# ARBITRATION

BETWEEN:

**NAV CANADA**
(the "Employer" or the "Company")

- and -

**CANADIAN AIR TRAFFIC CONTROL ASSOCIATION**
(the "Association", the "Union" or "CATCA")

With respect to (1) Grievance No. 98-009, a national policy grievance filed by the Association on March 24, 1998 relating to pay levels for controllers at towers where traffic levels have increased (the "Tower Classifications" grievance), and (2) Grievance No. 98-013, filed by the Association on December 19, 1997 relating to the effective date of pay adjustments at the Edmonton International Control tower due to increased traffic.

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# AWARD

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**BEFORE:** D. P. Jones, Q.C., Arbitrator

**REPRESENTATIVES FOR THE EMPLOYER:**
Mary Gleason, Counsel
Janice Schick, Solicitor for the Employer
Larry Boulet, Manager, Monitoring and Evaluations
Brent Clary, Manager, Labour Relations
Benoît Chartrand, Labour Relations Advisor

**REPRESENTATIVES FOR THE ASSOCIATION:**
Peter J. Barnacle, Counsel
Fazal Bhimji, Vice-President, Labour Relations (later President)
Rick Snow, Regional Director, Western

**HEARD** in Calgary, Alberta on March 17, 18 and 19, 1999 and on August 25 and 26, 1999, and in Ottawa, Ontario on January 20 and 21, 2000.

**AWARD ISSUED** at Edmonton, Alberta on May 31, 2000.

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## I. BACKGROUND

Prior to November 1, 1996, the aircraft navigation system in Canada was operated by Transport Canada. The system involved a number of bargaining units represented by different unions. Labour relations were governed by the federal public service legislation (including the *Public Service Employment Act* and the *Public Service Staff Relations Act*).

Under this statutory *régime*, certain matters were not capable of being bargained collectively or being included in a collective agreement, including classification. Air traffic controllers were governed by the 1991-93 collective agreement between Treasury Board and the Canadian Air Traffic Control Association.

When the civilian air traffic control system was privatized in November 1996, labour relations became governed by the federal private sector legislation (the *Canada Labour Relations Code*). By virtue of the *Civil Air Traffic Control Privatization Act* and the *Code*, the existing collective agreements continued in force pending negotiation of a replacement collective agreement. Nav Canada and its various unions signed a Memorandum of Understanding dated November 19, 1996 to apply during the transition period which (among other things) includes Appendix B replacing the previous grievance and arbitration procedure under the collective agreement.[1]

The grievances arise out of the following fact pattern:

- In 1977, Transport Canada adopted consistent criteria for the measurement of tower workload in a document referred to as TP1362.[2] The criteria used a mathematical formula to measure the dynamic and static elements of the work done at a particular tower. The measurement of the dynamic elements resulted in an "initial point rating" (or IPR), and the measurement of the static elements resulted in a "secondary point rating" (or SPR), which were combined into a "final point rating" (or FPR), which was intended to be regarded as a realistic mathematical reflection of the workload at any given tower. The FPR was used to determine the level of a particular tower, the daily controller staffing levels, the degree of administrative support, and sometimes the hours of operation.

- In 1991, Transport Canada adopted a classification standard for positions in the Air Traffic Control Group.[3] This Classification Standard used essentially the IPR, SPR, FPR calculations from TP1362 to create a three-year rolling average (the AFPR) which was used to classify the controllers' positions:[4]

**Table 1**

**SUMMARY**
**CLASSIFICATION LEVEL FOR**
**AIRPORT CONTROL POSITIONS**

| LEVEL | AFPR AVERAGE (3 YEARS) | A CONTROLLER | B SPECIALIST/ SUPERVISOR |
|---|---|---|---|
| 1 | UP TO 13,000 AFPR | Airport Controller AI-OPR-1 | Unit Operation Specialist AI-OPR-1 |
| 2 | 13,001 TO 30,000 AFPR | Airport Controller AI-OPR-2 | Unit Operation Specialist AI-OPR-2 |
| 3 | 30,001 TO 50,000 AFPR | Airport Controller AI-OPR-3 | Tower Supervisor AI-OPR-3 |
| 4 | 50,001 TO 70,000 AFPR | Airport Controller AI-OPR-4 | Tower Supervisor AI-OPR-4 |
| 5 | Over 70,000 AFPR | Airport Controller AI-OPR-5 | Tower Supervisor AI-OPR-5 |

- In 1995, Transport Canada revised the mathematical formula to update the method of measuring workload at the towers, and issued a revised TP1362 which took effect on 1 April 1996.[5] After Nav CANADA took over the navigation system in November 1996, TP1362 was renamed NP1362, but the contents were not changed.

- Using the new mathematical formula from NP1362, the AFPRs increased at some of the towers. The effective date of the increase depends upon whether one (1) uses the new formula to recalculate the AFPRs for the three previous years prior to the implementation of NP1362; (2) uses a combination of the FPRs calculated using the old formula for the time prior to the implementation of NP1362 and the new formula for the time thereafter; or (3) waits until there have been three years after the implementation of the new formula in order to be able to use it to calculate the AFPRs.

- The Employer takes the view that the new NP1362 relates only to staffing levels at the various towers, and does not have any impact on the classification of the positions at the towers (which, it says, is still governed by the 1977 version of TP1362). The Union says that the new NP1362 (however it is implemented) generates new AFPRs, which are then cross-referenced into the Classification Standard (*via* Table 1 above) and therefore impact pay.

The national policy grievance (Grievance No. 98-009) was filed by the Association on March 24, 1998.[6] It relates to pay levels for controllers at towers where traffic levels have increased. The operative part of the grievance reads as follows:

> ... [T]he employer's failure to upgrade towers arising from traffic increases is not unique to Dorval Tower. In fact, a Calgary Tower grievance was filed in June, 1997 by Todd Gabel in the same situation (copy enclosed). In addition, controllers at Winnipeg Tower and Saskatoon Tower have also been recently affected. In all cases, the issue is the failure of the employer to upgrade the units involved as a result of traffic increases, and hence pay the controllers at the higher rate associated with such an upgrade.
>
> ... In the circumstances, this is obviously an issue with national implications. Therefore, please consider this letter a union grievance with respect to the pay level for controllers at those towers across the country, including Dorval, Calgary, Saskatoon and Winnipeg, where the traffic levels have increased and the employer has failed to upgrade the towers affected. Such a failure results in the controllers at such units being paid at a lower rate than would occur if their tower was upgraded. We maintain that the employer has thus failed to apply the pay provisions of the Collective Agreement, including Article 14.02, 14.03 and Appendix "A".

The parties agreed to use the Calgary tower as a test case in the national grievance, with my remaining seized with the policy grievance to deal with the other towers if that is required.

The second grievance (No. 98-013) was filed by the Association on December 19, 1997. It relates to the effective date of pay adjustments at the Edmonton International Control tower due to increased traffic as a result of the transfer of scheduled traffic in June 1996 from the City Centre Airport to the International Airport. Although the Employer recognized that the transfer resulted in increased workload, it did not reclassify the controllers' positions until September 1997, effective retroactively to April 1, 1997. The Union says that the effective date should be June 1, 1996.[7]

## II. PRELIMINARY OBJECTIONS BY THE EMPLOYER

The Employer raised two preliminary objections to the national policy grievance—namely, (1) that it was filed outside the time limits prescribed in the collective agreement;[8] and (2) that it is a classification grievance which cannot be arbitrated under

the terms of the collective agreement.

Although counsel for the Employer initially raised an objection to the timeliness of the Edmonton tower grievance, this was not pursued at the hearing.[9] However, the Employer did object that the Edmonton tower grievance is inarbitrable because it is a classification grievance; in the alternative, that the Edmonton controllers were not entitled to be reclassified or to back pay under the terms of the Classification Standard; and in the further alternative that any damages should be limited to the period preceding December 19, 1997 equivalent to the time period for filing a grievance (*i.e.*, 40 days), during which no damages occurred.

I reserved my ruling on these preliminary matters until after hearing evidence and submissions from the parties.

## III. EVIDENCE FOR THE UNION

The Union led evidence from the following witnesses:

### (a) Fazal Bhimji

Although he subsequently became President, when the arbitration hearing started Mr. Bhimji had been Vice-President of Labour Relations for CATCA since July 1993, which is a full-time elected position. His duties included support in the collective bargaining process, interpreting the collective agreement, consultation and attendance at national consultation meetings with the Director of Air Traffic Services and other Vice-Presidents of the Employer, assistance with the wording of grievances, assigning work to legal counsel and

obtaining legal opinions, and attending meetings of the Union's National Executive and Board.

In 1996, the staff in the Labour Relations sections consisted of one Labour Relations Assistant who was responsible for tracking grievances. In 1997, a second Labour Relations Specialist was added who was responsible for the preparation of cases. In addition, the section has in-house legal counsel.

With respect to the administration of grievances, Mr. Bhimji testified that national officers are usually only involved at the final level of the grievance procedure. The first level occurs at the region, and national officers may or may not be aware of grievances filed at that level. Prior to privatization, the Union could not file Union grievances under the *Public Service Staff Relations Act*, but that can occur now that their labour relations are governed by the *Canada Labour Code*.

In general, once a grievance is filed at the branch level, a copy is forwarded to the Union's Regional Director and to the national office. However, that process does not invariably happen. Once a grievance comes to the attention of the national office, it has a tracking system which is intended to permit the Union to review outstanding grievances on a monthly basis to determine what files are to be referred to arbitration. However, the Union may not know about all of the grievances which are filed at the branch or regional level.

Mr. Bhimji acknowledged that there was confusion about the issue relating to Dorval Tower.[10] He understood that a grievance had been filed with respect to the workload at Dorval. Although Mr. Bhimji sent a letter to the Company in July 1997 referring the Dorval Tower matter to arbitration[11] and the matter was subsequently processed for arbitration,[12] with the hearing scheduled for February 26 and 27, 1998,[13] in January 1998 the Union

realized that no grievance had been filed concerning the classification of Guy Ruel's position at the Dorval Tower.[14] The day before our arbitration hearing, Mr. Bhimji became aware of a letter written by the President of the Dorval Branch of CATCA to the Manager of the Dorval Control Tower dated December 30, 1996[15] which noted the publication of the new version of TP1362 in January 1996, noted that using the new version would justify a higher classification for the Dorval controllers and supervisors back to March 1990, and asked that the salaries of all affected employees be adjusted to account for the reclassification back to that date with interest.

A copy of this letter is shown as having been sent to Guy Ruel, Regional Director of CATCA. On March 18, 1997, Mr. Ruel (as Quebec Regional Director of CATCA) sent a letter to Mr. Dupéré (Executive Regional Director of the Quebec Region of Nav Canada) to make:[16]

> ... a formal complaint in accordance with the Nav Canada general complaint resolution process. We submit that the Employer has not respected the TP1362 document that governs the calculation of workload at control towers. We are of the view that the workload of the controllers in the Dorval Tower requires an immediate and retroactive reclassification, with effect to the date that the workload justifies the reclassification.

In July 1997, Mr. Ruel asked Mr. Dupéré to transmit the complaint to the national level in order to accelerate resolution of the problem.[17] On September 5, 1997, Jean-Marc Blake (Vice-President of Human Resources for Nav Canada) denied the complaint because Mr. Ruel could not complain about the classification of the position in question because he did not hold that position and did not perform the assigned duties thereof.[18] On September 26, 1997, Keith Stefanik (Director, Compensation for Nav Canada) sent a follow-up letter to David Lewis (President of CATCA) asserting that the Company did not intend to affect classification when it revised TP1362.[19]

Mr. Bhimji testified that he first became aware of the situation at the Calgary Tower in Summer 1997. Todd Gabel telephoned Mr. Bhimji to advise that the former had filed a grievance in the following terms:[20]

> The McCall Branch is grieving the current classification of Calgary Tower. The FPR numbers indicate Calgary Tower should be at an AI-05 level, not an AI-04.

The corrective action requested was to "upgrade Calgary Tower to an AI-05 level". Mr. Bhimji perceived that the grievance was more like a pay issue than a classification grievance, and he suggested different wording for the grievance. Accordingly, Mr. Gabel filed a revised grievance on August 19, 1997 in the following terms:[21]

> I am being paid at the wrong level for the work I am doing. This is contrary to the collective agreement including Article 14, Appendix A, and other policies of the Employer on pay and classification.

The corrective action requested was:

> I wish to be paid at the AI-05(B) level retroactive to February 01, 1996. This would include all overtime and other bonuses that are applicable. I wish to be made whole.

The Calgary grievance was initially placed in abeyance with the consent of the CATCA Regional Director (Rick Snow) and the Employer's Regional Director of Human Resources (Janice Foley) in order to gather data. Although a meeting about this grievance took place in January 1998, the Calgary Tower grievance was folded into the national grievance in a letter dated March 24, 1998 from Peter J. Barnacle, CATCA's Legal Counsel, to Mary J. Gleason, Acting Legal Counsel for Nav Canada.[22] Mr. Bhimji stated that he became aware of the Edmonton grievance[23] which had been filed on December 19, 1997 by Richard Nye (CATCA's Northwest Regional Director) with the Employer's Regional Director for Western Canada (Mr. Corkett) in January 1998, although he had previously been in contact with Mr. Nye about the significant rise in traffic after the Edmonton City Centre Airport was consolidated at the International Airport.

The Edmonton grievance reads as follows:

> The Association hereby formally complains that the air traffic controllers at the Edmonton International Control Tower have not been paid at the correct rate between June 1, 1996 and March 31, 1997 inclusive. This action is contrary to the collective agreement and all other relevant policies and practices.
>
> The Association requests that all controllers affected receive corrective action through:
>
> 1. retroactive payment of pay at the higher rate (AI-03) for the period specified; and
>
> 2. payment of interest on the amount outstanding to each controller at the appropriate commercial rate of return; and
>
> 3. each controller receiving a letter of apology from NAV CANADA and in all other respects being made whole.
>
> If you are unable to grant this reasonable complaint then the Association requires that this become a grievance at the final level. The Association requests that all correspondence in this matter also be sent to the attention of the Vice President Labour Relations at the national office ....

In August 1998, the Employer's Director of Labour Relations (T. K. Veltheim) responded to the Edmonton grievance as follows:[24]

> ... Upon review of their positions and changes in traffic levels due to the movement of flights from City Centre Airport to Edmonton International Airport, the employees were reclassified retroactive to April 1, 1997 as per the relevant Classification Standard and policies. Any dispute concerning classification should be directed through the NAV CANADA alternative dispute mechanism, in our Employee Relations department.
>
> As there has been no violation of the collective agreement, the grievance is denied.

Mr. Bhimji confirmed that, while the system was part of the public service, pay was governed by public service guidelines as well as Article 14 of the collective agreement:[25]

> ARTICLE 14
> PAY
>
> 14.01 Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.
>
> 14.02 An employee is entitled to be paid for services rendered at:

(a) the pay specified in Appendix "A" for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment,

or

(b) the pay specified in Appendix "A" for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.

14.03 (a) When an employee is required by the Employer to perform the duties of a higher classification level for a period of at least four (4) consecutive working days, the employee shall be paid the pay of the higher level, calculated from the date on which the employee commenced to perform the duties of the higher level.

(b) An employee required by the Employer to assume the responsibility for air traffic control duties requiring the possession of a valid air traffic controller licence, or letter of authority, and which duties are the responsibility of a position classified at a higher level, shall be compensated as established in (a) above.

(c) An employee who is required to perform the duties of a higher classification level will not be arbitrarily assigned and reassigned between his or her regular position and the acting position solely for the purpose of avoiding entitlement to acting pay in the higher level position.

. . . . . .

Mr. Bhimji explained that the classifications in Appendix "A" are the result of the application of the Classification Standard[26] which uses the AFPRs.[27] When the Classification Standard was implemented in 1991, it referred to the 1977 version of TP1362, which in turn was designed to provide a uniform measure of workload at the various towers.[28] Mr. Bhimji described his understanding of the formula used in the 1977 version of TP1362, which results in the final point rating (FPR) for each airport. This number was reported monthly to Statistics Canada, who prepared a report for all airports in the country, which included a calculation of the average FPR for the airport for the preceding twelve months (the AFPR or Annual FPR). In 1977, the AFPR was used by the Employer only for determining staffing

levels—that is, how many shifts at a particular airport, the start time of the shifts, the number of controllers on a shift, etc.

In 1991, there was a reclassification for air traffic controllers. At that time, the AFPR levels derived from TP1362 became linked to classification levels in the Classification Standard.[29] Prior to 1991, the classification for towers was quite subjective. After discussions between the Employer and the Union, Treasury Board linked classification to AFPRs for airport controllers. The AFPR calculation in the Classification Standard was derived by averaging the FPR calculation from TP1362 over a period of twelve months. The result of the AFPR calculation was to determine the level of a particular tower and the corresponding classification of the positions at that tower. The issue in the national grievance (according to Mr. Bhimji) as exemplified by the Calgary Tower is whether it should be properly characterized as being a Level 4 or a Level 5 tower, in light of the AFPRs for the Calgary Tower after the 1996 revision to the method of calculating FPRs in TP1362 (and therefore AFPRs for the purpose of the Classification Standard).

The issue with respect to the Edmonton grievance is the date upon which the Edmonton tower should be characterized as being a Level 3 tower. Although a change in the level of tower normally looks to the annual Average Final Point Rating averaged over a consecutive three-year period, that is not mandatory where major changes in traffic patterns occur as a result of either reorganization or opening of airports, which cases will be considered on their relative merits.[30]

Thus, Mr. Bhimji said that if the workload at the Edmonton tower met the criteria for a Level 3 tower, one would go to Appendix “A” in the collective agreement to determine the pay rates for AI-03 positions.

The 1996 version of TP1362 was circulated in draft form to the Union, which had had input through the working group that prepared the draft revision. The revision of TP1362 was discussed at a number of national consultation meetings between the Employer and CATCA prior to the implementation of the revised version of TP1362:

- on June 30, 1993:[31]

> IFR WORKLOAD MEASUREMENT STUDY
>
> Mr. Buck (AANEH) provided an update on the IFR Workload Measurement Project explaining that the project uses sector flight minutes to assess sector workload. The project will enable managers to compare the workload of similar type sectors (TCU, enroute radar, non-radar etc.).
>
> Mr. Lewis requested a complete briefing on the project and Mr. Desmarais agreed that such a presentation would be beneficial.
>
> CONTROL TOWER WORKLOAD MEASUREMENT CRITERIA
>
> Mr. Buck explained that the method of assessing Control Tower Workload was under review as the original document (TP1362) had not been revised since its inception in 1977. The review team concluded that TP1362 is still a valid document with some exceptions that include: balloons; floatplane operations; CAT II; noise abatement; IFR communications; ATFM; departure release authority; de-icing; and qualifying levels for staffing.
>
> Mr. Lewis requested that the review team examine the methodology for recording overflights (88s) and that control tower/FSS manuals reflect the same methodology of recording traffic movements. CATCA will provide input prior to the Fall.
>
> The review team will reconvene, in the Fall, to examine outstanding issues.

- on January 27, 1994:[32]

> CONTROL TOWER WORKLOAD MEASUREMENT CRITERIA
>
> Presentation provided by Mr. E. Buck (AANEH) on the workload measurement criteria for Control Towers. As a result of an assessment completed in March 1993, it was identified that the initial criteria, developed in 1977, required an in-depth review to reflect the evolution in ATC equipment and operating procedures. This review has been completed and a

preliminary draft report is currently being considered. Mr. Lewis requested that CATCA take part in the review process of this draft report. Mr. Desmarais responded that when this report reaches final draft stage CATCA will be consulted.

- on October 6, 1994:[33]

Mr. Buck identified that care must be taken regarding the application of the new methodology as to any potential impact on the classification level of the Towers.

CATCA indicated that the classification level of the Towers are linked to the present method of workload measurement.

- on January 25, 1995:[34]

Mr. Bhimji stated that helicopter and water traffic must be considered in the methodology. Mr. Buck stated that the current classification of the Towers would not necessarily change but the new methodology would be recognition of the controller's workload....

Mr. Fudakowski stated that the existing workload measurement standard may be invalid at Pearson and Vancouver Towers. Mr. Fudakowski indicated that great care must be taken in the weighting of the factors in the workload methodology, in light of its impact on the classification of the Towers.

- on December 7, 1995:[35]

... [Mr. Buck] indicated that Statistics Canada and Transport Canada Aviation Management Statistics needed to be consulted. Implementation was scheduled for April 1, 1996. Mr. Buck indicated that with this new methodology the numbers would not be comparable and would require 12-18 months to ensure stability. Mr. Buck indicated that the new criteria will be implemented unless it affects the tower level. Mr. Lewis [President of CATCA] indicated the possibility of green-circling [if a tower dropped a level]. Mr. Buck indicated that both Mirabelle and St-Hubert which would have gone up with the old standard will not be affected.

Mr. Buck also indicated that Halifax Tower and others will not be affected until a 12-18 month time period for data collection has elapsed. Mr. Lewis expressed concern regarding the implications on members in light of this new methodology. Mr. Fudakowski responded that with the transfer to Nav Canada, staffing levels will be subject of the Collective Agreement.

In addition, there were consultations *after* the 1996 revision of TP1362 was put into effect in April 1996—namely, in March and April 1997 (Exhibit 3.6).

- March 6, 1997:[36]

> RE-CLASSIFICATION OF EDMONTON CITY CENTRE AND EDMONTON INTERNATIONAL TOWER
>
> Mr. Fudakowski opened this item and stated that no firm position has been taken yet regarding the implementation but that any measure taken will have to recognize the reality of the situation. Ms. Fox stated that as of June 1996, the traffic level [at Edmonton City Centre Airport] based on the FPR was not sufficient to maintain that facility at a grade three (3) level. Further, with the transfer of traffic to Edmonton International that facility had a sufficient FPR to increase by one category. The distinction was made between the classification level of employees working at a Tower (based on the Classification Standard) and the category of a Tower which is identified through the workload measurement instrument.
>
> Based on the Classification Standard, normally data over a consecutive three year AFPR average is used to determine the level of a facility; there is however flexibility provided in those cases in which there are major changes in traffic patterns in which case the three year period is not mandatory. Discussion took place as to when the impact of the change in FPR would affect classification. In effect the decision has not yet been taken in this regard. However for the unit category (which affects staffing) Ms. Fox indicated that the changes in category would take effect as of April 1, 1997.
>
> Mr. Lewis indicated that the classification document is permissive with respect to the situation at Edmonton International Tower. Mr. Lewis asked if salary protection would apply to those employees at Edmonton Municipal. Mr. Fudakowski stated that this aspect of the issue would be reviewed before an official response is provided to CATCA. Mr. Fudakowski raised the possibility of a salary freeze as one possible option and indicated to CATCA that they may wish to raise the issue in the afternoon session of the consultation with the VP of Human Resources.
>
> . . . . . .
>
> DORVAL TOWER CLASSIFICATION
>
> Mr. Lewis stated that Dorval Tower, based on the new NP1362 of April 1996, qualified for a reclassification to a grade level 5 Tower if present and historical data were considered. Mr. Lewis also stated that CATCA could provide the pertinent documentation.

> Ms. Fox responded that when the new criteria was introduced, there was no consideration to apply such retroactively. Further, the SPR cannot be calculated as the specific criteria is not reflected in the data supplied by the Aviation Statistics Centre. Ms. Fox also stated that the ATS Monitoring and Evaluations Division has reviewed the situation at Dorval and has found that the Tower meets the required SPR in only 7 of the last 12 months, based solely on the new NP1362 criteria.

- April 8, 1997:

> TOWER WORKLOAD MEASUREMENT AND CLASSIFICATION
>
> ... Mr. Fudakowski stated that Management is seeking to ensure that the application does not cause unforeseen circumstances. Mr. Fudakowski stated that with the application of the new formula as of April 1, 1996 it would take three years before there would be the possibility of impact on classification.
>
> Discussion ensued as to the period for the application of the new or old formula to arrive at the AFPR for purposes of classification. Mr. Lewis stated that both the old and new formulas would need to be applied to arrive at the required AFPRs (for a three year period) so as to respect the wording of the AI Classification Standard.
>
> Mr. Fudakowski stated that the new Tower Workload measurement criteria was not intended to be applied retroactively or in a blended manner in calculating the AFPR for a three year period (based on an application of both the old and new criteria for specific years within that three year period). Mr. Lewis stated that the use of NP1362 is clear as to its utilization within classification. Mr. Bhimji stated that the Classification Standard simply refers to the use of annual AFPRs averaged over a consecutive three year period for the classification of the operational sub-group. Mr. Tonner stated that the blending of averages based on the two criteria will have to be implemented. Ms. Fox stated that a blending of averages based on the two criteria had not been envisaged. Mr. Fudakowski stated that the impact of using AFPRs based on the different criteria is unknown at this time.
>
> Mr. Fudakowski concluded that the possibility of using both workload measurement criteria to establish AFPRs for a consecutive three year average would be reviewed. Mr. Fudakowski also stated that the results of this review would be formally provided to CATCA.

Mr. Bhimji testified that he had never seen the results of the Employer's review of using blended AFPRs (using the old formula for periods prior to April 1996, and the new formula for periods after March 1996). However, Mr. Bhimji understood that the Employer had clearly recognized that the revised TP1362 would impact on pay and classification, and that the only issue was about which method to use in calculating the AFPRs. This was consistent

with a letter dated January 22, 1997 from the manager of Dorval Tower (Donald Cameron)[37] to members of CATCA at Dorval explaining that the reclassification request for Dorval Tower was not able to be done by calculating the three-year AFPR by using a hybrid formula to apply the old calculation and the new calculation,[38] and in addition, referring to another management memorandum dated November 15, 1996,[39] directing that the data could not be used to justify any change in tower category, classification or staffing. Accordingly, the Dorval Tower could not be changed to a different level at that time.

Mr. Bhimji then referred to the Statistics Canada reports for the AFPRs for the Calgary Tower.[40] These AFPRs would put the Calgary Tower at Level 4.[41] Statistics Canada apparently made two mistakes in implementing the new formula in 1996—it applied the new formula back to (at least) January 1996, and it applied the old SPR (28.10) rather than the new SPR (59.02).[42] Nevertheless, the AFPR for December 1996 was 81109. The formula was corrected in 1997, and the AFPR for December 1997 was 87783, and for December 1998 was 94886. Applying these numbers to the Classification Standard (Table 1 above), Calgary Tower would have arguably moved to Level 5 (whose threshold is 70000).[43]

According to Mr. Bhimji, the Union was prepared to accept a blended three year average. On April 1, 1996 (contemporaneous with the implementation of the new version of TP1362), the Employer issued a Provisional Management Directive to change the unit staffing standard table at control towers as follows:[44]

**[Table 2]**

**CONTROL TOWER**
**UNIT STAFFING STANDARD TABLE**

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|---|

| | WORKLOAD LEVEL (FPR) | CONTROLLER SHIFTS PER DAY | SUPERVISOR SHIFTS PER DAY | ASSISTANT SHIFTS PER DAY | UOS OPS | UOO NON-OPS | CHIEF (NON-OPS) | OFFICE ADMIN. |
|---|---|---|---|---|---|---|---|---|
| A | 0 - 10000 | 2 | | | - | | 1 | 0.4 |
| B | 10001-15000 | 3 | | | - | | 1 | 0.4 |
| C | 15001-25000 | 4 | | | 1 | | 1 | 0.6 |
| D | 25001-35000 | 5 | | 1 | 1 | | 1 | 1 |
| E | 35001-40000 | 6 | 1 | 1 | 1 | | 1 | 1 |
| F | 40001-45000 | 6 | 1 | 1 | 1 | | 1 | 1 |
| G | 45001-55000 | 7 | 1 | 2 | | | 1 | 1 |
| H | 55001-65000 | 7 | 2 | 2 | | | 1 | 1 |
| I | 65001-75000 | 8 | 2 | 2 | | | 1 | 1 |
| J | 75001-85000 | 9 | 2 | 3 | | 1 | 1 | 2 |
| K | 85001-100000 | 10 | 2 | 3 | | 1 | 1 | 2 |
| L | 100001-115000 | 11 | 2 | 3 | | 1 | 1 | 2 |
| M | 115001 + | 12 | 2 | 3 | | 1 | 1 | 2 |

**On cross-examination**, Mr. Bhimji confirmed that CATCA's National Executive includes the President and the Vice-President (Labour Relations) who are both on leave from the Employer, and one part-time Vice-President for technical matters. In addition, the Regional Directors are members of the Board of Directors, although they are not part of the Executive. Under the Union's constitution, the Regional Directors have certain responsibilities, as does Mr. Bhimji in his role as Vice-President (Labour Relations). In particular, the Regional Directors are responsible for grievances at the first level (although the actual filing is usually done by Branch Chairs). Each branch is a unit, which may comprise more than one facility. At the branch level, there may be several stewards on different shifts, each of whom has responsibility for filing grievances.

Mr. Bhimji's role as Vice-President (Labour Relations) is responsibility for the bargaining relationship, including ultimate responsibility for grievances and the processing of grievances, especially at the final level of the grievance process. He has instituted a new process at the national level for tracking all Union grievances, and has put in place training seminars for stewards, and communicated these changes to the Employer's labour relations personnel.

The scope of what could be grieved under the *Public Service Staff Relations Act* was more restricted than is the case under the *Canada Labour Code*. For example, under the *PSSRA*, the Union could only grieve about matters which an individual could not grieve—for example, union dues. Classification grievances were not arbitrable under the *PSSRA*.

Mr. Bhimji agreed that the letter from Guy Ruel dated March 18, 1997 requesting to have the Dorval Tower reclassified to Level 5 did not constitute a grievance, but rather a complaint under the formalized complaint resolution process which is separate from the grievance procedure and which deals with matters which cannot be grieved. Similarly, Mr. Ruel's letter dated July 24, 1997 to Mr. Dupéré (Regional Director–Quebec)[45] was a complaint, not a grievance, and Mr. Bhimji confirmed that in fact no grievance was filed about the reclassification of controllers at Dorval Tower even though the Union erroneously sent the matter to arbitration.[46] There was confusion between this matter and another grievance involving the UOS file.

Mr. Bhimji confirmed that he only became aware in January 1998 of the letter from Keith Stefanik (Director, Compensation) to David Lewis (President of CATCA) dated September 26, 1997,[47] which asserted that the potential for impact of the new NP1362 on position classifications had not been discussed, and that the classification process was unchanged notwithstanding the implementation of the new NP1362.

Although Mr. Bhimji was aware before the fact that the formula in TP1362 was starting to be changed in April 1996, with an initial change to the IPR and a later change to the SPR, he was not involved with Statistics Canada about how the changes would be implemented by them. Although he knew that Statistics Canada prepares its reports monthly, the Union does not directly receive a copy, although he agreed that the Employer usually provides the Union with any requested information.

Mr. Bhimji confirmed that while the Employer was part of the federal government, classification matters were dealt with by the Treasury Board, and could not be bargained or arbitrated. When a position was created, the classification branch evaluated and classified it in the public service. The AI Classification Standard dealt with air traffic controllers, classifying the positions from AI-01 to AI-05 for operational positions (and higher for some non-operational positions; students were classified at the AI-00 level). While Mr. Bhimji agreed that under the 1991 Classification Standard[48] it is the position which is classified, he also pointed out that it is the level of the tower which is relevant to determine the classification of the positions, referring particularly to paragraph 5 in the Notes to Raters in the Classification Standard:

> Positions are evaluated by comparing their duties and responsibilities with the level descriptions provided. Allocation is made to the level whose description most closely corresponds to the duties of the position being evaluated.

If the level of the tower is downgraded, the Terms and Conditions of Employment in the public service green-circled the controller's pay, although their positions might be reclassified at the lower level and new employees would have been appointed at the new (lower) level. Mr. Bhimji agreed that all controllers at the Calgary Tower would have received letters or certificates of appointment at the AI-04 level.

Mr. Bhimji said that acting pay would generally not be available to a person performing the duties of his own position, although he understood that acting pay was sometimes paid when classification was delayed.

With respect to the original grievance filed by Todd Gabel at the Calgary Tower in July 1997,[49] Mr. Bhimji agreed that this version of the grievance had been withdrawn and that it was recast so as to be able to grieve the pay issue, which he said was a continuing grievance. He testified that he told Mr. Gabel to reword the grievance to make it track the pay grievance at the Ottawa Tower arbitration. At Ottawa, he said, the Employer tried to have trainee controllers perform only part of a job and purported to pay them at less than the rate of pay for positions at that Tower. The arbitrator required the Employer to pay the employees in question at the higher level once they were working without supervision.

With respect to the Edmonton International Tower, Mr. Bhimji says that the effective date of AI-03 should be June 1, 1996, the date of the transfer of the traffic from the Municipal Airport. Mr. Bhimji did not personally review the statistics, but was advised by CATCA's Northwest Regional Director (Mr. Peters) that the Edmonton International met this level under the criteria in the new NP1362, and that Mr. Peters was talking to Management about whether pay would be retroactive, and that Management had requested some more time in order to review more statistics. The controllers at the time had known right away that there had been a sudden and significant increase in their workload. The statistics a year later clearly justified the change. Using the figures in Exhibit 15 (which uses the old TP1362 formula up to April 1996, and the new formula thereafter), Mr. Bhimji agreed that the twelve month AFPR did not go over 30000 until January 1996 (31446), but pointed out that nevertheless there was a discrete increase in July 1996—in other words, one would have to look at the month of July 1996.

With respect to the other towers in the national grievance, Mr. Bhimji stated that he had not personally reviewed the statistics, and therefore could not specify the operative dates for the changes CATCA was seeking at these towers. However, he agreed that for all of these towers, the three year average would apply (because there is no suggestion of a discrete change in workload, as was the case at Edmonton International). The Union initially took the position that the Employer should recalculate the statistics for the three years prior to April 1, 1996 using the new formula. When the Employer replied that this would cause technical difficulties, the Union said that it would accept the hybrid formula.

Mr. Bhimji agreed that the 1977 version of TP1362 was in effect when the Classification Standard was written in 1991. He agreed that the ASPR ("Assigned SPR") is the result of applying the %SPR to the VSPR ("Available SPR for the unit, maximum available points for SPR"). Mr. Bhimji agreed that the Assigned SPR for a unit was done by Management. He also agreed that paragraph 3 of the Notes to Raters in the Classification Standard indicated that cases where there are major changes in traffic patterns "... will be considered on their relative merits", and that there is no rule or direction given as to how this is to be done except (Mr. Bhimji said) it must be reasonable.

The process for amending TP1362 started just before Mr. Bhimji became Vice-President (Labour Relations) in 1993. His understanding was that the purpose of the revision was to reflect workload, which in turn impacts both staffing and pay. He has not seen any terms of reference which restricted the mandate of the revision of TP1362 solely to staffing issues. However, he acknowledged that in 1993 Air Traffic Services was part of the Department of Transport, and that while staffing was within the authority which the Public Service Commission had delegated to the Director of ATS, classification was not within the Director's purview but rather rested with Treasury Board. Although there had been

consultation about classification in 1991-92, he agreed that the consultation did not constitute bargaining. Mr. Bhimji agreed that the cover letter dated November 7, 1995 conveying the draft revised TP1362 to the President of the Union[50] referred to the "Team to review the Control Tower Workload Measurement Criteria (TP1362) and the Staffing Standard". The Rationale and Explanations for the draft of the revised TP1362 referred[51] to the following:

> RECOMMENDATIONS FOR IMPLEMENTATION
>
> The application of FPR values in relation to the category of a tower is outlined in ATSAMM. In order for a tower to change categories, it must have the minimum point level for the new category, for at least 7 out of the last 12 months.
>
> It is recommended that there be a freeze on changes to tower categories for a period of 18 months after the first issue of FPR values using the new formula. This would allow sufficient time to establish a solid data base of statistic which would be used to assess the full impact of the revised formula.

However, Mr. Bhimji asserted that this paragraph deals only with staffing, and says nothing about classification one way or the other. Similarly, he agreed that the reference in the minutes of the October 1994 consultation meeting[52] to "IFR Workload Measurement" relates to measuring the workload at the Area Control Centres, which involves the number of flight minutes, which is relevant for staffing purposes (although it has not been implemented yet at the Area Control Centres). In the minutes of the January 1995 consultation meeting,[53] there was a discussion about whether TP1362 would adequately measure the staff levels at the Mirabel, Dorval and Pearson airports which have intersecting runways.

Mr. Bhimji agreed that the Employer had changed the staffing standard for towers contemporaneously with the implementation of the revised TP1362 on 1 April 1996.[54]

**On redirect examination**, Mr. Bhimji pointed out that the FPR at Edmonton had jumped from 27049 in May 1996 to 32202 in June 1996,[55] which reflected the transfer of the traffic

from Edmonton City Centre Airport. Thereafter, only one month (November 1996) had an FPR of less than 30000.

**(b) Richard Nye**

Richard Nye was currently an IFR Controller in training in Winnipeg Air Traffic Control Centre. He was recruited in 1990 and went to Edmonton, then to the Cornwall School in March 1991, then to Fort McMurray in October 1991, qualifying in April 1992. In January 1993, he was posted to Yellowknife Tower, where he checked out in April 1993. In July 1993, he was released from the direct IFR stream and obtained a permanent position in Yellowknife. In 1995, he won a competition to be the Unit Supervisor (the Operating Supervisor in the Tower). In March 1998, he went to Winnipeg by seniority bidding to start training.

Mr. Nye was the Branch Chair of CATCA in Yellowknife from November 1993 through April 1997, when he was elected as the Regional Director for the Northwest Region which includes the towers at Edmonton International, Edmonton City Centre, Villeneuve, Yellowknife and Whitehorse. In December 1997, this CATCA region merged with Rick Snow's region to become the Western Region. As CATCA Regional Director, Mr. Nye's duties included representing members at the Edmonton Towers and having discussions with Management at the Regional level.

Mr. Nye first became aware of the issue about the level of the Edmonton Tower when he was Branch Chair in Yellowknife, and also dealt with it when he became Regional Director. In late July 1997, he had a formal consultation with the Employer's Acting Regional Director (Ken Garlough) in the context of another meeting in Edmonton dealing with a proposed template for reorganization. This meeting was attended by Rick Snow, Ken Soady (then the

Regional Director of Air Traffic Services), Rick Johnson (who directly supervised the Unit Chiefs, and was Management's representative for control towers in the region), Ivor Hughston (the Unit Manager for Edmonton International Tower) and Don Wiens (the Unit Operations Specialist in Edmonton). There was a discussion about the figures showing that the Edmonton International Tower was operating at grade 3 level due to the increase in traffic from the Edmonton City Centre Airport. Mr. Nye wanted to know what plans Mr. Garlough had for reclassification and pay. Mr. Garlough did not commit because there was to be a new Regional Director, Robert Corkett (who was not at the meeting). However, Mr. Garlough and Mr. Soady said that the paperwork was in process, and as soon as it was done they would then deal with the pay issue. After this meeting, Mr. Nye went off on leave.

On his way back to Yellowknife from leave, Mr. Nye met with Mr. Corkett (the new Regional Director) in mid- to late-August 1997. Mr. Corkett had not yet appointed a Human Resources person, and wanted to do that before dealing with the pay issue. Essentially, Mr. Corkett was asking for time to deal with the issue, and did not raise any obstacle to the reclassification or increased pay. They talked again on the telephone, and Mr. Nye says that Mr. Corkett reassured him that things were on track.

On September 9, 1997, the Employer issued the classification notice reclassifying the positions at the Edmonton International Tower as AI-OPR-03 retroactive to April 1, 1997.[56] Subsequently, Mr. Nye pointed out that the classification did not seem to have an appropriate date, and should have been effective as of 1 June 1996 when the transfer of traffic occurred. The letter did not list all of the controllers in the Edmonton International Tower unit—but only those who had a permanent position there (for example, it did not include David Lewis, who was on staff but on leave as President of CATCA). Janice Foley (the new Human Resources person) and Mr. Corkett said they would investigate about the effective date. On November 30, 1997, Mr. Corkett advised that the Employer would not make the

reclassifications retroactive to June 1, 1996.[57] Accordingly, Mr. Nye filed a formal grievance on December 19, 1997.[58]

**On cross-examination**, Mr. Nye confirmed that he knew that there was an issue about pay in Edmonton by the Fall of 1996, shortly after the traffic had moved from the Edmonton City Centre Airport to the Edmonton International Airport.

**(c) Don Wiens**

At the time of the hearing, Mr. Wiens had been a Unit Operations Specialist at Edmonton International Tower for approximately four years. Prior to that, he was Unit Manager (a Management position) at Fort McMurray for approximately four years, prior to which he had been a Unit Operations Specialist at Fort McMurray and prior to that had been in a control position at Fort McMurray in Yellowknife. In all, he has worked for the Employer for approximately 19 years. Since April 1999, he had been the Secretary-Treasurer of the Yellowhead Branch (Edmonton International, Edmonton City Centre and Villeneuve). Prior to that, he was Branch Chair at Fort McMurray (while in the UOS position) and Shop Steward.

As a Unit Operations Specialist, Mr. Wiens liaises with the Airport Authority, as well as with the people at the Edmonton International Tower and the City Centre Tower, he does administration for the shift schedule and leaves, and deals with statistics for billing and Statistics Canada purposes. He is also an Operational Controller, and is required to work a certain amount of time in the tower cab. As part of his responsibility for statistics, he uses a computer in the tower cab which interfaces with EXCEEDS (which strips the data from the computer strips) and prepares a daily disk for billing the Airport Authority. He e-mails the same statistics daily to Statistics Canada.

Mr. Wiens referred to the statistical reports prepared for the years from 1994 through 1998.[59] Looking at the statistics for the 1996 year, Mr. Wiens pointed out that the FPRs are noticeably higher for the months from June 1996 onwards (32202 for June 1996 *vs*. 27049 for May 1996). He pointed out that the statistical formulas were changed twice. The first change, the %SPR should have been changed from 11 to 26 in Fall 1994 which would have increased the figures more. The second change took place in November 1996 as a result of a Transport Canada audit, which moved the SPR to 32 in September 1997.

Mr. Wiens testified that everyone knew that there was going to be a change to the workload at the Edmonton International Tower because there had been a civic referendum the previous October. Mr. Wiens saw copies of much of the correspondence dealing with the issue of how much the traffic would increase.[60]

**On cross-examination**, Mr. Wiens confirmed that he was not involved in the classification process, and that he dealt with FPRs and SPRs rather than AFPRs. Although he sent various statistics to Statistics Canada, he agreed that the formula for dealing with those statistics was provided by Head Office to Statistics Canada, not by the Region or Tower.

Mr. Wiens agreed that Rick Johnson did not have authority as Acting Director of Air Traffic Services for the Western Region to classify or reclassify positions. Nor did Ivor Hughston have that authority.

### (d) Todd Gabel

Todd Gabel is an air traffic controller at Calgary, with a seniority date of May 1990. After attending TCTE, he checked out in Fort McMurray and then was in Yellowknife for

approximately 3 years prior to moving to Calgary in 1994. His basic duties as a controller include the safe, efficient and orderly flow of traffic around the airport, on the ground and in the air. He deals with other controllers who are not located in the Tower (including the terminal controllers who are included in the Edmonton Area Control Centre).

Mr. Gabel has been the Branch Chair for most of the time since 1995, and prior to that was a member of the Branch Executive. His Branch responsibilities include running the Branch, holding meetings, advising on Union policy, and signing and filing grievances.

Mr. Gabel testified that he understood that the "Tower Grade Level" is a system for assigning staff and pay, and that the collective agreement uses grading for pay purposes. He is familiar with the Workload Measurement Reports.[61] Referring to Exhibit 25, Mr. Gabel identified that the FPR at Calgary in March 1996 was 67519 (using the old formula), and was 83255 (using the new formula with a %SPR of 28.10).[62] Similarly, the IPR using the old formula was 64329 for March 1996 compared with 79322 using the new formula. There were five months in 1998 with an FPR greater than 100000 (when the %SPR was 59.02). According to Mr. Gabel, this was caused by the change in the %SPR, busier traffic, and a lot of construction at the airport which affected the complexity of daily work. He says he works much harder now than in 1995 because procedures have changed; particularly as they try to make it easier for aircraft to enter and leave Calgary; there are a couple of new taxi ways, which makes ground control more complicated; and they also try to have airplanes take off in the ultimate direction of their travel. In addition, there has been a switch to the computer and radar systems, and there has been the addition of a coordinator's position.

Mr. Gabel testified that there are four controllers in the Calgary Tower on any shift; one dealing with clearance and delivery (which provides clearances for departures, issues discrete transponder codes, and has limited ground control function), ground control (which deals

with everything on the ground except the active runway), the coordinator (who assists the tower controller and does his paperwork), and the tower controller (who is responsible for separating aircraft on the active runway and the airspace around the airport. All of these controllers are located in the control tower, sitting in that order in a semicircle.

Mr. Gabel then referred to some correspondence with Chuck McCuaig from 1995 and 1996 about the level of the tower. Some of this correspondence related to the fact that the terminal controllers had just moved from Calgary to the Edmonton Area Control Centre, and changes in the Calgary Tower management and reporting structure. As a result of several meetings, the new Unit Manager, Max Lamoureux, became satisfied in August 1997 that:[63]

> This Unit has met the requirement for classification of controllers at the AI-05 level since ... **at least* January 1996 and, according to the numbers you supplied in our conversation, has had an increase in AFPR of approximately 7 percent over 96 in 97. By "met the requirement" I don't mean just barely but by a large margin—13 percent in 96 and higher in 97.
>
> * I don't have available the AFPR for 95.
>
> A memorandum from AANEH dated May 15, 1997 ... promised a review of staffing and classification to reflect any changes brought about by the new AFPRs.
>
> I respectfully submit that, given the circumstances, it would be ludicrous to wait any longer in reclassifying this Unit and its personnel.

Mr. Lamoureux sent this memorandum to the Regional Superintendent, ATS Tower Operations.

As a result of these discussions, Mr. Gabel wrote up his original grievance.[64] Shortly afterwards, he spoke with Mr. Bhimji, and revised the wording of the grievance.[65]

**On cross-examination**, Mr. Gabel testified that he did not know that there were discussions at the national level between CATCA and the Employer about what formula was to be used

for classification. Nor could he recollect whether he knew that the Employer took the position that the changes in the FPR and IPR in the formula were related to staffing only, not classification.

Mr. Gabel confirmed that Mr. Lamoureux and Mr. Johnson could not make any decisions to reclassify positions; that could always only be done at Head Office.

**(e) Scott Young**

Scott Young is an air traffic controller in Edmonton, currently working the Calgary Specialty Section. Prior to that, he was a controller at Calgary from 1993 to October 1998.

From July 1997 to October 1998, he replaced Todd Gabel as the Branch Chair.

Mr. Young testified that he first became aware of the issue about pay at the Calgary Tower after the 1995 CATCA convention in St. John's, where they learned that there was a statistical formula that correlated to the pay they should get. In July 1997, after he became Branch Chair, he had discussions with the local manager, Max Lamoureux, after a staff meeting at which Johnson introduced Lamoureux as the interim Tower Manager, explained how the realignment of functions affected them, and then discussed the statistics. As Mr. Young had just gone to a UOS position, there was day-to-day contact with Mr. Lamoureux, and when it became clear that nothing was going to happen about reclassifying the controllers at Calgary, he decided that the Union would have to grieve the issue, even though Mr. Lamoureux and Mr. Johnson were supportive.

When asked what he wanted out of this grievance, Mr. Young stated that he would like compensation for the work he did while at the Tower, which he said easily falls into the

Category 5 Tower. Regardless of what the grievance is called, he wants to be paid. It was evident people were working a lot harder, but the Employer was not prepared to recognized that. He wants compensation.

**(f) Rick Snow**

Rick Snow has been the Western Regional Director of CATCA since 1997, responsible for Edmonton Area Control Centre, Edmonton Towers, Calgary Tower, Springbank Tower and Yellowknife Tower. Previously, he held positions from Steward to Chair at the Edmonton Area Control Centre.

Mr. Snow spoke with Todd Gabel about the latter's original grievance, which Mr. Snow learned about from the Employer. Mr. Snow knew that a classification grievance was not arbitrable, so he arranged for Mr. Gable to get in contact with Mr. Bhimji. Mr. Snow knew that the controllers were concerned about their pay.

As Regional Director of CATCA, Mr. Snow would normally be involved at the first level of the grievance process, where he would discuss the grievance with the Regional Director for the Employer. However, a Union grievance goes directly to the final level, and is not discussed at the Regional level.

**On cross-examination**, Mr. Snow confirmed that he was aware in 1996 and 1997 that Regional management did not have the authority to change classifications.

## IV. EVIDENCE FOR THE EMPLOYER

The Employer led evidence from the following witnesses:

### (g) Barb Gagné

Barb Gagné is the Manager of Compensation Programs, and reports to Ken Stefanik (Director of Human Resources and Compensation Services). She is responsible for programs related to organization design and planning, job evaluation and compensation programs. In this capacity, she is responsible for reviewing jobs (both in-scope and out-of-scope of collective agreements), which are evaluated against classification standards, in order to establish the "job worth" or "classification". Her classification and job evaluation responsibilities apply to all Nav Canada regions and Head Office, including positions within the CATCA bargaining position. She has been responsible for this responsibility since the creation of Nav Canada in November 1996. The authority to reclassify lies with the Vice-President (Human Resources) who has delegated it to her section. Line management does not have this authority. Nor does Human Resources at the Regional level. At all relevant times, responsibility for the classification of controllers' positions lay with her section. She is also responsible for the administration of collective agreements for salary purposes, as well as for salaries for management.

Prior to the creation of Nav Canada, Ms. Gagné worked for the Department of Transportation from 1984 in a management consultant role, mostly focussed on organizational personnel issues. In the federal government, Treasury Board had the authority to classify; classification could not be collectively bargained; classification disputes could not be grieved to adjudication; the alternative dispute resolution process applied to classification matters, with

final authority lying with the ADM personnel pursuant to delegation from the Treasury Board. On a day-to-day basis, the application of a classification standard (as opposed to the setting of the standard in the first place) was subdelegated to the Director General of Personnel Operations.[66]

Ms. Gagné testified that Treasury Board was not involved in the amendment to the workload document in 1996, and was not involved in approving it. In addition, there was a legislated wage freeze at that time, and classification standards could not have been changed then because that would have changed salaries. Further, the change to TP1362 was not communicated to or approved by the Director General of Personnel Operations.

Under Nav Canada, the process for someone under the CATCA collective agreement complaining about misclassification would be the alternative dispute resolution process: informal discussion with the Manager; up to the Compensation Programs Unit, where a specialist (or perhaps a committee) would investigate and make recommendations for a final decision to the Vice-President (Human Resources). The latter's decision cannot be grieved or arbitrated.[67]

With respect to the situation in Edmonton, Ms. Gagné testified that her department was not consulted about the reclassification of controllers from AI-02 to AI-03, although it should have been. When the reclassification was effected in September 1997, the authority to do so was at Head Office in the Compensation Programs Branch; no one in Regional Human Resources had authority to do this; nor did Kathy Fox, who in the Summer of 1997 was Manager of Monitoring and Evaluation under the Air Traffic Services Branch. Ms. Gagné and her department became aware of the reclassification at Edmonton during the Winter of 1998 and the Spring of 1999. She was shocked because her section had not been informed of or even approached to do the reclassification. She now believes that there are systems in

place to prevent a recurrence. Ms. Gagné testified that the Edmonton controllers should not have been reclassified from AI-02 to AI-03 (although no action has been taken to undo this) because they were in negotiations, so there was a freeze on reclassifications. Ms. Gagné confirmed that it is positions which are classified, not a facility. Further, in compliance with the collective agreement, there is always a letter of offer to an employee who is offered a position. An employee can never be paid acting pay when doing the duties of his or her own position; acting pay contemplates doing the work of a created or existing position of a higher level. A "substantive position" is the employee's normal or ongoing appointed position, the one referred to in the letter of appointment or offer. An employee who is appointed to an AI-04 position who thinks he is doing the work of an AI-05 position cannot receive acting pay because there is no second position involved. Rather, this would be a reclassification case, which would go to the Classification, Organization and Compensation Branch for a decision, with the alternative dispute resolution process (but not a grievance or an arbitration) being available.

With respect to the earlier situation referred to by Mr. Bhimji at the Ottawa Tower,[68] Ms. Gagné understands that there were employees at the AI-01 and AI-02 levels who were trainees who were granted acting pay for performing duties of part of another position on a temporary basis. By contrast, in the present case, we are looking at the duties of employees in their own substantive positions.

With respect to the Classification Standard, Ms. Gagné testified that it refers to the 1977 version of TP1362, which was the version which was in effect when the Classification Standard was adopted in 1992. Prior to 1992, there was a previous Classification Standard[69] applicable to controllers which did not refer to TP1362. Officially, the change in 1992 was done by Treasury Board as a result of a joint departmental/Treasury Board working group.

Ms. Gagné confirmed that the September 1997 correspondence from Mr. Stefanik to Mr. Lewis correctly sets out that the 1977 version of TP1362 is to be applied for the purposes of the Classification Standard.[70]

**On cross-examination**, Ms. Gagné confirmed that the Classification Standard was developed under the statutory authority delegated from Treasury Board *via* the *Financial Services Act*. The purpose of the 1991 Classification Standard was to change the previous standard for operational control positions. The purpose of the new method was to provide a more objective measure of what controllers were actually doing. However, although there is a similar method for grading towers and for classifying positions at a particular tower, she said that there are no connections in the formula. After Nav Canada took over the system, certificates of appointment were no longer used, but formal letters of offer/ acceptance were.

**(h) Larry Boulet**

Larry Boulet is currently the Manager of Monitoring and Evaluations, Air Traffic Services at Head Office. He was appointed into this position in May 1998, but had performed it on an acting basis from April 1997. Prior to this, he was the Superintendent of ATC Monitoring Evaluations and Resource Utilization from 1993 to April 1997. Prior to that, he had been employed in Air Traffic Services since May 1991, and was in unionized positions until 1980. While in-scope, he was an active member of CATCA, having been a shop steward in Montreal and Ottawa, although he never held an elected position.

As Manager of Monitoring and Evaluations, his role is to conduct technical reviews of all ATS centres to ensure compliance with established rules and procedures. This is done at major towers and facilities every two years, and elsewhere every three years. The reviews look at the proficiency of staff and the efficient use of staff by Site Managers, identifies

deficiencies and ensures that they are corrected, debriefs both Site Managers and the Regional Manager as well as the Director of Air Traffic Services (ATS). His responsibilities also include the establishment and allocation of staff in all facilities. In addition, Mr. Boulet works with Labour Relations personnel. All inspectors under him are Managers. He monitors the air traffic system integrity on a daily basis to ensure that standards are met, and liaises with senior management, and is involved in assessing any Nav Canada responsibility in the event of an accident. In all, 12 staff report to him.

In 1993, when Mr. Boulet was Superintendent, the mandate of the group looking at TP1362 was to ensure that the workload being done at control towers was truly being captured so as to reflect appropriate staffing levels, not classification. None of the project numbers was from Human Resources or Personnel.

The Air Traffic Services Administration and Management Manual ("ATSAMM")[71] contains a table showing the number of control shifts required at each level, which was revised as a result of the change in TP1362. Instead of there being 11 categories of towers, there are now 13, and the dividing points in the ranges of FPRs for each category differ from the previous system. The tables have always only been a guideline; his section can increase or decrease the category of a tower based on their assessment. No one in his working group in 1993 to 1996 had any authority to change classifications.

With respect to the Calgary Tower, Mr. Boulet prepared two tables to demonstrate the difference between using the old AFPRs and a hybrid formula.[72] In April 1996, Statistics Canada had erroneously produced a report using the new TP1362 for the 12 months prior to April 1996, so as to get a new AFPR for April 1996 and succeeding months. According to Mr. Boulet, Statistics Canada should not have done this.

Because of the confusion, Mr. Boulet issued a memorandum to clarify the use of the statistics.[73] Although in April 1997 Air Traffic Services had told CATCA that they would review the whole confusion about trying to apply the revised TP1362 to classification, there never was any commitment that this would be done or done in any particular time frame. This resulted in Mr. Stefanik's letter to Mr. Lewis in September 1997.[74] As a result, the Employer decided that the old version of TP1362 continued to apply to classification, because Air Traffic Services had no authority to look at personnel matters. At the time the revised TP1362 was implemented, only Treasury Board had authority to do that. In particular, Kathy Fox (who was Chief of ATS Monitoring and Evaluations in June 1997) did not have authority to reclassify positions.

**On cross-examination**, Mr. Boulet confirmed that the revised version of TP1362 came into effect on 15 January 1996, and later was renamed NP1362.

Mr. Boulet confirmed that there are no towers where the grade of the tower differs from the AI level of the positions attached to that tower. However, he stated that the grade of the tower does not drive the classification, at least not directly. The working group produced the new table for categorizing towers.[75] Although Mr. Boulet confirmed that the company is of the view that the 1977 version of TP1362 continues to apply to the classification of controllers, he also confirmed that this version of the document has never been given an NP number. Nevertheless, he said that it was still in effect on 15 January 1996 for the purpose of classification of positions. ATS had no authority to change the Classification Standard, as opposed to the staffing requirements. He agreed that that could have been accomplished simply by changing the table categorizing towers in ATSAMM without changing TP1362; however, it was determined that TP1362 was not allocating the true points to reflect the true workload the controllers were doing, so modification of TP1362 was part and parcel of his group's review.

### (i) David Radtke

David Radtke has been the General Manager, Airport Operations, Eastern for two years. Prior to that, he was Regional Superintendent for Flight Services Stations[76] from 1984 to 1996; was an Area Manager in Halifax from 1977 to 1984; and worked in various other locations after joining Transport Canada in 1967. Mr. Radtke's current position makes him responsible for airport operations in Atlantic Canada, including the control towers, flight service stations and maintenance operations at each airport (where there is a Manager who reports to Mr. Radtke). His responsibilities include dealing with employees, unions, finances, and administrative matters rather than technical operations matters. He reports to the Regional Director, Eastern Region (Tom Fudakowski). Mr. Radtke confirmed that the classification of employees under Transport Canada was the responsibility of the staff relations component at Head Office. Since Nav Canada took over the system in 1996, the reclassification function resides with Human Resources in Head Office.

Mr. Radtke first became aware that there was some issue about the reclassification of controllers in Halifax Tower about Christmastime 1996 or early January 1997, when he had a discussion with the Manager of the Halifax Airport about its possible reclassification to Level 4.[77] As a result, Mr. Radtke spoke with Mr. Boulet about the statistics, and they concluded that the Halifax Tower did not qualify for being changed from a Level 3 to a Level 4 tower, and the employees were informed in due course.[78]

**(j) Tom Fudakowski**

Mr. Fudakowski has been the Regional Director–Eastern Canada since August 1999. Prior to that, he was Director of Air Traffic Services since 1994; Chief of Airspace and Procedures from 1989; Chief of Air Transport Services Evaluation Division from 1986 to 1989; started with Transport Canada in 1966 as a tower controller in Montreal Dorval, moving to the Montreal Area Control Centre in 1968, moving to Ottawa in 1977 as a Standard/Evaluations Officer, moving to Calgary in 1980 as Operations Manager of the combined Tower/Unit, returning to Ottawa in 1983 as Superintendent of Airport Evaluations and Resource Utilization.

While Mr. Fudakowski was Director of Air Traffic Services from June 1994 to August 1999, he managed four different divisions in Air Traffic Services: (1) Airspace and Procedures; (2) Technical Training and Human Resources Section, including training standards developed for both controllers and specialists, occupation health, retraining; (3) Operational Requirements Division, which identified systems and equipment requirements to deliver service; and (4) Monitoring and Evaluations Service, which would investigate any irregular operations.

Mr. Fudakowski testified that there was a slightly different organization to the system under Transport Canada, which tended to have more Regional administrative units mirroring the Ottawa structure, each operating semi-autonomously. There were six regions. His responsibilities involved how to carry out the business of the system and the application of standards and procedures uniformly across the system. Part of his responsibilities included measuring the workload criteria to obtain a level playing field for staffing standards.
After commercialization in November 1996, Mr. Fudakowski remained Director of ATS for a while. The role did not change from its role under the previous government *régime*,

although many of the other administrative functions (such as Finance and Personnel) were centralized, with the regions focussing on operations and not support functions.

Under Transport Canada, classification authority was strictly reserved by law to be the sole purview of the Employer, which was technically the Treasury Board. Accordingly, the organization that dealt with classification was the Treasury Board Secretariat, which sometimes delegated some of the functions to senior levels of the personnel group within Transport Canada (specifically, the Director General of Personnel at Operations in Transport Canada). Mr. Fudakowski did not have any authority over classification issues. With respect to staffing (the number of controllers needed in various towers), the Director of Air Traffic Services (Fudakowski) had responsibility to develop the standard and to see that it was applied uniformly across all facilities. This was a Head Office responsibility, but line management had an obligation to comply with the standards, even though the line management might have reported to the Regional Director of Air Traffic Control and not Headquarters.

Under Nav Canada, classification authority rests with the Vice-President (Human Resources). Although some functions may have been delegated to a senior management position in Human Resources (the Director of Compensation, Ken Stefanik, to whom Barb Gagné reports directly), it is a Head Office function. No responsibility for classification is held at the Regional level. Also, no one in Air Traffic Services (even Fudakowski himself) has any responsibility for classification.

With respect to the amendment of TP1362, Mr. Fudakowski confirmed that the original version had been developed in the middle of the 1970s, promulgated in 1977, and was strictly for the purposes of determining workload and staff level. It applied to control towers only. Mr. Fudakowski was Director of Air Traffic Services in April 1996, and the amendment to

TP1362 was made under his authority. He issued a memorandum dated November 1, 1995[79] to the Regional Managers of Air Traffic Services to confirm that the Air Traffic Services Management Board (ATSMB) had approved the revised Control Tower Workload Measurement Criteria and Staffing standard. The recipients were the persons to whom the Tower Managers and Area Control Centres reported. No one from Treasury Board or Human Resources or Personnel was involved in this process. As this memorandum noted, at least one year of data using the new criteria would be required before a decision could be made about any change in tower category. The reason for this was because the workload measurement is based on an average over 12 months, and they did not want to change staffing levels based on any unusual or seasonal changes. The origin of the relevant data comes from each control tower, and is forwarded monthly to Statistics Canada in order to generate TP1362 (about six months later).

After the change in the formula in April 1996, several issues arose about the integrity of the data and the way Statistics Canada dealt with it. The major anomalies in the data were cleared up by September 1997.

Mr. Fudakowski testified that "tower category" refers to the allocation of the number of controller shifts per day to be used at a particular location. This is reflected in the Control Tower Unit Staffing Standard Table contained in the Air Traffic Services Administration Management Manual,[80] which was issued under Mr. Fudakowski's authority, and which deals with staffing at the various control towers. This table was also changed in April 1996, and the number of categories of towers was increased and there were changes made to the bands of FPRs applicable to each level. Mr. Fudakowski was adamant that the revisions to TP1362 related solely to the category of a particular facility for staffing purposes, and not for classification (with respect to which he had no authority). The amendments to TP1362 were never negotiated with CATCA, and Mr. Fudakowski did not need to obtain CATCA's

concurrence, although there was an opportunity for CATCA and various controllers to provide input.

After the revised TP1362 was implemented in April 1996, it became apparent that Statistics Canada had made some unexpected changes to the statistics. In particular, Revenue Canada used a hybrid of the old formula and the new formula, and there were also some difficulties about the correct %SPR. So Nav Canada had Statistics Canada recalculate the reports correctly.[81] The first short page in Exhibit 25 uses the original version of TP1362 throughout. The second short page uses the hybrid formula.[82] Most of the statistical problems were cleared up by May 15, 1997, as advised by Mr. Fudakowski to the Regional Directors on that date.[83]

Mr. Fudakowski acknowledged that Transport Canada and CATCA held regular consultations about operations issues. These consultations were chaired by the Director of Air Traffic Services, and involved only those parties whose areas were affected at a particular meeting. Sometimes—but not always—there was a representative from the Labour Relations Group present. Mr. Fudakowski was present at the consultation meeting in June 1993,[84] and he says that the minutes clearly indicate that the discussion dealt with workload measurement, not classification. For example, the reference to the IFR Workload Measurement Study is a workload measurement methodology related to the Area Control Centres (not the towers), which drives the staffing levels. Similarly, the "ATC Staffing Plan" related to recruitment and staffing, not to classification. Mr. Fudakowski was also present at the consultation meeting in October 1994, and where IFR workload measurement (which has nothing to do with classification) was also mentioned. Mr. Fudakowski was also present at the consultation meeting in January 1995[85] where there was an update on the progress of the workload measurement to the effect that the existing Workload Measurement Standard might be invalid at Pearson and Vancouver Towers. At the December 1995 meeting, there was a

discussion about the need for some period of time after the implementation of the new criteria before changing the level of staffing (which was an exclusive management right under the collective agreement and not negotiable under the PSSRA). At the March 1997 meeting,[86] there was a discussion about the Edmonton International Airport—and in particular the distinction between the classification level of employees working at a tower (based on the Classification Standard) and the category of the tower which is identified through the Workload Measurement instrument, as well as the note in the Classification Standard that a position might be reclassified if there were an abrupt change in workload. That is why Mr. Fudakowski indicated to CATCA that they might wish to raise the issue of reclassification in a later consultation session with the Vice-President of Human Resources (who was the person who had authority to deal with classification). In the April 1997 consultation meeting,[87.] Mr. Fudakowski was non-committal about the Union's suggestion that a three-year blended formula using the old and new versions of TP1362 might be used for classification purposes; Mr. Fudakowski referred this matter to the people in Classification, and Keith Stefanik (Director, Compensation) subsequently made the Employer's position on this point quite clear in his letter dated September 26, 1997 to David Lewis (President of CATCA)[88] to the effect that classification was not intended to be affected.

With respect to Edmonton International Tower, Mr. Fudakowski testified that it was incorrect to suggest that the controllers there should have been reclassified from AI-02 to AI-03. However, that classification action took place at the Regional level by a person who had no authority to do so. When this matter was drawn to Mr. Fudakowski's attention,[89] Mr. Fudakowski indicated that the new formula was only intended to be used for workload measurement for staffing purposes, and that classification was still to use the old formula. However, Nav Canada did not try to reverse the erroneous reclassification because the parties were in bargaining at the time. In any event, if the controllers in Edmonton were reclassified

downward, the green circling provision in the collective agreement would protect their pay, although new controllers would be put at the corrected classification level.

**On cross-examination**, Mr. Fudakowski confirmed that prior to 1991 the classification for operational air traffic controllers used a point rating system which was not based on TP1362, and that this point rating system is still used for non-operational controllers. In 1991, there was a revision to the Classification Standard for operational traffic controllers[90] which used the AFPRs for tower grade and class, so that there was a linkage between the work measurement tool and classification. Although AFPR is used in the classification document, it is not contained in either version of TP1362. Mr. Fudakowski agreed that in each case, the classifications of positions contained in Table 1 from the Classification Standard[91] is related to the level of the tower. In the wage rate appendix to the collective agreement,[92] there are only five levels of operating employees. When the revised version of TP1362 came into effect in April 1996, Transport Canada also revised the staffing table contained in ATSAMM.[93] Mr. Fudakowski insisted that the staffing table applied to the vast majority of towers (but not to Vancouver or Toronto), because it is a general guideline to establish a level playing field for staffing, from which a local manager can deviate under appropriate circumstances.

With respect to the Edmonton International Tower, Mr. Fudakowski confirmed that the FPR went from 27049 for the month of May 1996 to 32202 for the month of June 1996.[94] He also confirmed that this would have moved the Edmonton International Tower for staffing purposes from a "D" to an "E", using the old formula[95] (because the cutoff between "D" and "E" was 30000); but under the new staffing table, it would have remained a "D" (whose band went from 25001 to 35000). Mr. Fudakowski testified that there would have been no change to the staffing at Edmonton, which may have been overstaffed using the old table.

With respect to the Calgary Tower, Mr. Fudakowski confirmed that the old staffing table would have placed it at the "J" level (80001-90000). Applying the new staffing table,[96] if the Calgary Tower was at either the new "J" or new "K" levels, there would be less staff. Although the revised TP1362 rebalanced the rating factors in the formula, that does not necessarily mean that workload has increased.

Mr. Fudakowski confirmed that the purpose of the salary/pay scale in Appendix A to the collective agreement was to reflect the skill level and responsibilities of each classification, and its relativity to other classifications. Although the Classification Standard[97] reflects the AFPR over a three-year period, Mr. Fudakowski insisted that it reflected the AFPR formula that existed at the date upon which the Classification Standard was implemented, although he conceded that the Classification Standard does not specifically state that. However, Mr. Fudakowski pointed out that he did not have authority to change the Classification Standard. It was irrelevant that the revised version of TP1362 put Edmonton with an AFPR in April 1996 over 30000 and Calgary over 85000, because the Classification Standard does not refer to the revised TP1362 (which is the source of the AFPR numbers being referred to by the Union).

When asked whether CATCA had asserted at the national consultation meetings that a revision to TP1362 would also affect classification, Mr. Fudakowski stated that was not ever his position, because it was not his authority to change classification. All of the participants in the national consultation were cognisant that there was a linkage between the workload measurement and classification, but he thought that Management had made it clear throughout that a revision to TP1362 would not automatically affect classification. The recognition in the minutes of the April 8, 1997 consultation meeting[98] that there might be an impact on classification, in Mr. Fudakowski's view, refers to the possibility that Management

might unilaterally adopt a new Classification Standard or that classification might be the subject of collective bargaining (which it could be after privatization).

With respect to the e-mail traffic about the proper date for reclassifying the positions at the Edmonton International Airport,[99] Mr. Fudakowski testified that the region was inappropriately involved in this reclassification, which should have been the prerogative of Human Resources at Head Office. In 1997, Kathy Fox was Manager of Monitoring and Evaluations Division, who reported to Mr. Fudakowski (who was then the Director). This division did not have authority to reclassify positions.

Mr. Fudakowski confirmed that the Classification Standard remains in effect today, and cannot be changed under the new collective agreement without mutual agreement.

Mr. Fudakowski confirmed that he was aware of a series of adjudication cases where the Employer's inadequate level of staffing led to a denial of leaves, which breached the collective agreement provisions about various types of leaves.

## V. SUBMISSIONS FOR THE UNION

Mr. Barnacle made the following submissions on behalf of the Union.

There are two grievances:

(1) The national grievance which affects a number of towers, but the parties had agreed to limit it to the Calgary Tower for the moment and to reserve with respect to the other towers. The fact that there was already a grievance submitted at the Calgary Tower apart from the

national grievance would be important if time limits are a problem with the national grievance; and

(2) The Edmonton grievance which involves the proper effective date for the reclassifica-tion of the controllers at the Edmonton Tower. The beginning of the hearing was the first time that the Union heard that the Employer was asserting that the reclassification of the Edmonton Tower at all was an error. Mr. Barnacle noted that the Employer had abandoned its timeliness objection to the Edmonton Tower grievance.

It is clear that traffic increased at the Edmonton International Tower on June 1, 1996 with the move of scheduled carriers to that tower from the Edmonton City Centre Airport. This was a clear and immediate shift of traffic. Mr. Fudakowski testified that the Employer was looking at a stabilization period for switching to the revised TP1362, perhaps a freeze of 12 to 18 months to freeze changes to classification. In 1997, the matter became an issue in the national consultation process (there had been no meetings on this issue in 1996 due to the parties' focus on privatisation). As indicated in the e-mails in the Summer of 1997,[100] there clearly were discussions as to when the Employer was going to do the reclassifications for the controllers in the Edmonton International Tower. In September 1997, the reclassification process took place, and pay was made retroactive to April 1, 1997.[101] Mr. Nye immediately corresponded with Mr. Corkett about why the date was not retroactive to June 1, 1996,[102] and Mr. Corkett replied on December 11, 1997[103] that the April 1997 date was a "saw-off". The grievance was filed on December 19, 1997.[104] Nowhere in this process is there any issue of the Union's not pursuing the issue in a timely manner; the grievance was filed as soon as the Employer indicated its method.

With respect to Calgary Tower grievance, Mr. Barnacle submitted that there is no issue on the facts. The Employer was looking at a 12 to 18 month stabilization period from April 1,

1996, which would take one to October 1997 at the outside. Although there had been some requests for statistics in 1995,[105] it was not until after the TCU had been moved physically to Edmonton leaving only the tower in Calgary, and after the Superintendent of Towers (Mr. Johnston) became the top Regional person to whom the towers reported, and after a new Acting Chief was appointed at the Calgary Tower (Max Lamoureux) in July 1997, that the penny dropped for the branch members after they saw the AFPRs that the new formula would generate new numbers which would justify an upgrade of the Calgary Tower as of January 1997. On July 9, 1997, Todd Gabel filed the initial grievance, which was replaced by different wording in August 1997 to seek an increase in pay as a result of the new numbers (which was well within the 18 month stabilization time frame which would have ended in October 1997). Accordingly, Mr. Barnacle submitted that there is no basis upon which to find that the Calgary grievance is out of time.

Mr. Barnacle submitted that the Union was being asked to assume the burden for lost pay where there was confusion that was mutual. While this matter was being dealt with in Edmonton and Calgary, there was ongoing national consultation, and the issue bubbled up at other units, too (such as Dorval, where the Union erroneously thought that it had filed a grievance and the parties even proceeded to select an arbitrator).[106] The national grievance was filed by the Union on April 20, 1998.[107] Immediately after, the confusion about the Dorval complaint was discovered.

Alternatively, if time limits are a problem, then Mr. Barnacle submitted that I should exercise my jurisdiction under paragraph 9 of the Memorandum of Understanding relating to the grievance and arbitration procedure entered into by the parties on November 19, 1996[108] which specifically allows the arbitrator to "relieve against time limits where the circumstances compel such action". Mr. Barnacle submitted that there would be no prejudice to the Employer by granting such an extension; it knew there was a live issue about whether

the towers were to be upgraded due to the new TP1362; the Employer was not lulled into any sense of false security. Further, the delay took place during the 12 to 18 months stabilization period; Nav Canada was being reorganized; collective bargaining was going on; both parties incorrectly thought that the Dorval Tower issue had been grieved and was en route to arbitration.

Alternatively, Mr. Barnacle submitted that the national policy grievance could be characterized as a continuing grievance, which would only affect the length of availability of remedy. Because the national grievance relates to pay, a new grievance arises with every pay period, so damages could only be limited to pay periods starting on or after 40 days prior to the filing of the national grievance on April 20, 1998.[109]

- Brown and Beatty, *Canadian Labour Arbitration*, Third Edition at 2-88 to 2-93.

With respect to the Employer's objection to arbitrability of these grievances, Mr. Barnacle submitted that this objection clearly overlaps the merits. The Union's concern is that controllers are paid at the wrong level (at Edmonton, since June 1, 1996 when traffic was transferred from the City Centre Airport; in Calgary, from January 1997 when the AFPRs calculated on a hybrid basis went over 70000). The Union does not care that the Employer has not caught up with classification, which is an administrative issue. Its failure to classify on a timely basis does not excuse its failure to pay controllers for the work performed.

Classification of controllers from AI-01 to AI-05 is incorporated into the collective agreement (in Appendix A). This classification comes out of the Classification Standard, which in turn shows the workload a tower must be doing in accordance with TP1362. In other words, the tower level determines the classification level, which in turn determines salary. It is intended to reflect the duties and responsibilities of operators at comparable

towers, regardless of location, and also to reflect relativity among towers. If the Employer can block payment of appropriate salaries by simply not carrying out a classification process, that would undermine the pay provisions of the collective agreement.

Mr. Barnacle submitted that there is no requirement in the collective agreement that a person's pay be limited to the pay of the person's own classification. Indeed, Article 14 specifically deals with acting pay.

- *Jean Beauregard et al. v. Treasury Board (Transport Canada)*, 8 May 1996 (Public Service Staff Relations Board; Yvon Tarte, Vice Chair).

In *Beauregard*, employees who were classed as AI-01s and AI-02s at other towers came for training at the Ottawa Tower, where the positions were classified as AI-04s. The Grievors checked out in some—but not all—of the chairs at the Ottawa Tower. They were "parked" doing the duties of those chairs under a letter of authority (which was specifically stated not to be part of their training) pending the availability of training in the other chairs. The PSSRB held that the Grievors were entitled to be paid at the AI-04 level for this period of time.

Mr. Barnacle submitted that the classification process is not the appropriate forum for dealing with the sort of macro problem which arises in the present case. *Weber* deals with the exclusion of the jurisdiction of the courts where arbitration is available, and the same concept has to apply where the arbitrator is being asked to defer to other processes like the one applicable to classification.

- *Fording Coal Ltd. and U.S.W.A., Local 7884*, (Elk Valley Miner Article, 1997) 69 L.A.C. (4th) 430 (R. K. McDonald), which was upheld by the British Columbia Court of Appeal in January 1999.

As this is a pay grievance, there must be jurisdiction to arbitrate the real issue between the parties—namely, did the introduction of the new version of TP1362 trigger an increase in pay for the controllers, on the basis that the workload measurement (on which their pay is based) entitles them to higher pay? The Union says that there is no evidentiary basis for the Employer's assertion that the revised TP1362 only relates to staffing.

Mr. Barnacle submitted that the present case is analogous to the leave cases where the PSSRB held that refusal to grant leave could not be justified by the Employer's failure to staff at the level set out in its guidelines, even though staffing is not part of the collective agreement:

- *Degaris and Treasury Board (Transport Canada)*, 4 January 1993, PSSRB (A. S. Burke).

Although the staffing provisions are not part of the collective agreement, the Employer cannot implement staffing policies which lead to violations of other provisions in the collective agreement (such as leaves). So too, says Mr. Barnacle, the Employer cannot rely on classification policies to justify violations of the collective agreement on pay.

Accordingly, Mr. Barnacle submitted that I, as arbitrator, have jurisdiction to hear and deal with these grievances, and to determine whether the controllers are entitled to pay on the basis of the workload assessment that came into effect in April 1996.

Mr. Barnacle then turned to the merits. He pointed out that Mr. Bhimji's and Mr. Fudakowski's evidence did not greatly differ. Both parties were working on the premise that the changes to TP1362 would ultimately affect both the level of tower and the pay of controllers; the question was when, not whether. Mr. Barnacle submitted that this is consistent with the perceptions of the other surrounding players—the controllers and their

managers. While TP1362 may have been developed for staffing purposes in 1977, its role was expanded in 1991 when it became relevant for classification and pay purposes as well. Everyone knew this, and assumed that those linkages would occur. The new version of TP1362 merely amended the prior version; it did not provide a whole new system for determining workload, but was rather an update. The Classification Standard incorporated TP1362 for generating the AFPRs, which are only referred to in the Classification Standard (not in TP1362, nor in the ATSAMM Staffing Table). TP1362 was a measurement of workload which was used for two purposes. Changing TP1362 automatically impacts on both of the processes depending on it. There is nothing in the Classification Standard which limits it to the 1977 version of TP1362. Merely because there was a new version of TP1362 did not require the Employer to change either the Classification Standard or the Staffing Table (although the Employer did decide to change the latter). Although only the Classification Standard refers to AFPRs, all of the statistics[110] in fact have a column for AFPRs, which would not be necessary if TP1362 were used only for staffing. In fact, the AFPRs are there because the statistics are used to determine tower grade level and classification as well. This was the perception of everyone. The Edmonton International Tower was dealt with on this basis. It was only subsequently that the Employer attempted to split off the pay use of TP1362 from its other uses.

The Rationale and Explanations for the revised TP1362[111] refer to the grade of the tower, and make it clear that the revised TP1362 was to be used for all purposes, not just some. TP1362 was revised because of the increased workload and increased complexity. The effect was to give greater IPRs, SPRs, FPRs and AFPRs.

Further, Mr. Gabel, Mr. Young and Mr. Wiens all testified that they were working harder, with more complexity, than in previous years. This was very clear in Edmonton where there was a discrete change in the workload on June 1, 1996 when the traffic was transferred from

the Edmonton City Centre Airport. However, there was no increase in staff (staff decreased because of the changed Staffing Table). There is no contrary evidence. Even though the increased workload at some towers—as measured by the revised TP1362—might not be sufficient to trigger a change in the level of the tower, at both Calgary and Edmonton it did.

The basis for pay is to pay people with similar duties at the same rate. If Calgary ATCs are doing Level 5 work, why should they not be paid at Level 5 rates? Alternatively, how can ATCs at Victoria be paid more than ATCs at Edmonton International? Mr. Barnacle submitted that, in effect, the Employer was violating the pay provisions.

- Brown and Beatty, *Canadian Labour Arbitration*, Third Edition, at pp. 5-40.3 to 5-40.4.
- *Re City of Winnipeg and Canadian Union of Public Employees, Local 500* (1991), 20 L.A.C. (4th) 394 (McGregor).
- *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79* (1987), 27 L.A.C. (3d) 1 (Burkett).

Because the Classification Standard is effectively incorporated into Appendix A to the collective agreement, Mr. Barnacle submitted that this permitted me as arbitrator to determine that the controllers at Edmonton International should be classified and paid at the AI-03 rate and at Calgary at the AI-05 rate. In the present case, skill and ability are measured by the workload, so that those in higher levels are paid for their greater workload.

Mr. Barnacle submitted that this case does not require the Employer to alter the Classification Standard, but rather to apply it by using the revised TP1362. There was only one version of TP1362 in effect at any given point in time. There is no document continuing the old version of TP1362 for classification purposes.

In summary, Mr. Barnacle submitted that the Union is seeking the following relief:

1. Controllers at Edmonton International to be paid at the AI-03 level back to 1 June 1996, with interest.

2. Controllers at Calgary should be paid at the AI-05 rate retroactive to January 1, 1997, with interest.

3. I should retain jurisdiction for all other towers covered by the national grievance.

4. I should retain jurisdiction to deal with any difficulties that arise with respect to the implementation of this Award with respect to items 1 and 2.

## VI. SUBMISSIONS FOR THE EMPLOYER

Ms. Gleason made the following submissions on behalf of the Employer.

***First preliminary objection—characterization of the grievances***

Ms. Gleason submitted that both the national policy grievance and the Edmonton Tower grievance are inarbitrable because they are properly characterized as classification grievances, and are not pay grievances.

Pay is a function of the classification of the position to which an employee is appointed. What is classified is the position to which the individual is appointed, not the facility in which he or she works.[112] This is recognized by Article 14 of the collective agreement, which specifically refers to *positions*. Thus, an employee cannot be paid acting pay for

working in the position to which the employee is appointed; acting pay is only payable if the employee performs the duties of a position other than his or her own.

All of the air traffic controllers in the Calgary Tower have certificates of appointment (or letters of offer if appointed after November 1, 1996) showing their positions as being classified as "AI-OPR-04". The only way in which the pay for working in one's own substantive position may be altered is if the position is reclassified.

In the past, identical claims have been found to constitute classification grievances:

- *Re Roy and Treasury Board (Canada Post)*, [1982] C.P.S.S.R.B. No. 155, at pp. 1 and 7-8.
- *Re Boyer and Marks*, [1989] C.P.S.S.R.B. No. 85, at pp. 103, 21-23.
- *Re Blumenschein and Treasury Board (Revenue Canada–Taxation)*, [1984] C.P.S.S.R.B. No. 218, at pp. 2-3.
- *Re Stout and Treasury Board (Department of Justice)*, [1984] C.P.S.S.R.B. No. 218; affd. [1984] C.P.S.S.R.B. No. 138, at p. 2 of the first award.

The fact that these grievances really are classification grievances is demonstrated by CATCA's own treatment of the situation at Dorval[113] and Mr. Gabel's first grievance.[114]

Accordingly, Ms. Gleason submitted that both of the grievances are inarbitrable and must be dismissed.

***Second preliminary objection—timeliness***

Ms. Gleason also submitted that classification grievances are not continuing grievances. Rather, there is a finite and definable point in time when the positions are to be reclassified—which the Employer contemplated would be when the annual three-year average AFPR met the requirements for reclassification. Ms. Gleason referred to the following authorities to the effect that classification grievances do not constitute continuing grievances:

- *Re Dominion Glass Co. Ltd. and United Glass & Ceramic Workers, Local 246* (1972), 1 L.A.C. (2d) 151 (Reville) at pp. 153-154.
- *Re United Glass and Ceramic Workers of North America (AFL-CIO-CLC), Local 246 and Dominion Glass Co. Ltd.* (1973), 40 D.L.R. (3d) 496 (Ont. C.A.) at pp. 496, 498-499.
- *Re Algoma Contractors Limited and United Steelworkers, Local 4694* (1980), 25 L.A.C. (2d) 292 (Hinnegan) at pp. 295-297.
- *Re Province of British Columbia and British Columbia Nurses' Union* (1982), 5 L.A.C. (2d) 404 (Getz) at pp. 413-415.
- *Roy and Treasury Board (Canada Post)* at p. 7.

Ms. Gleason submitted that—accepting for the moment CATCA's claim concerning the manner in which the amended TP1362 is to be applied—then the point at which reclassification ought to have been at the Calgary Tower was January 1997. However, the Calgary grievance was not filed by Mr. Gabel until August 19, 1997.[115] Similarly, although the Employer advised CATCA on September 26, 1997 that it was not applying the "workload formula" to the determination of classification issues, the national policy grievance was not filed until March 24, 1998.[116] The collective agreement contains mandatory time limits for the filing of grievances—namely, 20 days from the date upon which the Union knew (or

should have known) of the circumstances giving rise to the grievance.[117] The Union failed to meet these time limits in the context of the Calgary and national policy grievances. Although arbitrators possess jurisdiction to extend time limits pursuant to subsection 60(1.1) of the *Canada Labour Code* and the Memorandum of Understanding Applicable During the Transition Period,[118] this jurisdiction may only be exercised in the circumstances where there are reasonable grounds for the extension and where the other party would not be prejudiced by the extension. Ms. Gleason submitted that these criteria do not exist in the present case. CATCA officials were well aware of the existence of the Statistics Canada reports referred to in TP1362, which it could easily have obtained for the Calgary Tower. Further, on the national policy grievance, CATCA did not respond for six months after the Employer's clear enunciation of its policy concerning the way it was applying the Classification Standard, and there has been no satisfactory explanation for this delay. Ms. Gleason referred to the following authorities where arbitrators have refused to extend time limits for filing grievances:

- *Re Helen Henderson Care Centre and Service Employees Union, Local 183* (1992), 30 L.A.C. (4th) 150 (Emrich) at pp. 151, 155-159.

- *Re Donwood Institute and Ontario Public Services Employees Union, Local 541* (1997), 60 L.A.C. (4th) 367 (Brandt) at pp. 374-375, 377-378.

- *Re Carborundum Canada Inc., Niagara Falls and United Steelworkers, Local 4151* (1984), 16 L.A.C. (3d) 432 (H. D. Brown) at pp. 435, 438-442.

- *Re Corporation of the City of Brantford and Canadian Union of Public Employees, Local 181* (1983), 9 L.A.C. (3d) 289 (Samuels) at pp. 293-294.

Accordingly, Ms. Gleason submitted that the national policy grievance and the Calgary grievance were untimely and should be dismissed. [The Employer does not raise a timeliness objection about the Edmonton International grievance.]

***Classification grievances are inarbitrable***

Ms. Gleason emphasized that classification grievances are inarbitrable under this collective agreement. Parties agreed that the classification system in place as of privatization was to remain in place during the transition period (that is, until a new collective agreement came into force). Prior to privatization, classification grievances were inarbitrable:

- Collective Agreement, Article 5.03.
- *Public Service Staff Relations Act*, ss. 7. 91, 92, 96(2).[119]
- *Financial Administration Act*, ss. 5, 7(1)(b)(e) and 11(2)(c).[120]
- *Re Roy and Treasury Board (Canada Post)*, [1982] C.P.S.S.R.B. No. 155, at pp. 7-8.
- *Re Boyer and Marks*, [1989] C.P.S.S.R.B. No. 85, at pp. 1-4, 21-23.
- *Re Blumenschien and Treasury Board (Revenue Canada–Taxation)*, [1984] C.P.S.S.R.B. No. 218, at pp. 2-3.
- *Re Stout and Treasury Board (Department of Justice)*, [1984] C.P.S.S.R.B. No. 218, at p. 2; affd. [1984] C.P.S.S.R.B. No. 138.

The parties themselves recognized the inarbitrability of classification grievances by providing for an alternative dispute resolution process applicable to such claims.[121] Likewise, classification was not a negotiable issue when the collective agreement was negotiated; and the Classification Standard is not part of the collective agreement, nor is it incorporated into the collective agreement. Indeed, the Union's own witnesses admitted that if these grievances were classification grievances, they would be inarbitrable.

This conclusion is not modified by the decision in the Supreme Court of Canada in *Weber v. Ontario Hydro*.[122] Although the majority of the court held that matters must proceed to arbitration (as opposed to being the subject matter of civil actions), if they arise out of a collective agreement, one must consider two factors in order to determine whether a matter "arises out of the collective agreement": (1) the nature of the dispute; and (2) the ambit of the collective agreement. Subsequent litigation has held that if the subject matter of the dispute did not arise out of the collective agreement, the courts have held that they have retained jurisdiction to address the dispute:

- *B.M.W.E. v. Canadian Pacific Ltd.* (1996), 136 D.L.R. (4th) 289 (S.C.C.) at pp. 293-294.
- *Billinkoff v. Winnipeg School Division No. 1* (1999), 170 D.L.R. (4th) 50 (Man. C.A.) at p. 64.
- *Graham v. Strait Crossing Inc.*, [1999] P.E.I.J. No. 20 (P.E.I.S.C.A.D.) at pp. 5-6.
- *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [1999] B.C.J. No. 111 (B.C.C.A.) at p. 6.
- *Bohemier v. Centra Gas Manitoba*, [1999] M.J. No. 68 (Man. C.A.) at pp. 5, 7.
- *Piko v. Hudson's Bay Co.* (1998), 167 D.L.R. (4th) 479 (Ont. C.A.), leave to appeal to the S.C.C. refused, September 16, 1999 at pp. 483, 485-487 of the decisions of the Court of Appeal.
- *Praskey v. Metropolitan Toronto Police Services Board* (1997), 143 D.L.R. (4th) 298 (Ont. C.A.) at pp. 301-302.
- *Giorno v. Pappas*, [1999] O.J. No. 168 (C.A.) at p. 630.

In determining whether the scope of the collective agreement includes classification matters, Ms. Gleason referred to the authorities dealing with insurance policies, where grievances claiming insurance benefits are inarbitrable unless the insurance policy is incorporated into

the collective agreement or the agreement itself contains an obligation on the employer to provide the benefits:

- *Re Canadian Broadcasting Corporation and Burkett et al.* (1997), 155 D.L.R. (4th) 159 (Ont. C.A.) at pp. 166-168.
- *London Life Insurance Co. of Canada v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 2693*, [1998] O.J. No. 3996 (Ont. Gen. Div. Div. Ct.) at pp. 2-3.
- *Abbott Laboratories Ltd.* (1998), 72 L.A.C. (4th) 331 (R. Brown) at pp. 334-337, 341-343, 345-347.
- *ULS Corporation* (1997), 70 L.A.C. (4th) 263 (Davie) at pp. 277, 282-285, 287-288.
- *Parmalet Canada* (1998), 72 L.A.C. (4th) 359 (Kruger) at pp. 365, 367-368.
- *Siemens Electric Limited* (1998), 71 L.A.C. (4th) 38 (Barton) at pp. 47.52.
- *Atlantic Packaging Products Ltd.* (1997), 68 L.A.C. (4th) 174 (Carrier) at pp. 186, 189-190.
- *Norton Advance Ceramics of Canada Inc.* (1998), 69 L.A.C. (4th) 352 (Howe) at pp. 367, 371-372.
- *Shoppers Drug Mart 242* (1998), 69 L.A.C. (4th) 129 (Bruce) at pp. 139-141, 144.
- *Medicine Hat Catholic Board of Education* (1996), 60 L.A.C. (4th) 103 (Moreau) at pp. 112-114.
- *Canada Safeway Ltd.* (1997), 68 L.A.C. (4th) 277 (Hope) at pp. 285, 287-288.

As it is clear that the Classification Standard is not incorporated into the collective agreement (and it would indeed have been impossible under the legislated scheme in place when the collective agreement was negotiated to incorporate it into the collective agreement), the grievances are inarbitrable and should be dismissed.

***Merits***

Ms. Gleason also submitted that the grievances should be dismissed on their merits.

Even if the Classification Standard is incorporated by reference into the collective agreement in such a fashion that classification grievances are arbitrable, then what is determined is the Classification Standard as it existed in 1991 (which was the first time classification was tied to TP1362). Neither the collective agreement nor the Classification Standard provides that the latter will be applied in accordance with amendments that may be made from time to time to TP1362. The amendments to TP1362 were not negotiated with CATCA. They were introduced mid-term in the collective agreement unilaterally by Management (although there were discussions with CATCA members and its representatives). It is axiomatic that Management cannot unilaterally amend the collective agreement, nor can it unilaterally pay employees any rates of pay different than those provided for in the collective agreement:

- *Re Cominco Ltd. and United Steelworkers, Local 480* (1986), 26 L.A.C. (3d) 279 (Larson) at pp. 281-283.

Further, it is clear that those who introduced the amendments to TP1362 had absolutely no authority to alter the Classification Standard: see the testimony of Mr. Bhimji, Mr. Fudakowski, Mr. Boulet and Ms. Gagné. It is also significant that ATS Management adjusted the tables in ATSAMM in which the numbers from TP1362 were placed simultaneously with the adoption of the revised TP1362, but no alteration was made to the Classification Standard—precisely because the amendments to TP1362 were not intended to affect classification. Further, the amendments to TP1362 were not applicable to the country's largest airports, which would hardly be the case if the amendments had been intended to affect the Classification Standard (which applies to all controllers). Further,

under the wage restraint legislation in force in 1996, it would not have been legal for the parties to increase wages:

- *Public Sector Compensation Act*, S.C. 1991, c. 30, ss. 5(1), 7(1), 7(2), 9, 10.
- *Government Expenditures Restraint Act, 1993 No. 2*, S.C. 1993, c. 13, ss. 4(1), 7.

Accordingly, even if the Union has the right to arbitrate classification matters, then these grievances should be dismissed because the Classification Standard incorporates the "classification formula" from the unamended version of TP1362.

There is no basis for suggesting that the Employer is estopped from taking this position. Even if statements were made by members of Management which were supportive of the Union's claim, to the Union's knowledge these statements were made by individuals who lacked authority to make decisions in matters of classification. With respect to discussions at the national consultation level (likewise made by those known to the Union to lack authority to affect classification), the statements in question are ambiguous; and occurred mid-term in the collective agreement, and therefore are irrelevant to its interpretation.

Finally, if the revised TP1362 does apply, no entitlement to reclassification arises in Calgary until December 1999 (that is, after using the new formula for three years), which is outside the term of the collective agreement under which the grievance was filed. The Employer never had any intention of mixing the two formulas.

As for Edmonton, the Classification Standards exception to the requirement for an annual three-year average is entirely discretionary. In any event, due to the timing of the Edmonton grievance, damages cannot be awarded for the period in question.

In summary, Ms. Gleason submitted that the grievances should be dismissed.

## VII. DECISION

After carefully considering the very extensive evidence, submissions and authorities referred to in the hearing, I have come to the conclusion that the grievances must be dismissed for the following reasons.

At the end of the day, I have no doubt that these grievances are about classification. The structure of the collective agreement makes it clear that it is *positions* which are classified, and that each controller's classification is determined by his or her letter of appointment (prior to privatization) or letter of offer (after privatization). If this were a pay grievance, the issue would relate to whether the Grievors were paid at the appropriate level for the classification contained in their letters of appointment. However, that is not the issue which is raised in these grievances, because there is no doubt that the employees have been paid in accordance with the existing classifications of the positions which they occupy. Under the structure of this collective agreement, the employees would have to have their positions reclassified in order to be entitled to a higher rate of pay. Accordingly, I am satisfied that these grievances are properly characterized as classification grievances. Given that classification is without question inarbitrable under this collective agreement (both before and after privatization), I have no jurisdiction to deal with grievances about classification.

I have also considered and rejected CATCA's more subtle argument that the Employer has implicitly reclassified these positions because the Classification Standard must refer to TP1362 as it exists at any particular point in time (and therefore must incorporate the revised TP1362). In my opinion, this submission cannot be correct in the context of this particular collective agreement. In the first place, there is nothing in the collective agreement which

specifically refers to the Classification Standard or demonstrates an intention by the parties to incorporate the Classification Standard into the collective agreement. Rather, the Classification Standard is a separate document which lies completely outside the collective agreement (although the particular result of applying the Classification Standard when the collective agreement was signed in 1991 is contained in Appendix "A" setting out the rates of pay applicable to each of the classifications, the classifications themselves are referred to on a stand-alone basis in the collective agreement). It is important to recognize that this collective agreement does not incorporate the Classification Standard as a constantly-speaking formula for determining which positions fall within a particular classification (assuming that the collective agreement could contain such a provision in light of the provisions of the *PSSRA* which exclude classification from being a negotiable or arbitrable item). Further, although there clearly was a *de facto* linkage between the original TP1362 and the Classification Standard when the latter was adopted in 1991, the collective agreement does not incorporate the Classification Standard at all—and certainly not as a constantly-speaking document which would automatically incorporate the AFPRs generated by the 1996 version of TP1362 to reclassify the controllers' positions. Accordingly, as I have state above, in my opinion the existence and application of the Classification Standard lies completely outside the scope of the collective agreement.

Further, under the statutory and contractual structure of this collective agreement, reclassification must be an intentional action on the part of the Employer. As indicated above, I am satisfied that the Employer never decided or intended the revised TP1362 to generate statistics which would be automatically incorporated in the Classification Standard in a manner which would explicitly or implicitly result in the automatic reclassification of the positions in question (without any change in Appendix "A" to the collective agreement). Although the evidence indicated that the Employer recognized that the revised TP1362 would generate pressure to reclassify the positions at the various towers, reclassification requires an

intentional act which the Employer has not yet taken. As Mr. Stefanik (the Director of Compensation, who *does* have authority to deal with classification matters) indicated to the President of CATCA (David Lewis) on 26 September 1997, "... the present anomalous situation cannot be left untended."[123] Nevertheless, the Employer's recognition of this practical expectation by the employees and CATCA that reclassification would take place at some point in the future does not mean that reclassification has occurred, nor does it make these matters arbitrable.

Although estoppel was not clearly raised by the Union, I have also considered—and rejected—the possibility that the Employer's representations and conduct might estop it from denying that the revised TP1362 would be used for classification. In my view, there is not a sufficient evidentiary basis for such an estoppel in this case (even assuming that estoppel could be used to prevent the Employer from raising a jurisdictional objection to arbitrability). In particular, the evidence about the discussions at the national consultation level is too equivocal to support an estoppel: although representatives of the Employer recognized that the revised TP1362 would create an expectation that some controllers positions might have to be reclassified at some point in the future, the evidence does not indicate an unequivocal commitment by the Employer to do this, or to do this in a particular time frame, or to do this by using a hybridized statistic derived from using the old TP1362 for periods prior to April 1996 and the revised TP1362 for periods after March 1996. In my appraisal, all that the evidence establishes is that the parties recognized that at some point there would be a need to address classification; the evidence does not establish that the Employer ever represented or agreed that the new version of TP1362 would automatically be applied (in whatever fashion) for the purposes of the Classification Standard so as to automatically reclassify the positions. Similarly, the fact that the Employer did reclassify the positions at the Edmonton International Tower does not constitute a broader estoppel beyond that tower, because that reclassification was an intentional action by the Employer (although by representatives who

are in fact not authorized to take that step, and although there is still dispute about the statistics generated by the old and revised versions of TP1362). In my appraisal, the specific action by the Employer at the Edmonton International Tower is not sufficient to constitute a general estoppel about how the Employer would proceed at other towers. Further, even if there were an evidentiary basis for finding an unequivocal representation by the Employer that it would use the revised version of TP1362 to reclassify the controllers' positions within a certain time frame, this cannot constitute an estoppel because there is no evidence that the Union acted on the basis of such a representation to its detriment. The only possible detriment to the Union of any such representation would have been a decision by the Union not to negotiate classifications in some future collective agreement. However, because of the legislative structure governing this collective agreement in the relevant time frames, the Union could not have negotiated classifications at any relevant time in any event. Accordingly, in my opinion estoppel cannot be applied in the present case.

In reaching my decision that these grievances must be dismissed, it is not necessary for me to deal with the Employer's timeliness objection about the national policy grievance, or to deal with the merits of the grievances. In particular, it is not necessary for me to decide how the Employer might apply the Classification Standard—whether it would only use statistics generated by the revised TP1362 after three years have elapsed since the implementation thereof on 1 April 1996, or would use the revised TP1362 to recalculate the statistics for some or all of the period prior to the implementation of the revised TP1362 in April 1996, or would use some hybrid formula. As I have held above, reclassification in the context of this collective agreement is undoubtedly a unilateral management right which lies outside of the scope of the collective agreement, and therefore it falls to the Employer to determine how and when it will change the classifications in question. In these circumstances, it would not be appropriate for me to comment on how I might proceed if I were the Employer.

Finally, I have also considered—and rejected—the Union's submissions about the applicability of the Supreme Court of Canada decision in the *Weber* case. Both *Weber* itself and the subsequent jurisprudence make it clear that not all matters are arbitrable. Merely because an employee has some issue with his employer does not automatically make the matter arbitrable; the matter must arise out of the collective agreement. Because the statutory and contractual structure of this collective agreement makes it plain that classification issues are not part of the bargaining relationship between the parties, it is clear to me that *Weber* cannot apply.

## VIII. AWARD

The grievances are dismissed.

**SIGNED, DATED AND ISSUED** at Edmonton, Alberta on 31 May 2000 by:

D. P. Jones, Q.C., Sole Arbitrator

1. The 1991-93 collective agreement is Exhibit 1. The multi-union Memorandum of Understanding is Exhibit 2.1. Appendix B to the Memorandum of Understanding contains the grievance and arbitration procedure applicable to these proceedings.

2. This version of TP1362 is Exhibit 3.3.

3. The Classification Standard is Exhibit 3.4, which was issued by the Classification, Equal Pay, Information and Pay Division of the Personnel Policy Branch of Transport Canada in August 1992, with an effective date of January 1, 1991.

4. Table 1 is found on page 8 of Exhibit 3.4.

5. final draft of the revised TP1362 is Exhibit 3.2, which was sent by T.R. Fudakowski, Director of Air Traffic Services to Mr. D.S.T. Lewis, President of the Union under a cover letter dated November 7, 1995. The version which was actually implemented on April 1, 1996 is Exhibit 3.1.

7. The second grievance is Exhibit 2.15.

8. Exhibit 2.8B sets out the timeliness objection in the following terms:

   As concerns the national policy grievance, even in light of the Calgary facts, I will be pursuing a timeliness objection. The national policy grievance was not filed until March 24, 1998. Additionally, under what I now understand to be CATCA's claim, the AFPR statistics for Calgary (if the revised TP1362 is used) would have resulted in the Tower's exceeding the 70,000 three year average AFPR in January of 1997. (As you know, it is the company's position that the revised TP1362 formula is not to be used to determine classification, and accordingly, the claim is without merit.) Under the union's interpretation, moreover, an entitlement would have arisen in January 1997. However, after the July classification grievance was withdrawn, no grievance was filed with respect to Calgary until August 1997. And this, despite the fact that members of CATCA national executive were well aware of the issue, as is evidenced by the complaint filed with respect to Dorval Tower in December 1996, that was copied to Mr. Ruel and a further complaint, issued in March 1997, that was copied to Mr. Bhimji.

9. See Exhibit 2.8B.

10. See Exhibit 4 dated July 24, 1997 and Exhibits 2.9 and 2.10.

11. Exhibit 5.

12. Exhibit 8 (November 18, 1997).

13. Exhibit 10 (November 27, 1997).

14. Some of the confusion arose because there was a grievance filed about a second matter relating to Mr. Ruel, involving whether a Unit Operation Specialist was an operational position or not for pay purposes. See Exhibit 12.

15. Exhibit 2.9.

16. Exhibit 2.10. A copy of this letter is shown as having been sent to Mr. Bhimji (VP, Labour Relations, CATCA) and Mr. Marcotte (Dorval Branch President, CATCA).

17. Exhibit 4. A copy of this letter was shown as having been sent to Mr. Bhimji.

18. Exhibit 6. This letter does not show a copy going to Mr. Bhimji, and he did not recall having seen it at that time.

19. Exhibit 14. This letter does not show a copy going to Mr. Bhimji, and he did not recall having seen it at that time.

20. Exhibit 2.11 dated July 8, 1997. Underlining in the original.

21. This document can be found as an attachment to Exhibit 2.2.

22. Exhibit 2.2.

23. Exhibit 2.15.

24. Exhibit 2.17.

25. Exhibit 1.

26. Exhibit 3.4.

27. See Table 1 reproduced on p. 4 above.

28. The 1977 version of TP1362 is Exhibit 3.3.

29. The Classification Standard is Exhibit 3.4.

30. Paragraph 3 in the "Notes to Raters" on page 6 of the Classification Standard (Exhibit 3.4).

31. Exhibit 13A, at p. 3.

32. Exhibit 13B, at p. 3.

33. Exhibit 13C, at p. 6.

34. Exhibit 3.6, at p. 00029.

35. Exhibit 3.6, at p. 00020.

36. Exhibit 3.6, at p. 00007 and p. 00012.

37. Exhibit 14.

38. Citing a memorandum from AANEH to NAE-Dorval dated 4 November 1996, which stated that "[t]he extrapolation of AFPR numbers using the new formula and applying them to previous statistical data is not acceptable." Further this memorandum noted that "... the last data published by Statistics Canada is incorrect.

The revised SPRs were not available when the last publication took place, therefore the old SPRs were used and applied to the revised formula. This process never should have been implemented." This memorandum ends by referring to "... an appropriate allocation of personnel to meet demand"—that is, staffing.

39. Attached to Exhibit 14. The memorandum stated:

Since the revised SPRs have not yet been finalized, the data contained in this Tower Workload Measurement Report must not be used to justify changes in Tower category, classification or staffing levels.

40. Exhibit 2.12 contains the reports for December 1994, December 1995 and March 1996—using the old version of TP1362 (with the % SPR as 28.10). Using the old version of TP1362, the AFPR for December 1994 was 60857, for December 1995 was 66533, and for March 1996 was 66316.

41. See Table 1 reproduced on p. 4 above.

42. Exhibit 2.13, page 1 (month of December 1996).

43. "Arguably", because Table 1 requires the AFPR to be averaged over three years.

44. Exhibit 3.5: P-ATMD-9602 entitled "Tower Workload Measurement Criteria".

45. Exhibit 4.

46. Exhibit 5 dated 30 July 1997; Exhibit 8 dated November 18, 1997; Exhibit 12 dated January 14, 1998.

47. Attached to Exhibit 2.2A. Mr. Bhimji did not dispute that the letter was mailed to Mr. Lewis on or about September 26, 1997.

48. Exhibit 2.23 (especially Table 1 set out above on p. 4 of this Award).

49. Exhibit 2.11.

50. Exhibit 3.2.

51. At page 18 (page 00038 of Exhibit 3.2).

52. Exhibit 13(c) at page 6.

53. Exhibit 3.6 at page 00029.

54. Exhibit 3.5 at page 00003.

55. Exhibit 16 at page 2.

56. Exhibit 2.17.

57. Exhibit 18.

58. Exhibit 2.15.

59. Exhibit 19. Note the %SPR is shown as 11.00.

60. See Exhibits 20, 21, 22, 23 and 24.

61. Such as Exhibit 25.

62. See pages 3 and 4 of Exhibit 25.

63. Exhibit 29.

64. Exhibit 3.11.

65. Exhibit 2.2 at page 4.

66. See Exhibit 30 for extracts from the Personnel Policy Manual of Transport Canada.

67. Exhibit 2.22 is the Alternative Dispute Resolution Process for dealing with classification matters.

68. See the *Beauregard* decision; Exhibit 31.

69. The pre-1992 Classification Standard is Exhibit 32.

70. Exhibit 2.14.

71. Exhibit 34.

72. See Exhibit 25, pages 1 and 2.

73. Attached to Exhibit 23, dated 15 May 1997.

74. Exhibit 2.4.

75. Exhibit 34 (old table) and Exhibit 25 (new table).

76. Flight service stations differ from towers, because the former communicate with aircraft but the pilot makes the decision to take off or not; in other words, flight service stations have an advisory rather than a control function.

77. Exhibit 17 is a memorandum that was written by the Manager of the Halifax Airport (Jim Livingstone) to Mr. Radtke at a somewhat later point in time.

78. Exhibit 35.

79. Exhibit 36.

80. Exhibit 34.

81. Exhibit 25.

82. That is, the old formula up to March 1996, then the new version of TP1362 thereafter, although the program has converted the 12 previous months to the new formula, too, which affects the AFPR from April 1996 onwards. The long sheets use the new formula from April 1996.

83. Attachment to Exhibit 29.

84. Exhibit 13A.

85. Exhibit 3.6.

86. Exhibit 3.6.

87. Exhibit 3.6.

88. Exhibit 2.14.

89. Exhibit 18—e-mail from Richard Nye to Bill Gawiuk dated 12 November 1997.

90. Exhibit 3.4.

91. Exhibit 3.4 at page 00012. Table 1 is reproduced at p. 4 of this Award.

92. Appendix A of Exhibit 1.

93. See exhibit 34 for the old and new staffing tables.

94. Exhibit 19, page 4, entitled “December 1996".

95. Exhibit 34.

96. Both the new and old staffing tables are found in Exhibit 34.

97. Exhibit 3.4.

98. Exhibit 3.6.

99. Exhibits 19 through 24.

100. Exhibits 21 through 24.

101. Exhibit 2.17.

102. Exhibit 18.

103. Exhibit 18.

104. Exhibit 2.15.

105. Exhibits 26 and 27.

106. Exhibit 2.2.

107. Exhibit 2.3.

108. Exhibit 2.1, on page 20.

109. Combining the 20-day time limit for the complaint stage and the 20-day time limit for Step 1 in paragraph 5 of Appendix B (Grievance and Arbitration Procedure) to the Memorandum of Understanding dated 19

November 1996: Exhibit 2.1.

110. Exhibits 19 and 25.

111. Contained in Exhibit 3.2 at pp. 00020*ff*.

112. Ms. Gleason referred to the testimony of Barbara Gagné and to Exhibit 2.23 at pp. 1, 6 and 7 ("Definition", "Notes to Raters" no. 2, no. 5, no. 6 and no. 7).

113. Exhibits 2.9, 2.10, 4, 6 and 7.

114. Exhibit 2.11.

115. Exhibit 2.2.

116. Exhibits 2.14 and 2.2.

117. Exhibit 2.1, Memorandum of Understanding to Apply During Transition Period, Appendix "B", Articles 6 and 9.

118. Exhibit 2.1, Appendix "B", paragraph 9 in the "Arbitration Procedure".

119. Exhibit 2.19.

120. Exhibit 2.18.

121. Article 7 of Appendix "B" of the Memorandum of Understanding to Apply During Transition Period (Exhibit 2.1) and Exhibit 2.22.

122. (1995), 125 D.L.R. (4th) 583 at pp. 602 and 608.

123. Exhibit 2.14.