IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NAV CANADA

("the Employer")

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,
CAW-CANADA, LOCAL 5454

("the Union")

AND IN THE MATTER OF GRIEVANCES 2003-873 AND 2003-874;
COMMUTED VALUE AND EFFECTIVE DATE OF RETROACTIVITY

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer:

Jacques Emond, Counsel
Kecia Podetz, Counsel
Steve Cooper, Manager, Labour Relations
Derek Clement, Manager, Pension and Benefits Policy
Michael Abbott, Manager, Labour Relations, Research

For the Union:

Abe Rosner, National Representative, CAW-Canada
Greg Myles, National Secretary-Treasurer, CATCA
Joanne Richer-Donovan, Labour Relations Assistant, CATCA

AWARD

A hearing in this matter was held in Ottawa, Ontario on October 6 and November 4, 2004. At the outset of the hearing, the parties were agreed that the Arbitrator had been properly appointed pursuant to the collective agreement, and that I had jurisdiction to hear and determine the two matters in issue between them.

Grievances 2003-873 and 2003-874 are both policy grievances filed pursuant to Article 11.06 of the collective agreement. They both relate to the implementation of the Memorandum of Settlement of June 10, 2003, which is the template for the current collective agreement. Both of them are dated November 24, 2003. Grievance 2003-873 concerns the entitlement of members of the bargaining unit who became entitled to early retirement on or after April 1, 2001, but took the commuted value of their pension rather than a periodic pension, to retroactive salary payments arising from the Memorandum of Settlement and the collective agreement. Grievance 2003-874 concerns the entitlement of employees whose employment with NAV CANADA terminated between July 4, 2003, the date of ratification of the Memorandum of Settlement of June 10, 2003, and September 9, 2003, the official signing date of the new collective agreement, to the same retroactive salary payments.

While the negotiations which led to the current collective agreement were lengthy and complex, the history of the major events, for present purposes, can be simply stated. After a protracted mediation, the mediator, S. Bruce Outhouse, Q.C., issued his "Report and Recommendations" on May 23, 2003. He made recommendations for settlement over a range of issues in dispute, and recommended, among other things, a

four-year collective agreement with annual increases, effective April 1, in each of 2001 through 2004. His recommendation on the subject of retroactivity, which is central to these grievances, was as follows:

> Retroactive payments should be made only to current employees, as of the date of signing of the new collective agreement, and former employees who have retired or died since April 1st, 2001. No retroactive payments should be made to former employees who have resigned or who have been terminated between April 1, 2001, and the signing of the new collective agreement.

After the mediator's report was issued, the parties entered into further negotiations, and ultimately rendered the recommendations set out therein into a Memorandum of Settlement. That document, which is dated June 10, 2003, makes certain changes to the mediator's recommendations, but not in respect of his recommendation concerning retroactivity. The operative parts of the Memorandum of Settlement for the purposes of this award are as follows:

> The Union and the Employer agree to resolve all outstanding bargaining issues by entering into a collective agreement (the "Collective Agreement"), the terms and conditions of which shall include: 1. the items previously agreed to by the parties; 2. the recommendations of Mediator Outhouse in his report dated May 23, 2003, and his clarifications thereto, except where modified as follows:
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> . . . . . .
>
> The parties agree that the Outhouse recommendations be accurately reflected in contract language prior to contract execution.

On July 4, 2003, the Union notified the Employer that the Union membership had ratified the Memorandum of Settlement, and "that the provisions contained in that agreement can therefore be executed effective immediately".

During July, the parties exchanged correspondence relating to the preparation of a formal collective agreement for execution; it appears that a final version in English was available by July 25, and the French translation was prepared thereafter. By the end of the month, however, the parties were at odds about whether the provisions of the Memorandum of Settlement should be implemented forthwith, or whether they should await the signing of the formal collective agreement. This was resolved by a Memorandum of Understanding dated July 30, 2003, which specified that the implementation of the new rates of pay prior to the signing of the formal collective agreement would not be raised by the Union as determinative of whether or not the collective agreement has been executed.

Finally, on September 9, 2003, the formal collective agreement was executed. Clause 42.02 of the formal document specifies that:

> 42.02 Unless otherwise expressly stipulated, this Agreement shall become effective on the date it is signed and shall remain in effect until March 31, 2001.

The formal collective agreement, as signed, does not include any language on retroactivity for salary increases. The parties are agreed, however, that the language of the mediator's report is the language which governs this issue. It is also a matter of agreement between the parties that the language comes entirely from Mediator Outhouse, the parties having proposed different approaches to the question of retroactivity in their respective submissions to the mediator. Moreover, while the parties did request clarification of some issues of effective dates from the mediator after receipt of his report, there has never been an attempt to ask Mr. Outhouse what he meant by the language which he chose to use to limit retroactivity. In the result, therefore, the language must be

interpreted as it appears on its face, in accordance with the usual rules of contractual interpretation, the parties having adopted the mediator's report by entering into the Memorandum of Settlement.

Obviously, there are always a number of questions about the operative dates for various provisions of the new collective agreement. That is not in issue before me, however, since the operative dates for the salary increases are all specified, and it is only the entitlement to retroactive pay that is in issue. Fundamentally, the Union takes the position that "the date of signing of the new collective agreement" is July 4, 2003, the date on which the new collective agreement was ratified by notice from the Union to the Employer. The Employer takes the position that the appropriate date is the official signing date of September 9, 2003, when the parties signed the formal collective agreement document. From that dispute, and from a related dispute about the meaning of the words "former employees who have retired", the present grievances arise for determination.

As did the parties in argument, I propose to deal first with the question of the date of signing of the collective agreement for purposes of retroactivity. The parties referred me to a number of arbitral authorities for various principles and propositions. I do not propose to deal extensively with these authorities, since each of them is dependent upon the specific language being interpreted. Perhaps the most thorough review of the general legal principles operating on this question is found in Re Cape Breton Healthcare Complex and CAW-Canada, Locals 4600 and 4603 (Holiday Entitlement) (1999), 83 L.A.C. (4th) 289 (Outhouse), a decision of Mr. Outhouse in his capacity as a grievance arbitrator. In this award, Mr. Outhouse clearly emphasizes the importance of the

particular language chosen to express the bargain between the parties in light, in that case, of the statutory requirements for a collective agreement in the Province of Nova Scotia, which are different from those applicable in the present case.

In my view, however, there is really no need to rely on general principles and arbitral authority to decide this matter. The parties chose, in entering into the Memorandum of Settlement of June 10, 2003, to adopt Mr. Outhouse's language on retroactivity. That language specifies as the operative date "the date of signing of the new collective agreement".

In their Memorandum of Settlement, however, the parties refer specifically to the requirement that the recommendations be accurately reflected in contract language "prior to contract execution". While this is not exactly the same language as that chosen by Mr. Outhouse to express the appropriate operative date, it clearly indicates that the parties intended that their bargain would not be executed until a formal collective agreement had been created and signed. Indeed, that is the language which they also inserted into that new agreement in clause 42.02 to express the effective date of the new agreement.

Finally, when the question of whether the collective agreement was in force following ratification arose between the parties, the Employer agreed to begin implementation of some of the provisions of the agreement, but only after the parties had produced a new Memorandum of Understanding dated July 30, 2003, which specifically refers to ratification of the new collective agreement by the Union on July 4, 2003, and to the signing of "said collective agreement" at some time then still in the future, and which barred the Union from using any implementation prior to signing as an argument about

whether or not the collective agreement had been executed. In matters of interpretation of contractual language, parties must be held to the objective test of what reasonable parties in their positions would have intended. In my view, if the parties intended that ratification would constitute the equivalent of "signing" for the purposes of retroactivity, they would have expressly said so to contradict the inference which derives directly from the words which they have used throughout the transactions leading up to the signing on September 9, 2003.

In the result, therefore, Grievance 2003-874 must be denied.

The other issue relates to the exception to Mr. Outhouse's language restricting retroactive payments to current employees as of the date of signing, which requires that payments also be made to former employees "who have retired or died since April 1, 2001". Specifically, the parties disagree as to what the word "retired" means, and whether it applies to persons who, rather than taking a pension benefit paid periodically, choose instead to take the commuted value of the pension to which that person would be entitled. The Employer takes the position that this constitutes something other than retiring for the purposes of the retroactivity language, while the Union disagrees with that interpretation.

While any employee with more than 24 months of continuous pension plan membership is entitled to a deferred pension which can be commuted to a lump sum upon resignation, the categories of former employees whom the Union says ought to be considered to have retired, rather than resigned, are those covered by three specific provisions of the pension plan who are entitled to immediate early retirement pensions,

which can also be taken as a commuted value pursuant to the portability provisions of the pension plan.

These kinds of pensions are provided by the *NAV CANADA Pension Plan* (effective November 1, 1996), and specifically Article 5, which deals with retirement benefits in general. Clause 5.2 deals with early retirement benefits, and the early retirement plans here at issue are covered by paragraphs 5.2(f), (g) and (h), which provide for Category F, G and H pensions respectively. These pensions are applicable only to air traffic controllers, and not to other employees of the Employer. Category F pensions are available to air traffic controllers whose retirement is an Involuntary Cessation of Operational Service, and who have completed at least 20 years of Operational Eligibility Service that is also Pensionable Eligibility Service. The capitalized phrases are all defined terms under the pension plan; for present purposes it is not necessary to go into the details of what is involved. An air traffic controller who qualifies for this pension is entitled to an immediate unreduced early retirement benefit.

Category G pensions are available to air traffic controllers whose retirement is not an Involuntary Cessation of Operational Service, where the member has attained at least age 45 and completed at least 20 years of Operational Eligibility Service that is also Pensionable Eligibility Service, but has not reached a pension milestone that would entitle him or her to an unreduced pension. Category G pensions are also immediate early retirement benefits, but are actuarially reduced.

Category H pension benefits are for air traffic controllers whose retirement is an Involuntary Cessation of Operational Service, but who have completed only 10 years of Operational Eligibility Service that is also Pensionable Eligibility Service, and

not yet 20 years of Operational Eligibility Service that is also Pensionable Eligibility Service. This is also an immediate early retirement benefit that is actuarially reduced.

In addition to a right to a periodic pension benefit, members who qualify for these three categories of pension may, in some circumstances, take advantage of the portability provisions of the plan, set out in clause 7.3. Those provisions are set out in Article 7, which is entitled "Termination of Service", and I have set out the two preceding clauses for comparison:

7.1 Prior to Completion of 24 Continuous Months of Plan Membership

A Member whose employment is terminated for any reason other than retirement or death prior to completion of 24 continuous months of Plan Membership shall be entitled to receive a refund equal to the following:

- Member Contributions made to the Plan, together with Interest, plus,
- in the case of a Member who is a Designated Employee who became a Member on the Effective Date and who elected to transfer benefits from the Prior Plan to the Plan in accordance with Section 3.7, a refund of Member contributions made to the Prior Plan, together with Interest, plus a refund of Member contributions made to the Plan after the Effective Date in accordance with a written agreement entered into in accordance with Section 3.8 to purchase additional periods of eligible service under the Prior Plan, together with Interest.

7.2 On or After Completion of 24 Continuous Months of Plan Membership

A Member whose employment with the Employer is terminated for any reason other than retirement or death after completion of 24 continuous months of Plan Membership, but before becoming eligible for benefits in accordance with Article 5, shall be entitled to a deferred pension commencing on his Normal Retirement Date. The deferred pension shall be determined in accordance with Section 5.1(b).

The amount of annual pension determined above shall be adjusted in accordance with Section 3.5 to take account of any amount of outstanding contributions being made in accordance with a written agreement entered into in accordance with Section 3.5 to purchase additional periods of eligible service.

Notwithstanding the foregoing, a Member retiring on or after the Effective Date but prior to June 20, 1998 and prior to having both attained age 45 and completed 10 years of Pensionable Eligibility Service may in full settlement of his annual pension under the Plan in respect of Pensionable Service prior to the Effective Date, elect to receive a refund of Member contributions made to the Plan prior to the Effective Date, together with Interest, plus a refund of Member contributions made to the Plan after the Effective Date in accordance with a written agreement entered into in accordance with Section 3.8 to purchase additional periods of eligible service under the Prior Plan, together with Interest.

The amount of annual pension determined in accordance with this Section 7.2 shall be increased each year in accordance with Article 10.

7.3 Portability on Termination of Employment

Notwithstanding any other Plan provision, and subject to the Act, a Former Member who is entitled to a deferred pension under the terms of Section 7.2 or has not yet attained age 50 and who is entitled to an immediate pension under the terms of Section 5.2(f), 5.2(g) or 5.2(h), has the option to elect, within the timeframes prescribed by the Employer, on termination of employment, that an amount equal to the Commuted Value of his deferred pension payable from the Trust Fund, as determined in accordance with Section 7.2, be paid under one of the following options, subject to Section 7.8:

(a) to the pension fund related to another registered pension plan, provided the administrator of the other registered pension plan agrees to accept the payment; or

(b) to a registered retirement savings plan, or a life income fund, both as prescribed by the Act; or

(c) to an insurance company for the purchase of a life annuity, as determined in accordance with the Plan.

Such election shall be in full discharge of any entitlement payable in accordance with Section 7.2.

Notwithstanding the foregoing, if the transfer would impair Plan solvency as prescribed under the Act, the transfer of all or part of the Commuted Value shall be made in accordance with the Act. Where

> only a portion of the Commuted Value is transferred, the outstanding amount shall be transferred, with Interest, in accordance with the Act, subject to Section 7.7.
>
> Payment out of the Trust Fund of the total Commuted Value of benefits under Section 7.2 shall be in full satisfaction of all obligations of the Plan and the Trust Fund to such Former Member in respect of such Section.

The *NAV CANADA Pension Plan* is a plan which essentially overtook the *Public Service Superannuation Act* provisions which applied to those employees of Transport Canada who were transferred to NAV CANADA upon its creation on November 1, 1996. Because it is designed for employees in civil air navigation, it has inherited a number of provisions that had been developed previously for such employees. That is why all three of the categories of pensions involved here are applicable only to air traffic controllers. There is apparently no dispute between the parties that an employee who elected to take a Category F, G or H early retirement pension at a time between April 1, 2001, and September 9, 2003, would be considered to have retired for the purposes of the retroactivity provision in the mediator's report. The Employer takes the position, however, that if any of those employees elected instead to take the commuted value of the pension pursuant to clause 7.3, the termination of employment could not be called a retirement, and thus their entitlement to retroactivity would be lost.

A resolution of this issue requires a fairly detailed examination of the *Pension Plan*. The following provisions were identified by the parties as relevant to this exercise:

Article 1 Definitions

In this Plan, unless otherwise required or stipulated, words importing the masculine shall include the feminine and words importing the singular shall include the plural, and vice versa; and the following terms wherever used in this document shall for the purposes thereof, unless the context otherwise requires, have the meaning set forth below, despite any definitions that conflict therewith in any other document:

1.1 "**Act**" means the Pension Benefits Standards Act, 1985 and the regulations issued thereunder both as amended from time to time.

. . . . .

1.12 "**Commuted Value**" means the actuarial present value of a pension, a deferred pension or a pension benefit determined by applying the "Recommendations for the Computation of Transfer Values from Registered Pension Plans" issued by the Canadian Institute of Actuaries on September 1, 1993, or any updated version as permitted under the Act, subject to any requirements of the Canadian Institute of Actuaries.

. . . . .

1.15 "**Date of Cessation of Employment**" means, in respect of a Member, the day following the last day on which the Member receives Pensionable Earnings in respect of employment with the Employer.

Notwithstanding the foregoing, if the Member receives a benefit in respect of a previous period of employment which is based on Best Average Earnings which take into account Pensionable Earnings in respect of the most recent period of employment, as set out in Section 3.5, the Date of Cessation of Employment in respect of benefits under the previous period of employment shall be the day following the last day on which the Member receives Pensionable Earnings in respect of the most recent period of employment with the Employer.

Notwithstanding the foregoing, if the Member is on a leave of absence without pay in accordance with Section 3.5, the Date of Cessation of Employment is the day following the effective date that the Employer determines that the Member ceases to be employed.

Notwithstanding the foregoing, if the Member dies while still in the active service of the Employer or on a leave of absence without pay in accordance with Section 3.5, the Date of Cessation of Employment is the day following the date of death.

. . . . .

1.18 "**Early Retirement Date**" means any date prior to the Normal Retirement Date upon which a Member or Former Member elects to retire and commence receipt of pension payments in accordance with Section 5.2, Section 5.3 or Section 7.5.

. . . . .

1.23 "**Former Member**" means a former Employee who is no longer an active Member of the Plan, who remains entitled to benefits under the Plan, but who has not yet commenced to receive a pension.

. . . . .

1.25 "**Involuntary Cessation of Operational Service**" means, in respect of a Member who is an Air Traffic Controller, retirement on an Early Retirement Date if the retirement is for one of the following reasons.

(a) The Member is unable to meet the medical requirements for validation of his air traffic control licence in accordance with the policies and procedures established by the Employer for these purposes.

(b) The Member is unable to maintain the required level of technical proficiency.

(c) The Member must be removed from Operational Service for the preservation of the physical or mental health of the Member.

1.26 "**Member**" means an Employee who has joined the Plan in accordance with Article 2, and whose membership has not been terminated as a result of reaching his Date of Cessation of Employment.

. . . . .

1.36 "**Pensioner**" means a Member or Former Member who has retired and is receiving a pension benefit under the Plan.

The pension plan does not, unfortunately, define the word “retire”. There is, however, a provision in the *Pension Benefits Standards Act, 1985,* R.S.C. 1985, c. 32 (2nd Supp.), which is the statute which applies to pension plans in the federal sector. Section 2(3) of that Act is advanced by the Employer as authoritative. Subsection 2(1) is the definition section, which includes a definition of “retire” as follows:

“Retire” has the meaning assigned by subsection (3);

Subsection (3) is as follows:

> (3) For the purposes of this Act, a member of a pension plan shall be deemed to retire on commencing to receive an immediate pension benefit, whether the member's employment is terminated or not.

This provision includes the expression "immediate pension benefit", which is also defined in subsection 2(1):

> "Immediate pension benefit" means a pension benefit that is to commence within one year after the member becomes entitled to it;

The Employer relies heavily on this provision, which it says stands for the proposition that someone can only be said to retire when they commence to receive an immediate pension benefit, that is to say one which begins within a year after the entitlement date. With respect, I do not think that is the correct interpretation of the statutory provision. The provision does not purport to be an exhaustive definition of the word "retire", but only to deem a person to have retired in certain circumstances. What it expressly does is to indicate that there is no need to terminate employment in order to be deemed to retire, since it is the receipt of an immediate pension benefit that creates that result. The provision is, however, silent about someone whose employment terminates, who is entitled to an immediate pension benefit, but elects not to take it and to take a commuted value instead. In other words, it is sufficient to be deemed to retire to commence receiving an immediate pension benefit, but it is not, at least on a fair reading of this provision, necessarily required to do so in order to retire.

It should be noted from the outset that Mediator Outhouse did not specify in his report that retroactivity should be paid to former employees who have retired

within the meaning of the *Pension Plan* or the *Pension Benefits Standards Act, 1985*. He simply used the word retired, in my view in its general sense, to indicate a distinction between employees who have resigned or have been terminated, on the one hand, and those who have retired or died on the other. The collective agreement also includes other distinctions between resignation and retirement, and it is not an uncommon distinction generally in employment law.

However, having said that, the best place to start for an objective meaning of the word is with the *Pension Plan*, and the provisions that the Employer relies upon to distinguish between employees who retire and take an immediate pension, and those who commute the value of that immediate pension under the portability provision in clause 7.3.

In my view, any fair reading of the provisions relating to pensions in Categories F, G and H indicates that those entitlements are only available when an employee elects to retire. The preamble to clause 5.2 begins as follows:

> A Member who elects to retire on an Early Retirement Date shall be entitled to receive an annual amount of pension payable in the normal form, as described in Article 6, calculated in accordance with one or more of the following categories as set out below.

In other words, before an employee becomes entitled to any early retirement pension, the employee must first elect to retire. Turning then to clause 7.3, it is obvious that the option to elect to take a commuted value of the pension under the portability provisions and transfer it into another retirement vehicle is only available to two classes of persons: Former Members who terminate service under clause 7.2, and those who have not

attained age 50 and who are "entitled to an immediate pension under the terms of Section 5.2(f), 5.2(g) or 5.2(h)". One cannot be entitled to an immediate pension without electing to retire pursuant to the provisions of clause 5.2. There is nothing anywhere else in the *Pension Plan* to suggest that exercising the option, which is only available to those who are entitled to an immediate pension by having elected to retire, changes the character of the election to retire. In my view, no one in the second category described in clause 7.3 can ever become entitled to the portability option under clause 7.3 without first of all meeting the requirements for a specific category of early retirement pension, and then electing to retire. Electing to retire and ceasing employment in accordance with that election constitutes retiring by any reasonable interpretation of the words used.

I appreciate that there is evidence that the Employer's Pension and Benefits department has treated persons taking a commuted value differently from those who take a periodic pension. The difficulty is that there is nothing in the evidence to indicate that such differential treatment actually means anything. It was suggested that there would be a distinction between those who have taken a commuted value if they were rehired under section 3.6 of the pension plan and that they would have to be treated differently from pensioners who returned to work. As I read clause 3.6, however, neither paragraph (a) or paragraph (b) applies to persons who take the commuted value. Paragraph (a) refers to "Former Members" who are defined in the plan as those who are still entitled to a deferred benefit but have not yet begun to receive it, while paragraph (b) refers to pensioners who are receiving a benefit. The provision is simply silent about persons who have taken a commuted value, who are presumably simply treated as new employees should they return to employment.

In my view, the difficulty is that the difference in treatment seems to have been designed for persons who are entitled to a deferred pension under clause 7.2 of the pension plan. Those persons are, as can be seen from section 7.3, completely distinct from persons who are entitled to early retirement benefits under categories F, G and H. While the Employer would be entirely right to treat employees not otherwise entitled to an immediate pension as resigning when they take a commuted value, since they would never be entitled to immediate pension and could only elect to defer a pension, it is in my view not correct to treat persons electing the commuted value under categories F, G and H in the same way. As I have already pointed out, before becoming entitled to anything which can be commuted, they must first elect to retire.

I was also referred to a pension plan document distributed by the Employer as a plain language explanation of pension benefits, and a template for an annual pension report which is sent to every member of the bargaining unit on an annual basis. These documents were said to make it clear that taking the commuted value of a pension does not constitute retirement. Specifically, I was referred to page 21 of the template which includes a section headed, “If You Leave Before Retirement”, which the Employer argues puts employees on notice that taking a commuted value will not constitute retirement. That section, however, clearly describes the situation of employees covered by clause 7.2, and not those under the early retirement options in 5.2(f), (g) and (h). In the result, I have concluded that the requirement in the language chosen by Mediator Outhouse and adopted by the parties, “former employees who have retired”, is broad enough to include persons who become eligible for a benefit under paragraphs 5.2(f), (g) and (h), elect to retire, and subsequently exercise the option to have a

commuted value of pension entitlement paid into another retirement vehicle under clause 7.3.

In the result, Grievance 2003-873 must be allowed. The employees adversely affected by the Employer's interpretation of the retroactivity language are entitled to compensation accordingly. In case there is any difficulty in implementing this Award, I retain such jurisdiction as is necessary to bring it to a full and final conclusion.

DATED at TORONTO this 21st day of January, 2005.

Kenneth P. Swan, Arbitrator