58 of 64 DOCUMENTS

Cited as:

NAV Canada and Canadian Air Traffic Control Assn.

IN THE MATTER OF an Arbitration
Between
NAV Canada (The Employer), and
The Canadian Air Traffic Control Association (The Association)
AND IN THE MATTER OF a Policy Grievance Re Requests for Medical Examinations

[1998] C.L.A.D. No. 401

74 L.A.C. (4th) 163

Canada
Labour Arbitration

K.P. Swan, Arbitrator

Heard: Ottawa, Ontario, September 11 and 12, November 13 and December 4, 1997
Decision: July 10, 1998

(28 pp.)

Appearances:

For the Employer:
Mary J. Gleason, Counsel.
Lydia Zanetti, Manager, Labour Relations Programs.
Melvin Budarick, Manager, Occupational Health, Safety & Workers' Compensation Programs.
Doug Craven, Superintendent, Training & Human Resources.
Larry Boulet, Superintendent, ATC Monitoring & Evaluations.

For the Union:
Peter J. Barnacle, Counsel.
Fazal Bhimji, Vice-President, Labour Relations.
Rob Nishman, Labour Relations Specialist.

AWARD

1 A hearing in this matter was held in Ottawa on September 11 and 12, November 13 and December 4, 1997. Thereafter, correspondence continued between counsel and the arbitrator in relation to matters arising from oral argument. At the outset of the hearing, the parties were agreed that the arbitrator had been properly appointed, and that I had jurisdiction to hear and determine the matters at issue between them.

2 The dispute arises from a grievance filed by letter dated March 5, 1997 from Mr. Fazal Bhimji, Vice-President, Labour Relations for the Association, to Mr. Jean-Marc Blake, Vice-President, Human Resources for the Employer. Thereafter, a lengthy correspondence clarified the issues between the parties, culminating in a referral of the matter to arbitration by the Association by letter dated August 18, 1997.

3 The issues in this case are as complex in detail as they are general in scope. By its very nature, a policy grievance seeks an answer to a question that can be applied to a wide range of circumstances. As will appear, such an answer will necessarily be couched in generalities; the application of the principles thus established to any particular case may not always be straightforward.

4 In general, the policy grievance as refined deals with two issues: whether the Employer has the authority to require the release of personal medical information to a physician retained by the Employer, and whether the Employer has the authority to require a medical examination of an employee by a physician retained by the Employer.

5 The Employer has asserted this authority in a range of situations, including but not limited to cases where the fitness of an employee to return to work is at issue, where the validity of an illness or disability for which an employee has claimed sick leave is at issue, or where the fitness of an employee to remain actively at work is at issue.

6 Obviously, medical information can only be released, and a medical examination can only be conducted, with the consent of the patient. The issue is therefore whether the Employer may require that such consent be given, failing which sanctions such as discipline, the withholding of sick leave benefits, or a refusal to allow the employee to work, may be imposed.

7 The positions of the parties may only be understood in the unique historical and legal context applicable to this dispute. On November 1, 1996, NAV CANADA took over ownership and operation of the national air navigation system. NAV CANADA is a corporation without share capital established to acquire, own, manage, operate, maintain and develop the Canadian Civil Air Navigation System, on a not-for-profit basis. By agreement dated April 1, 1996, NAV CANADA acquired all of the assets of the air navigation system from Transport Canada, and effective November 1, 1996, some 6,400 employees were transferred from the federal public service, including some 2,300 air traffic control employees represented by the Association.

8 Those employees, previously covered by the Public Service Staff Relations Act, are now in a bargaining unit subject to the Canada Labour Code. While this change has many implications, one of them is a broader scope for the filing of policy grievances by the Association to challenge decisions of the Employer which, when the Employer was Transport Canada, could only be enforced by an individual employee. While there are a number of different classifications covered by the collective agreement, the vast majority are licensed Air Traffic Controllers (ATC), and the issues raised by this grievance apply most directly to licensed ATCs.

9 Both before and after the takeover by NAV CANADA, ATCs were recruited through a screening and interview process, followed by a training program of six or more months at the Employer's training facility in Cornwall, Ontario. This was followed by site-specific on-the-job training, and possibly more theoretical training, after which a check out process of another several months takes place on a one-to-one basis with a licensed ATC. The evidence indicates that this training is very rigorous, and that there are very significant drop-out rates throughout the process.

10 In addition, there are stringent medical requirements established under the Aeronautics Act, R.S.C. 1985, c. A-2,

as amended, and under the Canadian Aviation Regulations (CARs). Part IV, subpart 4 of CARs details these medical requirements. Briefly, these regulations establish that in addition to the technical requirements for licensing as an ATC, an employee must also hold a valid medical certificate, without which any exercise or attempt to exercise the privileges of the license is forbidden.

11 ATCs are required to hold a medical certificate in medical category 2, which is defined under paragraph 424.17(3) of CARs. An initial certification, and any renewal thereof, is valid pursuant to paragraph 424.04(3) of CARs for a maximum period of 24 months for ATCs under the age of 40, and for 12 months thereafter. The requirements are set out in painstaking detail, but the general requirement is summarized in the following provisions of the definition of medical category 2:

> 2.1 The applicant shall be free from
>
> (a) any abnormality, congenital or acquired; or
> (b) any active, latent, acute or chronic disability; or
> (c) any wound, injury or sequelae from operation
>
> such as would entail a degree of functional incapacity which accredited medical conclusion indicates would interfere with reliable performance of duties within the period of validity of the license.
>
> 2.2 The applicant shall not suffer from any disease or disability which may render the applicant liable to a sudden or insidious degradation of performance within the period of validity of the license.

12 Medical certificates are issued only after an examination by a Civil Aviation Medical Examiner (CAME). CAMEs are individually appointed based on familiarity with aviation medicine and the medical requirements of the various licenses involved in civil aviation. They may be private practitioners or public servants. Paragraph 424.04(2) includes the following requirements:

> (a) Every applicant for a medical certificate or revalidation thereof shall undergo a medical examination by a CAME.
> (b) Every applicant shall, at the time of the medical examination,
>
> (i) sign a declaration provided by the CAME stating whether the applicant has previously undergone a medical examination in connection with an application for a medical certificate or revalidation thereof and, where applicable, provide a statement that sets out the results of the most recent such examination;
> (ii) answer all of the CAME's questions that are pertinent to the assessment of the applicant's medical fitness;
> (iii) give written authorization for the disclosure of medical information to a physician named by the applicant; and
> (iv) undergo any other examinations or tests that are required by the CAME in order to assess the applicant's medical fitness.

13 Following the medical examination, the CAME may certify the employee as fit, unfit or deferred. If the employee

is fit, the expiring medical certificate is extended for a period of 90 days to permit the procedure for recertification to continue. That procedure requires that all documentation from the medical examination be forwarded with the recommendation to the Regional Aviation Medical Officer (RAMO), an official of Health Canada. The package may then be referred to the Chief, Clinical Assessment for presentation to the Aviation Medical Review Board. At each level, the assessment may be reconsidered, and a conclusion reached at a lower level may be overruled. Persons who are found to be unfit to exercise their licenses, or whose certificates are not renewed, may appeal to the Civil Aviation Tribunal.

14 The regulatory structure also provides for individual responsibility for fitness of each licensed employee, in paragraph 404.06 of CARs as follows:

> (1) Subject to subsection (3), no holder of a permit, licence or rating shall exercise the privileges of the permit, licence or rating if
> (a) one of the following circumstances exists and could impair the holder's ability to exercise those privileges safely;
>
> (i) the holder suffers from an illness, injury or disability,
> (ii) the holder is taking a drug, or
> (iii) the holder is receiving medical treatment;
>
> (b) the holder has been involved in an aircraft accident that is wholly or partially the result of any of the circumstances referred to in paragraph (a);
> (c) the holder has entered the thirtieth week of pregnancy, unless the medical certificate is issued in connection with an air traffic controller licence, in which case the holder may exercise the privileges of the permit, licence or rating until the onset of labour; or
> (d) the holder has given birth in the preceding six weeks.
> (2) No holder of a permit, licence or rating who is referred to in paragraph (1)(b), (c) or (d) shall exercise the privileges of the permit, licence or rating unless
> (b) the holder has undergone a medical examination referred to in section 404.18; and
> (c) the medical examiner has indicated on the holder's medical certificate that the holder is medically fit to exercise the privileges of the permit, licence or rating.
> (3) The Minister may, in writing, authorize the holder of a medical certificate to exercise, under the circumstances described in paragraph (1)(a) or (d), the privileges of the permit, licence or rating to which the medical certificate relates if such authorization is in the public interest and is not likely to affect aviation safety.

15 The Aeronautics Act also provides for obligations placed on medical professionals in relation to licence holders, in section 6.5:

> 6.5 (1) Where a physician or an optometrist believes on reasonable grounds that a patient is a flight crew member, an air traffic controller or other holder of a Canadian aviation document that imposes standards of medical or optometric fitness, the physician or optometrist shall, if in his opinion the patient has a medical or optometric condition that is likely to constitute a hazard to aviation safety, inform a medical adviser designated by the Minister forthwith of that opinion and the reasons therefor.
>
> (2) The holder of a Canadian aviation document that imposes standards of medical or optometric fitness shall, prior to any medical or optometric examination of his person by a

physician or optometrist, advise the physician or optometrist that he is the holder of such a document.

(3) The Minister may make such use of any information provided pursuant to subsection (1) as the Minister considers necessary in the interests of aviation safety.

(4) No legal, disciplinary or other proceedings lie against a physician or optometrist for anything done by him in good faith in compliance with this section.

(5) Notwithstanding subsection (3), information provided pursuant to subsection (1) is privileged and no person shall be required to disclose it or give evidence relating to it in any legal, disciplinary or other proceedings and the information so provided shall not be used in any such proceedings.

(6) The holder of a Canadian aviation document that imposes standards of medical or optometric fitness shall be deemed, for the purposes of this section, to have consented to the giving of information to a medical adviser designated by the Minister under subsection (1) in the circumstances referred to in that subsection.

16 The effect of all of these provisions is that, if an ATC is found to be unfit in the medical certification process, or self-reports a condition of unfitness, or is reported as unfit by a physician or optometrist under section 6.5 of the Aeronautics Act, the ATC is prohibited from working in that capacity. The collective agreement recognizes, in various provisions, the significant impact these stringent requirements can have on individual employees. For example, Letter of Understanding 3-91 provides for maintenance of salary for a period of one year for ATCs with five years or more of active ATC employment. The collective agreement also includes sick leave provisions and a long-term disability plan. The NAV CANADA pension plan continues provisions previously found in the Public Service Superannuation Act for special early retirement on medical grounds. There are also policies in force for retraining and reassignment.

17 It should be observed that, despite the stringency of all of the above medical certification requirements, none of those requirements are put in issue by the present grievance. The Association concedes the necessity for compliance with the statutory and regulatory medical certification scheme, and does not attack any requirement to consent to release of medical information or a medical examination that arises under those provisions. The present grievance deals with other circumstances where the Employer, or its predecessor Transport Canada, has in the past and may in the future attempt to compel the release of medical information to, or a medical examination by, a physician of its choice.

18 When the air navigation system was operated by Transport Canada, medical issues apart from those covered by the Aeronautics Act and the CARs were dealt with through the Public Service Health program operated by Health Canada for all federal government employees. The relevant procedures under the program were called Special Fitness to Work Evaluations, or FTWEs, in respect of which a very detailed protocol had been created by the time of the privatization of the air navigation system. A Special FTWE would be requested by management in circumstances where an employee's fitness to work was at issue. Such circumstances might arise when an employee was off work and claiming benefits, was attempting to return to work after a medical absence, or where there were work performance issues that raised questions of medical fitness.

19 The protocol required a request by management for a fitness assessment, the provision of a significant amount of information about job requirements, and a statement of the history of and reasons for the request, and an assessment by NAV CANADA of fitness. The assessment returned to management would simply state whether the employee was fit to

work or not, and any limitations or accommodations required to permit the employee to work. The evidence indicates that such assessments were generally done by requesting that information from an employee's own physician or physicians be provided to Health Canada medical staff, and in some circumstances that the employee submit to a medical examination by Health Canada medical staff.

20 The question of exactly what occurred in the past when the air navigation system was operated by Transport Canada is a matter of considerable evidence before me, and for the purpose of this explanation I simply observe that it was the Employer's position that it was entitled to request Special FWTEs, and that Health Canada was entitled to the production of medical information and, in certain circumstances, to conduct a medical examination of the employee as a part of the Special FWTE process. While either of these intrusions into medical privacy would require the consent of the employee, the Employer's position is that it was entitled to require employees to consent.

21 After the takeover by NAV CANADA of the air navigation system, the Employer no longer had access to Health Canada facilities. As a result, a process was begun to seek an alternative health services provider, since NAV CANADA itself had no medical capabilities. The process involved an external consultant, KPMG, representatives from NAV CANADA's Occupational Health and Safety, Human Resources, and Operations divisions, and a representative of the NAV CANADA Bargaining Agent Association. NCBAA is an umbrella organization representing the eight unions which have bargaining rights for NAV CANADA employees, which is involved at the corporate level in consultation on issues affecting all bargaining agents. The NCBAA representative in this process was from another union than the present Association. In the result MEDCAN Health Management Inc. was selected to provide services parallel to those previously provided by Health Canada.

22 MEDCAN is an integrated medical management company with its head office in Toronto, Ontario. It provides medical management services to some 500 clients, including a number of well-known corporations. It claims extensive experience in working with employers with multiple union relationships, and in dealing with the health care management of unionized work places.

23 A professional services agreement was entered into between MEDCAN and NAV CANADA on October 8, 1996. Several provisions of that agreement are relevant to the issues in the present arbitration. Paragraph 1, which is entitled "Description of Services", indicates that MEDCAN has undertaken the coordination of medical examinations for licencing purposes, limited to the administrative requirements for scheduling and notifying employees of appointments. Sub-paragraph (vi) also provides that MEDCAN will be responsible for:

> coordinating other medical examinations for NAV CANADA employees as requested by NAV CANADA based on mutually agreeable service standards and cost parameters;

24 Under sub-section 4(b), MEDCAN covenants and agrees:

> to protect the privacy and confidentiality of NAV CANADA employees' health information as required by law;

25 Under section 5, NAV CANADA "and its employees and agents" covenant and agree:

> (c) to provide MEDCAN personnel, where legally permissible, with access to all medical records, staffing records, management and labour employee information and all other information which may be reasonably required by MEDCAN and to which NAV CANADA has lawful access; and
>
> (d) to provide MEDCAN in a timely fashion, with all information and data which NAV CANADA has in their possession, or Health Canada, Government Canada or any other organization detains and which NAV CANADA legally has access to, and which is reasonably necessary for MEDCAN to file and provide effective integrated disability management.

26 Sub-section 6(f) provides:

> all MEDCAN files on NAV CANADA and its employees will be under MEDCAN's control during the duration of this Agreement. All NAV CANADA employees' medical files will be forwarded, upon termination of this Agreement, to an organization or individual appointed by NAV CANADA, respectful of applicable confidentiality, access to information, and conservation of medical files legislation.

27 Pursuant to this agreement, a draft of a document entitled "Supervisors Guide - Procedures for Medical Examinations" had been prepared, and was in the process of development. This document covers four kinds of medical examinations: periodic medicals for licencing purposes, pre-employment medicals, return to work (RTW) medicals and fitness for work evaluations (FFWE). Only the latter two are in issue here.

28 RTW medicals are stated to be for the purpose of determining whether the employee is medically fit to perform safely all, or part, of the duties related to his or her position. This is normally performed when an employee has been absent from work for an extended period. FFWEs may be requested "where there is considerable reason or concern that an employee may be medically unfit to safely perform the critical tasks of his or her position".

29 In each case, the NAV CANADA supervisor is to contact the employee to inform him or her of the request for the medical and "have the employee sign the "Consent to Medical Assessment and Release of Information Form". Information is then provided to MEDCAN orally, and then extensively in writing, about the reasons for the request and the occupational parameters of the employee's duties, as well as identifying information about the employee.

30 Briefly, the MEDCAN procedure involves the possibility of MEDCAN requesting information from the attending or treating physicians, but it also involves the possibility of MEDCAN scheduling an appointment for an assessment by another physician, whether a CAME, or another specialist chosen by MEDCAN. MEDCAN's internal procedure is to assign the request to a Nurse Consultant who will begin by contacting the attending physician in writing, setting out MEDCAN's role and the information requested. Since this process presumes that a valid consent has been signed, a response would normally be expected providing the information required.

31 The information received is then reviewed against internal guidelines by the Nurse Consultant, who would raise any concerns with a MEDCAN staff physician. In most cases, a follow-up with the attending physician will deal with any difficulties, and no further assessment will be needed. Where a further assessment is required, and the employee concerned is an ATC, MEDCAN will refer the employee first to a CAME, so that the particular expertise in aviation medicine will be available. If specialized medical assessment is required, then a specialist will be contacted and an appointment arranged. Medical information returning from either a CAME or a specialist is retained by MEDCAN, and is available only to the Nurse Consultants and MEDCAN's staff physicians.

32 The information provided to NAV CANADA is limited to a statement of whether the employee is fit or unfit for work, and any limitations that may be required to accommodate the employee's condition. All MEDCAN Nurse Consultants and physicians are licenced health professionals in Ontario or in whatever province services might be provided, and are thus bound by the statutory and regulatory requirements of their respective professions. In Ontario, the professional misconduct regulations for both nurses and physicians make it an act of professional misconduct to give information about a patient to a person other than the patient or his or her authorized representative, except with the patient's consent or as required by law.

33 MEDCAN also maintains internal policies and procedures on medical confidentiality, breach of confidentiality and the storage of employee medical files. Generally, these require that medical information will only be collected with the employee's consent, that medical information will not be disclosed to the employer, that all MEDCAN staff must operate under a signed pledge of confidentiality, and that health professionals must adhere to their respective codes of professional responsibility. If there is a suspected breach of MEDCAN's confidentiality policy, an internal investigation

will take place, and an actual breach of confidentiality will be met both with notification to the respective professional regulatory body, and by disciplinary action internally. Medical files are to be stored in a secured area to which only health professionals have access, except when in use by a Nurse Consultant, who will maintain the file in a locked drawer to which only the Nurse Consultant has access.

34 Finally, MEDCAN asserts that, in normal circumstances, employees would have full access to any medical information about them held by MEDCAN. The only exception specified would be circumstances where release of the information might be harmful to the employee, in which case it would be referred to the attending physician to impart the information directly to the employee and assist the employee in assessing its implications.

35 MEDCAN describes itself as in the business of employee health advocacy, and describes a range of services that it will provide to employees, including intervention with Workers' Compensation and other benefit administrators, arrangement of access to specialists and treatment programs, and assistance to attending physicians. For present purposes, however, it is only the medical examination issue which must be considered.

36 MEDCAN requires the Employer to obtain the consent of the employee before it will become involved in an assessment or referral for examination, and that the continued cooperation of the employee is required. If an employee fails to keep a scheduled appointment, then MEDCAN will notify NAV CANADA, so whatever enforcement is required in respect of obtaining the initial consent or maintaining the employee's cooperation and ongoing consent is the responsibility of NAV CANADA.

37 The Employer also adduced a considerable amount of evidence, both through testimony and through documentation, about "past practice" in relation to requiring employees to give access to medical information, or to submit to an examination by a physician of the Employer's choice. I have reviewed this evidence with care, but I do not propose to describe it any detail here. First, it is, to a certain extent, sensitive personal information about employees or former employees. Although the parties have agreed that I should suppress the identities of any individuals, any detailed description of the cases would probably allow the identification of some of them. Second, as will appear, it is possible to describe the legal effect of this evidence sufficiently for the purposes of this award without describing the evidence itself.

38 The Employer introduced this evidence for two purposes. First, it wanted to demonstrate, through actual fact situations that have arisen in the past, the necessity for a right to require release of medical information or examination by an Employer-appointed physician. The Employer argues that the extensive statutory and regulatory structure, while it permits periodic monitoring of the health situation of ATC employees, cannot deal with emergent circumstances, since the review cycle is too long to allow quick response to any concern that an employee is not fit to work. Moreover, it does not provide any assistance in relation to return to work situations where the reason for the absence has not affected the employee's licence validity certificate (LVC).

39 Finally, the Employer argues that the transfer of the air navigation system from a federal government department to a private corporation has severed all of the links that previously existed between Transport Canada and Health Canada in relation to safeguards on employee health, to the extent that the Employer no longer has any right to ask a RAMO to initiate a review of the medical condition of an employee who has given cause for concern.

40 I am not entirely convinced by this last argument; it seems to me that if a concern were raised by any interested person about the health and fitness to work of an ATC employee, the RAMO would be bound by both law and duty to take steps to ensure that there was no health-related danger to air navigation. Based on all of the evidence, however, I have been convinced that there may be, in some limited circumstances, a need for the Employer to seek medical information beyond what an employee is prepared to provide voluntarily. While the cases submitted by the Employer in evidence are of a number of different types, and many of them are not directly relevant to the issue in this arbitration, it is clear from the entirety of this evidence that circumstances could arise where the Employer, conscientiously adhering to its public responsibilities and its management functions, would require medical judgments about fitness to work not

available through the statutory and regulatory procedures.

41 The evidence was also introduced by the Employer as "past practice" evidence, to assist me in interpreting the collective agreement provisions here at issue. The Association opposes any such use of this evidence on a number of grounds, and I have concluded that the Association's argument is the correct one.

42 First, it should be clearly stated that the past practice is insufficient to give rise to an estoppel of any kind. There is simply nothing that could be taken as a representation by the Association that the Employer could exercise rights of the kind which it now seeks. Therefore, the only legal purpose to which past practice evidence could be put is in the resolution of an ambiguity in the language of the collective agreement. Leaving aside whether there is any ambiguity in the language to be interpreted, the law requires a high standard for evidence to be used in such an interpretive fashion. Perhaps the best statement is found in Re International Association of Machinists, Local 1740 and John Bertram and Sons Co. Ltd. (1967), 18 L.A.C. 362 (Weiler), at page 368:

> Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term [i.e., to resolve an ambiguity]. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provisions; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

43 Condition (1) in this excerpt relates to the question of ambiguity, which I have put aside. The other three requirements are all related to the standard of the evidence available, and it is my view that the evidence offered by the Employer does not meet any one of them.

44 First, the evidence is not, taken as a whole, unambiguously based on the collective agreement interpretation argued for by the Employer. Many of the cases arise in circumstances where an employee is seeking a benefit not covered by the agreement. In most cases, the employees have simply consented to disclosure of information or have undergone medical examinations without demur.

45 Second, once cases which have nothing to do with the interpretation of the collective agreement are removed from the body of evidence, which is already limited to a handful of cases, there is simply nothing left which can be described as "quite clearly expressed" acquiescence in the Employer's interpretation of the collective agreement.

46 Finally, there is no evidence at all that officers of the Association with real responsibility for the meaning of the collective agreement have acquiesced in the interpretation which the Employer now argues for. In the result, the past practice evidence simply cannot be used as an aid to interpretation of the provisions of the collective agreement now before me, and its use must be limited to the contextual value which I have already identified above.

47 I observe that in an arbitration between the present parties, Re NAV CANADA and Canadian Air Traffic Control Association (Letter of Understanding 4-91 Grievance), unreported, November 21, 1997 (Bird), the arbitrator placed a further requirement on past practice to be used to interpret this national collective agreement, that the practice itself would have to be national in scope in order to be used properly to found an interpretation which would be operable in all parts of the country. Given that I have already concluded that the evidence falls short on other bases, I do not find it necessary to deal with this issue.

48 The following provisions of the collective agreement are of some significance in this arbitration:

ARTICLE 1

PURPOSE

1.01 The purpose of this Agreement is to establish and maintain harmonious relationships between the Employer, the Association and the employees to set forth herein the terms and conditions of employment upon which agreement has been reached through collective bargaining.

1.02 The parties to this Agreement share a desire to improve the quality and to increase the efficiency of the Air Traffic Control Service and to promote the well-being of its employees so as to provide safe and efficient services to the public.

...

ARTICLE 3
MANAGEMENT

3.01 The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

(1) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
(2) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge.

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

...

ARTICLE 9
SICK LEAVE

9.01 An employee shall earn sick leave credits at the rate of nine decimal three seven five (9.375) hours for each calendar month for which that employee receives pay for at least ten (10) days.

9.02 An employee is eligible for sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:

(a) the employee has the necessary sick leave credits,

and

(b) the employee satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

> 9.03 Unless otherwise informed by the Employer before or during the period of illness or injury that a certificate from a qualified medical practitioner, licensed chiropractor, dentist, dental surgeon or orthodontist, will be required, a statement signed by the employee stating that because of this illness or injury the employee was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 9.02(b):
>
> (a) if the period of leave requested does not exceed five (5) days,
>
> and
>
> (b) if in the current fiscal year, the employee has not been granted more than ten (10) days' sick leave wholly on the basis of statements signed by the employee.
>
> ...

49 The first issue that must be resolved is the meaning of clauses 9.02 and 9.03. These are the only specific provisions in the collective agreement which deal with medical certification in any way, and the parties have advanced quite different interpretations of these provisions.

50 It is of interest that, although they have been in the collective agreement for a very substantial period of time, they do not appear to have been interpreted before in any adjudicative proceeding in relation to the issue which is now before me. The provisions are referred to in Re Belval and Treasury Board (Ministry of Transport), P.S.S.R.B. File 166-2-3410, April 7, 1978 (O'Shea), but they are not really interpreted there at all. Similar, but not identical provisions in Public Service Alliance of Canada collective agreements have been interpreted in a number of cases, such as Re Murray and Treasury Board (Revenue Canada, Customs and Excise), P.S.S.R.B. File 166-2-10181, March 23, 1982 (Frankel), Re Trépanier and Treasury Board (Agriculture Canada), P.S.S.R.B. File 166-2-16082, February 20, 1987 (Cantin) and Re Trevethan and Treasury Board (Communications), 166-2-16391, May 1, 1987 (Nisbet). All of those cases stand for the proposition that, in order to satisfy itself that an employee is entitled to paid sick leave, the employer may, where reasonable, require the provision of medical information to Health Canada physicians, or an examination of the employee by a Health Canada physician.

51 The collective agreement provisions there at issue, however, differ slightly from those under consideration here. The essential difference is that, instead of the words found in clause 9.03 of the present collective agreement "unless otherwise informed by the Employer before or during the period of illness or injury that a certificate from a qualified medical practitioner, licensed chiropractor, dentist, dental surgeon or orthodontist, will be required", the Public Service Alliance collective agreement only includes the words "unless otherwise informed by the Employer". There is thus no reference to a medical certificate in that provision.

52 The Association argues that this difference is crucial, and that the reference in clause 9.03 of the present collective agreement to a medical certificate clearly means that a medical certificate is the only additional evidence that may be required by the Employer. The Association thus reads that reference to a medical certificate as restricting the broad generality of paragraph 9.02(b), by limiting the Employer to either accepting a voluntary statement signed by the employee, or requiring a medical certificate.

53 In my view, this is not the correct interpretation of Article 9, read as a whole. The Association's interpretation can only be accepted if clause 9.03 is read in isolation, and then used as a limitation on clause 9.02(b). Read as a whole, the logical inference is that clause 9.03 only refers to the limited circumstances set out in paragraphs 9.03(a) and (b), where the employee is requesting sick leave not exceeding five days on this particular occasion, and not exceeding ten days in total in the current fiscal year. In those circumstances, the employee's written statement is sufficient to justify the leave unless the Employer puts the employee on notice that a certificate will be required.

54 The provision does not say that a certificate will always be conclusive, regardless of its quality, nor does it speak at all to other circumstances than those covered under clause 9.03. In my view, the generality of paragraph 9.02(b) is not affected, and the Employer has a right under that provision, as it states, to require the employee to satisfy it of a medical condition justifying sick leave "in such manner and at such time as may be determined by the Employer".

55 Such a broad provision, however, is clearly the kind of discretion conferred on the Employer that must be exercised reasonably. Medical information is intensely private and sensitive, and should receive no broader distribution than is reasonably necessary. A medical examination by a third party physician is extremely intrusive, and should be resorted to only in rare cases. As the Association rightly points out, and indeed as MEDCAN's Senior Vice-President for Corporate Affairs testified, it is only in rare cases that a medical examination other than by the employee's physician will be required. But even the release of medical information to third parties, even where those third parties are as apparently conscientious and careful about the security of that information as is MEDCAN, should not become a matter of routine. To whatever extent the Employer decides under clause 9.02(b) to require an employee to release medical information, that discretion must also be exercised reasonably in all of the circumstances. It would not be a reasonable exercise of the discretion set out in clause 9.02(b) for there to be any general requirement for third party access to medical information.

56 Subject to those limitations of reasonableness, however, I am of the view that the correct interpretation of Article 9 of the collective agreement is that, in limited circumstances, the Employer may refuse entitlement to sick leave with pay to an employee until the Employer is satisfied that the employee is suffering from a condition such that he or she is unable to perform duties because of illness or injury. Whether the Employer acts reasonably, either with respect to withholding entitlement, and with respect to the manner and time that the Employer requires to be satisfied pursuant to paragraph 9.02(b), may ultimately have to be determined by resort to the grievance and arbitration procedure.

57 As already observed, the Employer also asserts a right to require third party access to medical information and third party medical examinations in return to work or fitness for work situations. The collective agreement makes no specific reference to such circumstances, and the Employer relies on Article 3, the management rights provision, for its authority. A large number of arbitration decisions were referred to me by both parties, dealing with a broad range of circumstances. For the most part, the individual cases turn on their facts, and are not really of great assistance in the position in which I find myself, required to deal with a policy grievance in general terms, rather than a more specific fact situation.

58 I do not intend to review in great detail all of the cases presented. Rather, I think that there are two main propositions, which are to a certain extent contradictory, which may be gleaned from all of these cases. When those two propositions are put together, and are rationalized, it is my view that they adequately deal with the policy issues presented by this grievance.

59 The first proposition is that an employer, particularly one whose operations involve public safety, has a right to assure itself that its employees are medically fit either to return to work from an absence due to illness or injury, or to remain at work. The present Employer not only has such a right, it appears to have an obligation, at least in relation to its Air Traffic Control employees, as a condition of its operating licence in relation to the air navigation system.

60 The second proposition is that, absent some statutory authority or express consent either in a contract of employment or a collective agreement, an employer has no right to compel disclosure of personal medical information from an employee, or to compel the employee to undergo a medical examination by a physician of the employer's choosing. I have already detailed the extent to which the specific statutory structure applicable to ATCs requires such disclosure of medical information or such medical examinations. The collective agreement adds nothing specific to these statutory intrusions on personal privacy and integrity.

61 As I have observed, these two propositions are, at least on the surface, inherently contradictory. There may be circumstances where only the opinion of a physician, whether a specialist in aviation medicine or some other discipline,

would be sufficient to satisfy the Employer that a particular ATC is capable of returning to work or remaining on duty. If the employee does not consent to providing information to that physician or undergoing a physical examination by that physician, the Employer may simply be unable to satisfy itself of the employee's fitness, as it is both entitled and required to do.

62 In my view, in such circumstances, the Employer has authority under the management rights provision of the collective agreement, again provided that it has acted reasonably in exercising this discretion, to refuse to allow an employee to return to duty or to continue at duty. Such a decision may or may not, depending upon the circumstances, amount to an administrative suspension from duty. It may also result, in some circumstances, in a reduction in or cessation of salary. In each case, the collective agreement must be consulted to determine the rights of the individual employee affected.

63 However, while it is my view that Article 3 of the collective agreement is broad enough to allow the Employer to refuse to allow an employee to work unless it is satisfied of the employee's fitness, it is not broad enough to permit the Employer to compel release of medical information to or medical examination by a third party. The Employer may request that an employee consent so to do, and if the request is reasonable in all of the circumstances, an employee who does not consent may well suffer the consequences of not demonstrating his or her fitness for duty. But beyond that the Employer cannot go.

64 Specifically, it is difficult to imagine circumstances in which an employee could be disciplined for not granting consent. The very notion of consent would, indeed, be undermined by any such conclusion. There may be administrative consequences of refusal of consent, including being placed on leave, paid or unpaid depending upon the circumstances, but I am unable to envision circumstances in which discipline for, for example, insubordination could ever be justified by a refusal to provide information or to undergo an examination which has no statutory or collective agreement authorization, and which would amount to a serious invasion of personal privacy or integrity.

65 This is not say that there will not be circumstances where discipline may arise for related reasons. For example, there could be discipline for abuse of sick leave, or for breach of any of the regulatory requirements of disclosure of disabling conditions, or for a refusal to undergo medical examinations which are required by statute or regulation. At least in ordinary circumstances, however, I cannot imagine that it would ever be justified for the Employer to use threats of disciplinary action to compel an employee to consent to disclosure of medical information or to a medical examination. Obviously, in dealing in broad terms with a policy grievance there may be circumstances beyond my imagination which could justify such action; that can really only be determined based on the facts of each individual case.

66 I observe that, in my view, these interpretations are consistent with the findings in Re Kilburn and Treasury Board (Transport Canada), P.S.S.R.B. File 166-2-26434, November 24, 1995 (Tenace), which was quashed in part on judicial review by the Federal Court of Canada (Trial Division) in Re Kilburn and Treasury Board (Transport Canada) Docket T-1-96, December 12, 1997.

67 In the adjudication, which dealt with a circumstance of maintenance of salary pursuant to Letter of Understanding 3-91, the adjudicator found that management did not act unreasonably in asking the grievor to provide various medical certificates and to submit to medical examinations to satisfy management that the grievor remained unfit for duty. The adjudicator declined to decide whether the management rights clause in the collective agreement was required to be exercised fairly and reasonably. The Federal Court did not find that the adjudicator had acted improperly in declining to make any such general declaration, and declined to interfere with the adjudicator's determination that the employer had not acted unfairly or unreasonably. Instead, the Court found only an error in law in relation to the application of the collective agreement and Letter of Understanding 3-91, on the basis of which the matter was remitted to another adjudicator for rehearing of that issue.

68 In paragraph 9 of the decision, however, MacKay J. made the following observation:

> On July 13, 1993, his manager wrote to the applicant requesting medical forms on a regular basis and by separate letter, requesting consent of the applicant, and his undertaking, for an assessment of his medical fitness by a doctor of Health and Welfare Canada, a procedure not specifically provided for under regulations, the collective agreement or regular practice.

The Association argues that this is a binding determination that the collective agreement does not authorize third party medical examinations.

69 With respect, I disagree. The Court is simply stating what I have already said, that the collective agreement is silent on these particular issues. For that reason, I have concluded that the Employer has no independent right to require disclosure of medical information or third party medical examination which can be enforced by disciplinary action. Article 3 and Article 9 are, however, broad enough, for the reasons set out above, to justify administrative action to withhold sick benefits, or to refuse to allow an employee to return to or continue to work until the Employer is satisfied under Article 9 of the validity of a claim for sick benefits, or is satisfied that the employee is fit for duty, pursuant to its general rights and obligations under Article 3. If, in all of the circumstances, the Employer can only reasonably be satisfied by the disclosure of evidence to its medical advisors or by an examination by a physician specified by the Employer or agreed between the parties, then the employee may have to choose between suffering the continued administrative consequences, or consenting to the release or the examination.

70 Finally, I should observe that some of the arbitration awards cited to me deal with the extent to which the Employer may receive medical information itself. In my view, these issues are adequately avoided by the arrangements which have been established with MEDCAN, which provides a firewall between the employee and the examining physicians, whoever they may be, and the Employer. The Employer is entitled to know whether an employee is fit or not, and any limitations which may have to be accommodated. The Employer is not entitled to sensitive medical information. The MEDCAN contract would probably be a better protection for employees had it been entered into with the Association as well as with the Employer, but in the absence of any evidence of breach of the confidentiality obligations set out in the MEDCAN agreement, it provides a degree of security of private information sufficient to respond to the concerns expressed by many arbitrators, including me in some cases, about the direct release of sensitive medical information to an Employer. It will follow that, in the absence of these protections or their equivalent in any future contract for medical services, this award would have to be reconsidered.

71 Counsel for the parties described this arbitration as a search for guidance on complex policy issues, and I have taken that as an invitation to be discursive in my reply. Rather than attempt to summarize, which might lose some of the flavour of the qualifications which I have put on some of the propositions set out above, I simply declare that as a matter of general principle, the appropriate interpretation of the collective agreement clauses at issue is as set out above. While these principles may have to be adapted to individual cases, and there may be exceptions which I have not foreseen, these principles set out a reasonable balance between the rights of employees to personal privacy and integrity, even in the special circumstances of the air navigation system, and the rights and obligations of the Employer in relation to the fitness of its employees and the administration of the collective agreement.

72 I wish to thank counsel for their especially helpful submissions.

qp/s/tms