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")

(Cancelled Overtime Arbitration)

Arbitrator:	**H. Allan Hope, Q.C.**
Counsel for the Employer:	**Colin G.M. Gibson**
Counsel for the Union:	**Ainslie Benedict**
Place of Hearing:	**Richmond, B.C.**
Date of Hearing:	**November 22, 2000**

A W A R D

I - The Dispute

The Grievor, Mark Bernard, an Air Traffic Control Controller (ATC) in the Vancouver Area Control Centre, sought compensation for the cancellation of an overtime shift that had been scheduled for October 27, 1999. The scheduling of the shift was in accordance with a practice in which predictable overtime requirements are incorporated in an ATC's monthly "shift schedule". Shift schedules are required to be posted "at least 15 calendar days in advance" of the commencement of the schedule. The schedule containing the shift in question was posted on September 13, 1999. The Grievor was put on notice on October 20 that the overtime shift on October 27 had been cancelled.

On November 18, 1999 the Grievor filed a grievance in which it was alleged, in effect, that he was entitled to be paid for the cancelled shift at overtime rates. The position of the Employer was that the scheduling and cancellation of overtime shifts was a routine event necessitated by the nature of the work performed by ATC's and that there was no provision of the collective agreement that contemplated payment in those circumstances. In addition to the absence of governing language, said the Employer, there was no prior practice of compensation being paid or claimed for the cancellation of overtime shifts.

II - The Facts

The shift in question was cancelled when an ATC trainee qualified and was put into operations in the sense of having been assigned a "shift cycle". That term is defined in the collective agreement as, "the recurring sequence of an employee's days of work and days of rest". Coincidentally, she was assigned to a "shift

schedule", which is defined in the agreement as, the "advance posting of shifts to be worked by employees within their shift cycle". One of the days included in her straight-time shift schedule was October 27, 1999, thus making it unnecessary to have the Grievor work overtime. The parties filed an agreed statement of facts that reads as follows:

1. The Grievor, Mark Bernard, is an air traffic controller who works in the East Complex of the Employer's Area Control Centre at the Vancouver Airport.

2. On September 13, 1999, the Employer posted the shift schedule for October 1999 for the East Complex (the "Shift Schedule").

3. The Shift Schedule indicated that the Grievor (initials "CU") was scheduled to work an overtime shift on October 27, 1999. This was a swing shift, commencing at 12:00 noon (the "Overtime Shift").

4. On October 20, 1999, Debra Watling (initials ("DR"), successfully completed her training in the East Complex and became a licensed air traffic controller qualified to work in that Complex.

5. Given Ms. Watling's qualification, the Employer determined that it no longer needed Mr. Bernard to work the Overtime Shift. On or about October 21, 1999, the Employer posed a revision to the Shift Schedule, which showed that Ms. Watling was scheduled to work the 12:00 noon swing shift on October 27, 1999, and that Mr. Bernard was no longer scheduled to work on that date.

6. Apart from the cancellation of the Overtime Shift, Mr. Bernard's schedule for the remainder of October 1999 was not changed. He worked all the other dates shown on the Shift Schedule. He did not work on October 27, 1999.

7. The Employer did not pay Mr. Bernard any wages or other compensation for the cancelled Overtime Shift.

8. The grievance was filed on November 17, 1999.

9. The Employer denied the grievance on February 10, 2000.

10. The Employer's Staff Memorandum 99-31 was in effect when the events described above took place.

In addition to those facts, the Union called evidence from the Grievor. The Employer called evidence from one of the Grievor's shift managers, Joe Russo. The Grievor's evidence reflected the position he set out in a memorandum to the Employer on October 21, 1999. It reads in part as follows:

> When the October 1999 scheduled (for the East Complex) was posted in mid September, I was scheduled to work an overtime shift on October 27, 1999 (1200 - 2000 local). On October 20, I was told that my overtime shift on the 27th was cancelled because of a qualification in the complex. This shift cancellation goes against unit policy (Staff Memo 99-31) which states that "a scheduled overtime shift is no different than a regular scheduled shift and therefore it cannot be cancelled arbitrarily". The same memo goes on to state that, "Scheduled overtime shifts shall not be cancelled but employees may exchange overtime shifts that are on published schedules". In the past, I have made plans based on my regular schedule (prior to a schedule being posted), only to have as subsequently scheduled overtime that conflicted with those plans. My request to have a shift in question cancelled was denied. The manager stated that it was up to me to trade the shift. The October 27 shift has created the opposite situation. For over 30 days, I have been unable to plan anything on October 27th because I was scheduled to work. Suddenly, one week prior to my scheduled shift, I was told that my shift had been cancelled. I am in a situation where the employer has effectively ruined one of my too-few days off, and has mentioned no plan to remedy the situation. The "proper" thing for the employer

> to do in this case would be to schedule the newly qualified controller as an "extra body", allowing individuals to cancel overtime (if they wish). If the employer didn't schedule employees for mandatory overtime when they weren't required, this situation wouldn't arise. A schedule overtime is either "no different than a regularly scheduled shift", or it is very different. At this time, according to Staff Memo 99-31, it is not different. I am therefore demanding that my 1200-2000 (local) overtime shift on October 27 be reinstated, or that I get paid for the eight hours (at double time) that was originally scheduled. The employer should be more judicious in it's assigning of mandatory overtime, and must take responsibility when it does not allow employees to make plans for their days off. (emphasis in text and added)

In times past, the Employer had followed the informal practice of leaving blank days in the monthly schedule in circumstances where a trainee was expected to qualify within that month. The practice was intended to accommodate the introduction of the trainee into the schedule if and when she or he qualified. The blank shifts were filled shift by shift until the trainee qualified. That practice required the assignment of employees to overtime shifts on a voluntary or a mandatory basis as events unfolded. That informal practice ceased with the introduction of computer scheduling. Apparently the computer program does not accommodate leaving shifts unfilled. The decision to cancel the Grievor's overtime shift was made by the Employer for the purpose of introducing the newly qualified ATC into the existing shift schedule.

III - Positions of the Parties

(ii) The Union

The Union's position, as set out in the Grievor's memorandum, was that nothing in the collective agreement gave the Employer the

right to arbitrarily cancel a scheduled overtime shift and that the policy memorandum referred to by the Grievor in his memorandum, being Staff Memorandum 99-31, which was recited in part by the Grievor, provides that overtime "cannot be cancelled arbitrarily. Included in the memorandum is the following extract:

> It is important that everyone is aware that a scheduled overtime shift is no different than a regularly scheduled shift and therefore it cannot be canceled arbitrarily. However we understand that people have personal commitments that need to be met.

In the absence of a provision of the collective agreement to the contrary, said the Union, that policy memorandum supports the interpretation that neither party is free to arbitrarily cancel a scheduled overtime shift. In that same vein, the Union emphasized that the Employer routinely denies employees the right to cancel overtime shifts. In that context, the Union cited an example of that exercise of discretion by the Employer with respect to the Grievor. It was recorded in a memorandum directed to him on March 12, 1999 that reads in part as follows:

> It is my understanding that through previous consultation between this unit's CATCA executive and management an understanding was reached in the consideration of cancellation of overtime shifts. This being that:
>
> > The cancellation of a scheduled operational overtime shift will not be authorized (except in exceptional circumstances) if the person's total yearly overtime is below the complex's yearly average.
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> Based on this agreement and after comparing your overtime yearly total with the East Complex's yearly average it would seem you have worked less than the average amount and on this basis I am declining your request to have your scheduled overtime cancelled.

The Grievor said that the memorandum was sent to him in response to his inquiry about being relieved of scheduled overtime that exceeded 40 hours average in a week. He said that his request was based on a statement issued on behalf of the Employer that its policy was to confine average regular hours and overtime hours to 40 hours each week. He made the request when he calculated that he had already reached 40.5 hours for the period in question. The position of the Union in that regard was that it was unreasonable for the Employer to deny employees the right to cancel overtime assignments but to exercise that right on its own behalf without compensation.

The Union's submission was that employers must act reasonably in the cancellation of overtime shifts. It relied in that regard on MacMillan Bloedel Ltd. and C.E.P., Loc. 76 (Pellegrin), (1977) 61 L.A.C. (4th) 364 (Germaine) and Health Employers Assn. and British Columbia Nurses' Assn. (Burrage Grievance), [1996] B.C.C.A.A.A. No. 519, Award No. X-96/96 (Laing). In MacMillan Bloedel, Arbitrator Germaine was dealing with a collective agreement in which, as noted on p. 373, "[T]he parties' agreement [was that] at the point the shift was scheduled, it was the equivalent of any other scheduled shift". On that basis, the question he confronted was whether a scheduled shift could be cancelled without compensation. Having concluded that the collective agreement requires the employer in that case to compensate the employee affected, the issue became one of whether a "remedy in kind" was appropriate.

In the Burrage Grievance, Arbitrator Laing was dealing with a circumstance in which an employee agreed to cancel a regularly scheduled shift and to accept an overtime shift required to meet the sudden absence of another employee who was ill. The overtime shift was cancelled by the employer upon a review of the schedule and a determination that replacing the absent employee was not necessary

to maintain operations. In the result the grievor in that dispute, having agreed to cancel a regular shift to accommodate the employer, faced a loss of net pay when the overtime shift was cancelled. Arbitrator Laing concluded upon a review of various provisions of the collective agreement that cancellation of the grievor's scheduled shift in those circumstances amounted to an improper layoff and that she should be paid the wages she would have earned if she had worked that shift.

(ii) **The Employer**

The position of the Employer was set out succinctly in its reply to the grievance. That reply reads as follows:

> I have reviewed the grievance of Mr. Bernard wherein he complains that an overtime shift was cancelled without compensation. As required by the collective agreement, we endeavour to keep overtime to a minimum. In this particular case, an employee qualified and we were able to cancel the overtime in question. Mr. Bernard would have been aware of this prior to the completion of his shift on October 23 after which he proceeded on four days off. I see no language in the agreement which would provide any compensation in this situation. The grievance is denied.

The Employer's position was that shift schedules, of necessity, vary daily and that the cancellation of scheduled overtime by the Employer is routine. Part of that routine, said the Employer, is that entitlement to compensation for the cancellation of an overtime shift is restricted in the collective agreement. Its submission was that there is no provision of the agreement that supports the Grievor's claim either expressly or by implication. Rather, said the Employer, the parties directed their minds expressly to the question of when employees whose overtime assignments are cancelled will be entitled to claim compensation, and the provision does not extend to the

Grievor's claim. Reference was made in that context to the following provision:

> 21.01 When an employee is called in to work overtime that is not contiguous to the employee's scheduled shift, the employee is entitled to the greater of:
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> (a) compensation at the applicable overtime rate,
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> or
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> (b) compensation equivalent to four (4) hours' pay at his or her straight-time hourly rate.

In order to accept the interpretation of the Union, said the Employer, it would be necessary to conclude that if the Grievor had not been given notice of the cancellation of his overtime shift and had been sent home when he reported for that shift, he would have been limited to four hours pay at straight time rates under Article 21.01(b), but, having received advance notice of seven days and having avoided reporting for work, he was entitled to pay at overtime rates for the full shift.

Leaving aside that express restriction, said the Employer, its only obligation at the most extreme view of the arbitral authorities is to act reasonably in the cancellation of scheduled overtime shifts and that, in the circumstances present in this case, its decision was reasonable. The reality of training, said the Employer, is that the point at which a trainee will qualify and thus be available for assignment to a shift schedule cannot be predicted with any accuracy. The use of scheduled overtime provides the flexibility required to accommodate that fact, said the Employer, and it is and has been a routine aspect of scheduling of ATC's

generally. The decision was neither arbitrary nor unreasonable when considered in light of the available options, said the Employer.

In support of its position the Employer cited: Cominco Ltd. and United Steelworkers of America, Local 480, February 13, 1986, unreported (Hope); Steel Co. Ltd., (1958) 8 L.A.C. 162 (Schwenger); Webster Air Equipment Ltd., (1976) 13 L.A.C. (2d) 445 (Schiff); Collective Agreement Arbitration in Canada, Third Edition, Palmer; McMillan Bloedel Ltd., [1977] B.C.C.A.A.A. No. 107 (Germaine); British Columbia School District No. 39, [1996] B.C.C.A.A.A. No. 97 (Hope); and Alcan Smelters & Chemicals Ltd., [1998] B.C.C.A.A.A. No. 198 (Hope). In Cominco the arbitrator wrote on p. 16 that the employer under that collective agreement had retained "its right to schedule and cancel overtime assignments in response to changing circumstances and the exigencies of production".

In Steel Co. Ltd. the arbitrator dismissed a grievance where an employee working a double shift was sent home before the shift was complete, concluding that the collective agreement provided for a call-in premium but did not guarantee the continuation of an overtime assignment that had been scheduled. In Webster Air Equipment the cancellation of scheduled overtime was addressed by Arbitrator Schiff on p. 447 as follows:

> But, while the employer may cancel agreed overtime, we cannot think that it may do so without proper cause. An employer cannot cancel regular work hours arbitrarily or capriciously; it can cancel only for bona fide business reasons. Among such reasons must be concern for the immediate safety, health, and convenience of the employees in travelling from work to home. And, since overtime is indistinguishable for this purpose from regular hours, all this must also apply to agreed overtime. Therefore, if the foreman acted to permit the employees to leave before the dangers from the severe snow

> increased, he acted with proper cause. (emphasis added)

That decision has been viewed as standing for the proposition that, subject to the language of the particular agreement, an employer can cancel scheduled overtime in response to business reasons, but not personal reasons. It was cited for that proposition by the authors in Palmer, Collective Agreement Arbitration in Canada, p. 609, para. 15.68 as follows:

> Unless the collective agreement or legislation provides otherwise, the scheduling of overtime is in management's discretion. Therefore, an employer may avoid overtime by rescheduling or altering shifts. Management can also call off overtime previously requested. However there are certain restrictions placed on management's right to cancel scheduled overtime. An employer cannot cancel scheduled overtime for personal reasons with impunity. (emphasis added)

The Employer noted in that context that its reason for cancelling the Grievor's shift constituted a business reason relating to productivity and the efficient use of manpower. As noted, Webster Air Equipment was cited by the authors in support of the assertion that "an employer cannot cancel scheduled overtime for personal reasons with impunity". That principle was also applied by Arbitrator Germaine in MacMillan Bloedel, citing Webster Air Equipment. The Employer's position was that the facts in this dispute fell comfortably within the reasoning in that case. On p. 6, para. 39, Arbitrator Germaine wrote:

> The Company concedes that, once an employee has agreed to work an overtime shift, it is the equivalent of a scheduled shift and it is like any other scheduled shift for the purposes at hand. That is, although overtime is voluntary under the collective agreement, the employee is subject to discipline if he or she does not

> report to work a scheduled shift without good and valid reason such as illness. Correspondingly, although the Company is not under any contractual obligation to guarantee or distribute overtime, once it has scheduled an overtime shift it is not entitled to cancel the shift unless it has good reason. (emphasis added)

The Employer's principal position was that, quite apart from the application of general principles, the rights of employees under this collective agreement with respect to the cancellation of an overtime shift had been addressed and disposed of in Article 21.01. The Employer cited Vancouver School District and Alcan Smelters for the proposition that the onus was upon the Union to establish a mutual intention to provide a money benefit in the form of a significant premium for the routine cancellation of scheduled overtime.

III - Decision

I agree with the submission of the Employer. The contemporary approach to considering whether an employer is free to cancel scheduled overtime without compensation is to be addressed, first in the context of the language of the collective agreement, and, absent any provision between the parties governing that circumstance, in an application of the test of reasonableness to the particular circumstances. Here the language of the collective agreement favours the interpretation of the Employer in the sense that the call-in provision refutes any finding of a mutual intention to compensate employees whose overtime assignments are cancelled with notice.

Here the language of the agreement and the practice of the parties does not support the conclusion that they intended that an overtime shift, once scheduled, would be the equivalent of a regular shift. Rather, the parties agreed expressly that employees who report

for an overtime shift that is cancelled prior to commencement will receive a maximum of four hours of pay at straight time. That provision is contrary to the Union's interpretation.

I accept the Union's observation that the call-in language does not address in express terms the case of a scheduled overtime shift that has been cancelled. However, the language extends to such a shift by necessary implication. The term, "an employee ... called in to work overtime that is not contiguous to the employee's scheduled shift", is general in nature and cannot be read as excluding a scheduled overtime shift.

Turning to the Employer's alternative submission, I conclude on the facts that the cancellation of the Grievor's shift did not fall within the circumstances contemplated in the authorities where cancellation is proscribed. The Union failed to establish facts which would support a finding that the cancellation at issue was unreasonable in the arbitral sense of being arbitrary, discriminatory or made in bad faith. The Employer's reason, in effect, was that the need for the overtime shift had ceased to exist. To continue the shift would require payment of a premium for work which was no longer required. Neither the original scheduling nor the cancellation could be viewed as capricious or based on personal considerations. The cancellation was an operational business decision made in response to changing facts. The circumstances did not mirror those present in the authorities relied on by the Union.

I conclude that this collective agreement sets out the rights of employees affected when overtime assignments are cancelled and that the facts present in this dispute did not meet the criteria required for compensation. Further, I conclude that the Employer's decision was a reasonable response to changing operational requirements and could not be relied on to found a claim for compensation, even

assuming that such a claim fell outside the proscription set out in the agreement. In the occupational setting in which ATC's perform their duties, the assignment and cancellation of mandatory overtime is a routine event and one that the parties addressed in their collective agreement. In the result, the grievance is dismissed.

DATED at the City of Prince George, in the Province of British Columbia, this 17th day of January, 2001.

H. ALLAN HOPE, Q.C. - Arbitrator