ARBITRATION

BETWEEN:

NAV CANADA
(the "Employer")

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION
—CAW LOCAL 5454
("CATCA" or the "Union")

With respect to a grievance by the Union on behalf of Gary Ross about whether his absence on March 17 and March 21 through 26, 2002, should be characterized as lieu leave or sick leave.

AWARD

BOARD OF ARBITRATION	
D. P. Jones, Q.C.....	Sole Arbitrator
REPRESENTATIVES OF THE UNION	
Abe Rosner..... Greg Myles.....	National Representative National Secretary-Treasurer
REPRESENTATIVES OF THE EMPLOYER	
George Rontiris..... Steve Cooper..... Marc André Croteau.....	Counsel Manager, Labour Relations Labour Relations Officer

HEARD at Ottawa, Ontario on 11 July 2003.

AWARD ISSUED at Edmonton, Alberta on 27 October 2003.

I. BACKGROUND

The Employer runs the civil aviation navigation system in Canadian airspace. Its facilities operate on a continuous 24-hour-per-day basis year round. Operating employees rotate through every shift; shifts are not

assigned by seniority. Because of the continuous nature of the operation, operating employees are required to work on statutory holidays. To compensate for the inability to take statutory holidays off, operating employees are entitled to a credit of 93.17 hours of "lieu leave" in each vacation year, which can be scheduled either as an extension to vacation leave or as occasional leave. At the employee's option, lieu leave can be paid out at straight time at the end of the vacation year, or it can be carried forward for one vacation year. The Employer is obliged to "... make every reasonable effort to schedule lieu leave at times desired by the employee ... consistent with operational requirements and subject to adequate notice".

Operating employees are also entitled to the equivalent of 15 days per year of sick leave, which is bankable, but which is not generally able to be paid out on retirement.

The Grievor, Gary Ross, had made arrangements to take lieu leave on March 17 and March 21 through 26, 2002 (inclusive). However, prior to that day, he became sick. He asked to use sick leave for the days in question, rather than lieu leave. The Employer denied the request.

The issue in this arbitration is whether the Grievor is entitled to have the days in question characterized as sick leave rather than lieu leave.

II. AGREED STATEMENT OF FACTS

At the hearing, the parties submitted the following Agreed Statement of Facts:

1. Mr. Gary Ross, the grievor, is a full-time air traffic controller and classified as an AI-OPR-05 working at the Employer's Winnipeg Area Control Centre, a facility which operates on a continuous 24-hour-per-day, year-round basis.

2. As an operating employee, the grievor's lieu leave bank was credited with 93.17 hours on April 1, 2001 in accordance with article 28.05(a)(ii) of the collective agreement.

3. The grievor properly applied for and was granted lieu leave in accordance with article 28.05(c) of the collective agreement for March 17, 2002 and the period of March 21, 2002 to March 26, 2002, (inclusive). The grievor's scheduled rest days were March 18, 2002 to March 20, 2002 (inclusive), but prior to booking sick he had been scheduled to work overtime shifts on March 18 and 20. The lieu leave to be utilized dated from the current year.

4. On March 13, 2002, the grievor contacted the appropriate individual in accordance with the normal procedure and advised that he was sick and that his attending physician had issued an official disability certificate which stated a return to work date of April 1, 2002.

5. Also on March 13, 2002, the grievor requested that his lieu leave bank be credited with the leave previously granted and that his sick leave bank be deducted for the period of his sick leave.

6. The Employer denied this request on April 22, 2002, taking the position that the employee could not displace lieu leave with sick leave.

7. The Employer did not take issue with the validity of the grievor's sick leave.

In addition, at the hearing, the parties made the following oral stipulations:

8. The parties are aware of four other instances of employees in 2000 and 2001 who had scheduled lieu leave, who had fallen sick prior to the beginning of that lieu leave, whose lieu leave was not converted to sick leave. The Union is not aware of any grievances arising from these cases. The Employer is not aware of whether any of these employees had requested lieu leave to be converted to sick leave.

9. There are at least two other similar grievances across the country, at various levels.

10. The Union was not aware of any problem with respect to the administration of lieu leave prior to the filing of the present grievance and the other two grievances elsewhere. The Union is not aware of any discussions with the Employer about this issue.

III. RELEVANT PROVISIONS

The relevant provisions of the collective agreement are the following:

[Article 28–Holidays]

28.05 Lieu Leave (Operating Employees)

For operating employees,

(a) (i) On September 1st, 1999 an employee shall be credited with an additional one point three (1.3) hours of lieu leave. (This is in addition to the hours that have been granted as of April 1, 1999.)

(ii) On April 1st of each year thereafter, an employee shall be credited with ninety three point one seven (93.17) hours of lieu leave.

(b) Lieu leave may be scheduled as an extension to vacation leave or as occasional leave and shall be charged against the lieu leave credits on an hour-for-hour basis.

(c) Consistent with operational requirements and subject to adequate notice, NAV CANADA shall make every reasonable effort to schedule lieu leave at times desired by the employee.

(d) Where in any vacation year an employee has not utilized all of the lieu leave credited to him or her, the employee may elect to carry forward into the next vacation year the unused portion of his or her lieu leave.

(e) Lieu leave earned in the vacation year will be utilized before lieu leave carried forward from the previous vacation year.

(f) At the employee's option, any lieu leave which cannot be liquidated by the end of the vacation year in which it is earned will be paid off at the employee's straight-time rate of pay in effect at that time.

(g) In cases where lieu leave from the previous vacation year has not been fully utilized by the end of the current vacation year, any outstanding carry-over lieu leave credits will be paid off at the employee's straight-time rate of pay in effect at that time.

(h) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or after he or she becomes subject to clause 16.08 shall be subject to recovery of pay.

[Article 24—Sick Leave]

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,

and

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

IV. SUBMISSIONS FOR THE UNION

In starting his submissions for the Union, Mr. Rosner submitted that lieu leave is an earned benefit.

There are four reasons for granting this grievance.

First, this issue has already been addressed in previous grievances:

- In *Richard and Treasury Board (Transport Canada)*, [1994] C.P.S.S.R.B. No. 153, the Public Service Staff Relations Board (M.-M. Galipeau) held that the employer was wrong to refuse an employee to use sick leave instead of vacation leave where the employee became ill prior to the commencement of the vacation leave. *Richard* was decided under a previous version of the collective agreement, which involved the same bargaining unit, although at the time the employer was the federal government (Treasury Board) which was the predecessor to NAV CANADA. Although *Richard* dealt with the substitution of sick leave for vacation leave (as opposed to lieu leave in our case), the relevant provision contained very similar language:

> Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

Member Galipeault, hearing the matter for the P.S.S.R.B., decided as follows in *Richard*:

It seems to me that sick leave should have been granted for February 18 and 19, 1993 for the following reasons:

First, I believe that the grievor met the conditions set down in clause 9.02 [dealing with sick leave, which are now contained in Article 24.02]. Neither the genuineness of his illness nor the validity of the medical certificate (Exhibit A-2) were contested. First, he had "the necessary sick leave credits" (paragraph 9.02(a)) and, second, he satisfied his employer of his illness (paragraph 9.02(b)). Had February 18 and 19, 1993 been scheduled as working days instead of vacation leave, it is clear that the grievor would have been entitled to sick leave for these two days because he met the conditions set down in clause 9.02 for the granting of sick leave.

Does the fact that he was scheduled to be on vacation leave instead of at work preclude his being entitled to sick leave?

The employer argues that since, following a request from the grievor, he was originally scheduled to be absent for two days on vacation leave, he could not subsequently require that he be granted these two days as sick leave because there was no clause in the collective agreement that authorized substitution.

Were I to accept this argument, then it would also follow that where an employee is scheduled to work on a given day, and is absent from work owing to illness, he is not entitled to sick leave, even if he meets the sick leave requirements of clause 9.02, unless a clause authorizes the substitution of a sick leave day for a workday.

It is implicit that where an employee meets the requirements of clause 9.02 and establishes his entitlement to sick leave, the employer may substitute sick leave for the workday without there being any need for a provision expressly authorizing the employer to make the substitution. The substitution is implicit and follows naturally from the right to sick leave.

This being the case, I note that, in the present case, the grievor became ill before the vacation leave that he had originally requested began.

Before the vacation leave that he had been granted began, the employee notified his employer that he was ill and would be away for the next few days "on sick leave".

In my opinion, as soon as the grievor notified the employer that he was ill and would be absent "on sick leave" for the next few days, he served notice on his employer that his situation had changed.

Upon his return to work, the grievor made an application for sick leave.

The employer itself acknowledged that the grievor's situation had changed because it granted him sick leave for February 15, 16 and 17. The illness continued on February 18 and 19. However, for these two days, the employer did not take this fact into account.

*In the case of these two days, it seems to me that the employer should have taken a number of factors into consideration. First, when the grievor first requested vacation leave, he could not know that a few days before he was to go on vacation leave, he would fall ill. This new circumstance (*i.e. *illness), which arose prior to the vacation leave, changed the reason for the grievor's scheduled absence on February 18 and 19, 1993 and the grievor's wishes to take vacation leave. Since the primary reason for his absence was now illness, it seems to me that the leave granted should have reflected this reality, especially since the grievor met the sick leave requirements of clause 9.02. Moreover, since "efficient operating requirements" were not a bar to the grievor's absence, the employer should have "made every reasonable effort" to reinstate the vacation leave in accordance with the wishes" of the grievor (clause 17.06), in order to enable him to take sick leave, which more accurately reflected the factual situation. It should be noted that the*

> *circumstance (*i.e. *illness) that changed the grievor's wish to take vacation leave arose before the vacation leave began and was brought to the employer's attention before this leave could begin.*
>
> Finally, it should be noted, as counsel for the grievor pointed out, that clause 17.07 deals with a very different situation, *i.e.* the granting of bereavement leave during vacation leave.[[1]]
>
> Moreover, the collective agreement is silent regarding the situation that arose here, namely, where the employee becomes ill before vacation leave that has already been authorized begins. Under clause 17.06, once vacation leave is granted, the employee does not have an absolute right to postponement of this leave. Operational requirements limit this right and, furthermore, the employer has an obligation only to "make every reasonable effort" to schedule vacation leave in a manner acceptable to the employee. However, as I stated above, there is no evidence that operational requirements were a bar to the grievor's absence. Moreover, it seems to me that the fact that the grievor became ill before the vacation leave began was a fundamental reason that obliged the employer to "make every reasonable effort" to accommodate the grievor's wish to reinstate the vacation leave, especially since the grievor had the necessary sick leave credits to cover this absence.
>
> For these reasons, the grievance is allowed and the employer is ordered to reinstate the two days of vacation leave and to deduct from the grievor's sick leave credits two days of sick leave to cover February 18 and 19, 1993.
>
> [Emphasis added.]

The *Richard* decision governed the situation after it was decided in 1994, and after the privatization of the civil air navigation system to NAV CANADA on 1 November 1996. However, the first collective agreement between NAV CANADA and the Union in 1999 contained the following provision:[[2]]

> 4.02 The management rights of NAV CANADA shall not be restricted in any way by any practice, custom or past agreement not specifically renewed.

Because NAV CANADA took the position that the P.S.S.R.B.'s decision in *Richard* was wrong, and Article 4.02 prevented any effective estoppel arising from past practice as a result of it or Transport Canada previously giving effect to *Richard*, it took the opportunity to have the matter arbitrated again.

- In *Canadian Air Traffic Control Association and NAV CANADA (Paul Hansen Grievance; No. 99-086)*, 28 February 2002, Arbitrator Kuttner also dealt with the ability of an employee to recharacterize scheduled vacation leave days as sick leave, where the employee became ill prior to the commencement of the vacation. As noted above, NAV CANADA argued that it was not bound by the decision of the P.S.S.R.B. in *Richard*, and that the grievance had to be determined solely by reference to the collective agreement that was actually in force (which contained the same operative provisions as the 1978 collective agreement at issue in *Richard*.), particularly

because Article 4.02 of the 1999 collective agreement specifically prevented any practice, custom or past practice not specifically renewed therein from affecting in any way the management rights of NAV CANADA.

Arbitrator Kuttner discussed the "macro-climate" of the arbitral jurisprudence about permitting the recharacterization of vacation leave a sick leave if sickness occurred prior to the commencement of the scheduled vacation leave (pp. 10-12). With respect to whether he should follow the P.S.S.R.B.'s prior decision in *Richard*, Arbitrator Kuttner was not satisfied that *Richard* was "clearly wrong" within the principle articulated by Arbitrator Laskin in *Brewers' Warehouse Co. Ltd. and International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink and Distillery Workers, Local 278c*, (1954) 5 L.A.C. 1797 at 1798:

> It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable.

Arbitrator Kuttner also referred to Arbitrator Weatherill's article on "The Binding Force of Arbitration Awards", 8 L.A.C. 323; and to Arbitrator Swan's decision in *Phillips Cables Ltd. and United Electrical, Radio and Machine Workers, Local 410*, (1978) 16 L.A.C. (2d) 225 (Swan).[3]

Using this approach, Arbitrator Kuttner found the P.S.S.R.B.'s decision in *Richard* to be reasonable for the following reasons (at pp. 16-17):

> 19. . . . Does the Galipeau award pass muster on the reasonableness standard? Counsel for the Employer argues that it does not, placing great reliance on the fact that the condition precedent to eligibility for sick leave namely, that the employee be "unable to perform his or her duties because of illness or ...", cannot be said to have been met where an employee is not scheduled to work in any event due to vacation leave already granted. Secondly, counsel notes that in several other collective agreements binding between NAVCAN and other bargaining agents, and indeed in earlier versions of the collective agreement binding between CATCA and Treasury Board, the provisions of Article 27.08 were more broadly framed, providing for the displacement of vacation leave not only in the case of bereavement leave subsequently granted, but also in the case of subsequent grant of sick leave. [CATCA Book of Authorities tabs 1-4; Exhibit 7(a), (b), (c)].
>
> 20. I do not find the latter argument particularly persuasive. Arguing from a negative *i.e.* the absence of the inclusion of sick leave in the displacement article 27.08 even highlighted by the fact that earlier versions of the article in the predecessor collective agreements between these two parties included sick leave within its terms, does not lead to the conclusion that the grievor is disentitled to sick leave in the circumstances of the instant case. I read article 27.08 somewhat differently. There, "in respect of any period of vacation" an employee granted bereavement leave is entitled to have the vacation leave so displaced rescheduled irrespective of whether or not a scheduled vacation leave had already commenced. The effect of article 27.08 is to override the 'fundamental and primary reason for absence' doctrine which leads to differing outcomes depending upon whether or

not the employee had actually commenced a vacation leave subsequently interrupted by intervening events, in favour of an absolute entitlement to a rescheduling of that leave when interrupted, whether commenced or otherwise. The fact that the precipitating event for the article 27.08 displacement entitlement is limited to bereavement leave cannot be determinative of whether the grievor is entitled to the benefit of the 'fundamental and primary reason for absence' doctrine as developed in the arbitral jurisprudence.

21. Nor, in my view does the argument based on failure to meet the condition precedent for eligibility for sick leave with pay under article 24.02 bear close scrutiny. I am being asked to read article 24.02 as if it stipulated that 'the employee is unable to perform his or her *scheduled* duties because of illness', in which case it could be said to engage the provisions of article 16 governing hours of work, shift cycles and scheduling of specific duties. But it does not explicitly do so. Just as reasonable a reading of the phrase 'unable to perform his or her duties because of illness' is to view the concept of duties generically *i.e.* that range of tasks associated with his or her position which are ordinarily performed by the sick employee. This is the sense in which the term is used at article 17.03(a) addressing pay when an employee is asked 'to perform the duties of a higher classification'; and again at article 3.07 distinguishing 'regular' or 'normal' duties performed by employees in connection with their work from the duties carried out by a shop steward. The sick pay on overtime award of Arbitrator Hope is of no assistance given the requirement that overtime actually be worked to be entitled to any compensation whatsoever [Art. 20].

22. The core of Board Member Galipeau's finding that a grievor in circumstances such as those here present is entitled to have vacation leave rescheduled when displaced by sick leave on the 'fundamental and primary reason for absence' test, is found in the article 27.07(b) obligation placed upon the Employer to "make every reasonable effort to schedule vacations in a manner acceptable to employees." She concluded that inasmuch as (i) the grievor met the sick leave requirements of article 24.02; (ii) brought the fact of intervening illness to the attention of the Employer prior to commencing vacation; and (iii) efficient operating requirements were not a bar to the grievor's absence, the Employer ought to have made every reasonable effort to reschedule the vacation leave in a manner acceptable to the employee as per article 27.07(b) and had failed to do. Not only am I not of 'the clear conviction the award is wrong', I find it to have been an eminently reasonable interpretation of the governing provisions of the collective agreement within the context of the applicable arbitral jurisprudence, and would concur with it.

[Italicized emphasis in the original. Underlined emphasis added.]

Mr. Rosner submitted that the rulings in *Richard* and *Hansen* are extremely similar to the issue in the present case, and should be followed.

Secondly, Article 28.05(c) requires the Employer to make "every reasonable effort" to schedule lieu leave at times desired by the employee. While the Employer did this with respect to Mr. Ross's initial request for lieu leave, it has not done so with respect to his request to reschedule the lieu leave when his circumstances changed significantly due to his becoming sick. There is no issue of cheating here. There was ample opportunity for the Employer to accommodate Mr. Ross's request. The request would not cause any difficulty in meeting the Employer's operational requirements, because Mr. Ross was always going to be away on the days in question and the Employer always had to make different arrangements to cover for his absence. The same comment applies to the requirement about "adequate

notice" of the absence (although the Employer has not made "adequate notice" an issue in these proceedings).

Thirdly, when Mr. Ross became ill on 13 March 2001, the situation changed so that the "fundamental and primary reason for absence" (*Atlas Steel*) was his illness, not the original reason for the scheduled absence (lieu leave).

Fourth, equity, fairness and the balance of convenience favour the grievance in this case. It makes no sense for the Grievor's absence to be characterized as sick leave, which would then be suspended for lieu leave, which would then carry on as sick leave. The effect of the Employer's position is to deprive the Grievor of seven days of earned benefit of lieu leave because he was sick. The only cost to the Employer is the windfall loss of the Grievor's lieu leave.

Mr. Rosner referred to the following cases:

- *Canadian Steelworkers' Union and Atlas Steels Co.*, (1972) 24 L.A.C. 171 (Weatherill) at p. 174.
- *Alberta and AUPE (Conroy-Rossall)*, (1991) 20 L.A.C. (4th) 318 (McFetridge).
- *Nova Scotia (Department of Human Resources) and N.S.G.E.U. (Hewitt)*, (1998) 81 L.A.C. (4th) 236 (Archibald) at p. 247.
- *Hoyles Escasoni Complex (Newfoundland Hospital & Nursing Home Assn.) and N.A.P.E.*, (1992) 27 L.A.C. (4th) 231 (Alcock) at p. 248.
- *Nault and Treasury Board (Transport Canada)*, [1990] C.P.S.S.R.B. No. 86 (G. D'Avignon) at pp. 2 and 3.
- *Power and Treasury Board (Transport Canada)*, [1988] C.P.S.S.R.B. No. 56 (D. Kwavnick) at pp. 2 and 9.

With respect to remedy, Mr. Rosner said that the Union did not want monetary compensation or damages. Rather, because the Grievor intends to retire in 1 1/2 or 2 years, he wishes to have the lieu leave in question reinstated to his lieu leave entitlement. However, because the lieu leave in question would have been paid out by 31 March 2003, and given the length of time it took this matter to get to a hearing, Mr. Rosner submitted that it would be appropriate to give the Grievor a year from the date of the award to use the lieu leave in question.

(Counsel agreed that, if the outcome of the decision is to reinstate lieu leave, the parties should be given the opportunity to discuss between themselves how this would work, with my reserving jurisdiction on this aspect.)

V. SUBMISSIONS FOR THE EMPLOYER

Mr. Rontiris started his submissions by pointing out that Article 28.05 follows after Article 28.01 which deals with specific "designated holidays".

With respect to *non-operating* employees, the collective agreement then goes on to include a number of provisions for moving a particular holiday. If a non-operating employee is not scheduled to be working on a designated holiday, and falls ill prior to the designated holiday, the sick leave does not "trump" the holiday pay, because no work is scheduled for the employee on the day in question.

The point of Article 28.05 is to create a system whereby *operating* employees are given a number of hours of leave in lieu of designated holidays. Once the lieu leave date has been selected, that is the day which becomes the holiday. If the operating employee becomes ill prior to that day, why should sick leave "trump" lieu leave with respect to that day—any more than would be the case under the rules applicable to a non-operating employee? The Employer says that once the lieu day is fixed, that day becomes the holiday, and that is the end of the matter.

Mr. Rontiris referred to the following authorities:

- *Canada Labour Code*, Part III, Division V—General Holidays
- *Atlantic Packaging Products Ltd. and Communication, Energy and Paperworkers Union of Canada, Local 333*, (2001) 96 L.A.C. (4th) 64 (Goodfellow) at pp. 74-76.
- *The American Heritage Dictionary of English Language* for the definition of "perform".
- *Public Utilities Commission of City of Scarborough and Utility Workers of Canada, Local 1, Unit 1*, (1989) 6 L.A.C. (4th) 170 (T. A. B. Jolliffe) at p. 176.
- *British American Banknote Inc. (Ottawa Division) and Graphic Communications International Union, Local 588 (Lithographers)*, (29 July 1986; Emrich) at p. 10.

Mr. Rontiris also submitted that sick leave is effectively an indemnity—with the result that, if an employee does not lose pay because the employee is on paid lieu leave, there is no loss to be indemnified. Mr. Rontiris acknowledged that this argument was made unsuccessfully in front of Arbitrator Kuttner (at para. 16), but Mr. Rontiris submitted that the difficulty with Arbitrator Kuttner's approach is that the latter effectively added the word "scheduled" into Article 24.02. If an employee cannot make a claim for sick leave for a day on which there was no scheduled work to perform, then the employee cannot claim sick leave for a day with respect to which he was granted lieu leave and therefore is not scheduled to perform any work.

Mr. Rontiris agreed that the mechanical and chronological approach to determining the appropriate characterization of the leave is unhelpful, and that this case ought to be decided on a more principled and conceptual basis.

With respect to the Union's arguments about the Employer's obligation to make "every reasonable effort" to schedule (or reschedule) lieu leave, Mr. Rontiris submitted that the Employer did not really put its mind to this issue in the present case, because it perceived that the real issue was displacement of scheduled lieu leave by sick leave. The rescheduling issue only becomes relevant if, but only if, this type of displacement is the appropriate response to the Grievor's situation.

VI. REPLY BY THE UNION

With respect to the concept of displacement, Mr. Rosner referred to Article 27.08 of the collective agreement, which specifically permits an employee who is granted bereavement leave during a period of vacation leave to displace the latter with the former so that the latter can be used at a later date. Prior to 1989, this concept also explicitly applied to permit displacement of vacation leave not only for intervening (a) bereavement leave, but also for intervening (b) special leave with pay because of illness in the immediate family, and (c) sick leave on production of a medical certificate. Both *Richard* and *Hansen* permitted an employee to take sick leave instead of vacation, even though the collective agreement no longer contained such a specific provision but only referred to bereavement leave.

With respect to the suggestion that the grievance does not ask for a rescheduling of the lieu leave, Mr. Rosner referred to paragraph 5 of the Agreed Statement of Facts which states that "*... the grievor requested that his lieu leave bank be credited with the leave previously granted* and that his sick leave bank be deducted for the period of his sick leave." It was the Employer who raised the issue of displacement.

The only difference between *Richard* and *Hansen* is that those two cases involved sick leave in the context of previously-scheduled vacation leave, whereas the present case involves sick leave in the context of previously-scheduled lieu leave.

With respect to the Employer's submission that there should be no distinction between operating and non-operating employees, Mr. Rosner submitted that the fact is that there are two different classes of employees who are treated differently for several purposes under the collective agreement. For example, non-operating employees work 9:00 a.m. to 5:00 p.m. 5 days a week for 37.5 hours per week. By contrast, operating employees work 36 hours per week around the clock, on shift, with shift premiums. Further, the whole purpose of lieu leave is to recognize that holidays are not taken on designated days. That, however, does not make the identified lieu date the "holiday", any more than if this entitlement were paid out in cash.

Under this collective agreement, sick leave is not an indemnity, nor is it insurance; rather, it is a day off (a "leave") with pay. If one is sick on a day of rest, no sick leave is paid because there was no work scheduled for that day; no "leave" is necessary. Salaries under the collective agreement are annual; an employee can only get additions to his or her remuneration, or unpaid leaves. There was no need for Arbitrator Kuttner in *Hansen* to read in the word "scheduled", because sick leave is "leave with pay", not an indemnity.

VII. DECISION BY THE ARBITRATOR

After carefully considering the Agreed Statement of Facts, submissions and authorities presented in the case, I have come to the conclusion that the grievance must be allowed for the following reasons.

First, there is no conceptual distinction between the present case and the decisions in *Richard* and *Hansen*. Although the precise manifestation of the issue differs in the present case from the way it was manifested in *Richard* and *Hansen* (because our case deals with the interface between sick leave and lieu leave, whereas *Richard* and *Hansen* dealt with the interface between sick leave and vacation), there is no meaningful distinction in the analysis. Certainty, comity and labour relations sense overwhelmingly indicate that the reasoning in *Richard* and *Hansen* should be applied in the present case, unless there is either some meaningful factual distinction or the analysis in the previous decisions is clearly wrong. I am satisfied that the analysis in the previous cases is not clearly wrong, and that there is no meaningful difference in the factual circumstances of the present case.

Secondly, the fundamental issue in this case is the Employer's obligation under Article 28.05(c) to "make every reasonable effort to schedule lieu leave at times desired by the employee". In my view, that includes making reasonable efforts to reschedule lieu leave. At the hearing, counsel agreed that lieu leave is frequently rescheduled for many reasons. In the facts of the present case, there is no issue about such rescheduling being inconsistent with operational requirements or not providing adequate notice, so these two other aspects of Article 28.05(c) do not need to be considered in this case.

In my view, the Employer's obligation under Article 28.05(c) to make every reasonable effort to schedule lieu leave at times desired by the employee is sufficient to dispose of the present grievance. However, if it were necessary for me to do so, I would also reach the same result by referring to the doctrine about the fundamental and primary reason for an employee's absence. That doctrine provides that, where an employee becomes sick prior to the commencement of a scheduled leave (usually vacation), the absence shall be characterized as sick leave and not vacation leave because the fundamental and primary reason for the absence was sickness. I agree that this is a mechanical approach, which may give different results depending upon the chronological order of events, but do note that it would reach the same result in the present case as the more principled and conceptual rationale relating to the Employer's obligation under this collective agreement to make every reasonable effort to schedule lieu leave at times desired by the employee. Where the employee becomes ill prior to the day of

scheduled lieu leave, it is reasonable for the Employer to reschedule the lieu leave (provided doing so is not inconsistent with operational requirements and the request is made with adequate notice).

VIII. AWARD

The award is that the grievance is allowed. The Grievor's sick leave credits for the 2002 fiscal year will be reduced by 7 days. The Grievor's lieu leave entitlement will be increased by the 7 days as of the date of this award. As agreed by counsel, I reserve jurisdiction to give further directions about when the restored lieu leave will expire or must be paid out, subject to prior agreement by counsel to resolve this issue.

SIGNED, DATED AND ISSUED at Edmonton, Alberta on 27 October 2003 by:

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

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[1]. Article 17.07 of the version of the collective agreement in effect in February 1993 read as follows:

> ARTICLE 17
> VACATIONS
>
> 17.07 Where, in respect of any period of vacation leave, an employee is granted bereavement leave, the period of vacation leave so displaced shall either be added to the vacation period, if requested by the employee and approved by the Employer, or reinstated for use at a later date.

[2]. Article 4.02 was deleted from the subsequent collective agreement signed in June 2003.

[3]. Reference might also have been made to *Royal Alexandra Hospital and United Nurses of Alberta, Local 33*, (1995) 45 L.A.C. (4th) (D.P. Jones, Q.C.).