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")

(Jody Croft Grievance)

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:	September 15 and 16, 1999

Preliminary Decision

I - The Dispute

In this dispute the Grievor, Jody Croft, a probationary employee in training as an air traffic controller, was terminated on January 17, 1997 for the reason that she was "unable to meet the required standards for the training programme in which you were participating". A grievance was filed on January 30, 1997 in which it was asserted that the Grievor had been "wrongfully dismissed" and that her "training was not conducted as per the Vancouver Area Control Centre Unit Qualification Training Program".

On September 8, 1999 the Union abandoned the assertion with respect to inadequacies in the training and advised that the issue to be addressed in the arbitration was a failure on the part of the Employer "to undertake a reasonable job search for positions with Nav Canada prior to any decision to terminate Ms. Croft's employment". That position triggered two preliminary objections brought by the Employer, the first relating to the assertion that the grievance as particularized by the Union amounted to a change in grounds. The second objection relates to the jurisdiction of an arbitrator to rule on the grievance as particularized on the basis that the right asserted did not arise under the collective agreement.

The events giving rise to the grievance straddled the privatization of air traffic control in Canada which saw the air navigation system transferred on November 1, 1996 from Transport Canada to Nav Canada. The grievance was filed under a collective agreement in force between Transport Canada and the Union and under the provisions of a December 13, 1996 addendum to that agreement entered into by Nav Canada and the Union. It consisted of a memorandum of understanding dealing with transition issues not covered or covered differently under the Transport Canada collective agreement. That

memorandum served to guide the parties during the transition from the public service to Nav Canada. The memorandum was made up of four appendices, one of which addressed the "grievance and arbitration procedure" agreed to by the parties. The grievance in this dispute was subject to the procedure set out in that appendix.

As stated, at the material time the Grievor was a probationary employee undergoing training. However, she had a prior history of employment with Transport Canada as an air traffic controller that commenced in July of 1990 and continued until her voluntary resignation in September of 1996. The Grievor's earlier period of employment was under the Transport Canada collective agreement. Her current term of employment began on October 2, 1996 when she was rehired by Transport Canada as a trainee for a position as an Instrument Flight Regulation (IFR) controller. Her employment was continued by Nav Canada.

The Grievor's employment was recorded in a letter from Transport Canada dated October 2, 1996 and was subject to certain conditions, one of which was, "If you do not qualify as an IFR controller, you will be rejected on probation". The term, "rejected on probation", has a singular meaning between the parties that need not be addressed in this preliminary decision. I note in that same vein that training positions occur within a relatively complex operational structure in which there is no generic position of probationary employee. Probationary employees are tied to a particular level in a particular area.

In this case, as stated, the Grievor was in training for a position as an IFR controller. The position was in the Vancouver Area Control Centre for what is described as the West Speciality Area. On January 17, 1997 the Employer wrote to her to advise her in part that:

> You are unable to meet the required standards for the training program in which you were participating. For this reason, please be advised that you are now released on probation this date, and you will receive two weeks pay in lieu of notice.

On January 30, 1997 the grievance filed on the Grievor's behalf read in substance as follows:

> In accordance with Article 6 ... relating to the termination of employee's employment, we hereby grieve that Jody Croft was wrongfully dismissed and that training was not conducted as per the Vancouver Area Control Centre Unit Qualification Training Program.
>
> Corrective Action Requested
>
> We request that Jody Croft be re-admitted to the IFR training program and made whole.

The reference to Article 6 is to a procedural section set out in the grievance portion of the Grievance and Arbitration Procedure Appendix agreed to by the parties to govern their relationship during the transition to the private sector. On August 31, 1999 Mr. Barnacle wrote to Mr. Gibson requesting documents deemed relevant by the Union to the issues pending in the arbitration. Mr. Gibson responded to that letter on August 31, 1999. In that letter Mr. Gibson reflected his understanding of the issues the Union intended to raise in the arbitration. Following are two passages that set out his understanding:

> As I understand it, the Union challenges the termination of Ms. Croft's employment on two grounds. <u>First, the Union says that there were flaws in Ms. Croft's training, such that a "cease training" order should not have been issued</u>. Second, the Union claims in the alternative that if the cease training order was indeed appropriate, then <u>notwithstanding her probationary status and the express condition</u>

> contained in her appointment letter, Ms. Croft should have been offered another position in the bargaining unit.
>
> . . . . . .
>
> On the issue of the Employer's alleged obligation to find Ms. Croft another position in the bargaining unit, I need to obtain the following particulars from you:
>
> (a) the facts upon which the Union relies in support of its argument that such an obligation existed, including but not limited to any evidence of past practice or negotiating history; and
>
> (b) the position(s) in the bargaining unit which the Union says Ms. Croft ought to have been given. (emphasis added)

On September 8, 1999 Mr. Barnacle advised Mr. Gibson that the Union was withdrawing the training aspect of the grievance. He particularized the Union's position in part as follows:

> We have had the opportunity to review the training issue and be advised that the union does not intend to challenge at arbitration the decision to cease training Ms. Croft in January, 1997. Our view is, however, that the employer had an obligation in law to undertake a reasonable job search for positions with NAV CANADA prior to any decision to terminate Ms. Croft's employment. This is a right that arises under the just cause protection provided in the collective agreement. The employer cannot avoid such an obligation by attempting to enforce purported terms and conditions entered into at the time of hire and in conflict with the collective agreement. (emphasis added)

In responding to that letter on behalf of the Employer, Mr. Gibson set out in substance the position taken by the Employer in these preliminary proceedings. In particular, he advised that the Employer viewed the issue described by Mr. Barnacle as amounting

to "a substantive change in the nature and scope of Ms. Croft's grievance". He communicated his instructions that:

> [D]uring the grievance procedure, the only issues raised by the Union regarding [Ms.] Croft's release from service related to alleged inadequacies in her training. The Union never once claimed that another, non-IFR position should have been found for her.

Mr. Gibson described the second objection, being an objection to jurisdiction, as follows:

> [T]he Just Cause provision in paragraph 2 of the Grievance Procedure part of the MOU ... grants the Employer the discretion to discharge employees for non-disciplinary reasons during their probationary periods. An arbitrator only has jurisdiction to review the Employer's decision if the Union is able to establish that the Employer failed to exercise its discretion in good faith, without discrimination, and in a non-arbitrary fashion. As I understand your September 8th letter, the Union does not argue that the Employer acted arbitrarily, discriminatorily, or in bad faith. Rather, the Union claims that having made a proper decision to cease [to] train Ms. Croft, the Employer should have found her another job, notwithstanding her probationary status. Given the limited scope of Mr. Hope's jurisdiction to review the Employer's decision, this issue is not arbitral. (emphasis added)

I pause to note that the Union did not agree with that summary of its position. In particular, it was of the view that in failing to search for an alternate position, the Employer was acting in a manner which was unreasonable in the sense of being arbitrary, discriminatory or flawed by bad faith. In presenting its preliminary objections in these proceedings the Employer took the position that evidence of the discussions between the parties in the grievance procedure should be adduced for the purpose of supporting the

Employer's assertion that the Union was seeking to raise a fundamentally different issue than the one pleaded in the grievance and further defined in grievance procedure exchanges. The Union objected to calling evidence of grievance procedure discussions on the basis of privilege and, in any event, because there was a dispute between the parties as to what occurred in those discussions.

In support of its position the Employer cited Re Alcan Rolled Products Company (Kingston Works) and United Steelworkers of America, Local 343, (1996) 56 L.A.C. (4th) 187 (Gray) and Re Etobicoke General Hospital and Ontario Nurses' Association, (1992) 25 L.A.C. (4th) 376 (Craven). Those authorities stand for the proposition that the privilege that extends to communications in the grievance procedure is not absolute and can be waived where the factual issue raised requires it. In Alcan Rolled Products the same issue addressed in these preliminary proceedings was under consideration. In particular, there was an allegation the employer in that dispute was seeking to change the grounds upon which the grievor had been dismissed and the union was permitted to call evidence of exchanges during the grievance procedure to prove that point. In Etobicoke General Hospital a similar issue was addressed and the conclusion was that the privilege attaching to grievance procedures is not absolute and does not prohibit an arbitrator from hearing evidence that addresses the scope of the grievance and whether either of the parties is seeking to change the issues raised.

The Employer cited Ontario Hydro, (1996) 53 L.A.C. (4th) 163 (Burkett); St. Joseph's Hospital, (1997) 65 L.A.C. (4th) 160 (Solomatenko); Electrohome Ltd., (1984) 16 L.A.C. (3d) 78 (Rayner); and Canac Kitchens Ltd., (1996) 58 L.A.C. (4th) 222 (Abramsky) for the proposition that parties are bound by a grievance as pleaded. Employers are not at liberty to change the grounds that gave rise to the grievance and unions are not at liberty to change the terms of the grievance as pleaded.

The Employer next cited Earle and Treasury Board (Transport Canada), [1997] C.P.S.S.R.B. No. 61 (Turner) for its discussion of the rights of the parties with respect to a dismissal in the form of a rejection on probation and its significance in terms of whether employees affected by a rejection have a right to challenge the decision by grievance. The Employer also cited Burchill v. Attorney General of Canada, [1981] 1 F.C. 109 (C.A.) for its reasoning that it is not open to parties to introduce an issue which was not introduced either in the grievance itself or in the exchanges during the grievance procedure that preceded the submission to arbitration.

The decisions in Edith Cavell Private Hospital, (1982) 6 L.A.C. (3d) 229 (Hope) and National Harbours Board and Int'l Longshoremen's & Warehousemen's Union, Local 517, October 1982, unreported (Hope) were relied on by the Employer to support its submission that the Union was seeking to introduce an issue that had no application to probationary employees. In terms of the principles that have application to probationary employees, the Employer cited Brown & Beatty, Canadian Labour Arbitration, (1999) paras. 7:5000 to 5020, pp. 7-253 to 271; Transair Ltd. and C.A.L.P.A., [1978] 2 C.L.R.B.R. 354 (LaPointe); McRae Waste Management and I.U.O.E, (1998) 71 L.A.C. (4th) 197 (Sanderson); B.C. Rail and C.U.T.E. 6, March 1, 1990, unreported (Hope); and Hawker Siddeley Canada Inc. (Orenda Division) and I.A.M.A.W., Lodge 117, (1991) 21 L.A.C. (4th) 289 (Joyce).

The Employer relied on the decision in Leonarduzzi and Canadian Air Traffic Control Association, [1999] C.P.S.S.R.B. No. 46 to support its assertion that air traffic controllers who have been rejected on probation have no right to challenge the termination of their employment. In that case the Board rejected an application by an employee who had been dismissed as a result of a rejection on probation for a direction that a grievance filed on his behalf be processed through to adjudication. The position of the Employer on

those latter authorities was that it was clear that the Grievor in this dispute, even assuming the issue was properly before me as an arbitrator, was seeking a remedy which was not available.

The issue articulated by counsel for the Union on September 8, 1999 is not arbitrable, said the Employer. Its submission was that it was appropriate to have the issues arising with respect to the scope of the grievance and its arbitrability addressed and determined in these preliminary proceedings because it may avoid the time and expense of a hearing. Its position was that the issue sought to be raised by the Union was not only inconsistent with the prevailing authorities dealing with the rights of probationary employees, it was a position which had not been raised previously between the parties.

The Union confirmed its position that the grievance raised in issue the question of whether the Employer, having made the decision to terminate the Grievor's training, was entitled to dismiss her without first having sought to place her in an alternate position for which she was qualified. On that issue, said the Union, the calling of evidence was necessary in order to establish that failing to extend that opportunity to the Grievor rendered the decision to dismiss her unreasonable in the sense of being arbitrary. That, said the Union, was a position that fell readily within the first aspect of its grievance, being its assertion that the Grievor "was wrongfully dismissed".

Discussions in the grievance procedure, said the Union, could not be accessed and relied on to narrow a grievance. On that basis it distinguished the authorities relied on by the Employer and cited and relied on Nav Canada and Canadian Air Traffic Control Association (Richard Summers Dismissal), October 28, 1998, unreported (Jones) to support its assertion that the issue it sought to raise in this dispute had been raised between the parties in the Richard

Summers Arbitration which was heard in June of 1998. In that dispute, said the Union, essentially the same issue was raised although the arbitrator did not find it necessary to address it.

The Union argued on the basis of the authorities cited by the Employer that the objections raised should be dismissed or, alternatively, adjourned to be heard in conjunction with a hearing on the merits. Its position was that the authorities and the reasoning had application to the collective agreement that governed Transport Canada and the Union but that they had no application to the current collective agreement as reflected in the transition addendum.

Its submission, in effect, was that all of the remedies available to probationary employees under the governing arbitral authorities are now available to employees in this bargaining unit who have been rejected on probation. Its submission was that it was necessary to hear the dispute on its merits in order to determine whether the issue raised fell within the scope of the grievance; whether the Grievor had the right asserted on her behalf; and whether it was appropriate to grant her the remedy sought on the basis of the particular facts.

II - Ruling

In my view the Employer failed to make a preliminary case for calling evidence of discussions that took place during the grievance procedure. It became apparent during the proceedings that a finding of fact as to what was said during the grievance procedure would not resolve the issue with respect to the nature and scope of the grievance. The submission, in effect, was premature. If it were to be accepted that the Union had failed during the grievance procedure to raise the issue it now advanced, that would not resolve the question of whether the issue fell within the scope of the grievance and would not answer the broad question of whether the termination of the Grievor

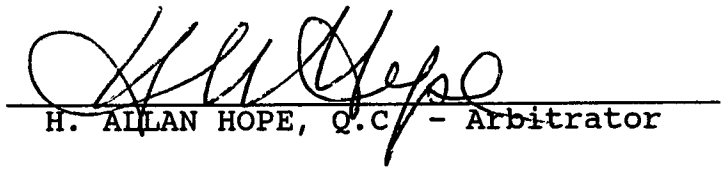
met the arbitrary, discriminatory or bad faith test on the particular facts.

Similarly, the substance of the Employer's submission with respect to jurisdiction raises the question of whether the Employer is correct in its assertion that in order for an arbitrator to have jurisdiction over a dispute involving the termination of a probationary employee under this collective agreement, the Union is obligated to point to facts that amount to a prima facie case in support of its position. In my view that submission is also premature and is one that should be addressed in the context of all relevant facts.

The dismissal of a grievance on a preliminary motion is discretionary in an arbitrator and it is a discretion that should be exercised judicially. In particular, it should be exercised consistent with the principles of a fair hearing. Only in the clearest of cases should a party be foreclosed from presenting its case on the merits. That is particularly true where the grievance involves a termination of employment. However, it is appropriate to emphasize that this ruling should not be read as endorsing the position of either party on the merits. It simply reflects the conclusion that the issues raised should be addressed in the context of the material facts.

I conclude that the Employer is entitled to pursue one or both of its objections when the proceedings resume on the merits and is free to call whatever evidence it deems relevant to the various issues, including making an application to adduce evidence with respect to what occurred in the grievance proceedings and to renew its submissions that the grievance as pleaded did not embrace the issue of the right of a probationary employee to claim alternate employment. It is also free to revisit its submission that the grievance as pleaded is not arbitrable and to call any evidence deemed necessary to support it. In the result, the preliminary motions are adjourned to be heard together with a hearing on the merits.

DATED at the City of Prince George, in the Province of British Columbia, this 13th day of October, 1999.



H. ALLAN HOPE, Q.C. - Arbitrator