In the Matter of an Arbitration

Between

Nav Canada [employer]

And

Canadian Air Traffic Control Association/Unifor Local 5454 [CATCA or union]

And

In the Matter of Max Hours

Before: M. Brian Keller, arbitrator

Amanda Sarginson, for the employer

Louis Gottheil, for CATCA

Hearing in Ottawa, April 26, 2018

Award

The parties filed a statement of agreed facts which, they agree, both state the two issues in dispute and form the factual background by which this matter is to be determined.

The Statement of Agreed Facts reads as follows:

Introduction and Issues

1. This arbitration concerns the interpretation of the rules pertaining to the calculation of the legally permissible number of maximum hours of work for operational employees of NAV CANADA represented by CATCA, during the averaging period specified in the parties' collective agreement.
2. The parties have had an exchange and agree on the following two distinct issues for disposition:
    a. When administering and applying the terms of the *Canada Labour Code,* and calculating permissible hours of work, how should hours taken as time off in lieu of overtime (TOIL) be treated?
    b. The second issue concerns NAV CANADA'S ability, without an employee's consent, to place an employee on a paid administrative leave. A follow-up issue concerns the treatment of the hours that the operational employee is placed on paid administrative leave and how those hours affect the maximum permissible hours under the *Canada Labour Code.*

Background

3. The grievance underlying the arbitration arises from and refers to incidents in East Specialty and Vancouver Terminal which occurred during the averaging period ending Sunday, August 13, 2017.
4. These incidents, described below provide the factual context for the disposition of the legal dispute between the parties, which encompasses, in part a difference over the interpretation of Section 6 of the *Canada Labour Standards Regulations* CRC c. 986.
5. CATCA, (or "The Union) and NAV CANADA are bound by a collective agreement made effective March 31, 2017.
6. Under the agreement, operational employees have a 36-hour work week averaged over a 56-day period. (Article 16.01)
7. The averaging period normally ends on a Sunday at 23:59h and begins on the following Monday at 00:01h.
8. At the times material to this dispute, a regular shift had a scheduled duration of 8.47 hours or 8 hours and 28 minutes.
9. Time worked in excess or outside of an employee's scheduled hours is considered to be overtime. (Article 20.01)
10. All employees are paid for overtime worked by them at two times their straight time hourly rate.

    Employees at their request, shall be granted time off in lieu of overtime at the appropriate overtime rate. The employee and his or her supervisor shall attempt to reach mutual agreement with respect to the time at which the employee shall take such lieu time off. However, failing such agreement, such lieu time will be accumulated. (Article 20.02(a))

11. As per Letter of Understanding 2017-02, for calendar years 2017 and 2018 employees who work overtime between June 15 and September 15, and who choose to have such hours paid out, are compensated at 2.25 times their straight-time hourly rate.
12. At all times material to this dispute, operating employees have principally, though not exclusively worked two kinds of shift cycles that flow through a 56-day averaging period: (a) a 17/11 shift cycle that conforms to Article 16.02(a) or (b) a 34/22 shift cycle consisting of days of rest as defined by Article 16.02 (b).
13. Shift schedules are posted at least 15 days in advance of the commencement of the shift cycle, to provide an operating employee with reasonable notice as to the shift he or she will be working. (Article 16.04 (a))
14. The shift as indicated in this schedule shall be the employee's scheduled hours of work. (Article 16.04 (a))
15. NAV CANADA operates and administers a scheduling system known as the ESS, the Employee Scheduling System.
16. Many if not all operating employees have access to the system including access to shifts and hours worked and to be worked during the averaging period.
17. The ESS is programmed to count all hours for which an employee is paid as hours worked. For example, if an employee is paid 8.47 vacation hours the system counts 8.47 hours of work.
18. Each region plays a role in scheduling shifts through the work and auspices of a shift optimization office.
19. In some units across the country there are staffing shortages that can only be addressed through the use of overtime without placing restrictions on air traffic.

20. NAV CANADA is in the process of taking a number of initiatives, i.e. hiring resources to support training, buying new simulators, increasing the number of trainees, in order to meet a corporate objective to be fully staffed by 2021.

YVR Example

21. Dan Joanis is an operational air traffic controller. Employed in the Vancouver ACC East Specialty.
22. Mr. Joanis was scheduled to work a 6:00h-14:30h shift on Saturday, August 12, 2017. He attended at work at the specified start time, 6:00h.
23. Mr. Joanis was also scheduled to work a regular shift commencing at 22:30h that same day Saturday, August 12, 2017, and ending the next day Sunday, August 13, 2017 at 6:58h, thus providing Mr. Joanis with a minimum 8-hour shift change rest period between the first shift ending at 14:30h.
24. The relevant averaging period with respect to Mr. Joanis at this time terminated on Sunday August 13 at 23:59h.
25. It became apparent on August 12, 2017, that NAV CANADA faced a shortage of staff for one or more operating positions in the East Specialty due to sick calls with respect to the evening shift of Saturday August 12, 2017. The shortage of personnel was particularly noticeable for the time of 21:00h to 22:30h, a busy period of traffic.
26. On Saturday August 12, 2017 a few hours after his arrival for his regularly scheduled shift, Mr. Joanis was asked if he would leave his regular shift and go home early. He agreed to do so at 11:00h. He was also asked, by NAV CANADA, and he agreed, to return to work that same day at 19:00h, three and a half hours before the regular start of his evening shift at 22:30h. He departed the workplace at 11:00h on request of NAV CANADA, with his consent, because there was a greater need for staff coverage at 19:00h due to the sick calls.

27. NAV CANADA considered Mr. Joanis' time between 11:00h and the scheduled end of his regular day shit at 14:30h as paid administrative leave. Mr. Joanis was paid his regular rate of wages for the period he was sent home, namely 11:00h to 14:30h though he did not perform any "regular" work.
28. Mr. Joanis was paid at an overtime rate of pay for the hours he worked commencing at 19:00h that were added to his regularly scheduled shift that would have otherwise started at 22:30h.
29. Mr. Joanis completed his shifts as set out above.
30. NAV CANADA's use of administrative leave with pay is for the following business purposes:
    a. To ensure adequate coverage for traffic, in NAV Canada's opinion; and
    b. To not exceed maximum hours of work, in NAV CANADA's opinion.
31. Jesse South is an operational air traffic controller. Employed in the Vancouver Terminal Specialty.
32. Mr. South's hours of work during the averaging period are outlined in NAV CANADA's book of documents.
33. NAV CANADA initially communicated to the Union that Mr. South had exceeded the maximum hours of work by 9.37 hours and that Mr. Joanis exceeded the maximum hours of work by 3.37 hours.
34. This was later revised by NAV CANADA who informed the Union that only Mr. South had exceeded the maximum hours of work.
35. Sylvain Guindon, then Manager of Labour Relations, reviewed the hours calculated in the ESS for Dan Joanis and Jesse South and reconciled vacation, sick, and administrative leave to reduce the hours of work, in his opinion, under the terms of Section 6(7) of the *Canada Labour Code* regulations. Having done this, Jesse South still exceeded the maximum hours of work under the CLC.

36. This situation caused an exchange between Ms. Cameron of NAV CANADA and Mr. Duffey of CATCA with respect to, among other things how hours of work are calculated under the Canada Labour Code for the purposes of determining maximum permissible hours of work.
37. As a matter of practice in Vancouver ACC, and in CATCA's understanding across the country, administrative leave hours have been counted towards CLC maximum hours of work.
38. If administrative leave with pay had been counted for Dan Joanis he would have exceeded CLC maximum hours.
39. On August 12, 2017 there were operational employees other than Dan Joanis with available hours or space under CLC rules who could have been directed to perform work deemed by NAV CANADA.
40. On August 11, 2017 there were operational employees other than Jesse South with available hours or space under the CLC to perform the hours needed.
41. Despite paragraphs 39 and 40, other options were explored by NAV CANADA for overtime coverage with other employees.

Communications Between the Parties

42. In a memo dated May 23, 2012 from Phil Valois, Human Resources Manager of NAV to Greg Myles then President of CATCA. Mr. Valois advised Mr. Myles that "*I will notify my LERMS that for the time being we will not change our practice with regard to TOIL. i.e. we will not use TOIL days observed to increase a controller's maximum available hours of work".*

    As a result of the present grievance, NAV CANADA has undertaken not to change this practice for the remainder of the term of the current collective agreement.
43. On August 15, 2017, Ms. Cameron forwarded Mr. Duffey a NAV CANADA memo which set out the company's view of how to calculate hours of work during an averaging period for the

purposes of the *Canada Labour Code* standards and the determination of maximum permissible hours of work. That memo is found at Tab 3 of the Union's Book of Documents. One part of NAV CANADA's memo concerned NAV CANADA's proposed treatment of **Time Off in lieu of Overtime / Compensatory Time Off** for the purposes of calculating maximum hours of work under the Canada Labour Code rules. NAV CANADA's position expressed in the memo was that *Time Off in lieu of Overtime ("TOIL") does not get counted towards the standard or maximum hours of work since it is a premium in lieu of overtime payment. The hours have already been counted as overtime hours.*

CATCA expressed its disagreement with this view and treatment of TOIL hours.

44. On September 12, 2017 NAV CANADA wrote the office of the Regional Director of HRSDC about the circumstances of the excess of hours worked by Jesse South. The letter from NAV CANADA to the offices of the HRSDC is found at Tab 5 of the Union' Book of Documents.
45. In turn, CATCA wrote the office of the HRSDC to submit that there have been other incidents of operational employees performing hours or work more than the maximum standards set out by the Canada Labour Code.
46. Once it was clear that NAV CANADA and CATCA could not come to a consensus regarding the proper method of counting hours of work for the purposes of determining maximum permissible hours of work under the Canada Labour Code, the Union filed the present grievance.

As is clear from the statement of agreed facts, the issue revolves around a determination of the meaning of a subparagraph 7, and in particular subparagraph [7] [e] of Section 6 of the Canada Labour Standards Regulations.

That provision reads as follows:

[7] Subject to subsection [8], the standard hours of work and the maximum hours of work calculated in accordance with subsection [6] shall be reduced by eight hours for every day during the averaging. That, for an employee, is a day

[a] of bereavement leave with pay;

[b] of annual vacation with pay;

[c] of leave of absence with pay under subsection 205 [2] of the Act;

[d] of general or other holiday with pay; or

[e] that is normally a working day in respect of which the employee is not entitled to regular wages.

I will deal with each of the two issues in dispute independent of the other.

Time off in Lieu [TOIL)

Pursuant to article 20 of the collective agreement, as is indicated in the statement of agreed facts, an employee working overtime has the option of being paid for the overtime, or accepting time off in lieu of pay for the overtime worked. The specific issue is how the hours that are taken as time off in lieu are to be treated under Section 6 of the Canada Labour Standards Regulations.

The union submits that in interpreting the provision in dispute, the purposes and objectives of the provision needs to be considered. That is, what must be kept in mind is that the purpose of Section 6, and related provisions, is to protect employees from overwork. It is submitted that, where there are two possible interpretations, the correct one must be one that extends to statutory protections as far as reasonably possible. The union acknowledges that the regulations provide for exceptions but submits that those exceptions must be strictly construed.

The union submits that the purpose of Section 6 [7] is to credit the employee for the period not worked while not requiring them to make up the hours to reach the maximum allowed. To put it another way, it is submitted that the employee should not pay an adverse price for being absent from work during the averaging period where the preconditions are met.

The union also submits that the pay of an employee on the day in which they take time off in lieu is not regular wages but rather it is overtime pay. It acknowledges that if the employee did not take time off in lieu on that day it would be a normal working day.

It is further submitted by the union that its interpretation is to be preferred as it protects employees from overwork during the rest of the averaging period. To accept the employer's interpretation would exacerbate the problem of employees working more than the allowable hours under the Code. That is, if time off in lieu does not count towards the hours in the averaging period, employees would end up working greater hours than what is permitted.

It is further submitted that the Code distinguishes between wages and regular wages. The union argues that the pay for time off in lieu is not regular wages, but rather should be considered as overtime wages or payment.

In support of its arguments, the union relies on a number of authorities. In the matter of *NAV Canada and Canadian Air Traffic Control Association, 94 L.A.C. (4th) 75 (Hope),* the arbitrator determined that overtime is a premium as opposed to regular pay.

In the matter of *Raillink Canada Limited, McKenzie Northern Railway Division and Teamsters Canada Rail Conference [Stenhouse grievance], [2005] C.L.A.D. No. 483 (Moreau),* the arbitrator states at page 4 of his decision:

"It is clear from Regulation 17 and from a reading of S. 192 [2] of the Code that Parliament never intended to include overtime when calculating an employee's "regular wages for his normal hours of work".

Thus, the union argues that the time taken off as time off in lieu attracts not regular wages but rather wages for the overtime that was worked.

The employer acknowledges the provision that is in dispute is what separates the parties in this matter. It submits that there are no authorities that have considered the particular provision at issue in this case and, therefore, it is a matter of first instance. It further acknowledges that it has, until recently, interpreted the provision in the matter put forward in this arbitration by the union.

It says that it has difficulty meeting its mandate as a result of staffing issues but expects that those difficulties will be addressed by 2021.

The essence of the argument on behalf of the employer is that the hours should not count towards the maximum hours as the rate of pay, during time off in lieu, is regular wages and, further, the employee is receiving those regular wages for time not worked. It submits that as the employee has not performed any work there should be no decrease in the maximum hours.

The employer submits that there is no provision in the collective agreement that deals with this matter and that it has to be determined on the basis of an interpretation of the Code.

The parties have agreed that, notwithstanding any decision I make in this matter, the current practice will continue until at least the expiry of the collective agreement on March 31, 2019.

This is, frankly, not an easy matter to decide. The specific provision of the Code to be interpreted is, in my view, less than clear. I agree with the union that the interpretation made must be considered in light of the objectives of Section 6 in particular and, more generally in light of the objectives of that Part of the Code. I believe it is fair to say that the general and specific purpose is to limit the maximum hours of work of employees for genuine health and policy considerations.

As indicated above, an employee who works overtime has a choice of compensation. The employee can choose to be monetarily compensated for the hours worked at the applicable overtime rate. There is, additionally, a second method of compensation. The employee can be compensated for the hours that were worked by being allowed to take time off in hours, in accordance with the applicable provisions of the collective agreement. The time off that is taken is time off in lieu of monetary compensation. It is, effectively, deferred compensation for overtime work already done.

In my view, the characterization of wages, that is, whether they are overtime wages or regular wages, is not fully determinative of the issue. Rather, what is particularly determinative is that the parties have agreed to two methods of compensation for overtime that is worked. Both methods of compensation are designed to recompense the employee who worked the overtime. Both are compensation for the overtime that was worked and, therefore, should attract the same result in terms of how the hours are counted.

What has to be looked at is the intent of the time off in lieu. The purpose is to place the employee who worked the overtime, but chose not to be compensated for it then, in the same position as an employee who worked the overtime but chose to be compensated for it at the time it was worked.

I do not believe, in looking at the applicable provision of the Code that has to be interpreted, that this specific issue was necessarily contemplated. The normal method of compensating for overtime is to pay the employee for the time worked. A time off in lieu scheme is clearly not the norm. I am satisfied that one has to interpret the provision so as to provide to the parties a result that as closely as possible gives effect both to the words and to the intent of the provision.

Employees who choose monetary compensation only have the hours actually worked counted toward their maximum hours. Employees who choose time off in lieu would reap a benefit greater than employees who work the overtime by having more hours counted toward their maximum hours. In other words, what results are two regimes to calculate hours even though the actual number of hours worked is exactly the same. That may not be an absurd result, as shown by how the parties have

governed themselves until now, but it is certainly an illogical one. Further, the result urged by the employer can not be said to offend the purpose of the Code as it does nothing more than to put employees who choose time off in lieu in exactly the same position as those employees who choose payment for the overtime worked. Both would be “credited” the same number of hours.

In the instant case, I find that the provision should be interpreted so that there is no difference in the hours counted regardless of the method of compensation chosen by the employee. That is, regardless of whether the employee chooses monetary compensation or compensation by way of time off, the hours to be counted should be the hours that would be counted had the employee chosen monetary compensation.

Paid Administrative Leave

The union argues that there is nothing in the collective agreement which allows the employer to place an employee on administrative leave. It acknowledges that, in the specific case giving rise to this question, the employee agreed to the request of the employer. It submits that there are there limits to the employer’s authority to place an employee on unpaid administrative leave when the employee does not agree to the request of the employer.

For its part, the employer argues that it can place an employee on unpaid administrative leave pursuant to its residual authority in the management rights clause. In particular, it refers to its right to "plan direct and control operations" found at article 4.01 [a] of the collective agreement, and its right to "direct the working forces including the right to decide on the number of employees, to organize and assign work", found at article 4.01 [b].

In dealing, first, with the union's argument that the actions of the employer would constitute a lay off, I find that that argument cannot be sustained. I make that finding for two principal reasons. The first is that the more common understanding of what a lay off is appears to be settled law by arbitrators and the courts.

The employer referred me to the decision of "Communication, Energy and Paperworkers Union, local 333 and ICS Courier, 2011 CarswellOnt 9310, [Jesin]". At paragraph 21, after a review of relevant authorities, the following is written by the arbitrator:

"What is clear from these cases is that, absent a contrary provision in the collective agreement, an employee whose work assignment has been changed – by reclassification or otherwise – and who has not suffered a reduction in earnings, cannot be said to have been laid off by virtue of the elimination of their original assignment."

Although I was referred to a number of contrary authorities by the union, they are mostly older decisions and it is my view that they are, at this point, a minority view and not generally followed.

I have also considered the layoff provisions in the collective agreement. In my view, a purposive approach must be taken in analysing those provisions in order to determine whether what the employer has done in the instant case would constitute a lay off pursuant to those provisions. I note that there is an elaborate process to be followed and the thrust of the article does not contemplate, in my view, the situation at issue here.

The union also makes reference to the various time off, or leave, provisions in the collective agreement. It makes the point that in virtually all cases they are employee and not employer driven.

It is my determination, that there is nothing in the collective agreement which deals specifically with the question of administrative leave. I do not accept the proposition of the union that, for the reasons expressed above, it is a lay off. I am not of the view that because other types of leave or time off are employee driven, that is an impediment to the employer placing an employee on administrative leave.

Absent an express provision to the contrary, I find that the employer has residual rights under article 4 of the collective agreement to place an employee on administrative leave. It was acknowledged by the parties that this right would, of course, be circumscribed by the obligation of the employer not to act in

a discriminatory or arbitrary manner, to act in good faith, and to make its decision for valid business reasons.

The subsidiary question is whether or not the hours paid to an employee when they are sent home on administrative leave would count towards max hours. In my view they would not. I make reference to the Canada Labour Standards Regulations quoted above at section 6 [7]. In this particular situation, it is clearly not a bereavement leave with pay, nor a vacation with pay, a leave of absence with pay under section 205 [2] of the act, or a general or other holiday with pay. The question is whether it fits within subsection [e]. In the particular situation at issue, it was, for the employee, a normal working day. The employee was entitled to regular wages for the period he was sent home on administrative leave.

Accordingly, the situation is not one as defined in the regulations which reads:

"Normally a working day in respect of which the employee is <u>not</u> entitled to regular wages". (emphasis added)

It was, in the in the case before me, normally a working day for the employee. On that day, according to the Statement of Agreed Facts, when he was sent home on administrative leave, he was entitled to regular wages, and was paid his regular wages.

Consequently, I do not find that any of the preconditions to reduce max hours at article 6 [7] have been met in this particular situation.

I remain seized as required.

Ottawa, this 26th day of June, 2018