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 "PRACTICUM" TRAINING

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer:

Mary J. Gleason, Counsel
Gordon Cudney, Student-at-law
France Morier, Manager, IFR Training
Steve Cooper, Labour Relations Advisor
Barbara Gagné, Manager, Labour Relations

For the Union:

Abe Rosner, National Representative, CAW-Canada
Rob Thurgur, President, CATCA
Greg Myles, National Secretary-Treasurer, CATCA

AWARD

A hearing in this matter was held in Ottawa, Ontario on June 1, 2 and 16, 2006. 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 matters at issue between them.

The dispute in the present case arises not from a grievance, but from the joint submission to arbitration of a question which has arisen between the parties from their last set of collective agreement negotiations. The parties reduced the essence of the dispute between them to the following question:

> "Does the Employer have the right to assign students (non-employees) training duties in an operating position under the authority of licensed Air Traffic Controllers?"

Understanding what the question means and how it is to be answered, to the extent that it can be answered, requires the exposition of a considerable factual background. The previous collective agreement expired on March 31, 2005. A new collective agreement was negotiated and ratified in August 2005 for a term from April 1, 2005 to March 31, 2009, but has not yet been reduced into a final executed form because of a number of complicating factors which have arisen, among them the matter which is the subject of the present arbitration.

For many years, NAV CANADA has operated a training facility in Cornwall, Ontario, the NAV CANADA Training Institute (NCTI). NCTI is a residential institution to which new air traffic control trainees (referred to as *ab initio* trainees to distinguish them from employees being retrained) from across the country would be sent for some five to six months of training. That training would eventually stream into

Instrument Flight Rules (IFR) and Visual Flight Rules (VFR) groups, the two basic kinds of air traffic control used across the country. The issue before me concerns only the *ab initio* training of IFR controllers.

Until quite recently, after the first four or five months of basic training at NTCI, IFR trainees would be posted to one of the Area Control Centres (ACC) across the country where they would engage in further training related to a particular specialty. A specialty is a defined segment of airspace to which an air traffic controller is assigned, and in the control of air navigation within which he or she must be trained and certified. An air traffic controller's licence is generally limited to one specialty.

The training undertaken at NCTI included both classroom and simulator training, the simulator training being done on a fictitious segment of airspace designed to present the same kind of problems that would be encountered in an actual specialty, but not resembling any particular specialty. At the IFR Training Unit (ITU) at each ACC, there was further simulator training which replicated the actual airspace of the specialty for which the trainees were being prepared, although the participants in the training were only role-playing; the students, apart from an exception to which I return below, were not involved with actual air traffic control duties on real airspace.

Depending on the specialty concerned, the ITU training could take up to six to twelve months in the Employer's estimate, although the Union questions whether that training would typically last more than nine months. Following successful completion of that phase of training, the trainees were assigned to On-the-Job Training (OJT) in the ACC for a further twelve months, during which time they would progress to controlling actual traffic "live" under the direct supervision of an air traffic controller

instructor (OJI) licensed for the specialty on which the OJT took place. While the trainee would be actually controlling the traffic, he or she would do so only under the OJI's licence.

Under that regime, a trainee would be issued a Certificate of successful completion at the end of the training at NCTI. The issuance of that certificate carried with it a significant change in status. Prior to completion, trainees were students at what amounted to an educational institution, for which at least in later years they paid tuition, and had no employment relationship with NAV CANADA and no union representation or membership. Upon receipt of the Certificate of successful completion, however, employment status was conferred on these individuals, and they became members of the bargaining unit covered by the Union. The collective agreement includes a classification of Air Traffic Controller-in-Training which applied to these employees. That classification applied both during the classroom and simulator training in the ITU, and during the subsequent OJT phase in the ACC. At the outset of the OJT phase, those employees also attained operational status, which carries with it different terms of employment and enhanced earnings.

It is common ground between the parties that training for air traffic controllers has been protracted, expensive and prone to a significantly high failure rate. As part of its ongoing efforts to address all of these issues, NAV CANADA decided, at some point prior to the last round of collective agreement negotiations, to alter the way IFR training would be carried out in the future. The new process would involve the identification of new IFR trainees at the selection stage, and their training would be carried out from the beginning at the ITUs, rather than at NCTI. The training would still

involve both classroom and simulator training, but the simulator training would be based on the airspace of the specialty for which the individuals were being trained. IFR instructors from NCTI would be relocated to the ITUs, and all of the training would take place for prospective IFR controllers at the ACC where they would be employed if successful. Depending on the specialty, this phase would take from nine to fifteen months to complete, after which the trainee would advance to up to twelve months of OTJ as under the previous regime.

When this change was ready for implementation, the parties were in negotiations for the current collective agreement. It was recognized that some changes to the collective agreement would be required in order to accommodate this new alignment of training, and the parties thus established a subcommittee to discuss the issues involved and negotiate a resolution. Each party nominated two representatives to this committee, the Employer's representatives including its Vice-President of Human Resources, and the Union's representatives including its President. The result of these negotiations was a Letter of Understanding dated February 20, 2004, which was as follows:

> **RE: IFR CONTROLLERS IN ITU and NCTI COURSE MAINTENANCE STAFF**
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> The parties agree that with the movement of IFR ATC Training from NCTI to the IFR Training Units, there is a need to review the classification of IFR Instructors.
>
> The parties agree that once IFR ATC Training moves from NCTI to an ITU, ab-initio trainees who thereafter begin IFR ATC Training at that ITU will not be issued a certificate of successful completion of a course in air traffic control until successful completion of the ITU portion of that training. Only upon issuance of such a certificate will these trainees become employees governed by the collective agreement. Such employees will be considered "operating employees" and will be compensated at the annual rate of AI OPR-02 for the remainder of their training.

Upon the earlier of the commencement of IFR ATC Training at a specific ITU or the date a surplus NCTI IFR Instructor reports to an ITU as a result of accepting an assignment to a position in that ITU, the following changes to the classification and terms and conditions of employment of all controllers assigned to permanent positions in that ITU will take place:

1. Employees with a valid Medical Certificate will be assigned to the position of "IFR Controller" which position is classified at the AI-OPR-05B level. Incumbents will be "operating" for the purposes of rates of pay, Operation Facility Premium, Maintenance of Salary, the Retraining and Reassignment Program, and Pension. They will be considered "non-operating" employees for all other purposes, including but not limited to Hours of work, Overtime, Vacations and Holidays.

2. Employees without a valid Medical Certificate will be assigned to the position of "IFR Instructor" which position is classified at the AI-OPR-05B level. Incumbents will be "operating" for the purposes of rates of pay and Operation Facility Premium only. They will be considered "non-operating" employees for all other purposes, including but not limited to Hours of Work, Overtime, Vacations, Holidays, Maintenance of Salary, the Retraining and Reassignment Program and Pension.

The parties agree that the Course Maintenance positions at NCTI will be classified at the AI-NOP-06B level, effective the date that employees are appointed to these positions.

This agreement is without prejudice to the Employer's right to determine the classification of positions within the Bargaining Unit.

The difficulty that arises here relates to an element used in some ITUs under the previous training regime, for training in some specialties only, which may be referred to as the practicum, although other expressions, such as training model, incremental training program, training block or, in French, *stage au milieu du travail* have also been used to describe it.

The practicum appears to have been developed at the level of the instructors in the ITUs where it was used, to introduce trainees early to the actual operations "floor" of the ACC. While most of the training in the ITU phase took place

either in the classrooms or on the simulators, in Vancouver, Winnipeg, Toronto and Montreal, trainees would spend various amounts of time on the operations floor, under the supervision of an instructor, either observing or, in some specialties, performing certain air traffic control tasks which would normally be performed by a licensed air traffic controller.

The duration and content of the practicum varied quite considerably from specialty to specialty within an ACC, and from one ACC to another. The most extensive use of the practicum appears to have been in Montreal, where trainees for all specialties spent at least some time in the practicum. In Winnipeg, by contrast, the practicum was much less used, and much less developed.

I shall return to the content of practicum training in more detail below, but in general the Employer and the instructors were extremely positive about the impact of the practicum on the training environment. Ms. France Morier, the Manager of National IFR Training, was formerly the Training Manager in Montreal and had extensive experience with the use of the practicum in that location. She testified that the early introduction of trainees to the floor environment reduced the intimidation trainees normally suffer from the complexity and intensity of operations on the floor, and introduced the trainees at a very early stage to the operating atmosphere. Ms. Morier testified that in Montreal the introduction of the practicum was accompanied by a significant increase in success rates for trainees during the ITU period, an increase which continued through the OJT period and resulted in a significant increase in successful completion of training and certification. It is Ms. Morier's view, apparently supported by the Employer at all levels of management, that the use of the practicum should be

expanded to all specialties, so that the advantages can be realized by all trainees. Training for air traffic controllers is lengthy and expensive, and overall failure rates have been significant. The use of the practicum, coupled with the transfer of IFR training to the ITUs, promises to reduce the length and expense of the training, and to significantly improve success rates, and the employer is committed to the introduction of the practicum much more widely than it has been used in the past.

The problem arises because the trainees who were engaged in the practicum prior to the negotiation of the Letter of Understanding dated February 20, 2004 were already bargaining unit members. They had been awarded a Certificate of successful completion upon finishing their training at NCTI, and had become employees upon arrival at the ITU to which they were assigned. Therefore, to whatever extent what they did during the practicum involved the performance of duties normally performed by licensed air traffic controllers, they were in a similar position to trainees during the OJT period, bargaining unit members who were performing bargaining unit functions, albeit under the supervision of, and covered by the licence of, the air traffic control instructor to whom they were assigned.

The impact of the Letter of Understanding dated February 20, 2004, however, is to withhold bargaining unit status from trainees until the successful completion of the "ITU portion" of IFR training. Because the practicum was a part of the ITU portion of the training, the result is that in the future, when trainees are involved in the practicum, they will not be employees, nor bargaining unit members.

The parties have stipulated that, while some local and one regional union representative was aware that the practicum was being used in some specialties during

the ITU portion of the training prior to February 2004, and some local and national management officials also had such knowledge, the four representatives of the parties who negotiated the Letter of Understanding dated February 20, 2004 were not aware of the existence of the practicum, and were not advised by any of the individuals who were aware of the practicum of its possible implications for the drafting of the letter of understanding. The parties do not attribute any negligence to each other in this regard, but they are agreed that the four negotiators who worked out the language of the letter of understanding did so in complete ignorance of the existence of the practicum, and the implications of delaying employee status and bargaining unit membership from the beginning of the ITU portion of training to the end of that portion of the training.

Clause 5.01 of the collective agreement relates to work of the bargaining unit. There has been a recent amendment to this provision, to be incorporated into the new collective agreement when it is finalized, in the form of paragraph 5.01(c). With that addition, the clause will read as follows:

> 5.01 **Work of the Bargaining Unit**
>
> (a) Functions that at present are performed exclusively by members of the bargaining unit will not be contracted out or assigned to members of other bargaining units.
>
> (b) Where because of operational requirements either party deems it desirable to deviate from this understanding, the parties agree to enter into discussions to consider such proposal of either party and may mutually agree to make exceptions to the foregoing.
>
> (c) Individuals whose services are engaged to perform work of the bargaining unit under the control and direction of the company will be deemed to be employees in the bargaining unit for all purposes of the collective agreement.

The issue which arises is whether non-employee trainees in the ITU portion of their training who, during the course of the practicum, perform duties which "at present are performed exclusively by members of the bargaining unit" cause a breach of clause 5.01. The answer to that question lies in the degree to which what trainees do during the practicum is similar to or identical with duties air traffic controllers-in-training perform during the OJT portion of the training; air traffic controllers-in-training are members of the bargaining unit, and are considered as operating employees. That there is some similarity between the practicum and the duties of air traffic controllers-in-training is illustrated by the practice in Vancouver and Toronto under the former training regime of changing the status of trainees from non-operating to operating at the beginning of the practicum, apparently in recognition of their performing duties of an operating nature, sufficiently similar to those performed by an air traffic controller-in-training during the OJT phase, to justify a change to operating status. The practice in Montreal and Winnipeg, however, was the opposite; there trainees remained in non-operating status during the practicum, and only became operating employees at the beginning of the OJT phase.

What air traffic controllers-in-training do is central to the work of the bargaining unit because, in essence, they do exactly what licensed air traffic controllers do, except that they do it under the supervision of, and under the licence of, the air traffic controller who is assigned to provide training. Such an assignment carries with it an on-the-job training bonus, as defined in clause 17.08:

> **17.08 On-the-Job Training Bonus**
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> When an operating controller in a control tower, terminal control unit or area control centre who is qualified to provide on-the-job training,

> is required to provide training to another controller or controller-in-training who is actively controlling air traffic, and the trainee is operating on the authority of the air traffic control licence of the trainer, the trainer shall be entitled to receive eight dollars and fifty cents ($8.50) for each hour so engaged. The duration for such on-the-job training will be in accordance with unit standards for such training.

The result of these provisions is that, to whatever extent trainees, who have not yet become members of the bargaining unit and employees of NAV CANADA, are assigned duties relating to air traffic control, they may be performing duties that are functions that are "performed exclusively by members of the bargaining unit". Therefore, to whatever extent trainees are assigned to functions that would be performed by air traffic controllers-in-training, which are identical to the duties of air traffic controllers, the possibility of a breach of clause 5.01 becomes a reasonable possibility.

Indeed, when the first trainees under the new IFR training structure based at the ITUs arrived in the ACCs for the first round of practicum training as non-employees, all of these issues rose to the surface immediately. The air traffic controllers assigned to conduct this training voiced concerns about the trainees' lack of employee or bargaining unit status, and apparently the issue of whether those assigned to this training were entitled to the on-the-job training bonus also arose. As a consequence, the employer agreed to suspend practicum training for non-employee trainees until the dispute between the parties could be resolved.

There is no dispute that the collective agreement gives the employer a fairly broad right to determine how training is to be conducted. The provision is as follows:

ARTICLE 29

TRAINING

> 29.01 NAV CANADA shall determine training requirements and the means and methods by which training shall be given and shall provide operating employees with adequate training and instruction on equipment and procedures prior to their introduction and refresher training, where appropriate.

Through the evidence of Ms. France Morier, the National Manager of IFR Training, I received a detailed briefing into how the practicum training was conducted in relation to those specialties where it was used prior to the change in the delivery of IFR training. A number of observations must be made about this evidence.

First, it is extremely difficult for any person not experienced in air traffic control functions to understand how these functions are carried out, and how training in relation to these functions takes place, without ever having seen the inside of an ACC. This creates a significant obstacle to being able to come to any definitive conclusions on the merits of the present dispute.

Second, the extent to which the practicum was a developed and integrated part of the training curriculum varied from ACC to ACC, and from specialty to specialty within the ACCs. There appears to have been some local initiative, some experimentation, and a great deal of creativity involved in setting up the practicum part of the training, and the fact that the training objectives for every single specialty are different from the objectives for all other specialties means that it is really not possible to say with any degree of generality what the content of practicum training was at the time that the parties entered into the Letter of Understanding dated February 20, 2004.

Third, the level of involvement of the trainees in activities which potentially could duplicate bargaining unit functions varied from place to place, and from stage to stage during the course of the practicum. For example, at all locations the practicum began with a period of observation on the floor of the ACC, where the trainees simply watched what air traffic controllers did on the job, presumably with input from their instructors as to what to watch for, and how to understand what they were seeing. It may be, although the evidence is not perfectly clear, that this observation stage is as far the practicum ever went in some locations, particularly Winnipeg.

At a level of involvement beyond observation, for some specialties trainees were assigned during the practicum to deal with the administrative functions of air traffic controllers. They would deal with the various notices, schedules, log books, forms, notices and bulletins which comprise the day-to-day paper load of the air traffic controller function.

At many locations and for many specialties, however, the practicum training went farther than this. A fairly common assignment, often limited by such phrases as "in situations of light traffic and to a limited degree", "in situations chosen by the OJI (On-the-Job Instructor)" or similar expressions, was to assign trainees to perform at least some of the duties of the data position, one of the jobs normally filled by a licensed air traffic controller. In this position, using a data board and slips representing the flight movements within the specialty air space, planning for control of aircraft movements, coordination of movements of aircraft through the air space, and the maintenance of proper separation between aircraft is carried out. Many of the specialties had developed practicum training in which the trainees performed a substantial amount of

the duties of the data position, albeit under the supervision of an instructor. In some specialties, the training documents specify that the trainee is not to be involved in the separation of aircraft or the resolution of conflicts, but even that limitation was not universally applied.

For example, in the North specialty in Montreal, in the second module of the practicum, the trainee is to be guided "in the limited application of non-radar separation standards". This is to take place "at a suitable time and in situations chosen by the OJI". The trainee is allowed only to observe in circumstances where the traffic complexity and/or density prevents the trainee from performing these tasks himself or herself, but this limitation makes it clear that there will be times when the trainee does apply the separation standards.

Similarly, in some of the specialties, trainees apparently engaged in communication with aircraft by radio, and with other agencies by telephone, communicating operational data.

I did not understand the union to be objecting to the observation aspects of the practicum training, nor to the purely administrative aspects of the duties of an air traffic controller. As I understand it, the objection is to the performance of any operating duties, in any circumstances, by non-employees. Therefore, the performance of even a limited set of the functions of the data position, or the performance of communication functions involving live operational data, are objected to by the union as the performance of bargaining unit duties. To assess the merits of this objection, an analysis of the collective agreement, the applicable statutory and regulatory provisions, and the arbitral jurisprudence will be necessary.

The Union observes that the collective agreement was renewed, in the form of a Memorandum of Agreement, and ratified during August 2005. At that time, the Letter of Understanding of February 20, 2004, which will become Letter of Understanding 2005-02 pending the outcome of this arbitration, had been negotiated for much more than a year. Similarly, the Memorandum of Agreement relating to Policy Grievances 2003-168 and 2003-868, which is the source of the new language in paragraph 5.01(c), was signed on December 3, 2004, also well before the conclusion of the collective agreement. Finally, the parties stipulated that the issue of non-employee trainees performing operational duties of some kind during the practicum first arose in May 2005. I shall return below to the significance, if any, of the chronology of these events.

To return to the issue before me, the parties have posed the question:

> "Does Employer have the right to assign students (non-employees) training duties in an operating position under the authority of licensed Air Traffic Controllers?"

As I understand it, the parties want to know whether the Employer has such a right under the new collective agreement as ratified in August 2005. That collective agreement is not yet in final form, but all of the elements of the agreement which might affect this particular issue are not now in dispute between the parties.

The Employer observes, and I accept, that there are arbitration awards under other collective agreements which have held that the assignment of bargaining unit duties to students, as a part of a practical training program, does not make those students employees of the employer: *Hospital Employees Union, Local 180 and Cranbrook and District Hospital and Selkirk College,* British Columbia Labour Relations Board Decision

No, 128/74, September 20, 1974 (Weiler). There is also authority that assignment of bargaining unit work to summer students or cooperative work placement students does not offend against a bargaining unit work clause, not unlike the clause in the present collective agreement: *Re Hamilton Health Sciences and Canadian Union of Public Employees, Local 4800,* December 17, 2004 (Surdykowski). There are also decisions of various authorities under employment standards legislation which deal with the application of statutory or regulatory provisions which determine when an employment relationship exists between a student or trainee and an employer, but these are specific to statutory or regulatory definitions which do not apply in the circumstances of the present case.

At first impression, the assignment of some "training duties in an operating position" to a non-employee student would not appear to offend against Article 5. Even if those training duties are "functions that at present are performed exclusively by members of the bargaining unit", the functions are not being contracted out as prohibited by paragraph 5.01(a), in the sense that they are to be performed by outside contractors not in the bargaining unit, and they are not being assigned to members of other bargaining units.

There does not appear to be a violation of the new paragraph 5.01(c) either, since that really deals with the situation of "contracting in", where contractors come in to the employer's premises to work, as seems to be suggested by the expression "under the control and direction of the company". Here, the trainees cannot be said to be "engaged to perform work", since their presence on the operations floor is entirely peripheral to the performance of work, even though they may, from time to time, under

close direction and supervision, carry out a task that would normally be performed by a bargaining unit member.

Another way that arbitrators have sometimes looked at bargaining unit work clauses is through a purposive analysis. The purpose of such clauses is generally thought to be to prevent loss of employment opportunities, including overtime opportunities, for bargaining unit members. When this analysis is applied in the present case, it will be clear that there is no diminution in the numbers in the bargaining unit, no reduction in opportunities for either regular or overtime work, no displacement of bargaining unit members, and no replacement of bargaining unit members absent on leave resulting from assignment of tasks to the trainees. The introduction of the trainees to the operations floor does not affect in any way the numerical integrity of the bargaining unit or the opportunities for employment of its members.

There may be, of course, some impact on what might be called the professional integrity of the bargaining unit, the notion that only licensed air traffic controllers should ever communicate in an operational sense with aircraft, or be involved with the equipment that is used for the control of live air traffic. This is clearly an important consideration, although it is not clear that the language of Article 5 is designed to protect that aspect of bargaining unit integrity. The primary statement of this professional integrity is found in the Canadian Aviation Regulations, in section 402.04, which is as follows:

> **402.04** (1) No person shall act as an air traffic controller or exercise the privileges of an air traffic controller licence unless that person holds and can produce while so acting and while exercising such privileges:
>
> *(a)* an air traffic controller licence endorsed with a rating appropriate to the privileges being exercised and with the appropriate operational location; and

> *(b)* a valid Category 1 or 2 medical certificate.
>
> (2) Paragraph (1)*(a)* does not apply to a person who, while under supervision, acts as an air traffic controller or exercises the privileges of an air traffic controller licence when undergoing
> *(a)* instruction, training or testing in respect of an air traffic controller licence; or
> *(b)* ATC unit familiarization in the course of the person's employment.

What this clause requires is that no one can act as an air traffic controller or exercise the privilege of an air traffic control licence except those who hold such a licence and can produce it, along with a valid medical certificate or those who are exempted under paragraph (2). Paragraph (2)*(a)* applies here, since the trainees would be engaged in instruction, training or testing in respect of an air traffic controller licence. Although the union suggested that the words "in the course of the person's employment" in paragraph (2)*(b)* should be read as distributive over both paragraphs *(a)* and *(b)*, in my view, the placement of the disjunctive "or" between the two clauses makes it clear that there is no requirement that instruction, training or testing be in the course of employment.

In fact, the essence of the protection of the professional integrity interest is that neither live air traffic control, nor instruction, training or testing can take place except in the presence and under the supervision of a licensed air traffic controller. In that sense, therefore, the trainees can never be performing air traffic control duties except as the direct agent of the air traffic controller whose licence validates both the operational and the training aspects of what is taking place.

In this regard, the Union also referred me to *Hudgin v. Attorney General of Canada (Minister of Transport),* [2002] F.C.A. 102, a decision of the Federal Court of

Appeal, which overturned a refusal by the Federal Court, Trial Division to grant an application for judicial review of a decision of an Appeal Panel of the Civil Aviation Tribunal.

In that case, Mr. Hudgin had been the OJI supervising an air traffic controller-in-training who had given an instruction contrary to the Separation Standards, an offense under sub-section 801.01(2) of the Canadian Aviation Regulations.

The Civil Aviation Tribunal had found Mr. Hudgin, not the controller-in-training, guilty of the offense, and had imposed a fine. The Court of Appeal found that Mr. Hudgin's conviction was contrary to law, since he had been charged with issuing an instruction which, in fact, he did not issue. The essence of the court's decision is found in paragraph 4:

> In my opinion, these arguments are not responsive to the Appellant's basic point: he was charged with issuing an improper instruction when the instruction was issued, not by him, but by the trainee. There is nothing in the Regulation, or in any more general legal principle, whereby the action of one employee can be deemed to be that of another.

As I understand the Union's argument, it relies on the *Hudgin* case for the proposition that controllers-in-training, or by extension non-employee student trainees who issue instructions to aircraft, are themselves performing the function, and cannot be said to be performing them on behalf of the OJI controller. The Union abstracts from this reading of the case that the trainee who issues any instruction to an aircraft is performing bargaining unit work.

With respect, I do not think that the *Hudgin* case can bear all of the freight that the Union loads on it. It is a very narrow decision based on the quasi-criminal offense created by the Canadian Aviation Regulations, and a finding that, not having

committed the act which the offense specifies, the OJI controller can not be charged with that offense. There is recorded in the decision an admission by Mr. Hudgin that he was "responsible" for the trainee's actions and was under a duty to monitor them, and there are a number of statements to the effect that it is surprising that the Canadian Aviation Regulations do not place duties of responsibility and due care and attention on OJI controllers in respect of the conduct of trainees. Except in the very narrow quasi-criminal sense, therefore, the court does not in any way detract from the overall responsibility of the OJI controller for the actions of anyone, and I use that word advisedly, who performs air traffic duties under the authority of the OJI controller's licence.

What makes this case, and this collective agreement, different from the general run of the jurisprudence on bargaining unit work provisions is the existence of the separate classification of Air Traffic Controller-in-Training. Were it only a matter of considering whether non-employee trainees on the practicum would be performing the duties of an air traffic controller, I would have no hesitation, based on the reasoning set out above, in finding that they would not. The existence of the Air Traffic Controller-in-Training classification, however, requires further scrutiny. Air traffic controllers-in-training who are on the OJT part of the training program are employees, are covered by the collective agreement, but exercise whatever air traffic control functions they are permitted or assigned to exercise only under the licence of the OJI controller responsible for them. During the OJT portion of the training, the controllers-in-training are performing specific duties, beginning with a part of the air traffic controller job, and gradually working up to performing the entire job as a requirement for qualification. At the early stages, at least, what they do is indistinguishable from what the non-employees

would do during the practicum, although they would be expected to advance steadily to a level far beyond what the non-employee trainees are likely to be permitted to do during the practicum. The question is therefore whether that difference between this case and the general run of the jurisprudence makes a difference to the outcome of the dispute before me.

The Employer's position is that the trainees will never be permitted to perform in the practicum anything like the range of duties or tasks that are performed by the controllers-in-training during the OJT phase. The practicum is meant to be an introduction to operations, and is limited both in time and in the complexity of the duties to be assigned. The parties have agreed that the ITU portion of the training will take place before the Certificate of qualification is issued and accession to bargaining unit membership takes place, and the practicum has always been a part of the ITU training, and took place before the beginning of the OJT training.

The Union, on the other hand, argues that the duties of a controller or a controller-in-training are indivisible and that the assignment of any one duty to someone who is not in the bargaining unit is a breach of Article 5. Thus, the assignment of one of the duties of a controller-in-training to a non-employee trainee is immediately a breach of the collective agreement.

While I am able to see the force in this argument, given the existence of the controller-in-training classification, I have come to the conclusion that there must exist a range of practical functions which can be performed by a non-employee trainee on the operations floor without offending the essence of Article 5. The arbitral jurisprudence has always focused on the performance of core duties rather than peripheral functions.

The core duties of an air traffic controller are not holding a microphone and talking into it, or adding or removing slips from a data board, but making the decisions that ensure that the instructions that are spoken into the microphone are correct and in accordance with the Separations Standards, and that the content of the slips placed on the data board or removed from it are correct, and that they are correctly placed or removed in accordance with Separations Standards. In short, as long as the trainees are not making decisions independently, which is something that controllers-in-training do begin to undertake as their experience progresses, they are not performing the core duties of an air traffic controller or a controller-in-training. Merely carrying out the manipulations which a controller or a controller-in-training is required to do does not constitute anything more than imitating a controller, rather than performing a controller's functions, as long as the trainee is not "actively controlling air traffic", to use the words of clause 17.08.

The difficulty with this conclusion is that there is scope for considerable ongoing disagreement between the parties as to the extent to which any particular assignment of training duties to a non-employee trainee crosses the line between what trainees may do, and what controllers-in-training may do. I am simply not in a position to assist the parties in drawing that line. The extent of my knowledge of the functions performed by controllers is entirely theoretical, having been gleaned from this and other arbitration hearings, and never from performance or even observation of the work of an operational controller. The parties themselves will have to engage this issue, or the likelihood is that they will be involved in ongoing disputes about the assignment of training duties to non-employee trainees.

What is clear is that the non-employee trainees cannot be assigned duties of such complexity and independence that they become, in all practical terms, controllers-in-training. The employer says that they will not, because their assignment to such functions will be limited both in time and in scope so that what they do is never as much in quantity or quality as what controllers-in-training do. As I understand the training materials that were presented in evidence, in general that level of restriction appears to have been achieved, although there are a few cases where the training manuals seem to suggest that the trainees would be expected to make independent decisions on separation or conflict resolution. Without attempting to prejudge how much independence would violate the collective agreement, it seems to me that there could be circumstances where, applying a broad interpretation of the training manuals, the non-employee trainees might cross the line into performing the functions of a controller-in-training.

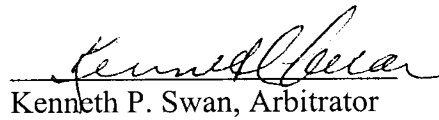
Obviously, the parties are well placed to deal with this possibility, much better placed than an arbitrator. The training manuals are developed by members of the bargaining unit, the instruction in the ITU phase is carried out by members of the bargaining unit, and the Employer's training department oversees all of this. It is in the interest of the parties to find a way to draw the line between the kind of practical involvement during the ITU phase that does not cross the line into the performance of the duties of a controller-in-training, and that which does cross that line.

The answer to the question posed by the parties, therefore, is that yes, the Employer does have the right to assign students (non-employees) training duties in an operating position under the authority of licenced air traffic controllers, provided that those duties are limited in time and scope and complexity so that the students do not

begin to perform the duties, which are also training duties, of an air traffic controller-in-training.

I remit to the parties the task of defining the scope of the permissible assignment of duties. Should there be any further assistance I can provide, I shall retain jurisdiction over this matter to whatever extent is necessary to do so.

DATED AT TORONTO, ONTARIO this 14th day of September, 2006.



Kenneth P. Swan, Arbitrator