument one should not lose sight of the fact that the parties knew in 1997 that they were negotiating a new seniority bid document covering the operational training programme to apply to the private Employer NAV CANADA and that it was replacing the 1993 document and presumably any subordinate documents pertaining thereto. The previously negotiated sunset clause not being specifically referenced in writing at the time of the re-write of the operational training programme document in August 1997, it should be viewed as ceasing to exist at that point. A plain reading of the new document should not be taken as disclosing any ambiguity. The obligation, as agreed upon by the parties, were clearly revealed by articles 9 and 10 setting out as it did a new seniority bidding regime. Hence, past practice and negotiating history was irrelevant and should not be considered. He cited arbitrator Davie's decision in Re: Toronto Transit Commission and A.T.U., Local 113 (Rain Pay) (1999) 78 L.A.C. (4th) 364 for her decision based on the negotiated collective agreement language, in the form of a new memorandum of agreement having vitiated the past practice relative to receiving "rain pay" by the parties' longstanding interpretation of a former memorandum. Neither memorandum, in dealing with issues of employees working in inclement weather had expressly used the term "rain pay" albeit that

had been the prior longstanding interpretation. In that case, the employer counsel had taken the position that the language of the collective agreement was clear and unambiguous and that extrinsic evidence of past practice or bargaining history was irrelevant, further arguing that any past practice which had developed under a former collective agreement could not be used as an aid to interpreting the new amended collective agreement. While the arbitrator acknowledged that extrinsic evidence was admissible in the form of past practice or negotiating history if the parties had mutually intended a different interpretation or application of the collective agreement language, presumably a reference to the possibility of a latent ambiguity, the union's problem lay in the wording of the new memorandum. It is apparent that the parties had agreed in its re-wording to specifically define the term "inclement weather", which it had not done previously. She remarked "in the face of such a newly negotiated and specific definition little room is left for this board to adopt 'past practice' as an aid to interpreting a term which the parties have themselves now clearly defined". However, notably, there was no issue of there being any ancillary document as the interpretation problem was confined to the two memoranda of settlement dealing with inclement weather, the latest one meant to more fully define and circumscribe it for purposes of employees receiving payment. In essence, the arbitrator found that the new language was meant to deal with all the circumstances of inclement weather with "rain pay" having been omitted. Her analysis does not exclude the possibility of discovering the parties' true intent by examining ancillary documents by which they may have meant to contractually bind themselves, if any had existed which does not appear to be the case in Toronto Transit Commission.

The facts of the matter as I find them to be are relatively straight forward and can be compactly summarized as follows for purposes of my determining the issue of whether the eight year sunset clause continues to have application either as a matter of straight forward interpretation, or assisted by extrinsic evidence for purposes of explaining an ambiguity, or determining an estoppel issue.

1. The collective agreement still current at the time of the grievance dated from 1992. It sets out the terms and conditions of employment for bargaining unit employees represented by the Association working initially as they did for Transport Canada and then for the successor Employer NAV CANADA. Hence, for purposes of interpreting rights and obligations contained therein, or in any agreed upon memoranda or letters of intent speaking to contractual rights, we are dealing with a continuous period of time uninterrupted by any subsequent collective agreements.
2. The first operational training programme dealing with selection by seniority for operational training purposes was said to be effective March 1, 1992, superceding a previous version. It contained article 9(b) dealing with controllers being rendered ineligible for having failed the same training programme or the theory portion of similar training programmes on more than one occasion, and article 10 indicating that the responsible ATS manager may waive such restrictions where appropriate.
3. An agreement was signed by the parties on May 19, 1993 stipulating that article 9(b) would only be applied if the training failures mentioned occurred within an eight year period immediately preceding the commencement date of a training programme, thereby constituting a sunset clause for purposes of limiting a controller's ineligibility.
4. The "direction and guidance" provided by the August 1997 operational training programme were to remain in effect until a new collective agreement was negotiated and capable of being amended by mutual agreement between the parties. It contained a re-written article 9(b) which referred to a controller being ineligible for having failed the same training programme on more than one occasion. There were also changes to article 10 which now referred to waivers being granted when deemed by management to be in the best interests of NAV CANADA or when management believed that individual circumstances surrounding the ineligibility of a bidder warranted a waiver. There was no reference to the sunset clause which the parties had attached to the previous operational training programme by an ancillary document on

May 19, 1993 but also no indication whether the "direction and guidance" provided by its provisions were meant to be exhaustive and/or unaffected by any other agreements or undertakings the parties may have entered into touching some of the same issues in one fashion or another.

5. At the time of negotiating the August 1997 operational training programme document the NAV CANADA manager, Mr. Coté, was of the understanding that the sunset clause from the May 19, 1993 agreement had not been changed but that the wording of the operational training programme document had been simplified to a degree with the changes to paragraph 9 and 10. As the Employer's negotiator in 1997, he was not intending on doing away with the 1993 ancillary agreement. Since that time he has come to be unsure whether the sunset clause was still in effect.

6. The Association holds to the view, as indicated by Mr. Nye, that it never would have negotiated an updated operational training programme document had there been any indication that somehow the previously agreed upon sunset clause agreement with respect to ineligibility was going to be displaced.

On the evidence presented, in my view, this matter need not be decided on the basis of an ambiguity or estoppel. It is evident from a reading of both the 1992 and 1997 documents dealing with selection by seniority for operational training that the programme was meant "to provide direction and guidance" relative to training issues, insofar as it went, through the language contained in the documents. There was no indication therein, and more particularly in the latter August 1997 document, that it was meant to exhaustively deal with all issues or that a firm commitment made elsewhere relative to seniority bidding for operational training could not continue such as the May 19, 1993 agreement relative to confirming interpretations and agreements made concerning the application of the seniority bidding guidelines, article 9. There was no language contained in the August 1997 document indicating that the parties were also agreeing to terminate the eight year sunset clause contained in another document signed by both parties, presumably meant to be an open ended

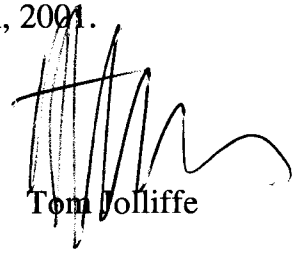
commitment on the Employer's part until terminated by clear reference to that issue. It is, in my view, no complete answer to say that articles 9(b) and 10 had been reworked to a degree. Neither had dealt with the issue of the eight year sunset clause in the first place. It had been handled by a separate agreement since 1993. I conclude that the prior agreement on the eight year sunset clause was not extinguished and continued to be in effect at the time the grievance was filed in 1998.

I would add, in the event there is an issue of latent ambiguity arising in that the selection for seniority directions and guidelines might be seen as uncertain or difficult to apply in the current circumstances, then that ambiguity would have to be resolved in favour of the Association's interpretation that the operational training programme document was intended all along to continue applying in concert with the previous agreement reached respecting an eight year sunset clause on ineligibility. Whether Mr. Coté in recent years has come to have doubts respecting the applicability of the earlier agreement, there was clearly no such doubt in his mind at the relevant time he negotiated the August 1997 document on behalf of the Employer. He fully understood at that time that the sunset clause agreement still remained in effect and that the new operational training programme document was to be applied in that context. As an aside, one might note that the concerns which Mr. Coté had developed over the observed reluctance on the part of managers to exercise discretion under article 10 in looking at individual circumstances, thereby giving rise to the perceived need for an eight year sunset clause, may still be valid despite the arguably strengthened language of article 10. The documents disclose no indication that the grievor was ever told, whether by his manager or during the grievance reply process, that his individual circumstances were examined at the time his seniority bid application was denied. The only reason for denial ever presented to him on the information entered in evidence was his having repeatedly failed the same training in the past.

In these circumstances the grievance must succeed with a declaration to the effect that the Employer in contravention of its May 19, 1993 agreement failed to apply an

eight year sunset clause respecting ineligibility to the grievor's application. The grievor's name should be added to the bidding list in accordance with his seniority and I leave it up to the parties at this point to discuss the issue of an appropriate training to be made available if he has the requisite seniority. I remain seized pending implementation and in the event that any further directions or clarification are required.

DATED this 20th day of March, 2001.



Tom Joliffe