IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

(The Employer)

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

(The Association)

AND IN THE MATTER OF A POLICY GRIEVANCE RE SICK LEAVE AND MOS

ARBITRATOR:	Kenneth P. Swan
APPEARANCES:	
For the Employer:	Jacques Emond, Counsel Marie Josée-Guérer, Director, Pension, Benefits and Employee Health Program Joseph Farrell, General Manager, IFR Operations Tor Veltheim, Senior Director, Human Resources and Labour Relations
For the Association:	Dougald Brown, Counsel Richard Nye, Vice-President, Labour Relations Greg Myles, Western Regional Director

A W A R D

The hearing in this matter was held in Ottawa on February 8 and 9 and March 9, 2001, at which time the parties agreed that the arbitrator had been properly appointed pursuant to the collective agreement and that I had jurisdiction to hear and determine the matter at issue between them.

While that matter initially arose from a policy grievance No. 00-009, discussions between the parties were successful in reducing the issues to four. Those issues are as follows:

1. When a controller is unable to provide or supervise air traffic control services pursuant to Section 404.06(1)(a) of the *Canadian Aviation Regulations* and is in receipt of sick pay with leave under Article 24.02 of the Collective Agreement, is the Employer entitled to assign other duties to the controller subject to confirmation that the controller is fit to perform such other duties?
2. In circumstances where a controller is on sick leave but the controller's license is not affected (ie. suspended, cancelled or not renewed) is the controller entitled to use all of his/her earned sick leave credits before being placed on Maintenance of Salary?
3. Is Nav Canada entitled to require a controller to perform other duties "outside" the air traffic control bargaining unit as a condition of receiving Maintenance of Salary under LOU 6-99?
4. Are controllers entitled to exhaust all forms of earned sick leave credits, including lieu leave and vacation leave, before being placed on Maintenance of Salary under LOU 6-99?

While there was some question between the parties as to whether the first of these issues was correctly worded by the Union, that dispute will be resolved along with the substance of the issues as identified. I therefore proceed on the basis of these questions to deal with the matter as it appears before me for resolution.

As will appear, the issues between the parties relate to the sick leave and other income maintenance provisions of the collective agreement for air traffic controllers who are ill, injured or disabled. Medical issues involving Air Traffic Controllers must be understood against a statutory backdrop which is complex in its nature and application. The parties were agreed that this statutory structure was adequately described in the award of the present arbitrator in *Re Nav Canada and Canadian Air Traffic Control Association (Medical Examinations)* (1998), 74 L.A.C. (4th) 163 (Swan):

> The positions of the parties may only be understood in the unique historical and legal context applicable to this dispute. On November 1, 1996, NAV CANADA took over ownership and operation of the national air navigation system. NAV CANADA is a corporation without share capital established to acquire, own, manage, operate, maintain and develop the Canadian Civil Air Navigation System, on a not-for-profit basis. By agreement dated April 1, 1996, NAV CANADA acquired all of the assets of the air navigation system from Transport Canada, and effective November 1, 1996, some 6,400 employees were transferred from the federal public service, including some 2,300 air traffic control employees represented by the Association.
>
> Those employees, previously covered by the Public Service Staff Relations Act, are now in a bargaining unit subject to the Canada Labour Code. While this change has many implications, one of them is a broader scope for the filing of policy grievances by the Association to challenge decisions of the Employer which, when the Employer was Transport Canada, could only be enforced by an individual employee. While there are a number of different classifications covered by the collective agreement, the vast majority are licensed Air Traffic Controllers

(ATC), and the issues raised by this grievance apply most directly to licensed ATCs.

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

In addition, there are stringent medical requirements established under the Aeronautics Act, R.S.C. 1985, c. A-2, as amended, and under the Canadian Aviation Regulations (CARs). Part IV, subpart 4 of CARs details these medical requirements. Briefly, these regulations establish that in addition to the technical requirements for licensing as an ATC, an employee must also hold a valid medical certificate, without which any exercise or attempt to exercise the privileges of the license is forbidden.

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

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

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

Every applicant for a medical certificate or revalidation thereof shall undergo a medical examination by a CAME.

Every applicant shall, at the time of the medical examination,

sign a declaration provided by the CAME stating whether the applicant has previously undergone a medical examination in connection with an application for a medical certificate or revalidation thereof and, where applicable, provide a statement that sets out the results of the most recent such examination;

answer all of the CAME's questions that are pertinent to the assessment of the applicant's medical fitness;

give written authorization for the disclosure of medical information to a physician named by the applicant; and

undergo any other examinations or tests that are required by the CAME in order to assess the applicant's medical fitness.

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

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

Subject to subsection (3), no holder of a permit, licence or rating shall exercise the privileges of the

permit, licence or rating if

one of the following circumstances exists and could impair the holder's ability to exercise those privileges safely;

the holder suffers from an illness, injury or disability,

the holder is taking a drug, or

the holder is receiving medical treatment;

the holder has been involved in an aircraft accident that is wholly or partially the result of any of the circumstances referred to in paragraph (a);

the holder has entered the thirtieth week of pregnancy, unless the medical certificate is issued in connection with an air traffic controller licence, in which case the holder may exercise the privileges of the permit, licence or rating until the onset of labour; or

the holder has given birth in the preceding six weeks.

No holder of a permit, licence or rating who is referred to in paragraph (1)(b), (c) or (d) shall exercise the privileges of the permit, licence or rating unless

the holder has undergone a medical examination referred to in section 404.18; and

the medical examiner has indicated on the holder's medical certificate that the holder is medically fit to exercise the privileges of the permit, licence or rating.
The Minister may, in writing, authorize the holder of a medical certificate to exercise, under the circumstances described in paragraph (1)(a) or (d), the privileges of the permit, licence or rating to which the medical certificate relates if such authorization is in the public interest and is not likely to affect aviation safety.

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

> 6.5 (1) Where a physician or an optometrist believes on reasonable grounds that a patient is a flight crew member, an air traffic controller or other holder of a Canadian aviation document that imposes standards of medical or optometric fitness, the physician or optometrist shall, if in his opinion the patient has a medical or optometric condition that is likely to

constitute a hazard to aviation safety, inform a medical adviser designated by the Minister forthwith of that opinion and the reasons therefor.

(2) The holder of a Canadian aviation document that imposes standards of medical or optometric fitness shall, prior to any medical or optometric examination of his person by a physician or optometrist, advise the physician or optometrist that he is the holder of such a document.

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

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

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

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

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

In addition to this statutory backdrop, the following provisions of the collective agreement are relevant:

Article 24 - Sick Leave

24.01 (a) An employee shall earn sick leave credits at the rate of nine decimal three seven five (9.375) hours for each calendar month for which that employee receives pay for at least ten (10) days. All operating employees in the bargaining unit will in addition be credited 0.9375 hours for each calendar month for which the employee receives pay for at least ten days.

(b) Effective September 1, 1999 an employee shall earn sick leave credits at the rate of ten decimal five nine (10.59) hours for each calendar month for which that employee receives pay for at least ten (10) days.

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

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

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

24.03 Unless otherwise informed by NAV CANADA before or during the period of illness or injury that a certificate from a qualified medical practitioner, licensed chiropractor, dentist, dental surgeon or orthodontist will be required, a statement signed by the employee stating that because of this illness or injury the employee was unable to perform his or her duties shall, when delivered to NAV CANADA, be considered as meeting the requirements of clause 24.02 (b):

(a) if the period of leave requested does not exceed five (5) days, and

(b) if in the current fiscal year, the employee has not been granted more

than ten (10) days' sick leave wholly on the basis of statements signed by the employee.

24.04 An employee is not eligible for sick leave with pay during any period in which the employee is on leave of absence without pay or under suspension.

24.05 (a) Where an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of 24.02, sick leave with pay may, at the discretion of NAV CANADA, be granted for a period of up to one hundred twenty three decimal seven five (123.75) hours subject to the deductions of such advanced leave from any sick leave credits subsequently earned.

(b) Effective September 1, 1999 for those employees who make a request under 24.05(a) where the employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of 24.02, sick leave with pay may, at the discretion of NAV CANADA, be granted for a period of up to one hundred and twenty-seven decimal zero five (127.05) hours subject to the deduction of such advanced leave from any sick leave credits subsequently earned.

24.06 The amount of sick leave with pay already credited to an employee by NAV CANADA at the time this agreement is signed shall be retained by the employee.

24.07 NAV CANADA agrees that in the event of an employer initiated release for incapacity by reason of ill health, an employee may exhaust any remaining accumulated sick leave credits prior to his or her release .

. . .

LETTER OF UNDERSTANDING (6-99)

Mr. Fazal Bhimji
Chief Negotiator
Canadian Air Traffic Control Association
162 Cleopatra Drive
Nepean, Ontario
K2G 5X2

Dear Mr. Bhimji:

This is to confirm an understanding reached during the current negotiations in respect of removal from active control duties for medical reasons.

Provided a controller has performed active control duties for NAV CANADA (or in the case of a "continued employee" for NAV CANADA and Transport Canada) for a period of five (5) years and is no longer able to perform active control duties due to medical reasons, it was agreed that the individual involved would suffer no loss of his or her normal pay for a minimum of one (1) year. Subject to paragraph 4 this one (1) year period will commence on the date on which the medical endorsement of his or her air traffic controller licence is revoked or sixty (60) days following the first day that the employee ceased to exercise active control duties as a result of being on sick leave, whichever is earlier. This maintenance of salary would be conditional upon the employee first performing other duties related to his or her technical background and/or experience as assigned by NAV CANADA for which the employee is medically qualified. If the employee is unable to perform such duties because of medical reasons or if no alternate duties are available then he or she must utilize all earned leave credits during the maintenance of salary period referred to above.

The total maintenance of salary provided under this letter shall not exceed one (1) year during an employee's total period of employment within NAV CANADA and its predecessor the Public Service unless, through consultation on individual cases, the parties agree to an extension of salary maintenance.

An employee will not be placed on maintenance of salary if the employee has sufficient leave credits to cover the period of his or her absence and the employee's LVC is not affected.

. . .

These provisions have been in the collective agreement for some time, and have been reproduced without amendment through several sets of negotiations. In the course of the transfer of

civil air navigation services from the Public Service to NAV CANADA, the provisions underwent editorial changes to reflect the change in employer, but there were no material changes relevant to the issues involved in this arbitration.

In the negotiations which led to the collective agreement in effect at the time of the hearing, there were no changes to these provisions either. However, late in those negotiations, specifically on June 5 and 8, 1999, there were discussions among the negotiators of the parties in the course of which NAV CANADA put the Association on notice that it would only agree to the continued presence of Letter of Understanding 6-99 (LOU 6-99) in the collective agreement on the basis that all past practices in relation to the interpretation of that provision would cease, and that it would henceforth be applied strictly in accordance with its language. There is no dispute between the parties that the result of this demand by NAV CANADA, and the acceptance of it by the Association, means that the language of LOU 6-99 must now be interpreted as a matter of first impression. The dispute, of course, is about what that language really means.

NAV CANADA introduced its interpretation of the language in a presentation to management and representatives of all of the unions in January 2000, and subsequently to CATCA in February 2000, by Ms. Marie-Josée Guérer, Director of Pension Benefits and Employee Health Programs. Inherent in this presentation were a number of interpretations of the sick leave and Maintenance of Salary (MOS) policies which departed from the past practices between the parties. These interpretations also resulted in a document entitled "Management Guidelines for the M.O.S. and R & R Programs". The grievance was subsequently filed, and following discussions between the parties already referred to, the guidelines were amended on August 23, 2000 to reflect those

discussions. While the guidelines continue to contain the interpretations which are described in the four questions quoted above, the rest of the guidelines are not really in dispute. Against this historical background, therefore, I shall proceed to the evidence and argument in relation to each of the four issues in the order in which they were presented.

ASSIGNMENT OF MODIFIED WORK

This issue arises not from the language of LOU 6-99, but from clause 24.02. Essentially, the parties are divided as to the meaning of the expression "when the employee is unable to perform his or her duties because of illness or injury". The Union argues that this refers to the core duties of each classification, and that for operating employees, as defined in Article 1 of the collective agreement, those core duties are essentially related to the active control of movement of aircraft. The Association points out, by way of contrast, the broad language in LOU 6-99, and suggests that the inference is that only a very narrow range of duties, directly relating to a controller's usual functions, may be assigned.

To understand the implications of the difference in language requires appreciation of the difference between sick leave when the medical certificate required by section 404.03 of the *Canadian Aviation Regulations*, Part IV, without which no controller can exercise or attempt to exercise the privilege of an air traffic control licence, is unaffected; and Maintenance of Salary (MOS), which commences as soon as the medical certificate is "affected". A licence is affected when it is suspended, revoked or expired, and where that takes place for medical reasons, the effect

is to remove an employee from the control of aircraft movements, and to commence the MOS protection found in LOU 6-99. Not every illness will, however, affect the medical certificate. Section 404.06 of the *Canadian Aviation Regulations* prohibits the holder of a licence from exercising the privileges of that licence when circumstances exist which could "impair the holder's ability to exercise those privileges safely", which includes suffering from illness, injury or disability, taking a drug, or receiving medical treatment which has that effect. Such conditions, particularly where they are temporary and transient, need not affect the controller's medical certificate, but may require the controller to refrain from exercising the privileges of a licence while those conditions continue.

In addition, there may be some situations where an employee would be able to perform duties despite the prohibition in section 404.06, but would be prevented from attending work by illness or injury. As long as the medical certificate is not affected, controllers remain covered by the sick leave provision in Article 24, at least until the secondary trigger in LOU 6-99 requires that the employee be placed on MOS after an absence on sick leave has continued beyond a certain point, the definition of which point also being in dispute in this arbitration.

Finally, while obviously the sick leave provisions, unlike LOU 6-99, apply equally to non-operating and operating employees, the first issue was presented essentially as one testing NAV CANADA's right to return operating employees to work on modified duties which would include non-operating or non-control functions. It seems likely that any resolution reached in respect of operating employees could be readily applied as well to the apparently less difficult case of non-operating employees.

The initiative to return the controllers to work on modified duties is part of NAV CANADA's overall health-management program. It was this program that Ms. Guérer was expounding in her presentations in January 2000, as a new initiative apparently at least partly sparked by the understandings reached in negotiations. The program is managed by two occupational health nurses dedicated to it, with a view to integrating preventive programs, income support programs, and reintegration or rehabilitation programs.

In relation to the work reintegration aspect, Ms. Guérer described the philosophy of the program as providing early intervention to get employees back to work, on the basis that the longer the absence, the more difficult reintegration becomes. A properly managed program would permit an employer to plan to deal with the absence as a personnel management issue, while from the employee's point of view reintegration is seen to have a positive rehabilitative effect as well as conserving income support credits. The trigger chosen to set the early intervention mechanisms into operation was an absence in excess of three weeks. After that point, the manager would offer such duties as were available, subject only to medical clearance from the employee's physician to perform those duties, including any limitations and accommodations which might be required. If medical clearance were not forthcoming, then a medical prognosis would be requested, and that prognosis would be followed up in accordance with its terms. An indefinite prognosis would be followed up on a regular basis to stay in touch with the employee's situation and reintegrate the employee as quickly as possible.

I observe that there is some issue between the parties even as to the availability of substantial amounts of non-control duties for operational air traffic controllers. The uncontradicted

testimony of Mr. Joseph Farrell, General Manager of Toronto A.C.C., was to the effect that a broad range of duties are available requiring the special skills of air traffic controllers, but not involving active control functions. He listed training, airspace review, procedure and documentation review and up-dating, introduction and implementation of new technology, liaison with outside agencies and customers, backfilling for non-operational employees such as Unit Operations Officers, and special projects of various kinds and levels of complexity.

While this evidence was uncontradicted, it was certainly tested on cross-examination, and it seems clear to me that the level of non-operational activity available at Toronto ACC is not reached at smaller ACCs, and may be virtually non-existent in more remote geographical locations. Availability of such duties is, however, secondary to the right to assign them.

In general, arbitrators have held that an employer is entitled, as a matter of management rights, to require employees who are medically able to do so to perform modified duties, always subject to other provisions of the collective agreement, and to a general test of reasonableness and good faith: *Re Canada Post Corporation and Canadian Union of Postal Workers, Ludwar Grievance* [1986] C.L.A.D. No. 11 (Bird).

As to collective agreement limitations, the managements rights provision, Article 4, gives management the right to "organize and assign work". The only express limitation is found in Article 5, relating to bargaining unit work. Clause 5.02 is as follows:

5. 02 **Assignment of Air Traffic Control Duties**

> NAV CANADA will only assign work to the air traffic control group that is related to the air traffic services business.

The Association also referred me to clause 32.04, which is as follows:

> 32.04 **Deployment**
>
> The assignment of work and the movement of employees at the same level in a location, shall be at the discretion of NAV CANADA. However, NAV CANADA may transfer an employee into a location for an assignment to a position at the same or lower level if such action does not create a position vacancy to be staffed under the present Article in the employee's former location. In the case of transfer, the employee may refuse the assignment.

In the Association's argument, this provision, when read with clause 24.02, creates an implicit restriction which would prevent the assignment of modified duties. Despite much scrutiny of the language, I am unable to follow this argument. If any particular assignment of modified duties offends some part of clause 32.04, then obviously it would be prevented by the collective agreement. But it does not seem to me that the provisions, read together, constitute a general prohibition on the assignment of modified work that is otherwise not prohibited.

As to the issue of reasonableness and good faith, my understanding is that NAV CANADA accepts this limitation, and indeed generally accepts the content applied to those concepts, in the context of the assignment of modified duties, as set out in my interest arbitration award in *Re Corporation of the Town of Oakville and Oakville Professional Fire Fighters Association*, *1996 Interest Arbitration*, unreported, May 1, 1998 (Swan). The conditions set out at

page 7 of that award for any modified duty program which our board of arbitration would have awarded were as follows:

> 1. Modified work must be mandatory not only in the sense that the Corporation can require a fire fighter to accept suitable modified work, but also in the sense, consistent with the duty to accommodate disability, that fire fighters who require it have an entitlement to modified work where it is available.
> 2. The program must be so organized that it does not negatively affect sick leave entitlement, access to long-term disability benefits, or accrual of seniority.
> 3. The creation of a modified duty position must not result in a lay-off, nor in the displacement of any other employee, including an employee already occupying a modified duty position, unless that employee consents to the displacement.
> 4. The duties assigned to a modified duty position must be duties reasonably within or related to the usual duties of a fire fighter.
> 5. If there are more fire fighters at any time requiring modified duty positions than there are positions available, the available positions must be assigned to the fire fighters capable of performing them in order of seniority.
> 6. Assignment of or denial of access to modified duties must not involve discrimination contrary to Article 4 or the Ontario Human Rights Code, discipline or reprisal.
> 7. The procedure for assessment of the capacity of a fire fighter to perform the duties of a modified duty position must be made in such a way as to protect the confidentiality of the fire fighter's medical information, so that the information provided to the Corporation is limited to whether the fire fighter is fit or unfit to perform the duties specified for the modified duty position, as well as any limitations which may be placed on the performance of those duties.

Obviously, those conditions would have to be adapted to the context of this particular collective agreement and these particular employees, but I understand them in principle not to be disputed by NAV CANADA as appropriate to the exercise of its managements rights in this regard.

Based on all these considerations, I am unable to conclude that there is any prohibition in the collective agreement to prevent NAV CANADA from implementing its health

management program to the extent that it involves a requirement for the performance of modified work by medically qualified employees, including the assignment of non-operating duties to operating employees, who would otherwise be on sick leave. Established in accordance with the collective agreement and the principle of reasonable administration and good faith, such a program would protect the employer's interest in maintaining its investment in the expensive and very sophisticated skills of controllers, while protecting the accrued sick leave credits of employees. Any particular application of the collective agreement principles and the concept of reasonable interpretation is best examined in the context of a real situation. There is only so much guidance that an arbitrator can give on a policy grievance, and my conclusion is that the observations set out above have exhausted my ability to be of assistance.

EXHAUSTION OF SICK LEAVE CREDITS

The second issue between the parties requires an interpretation of the last paragraph of LOU 6-99, and in particular the expression "sufficient sick leave credits to cover the period of his or her absence". This only applies in circumstances where the controller's licence (LVC) is not affected.

The interpretation advanced by NAV CANADA for this language requires some careful explanation. The final paragraph of LOU 6-99 is a limitation on the provision in the second paragraph which provides that, where the licence is not affected, the one year period of MOS begins 60 days following the first day that the employee ceased to exercise active control duties as a result

of being on sick leave. NAV CANADA asserts that the exception is only for employees who have sufficient sick leave credit to cover all of the period of an absence. An employee whose sick leave expires before the 60 day period ends is not caught by this interpretation, although that situation arises in another issue below. It is only employees who have sufficient sick leave credits to carry them beyond the 60 day period who would be caught by the clause as propounded by NAV CANADA.

The management guidelines give the following example:

> Controller has 70 days of sick leave (no other leave) in the bank when he/she starts sick leave. Controller does not perform other duties and returns to control duties following 80 days of absence. Controller does not have sufficient sick leave to cover the entire period of the absence. Therefore at day 71 (expiry of sick leave) an administrative action is taken to deem MOS to have commenced at day 61. Any allowances (including OFP) paid between day 61 and 70 will not be recovered. The remaining 10 days of banked sick leave will run concurrently with MOS from day 61 to day 70.

It will be obvious that this is a complicated interpretation of the language. It essentially requires, for the language to bear this interpretation, that the word "entire" be inserted in front of the expression "period of his or her absence" in the fourth paragraph. Indeed, throughout the management guidelines, every explanation of this interpretation does indeed insert the word "entire" to modify "period of absence".

Moreover, this interpretation can only be applied retroactively. It is essential to wait until either the absence has come to an end or the sick leave has been exhausted to determine whether the exception in the fourth paragraph has been met. At that point, if it has not been,

retroactive administrative action is necessary to recharacterize payments already made from sick leave to MOS.

The Association relies on an earlier interpretation of LOU 6-99, *Re Martin and Treasury Board (Transport Canada)* P.S.S.R.B. File 166-2-25920, March 10, 1995 (Tenace). The *Martin* decision is not exactly on the point raised in the present dispute, and it may be that a proper interpretation of the understanding arranged between the parties would prevent me from relying on the *Martin* interpretation in any case. In my view, however, merely because there has been an understanding to apply the strict language of the Letter of Understanding does not require me to reverse the *Martin* decision.

In my view, the language simply cannot bear the interpretation argued for by NAV CANADA. It is a complex and awkward interpretation which the parties could have directly achieved only by inserting another word into the language chosen to describe their bargain. The correct interpretation of the fourth paragraph of LOU 6-99 is that an employee whose absence on sick leave extends beyond 60 days from the first day on which the employee ceased to exercise active control duties will not be placed on MOS until all sick leave credits have been exhausted.

ASSIGNMENT OF MODIFIED DUTIES OUTSIDE OF THE BARGAINING UNIT

LOU 6-99 provides that maintenance of salary is conditional upon the employee "first performing other duties related to his or her technical background and/or experience as assigned by NAV CANADA for which the employee is medically qualified". Obviously, the kinds of duties which might be assigned in these circumstances would include all of the duties which could be

assigned to an employee who might otherwise be on sick leave under clause 24.02. The concern expressed relates to the possibility that duties outside the bargaining unit might be assigned under this provision. The Association, by reference to *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1994), 41 L.A.C. (4th) 24 (Knopf), submits that an involuntary transfer to another bargaining unit is contrary to the collective agreement. The collective agreement in the *Riverdale Hospital* case, however, had an express prohibition for transfers exceeding six months; apart from whatever may be inferred from clause 32.04, there is no such provision in the present collective agreement.

In any case, the Letter of Understanding only speaks of a requirement to perform other duties as assigned. Other collective agreements in relation to other bargaining units may have an impact on what duties can be assigned, and any specific assignment would have to be assessed against the range of provisions in the present agreement, as well as other agreements which might apply to the duties being assigned.

It seems unlikely that any application of the language of LOU 6-99 would lead to an assignment outside the bargaining unit. The duties to be assigned must be related to "his or her technical background and/or experience", and while that may be a broader expression than the kinds of duties which can be assigned to controllers on sick leave, the requirement that duties be related to a controller's technical background seems likely to have a limiting effect.

Moreover, the overwhelming concern in cross-bargaining unit transfers of work is the protection of seniority. Article 31 of this collective agreement differentiates between Company seniority and seniority based on continuous service as a licenced air traffic controller. The former

would not seem to be affected by LOU 6-99, while the latter appears to be suspended by paragraph 31.02(b) by breaks in service of employment as an air traffic controller, with the likelihood that there would be a break in service for anyone on MOS under LOU 6-99. Even at that, there are exceptions in paragraph 31.02(b) which might continue service if certain kinds of duties are assigned, including some of those authorized under LOU 6-99.

On the face of it, therefore, there seems little likelihood that a proper application of LOU 6-99 would affect seniority, or would result in assignment of cross-bargaining unit work. To whatever extent it does, however, this would amount to an assignment of duties rather than a transfer. It may be that other bargaining agents would be concerned about such an assignment, but in my view the scope of LOU 6-99 is such that an employee covered by its provisions would remain a member of this bargaining unit and under the protection of this collective agreement. Beyond that, the impact on these provisions can only be finally determined in the context of an actual assignment or purported assignment of duties.

USE OF ACCRUED LEAVE CREDITS PRIOR TO MOS

The management guidelines provide that, where a controller has insufficient sick leave to cover the period of absence during the 60 day waiting period under LOU 6-99, the controller may not use other accrued paid leave solely for the purposes of ensuring income continuity during that waiting period. Pre-authorized vacation leave may be taken, but that counts toward the 60 day waiting period. NAV CANADA has instructed its managers not to approve other paid leave for the

purposes of providing pay for days which would not otherwise be covered by sick leave.

The Association argues that this interpretation has the effect of depriving employees of previously earned and accrued rights and benefits, and doing so only on the basis that the employee is disabled from work by reason of illness or disability. This, it claims, is discriminatory with the meaning of *Ontario Nurses' Association v. Orillia Soldiers' Memorial Hospital et al.* (1999), 42 O.R. (3d) 692 (Ont. C.A.), leave to appeal denied, December 9, 1999 (S.C.C.). NAV CANADA argues that this is an appropriate interpretation of LOU 6-99. To some extent, the interpretation is bound up with NAV CANADA's interpretation in relation to the fourth paragraph of LOU 6-99, which I have already rejected as not supported by the language of that provision. I propose, however, to treat this issue as independent for the purposes of assessing the meaning of the language.

It is clear, and not in dispute, that one of the conditions of the payment of MOS under LOU 6-99 is that, if an employee is unable to perform the alternate duties already discussed or if no alternate duties are available, then all earned leave credits remaining are "burned off" during the one year MOS period. Thus, a controller who reaches the beginning of the MOS period with accrued leave credits is effectively required to contribute those credits toward the MOS period, with the remainder of the MOS period falling to the responsibility of NAV CANADA. The kinds of credits which are involved are any remaining sick leave credits, any lieu day credits, and any unused vacation.

In my view, it is not necessary to enter into the complexities of the law in relation to discrimination on the basis of disability in order to resolve this matter. The language of LOU 6-99

does not cancel all earned leave credits. It only requires that such credits be used during the Maintenance of Salary period if the employee is unable to perform alternate duties or if no alternate duties are available. I have described that above as a contribution to the MOS period of unused credits, but there is no effect on those credits unless and until the MOS period actually begins.

If the controller's licence is affected, of course, the MOS period begins immediately. Otherwise, however, the MOS period begins after a 60 day waiting period, or, as I have found above, after the exhaustion of sick leave credits.

In my view, the effect of the second paragraph and the fourth paragraph of LOU 6-99 for controllers whose licence is not affected is that the MOS period begins after 60 days, unless the employee has sufficient sick leave credits to cover the period of the absence. There is nothing in this language which would permit augmenting that period by taking other kinds of leave, provided that sick leave credits continue to be available. NAV CANADA has conceded that pre-scheduled vacation may be taken , but otherwise I agree that the scheme of LOU 6-99 is that, as long as sick leave credits are available, those credits may not be converted into other kinds of paid leave. An employee who is on sick leave is entitled to that form of income replacement, and not to any other.

However, there is nothing in this letter of understanding to prevent an employee whose sick leave credits run out before the 60 day waiting period has expired from using accrued paid leave credits during the rest of the waiting period. Those credits belong to the employee, they have been previously earned, and there is nothing in the language chosen to the effect that they are forfeited unless and until the specific provisions of the LOU are met. Those provisions require that the MOS period begin, and that the employee is either unable to perform alternate duties or such

duties are unavailable. Until that time, it would take very clear language to divest employees of benefits already earned and accrued.

CONCLUSION

To some extent, this arbitration illustrates the limits to resolving disputes by way of policy grievances. Where the simple interpretation of collective agreement language is concerned, it has been possible for me to provide a resolution to the dispute between the parties. Where, however, the application of the collective agreement language depends as well upon a close consideration of the factual context in which that language must be applied, it is much more difficult to be prescriptive in resolving the disputes.

Because of those concerns, I am hesitant to try to draft the remedy in this matter in terms of an express declaration. Of the four questions placed before me for resolution, only question two is susceptible of a simple answer, and even there I am hesitant to make a declaration in categorical terms in advance of any particular fact situation which might arise.

In the result, therefore, I think the appropriate relief is to award that I declare that the answers to the issues placed before me are as set out in the discursive analysis above. The precise application of these principles to any particular case may depend upon the factual context in which the case arises, and should not really be foreclosed in advance.

In the circumstances, I think it is wise to retain jurisdiction over this award to whatever extent is necessary to clarify any particular concerns which the parties may have in adapting this award to apply it to their ongoing relationship.

DATED AT TORONTO this 28th day of June, 2001.

"Kenneth P. Swan"
Kenneth P. Swan, Arbitrator