IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(The Employer)

and

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION, CATCA/UNIFOR LOCAL 5454

(The Union)

AND IN THE MATTER OF A GRIEVANCE RELATING TO DENIAL OF CARE AND NURTURING LEAVE, CLAUSE 26.09

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer:

Amanda Sarginson, Senior Legal Counsel
Sheri King, Director, Labour Relations
Wayne Nyman, General Manager, Moncton FIR
Bax Vokey, MACCO, Moncton FIR
Dustin Abbott, Labour Relations Researcher

For the Union:

Abe Rosner, Labour Relations Consultant
Grant Boland, Labour Relations Advisor
Peter Duffey, President
Doug Best, Executive Vice-President
Ian Thomson, Regional Vice-President, Atlantic

AWARD

A hearing in this matter was held in Ottawa, Ontario on July 11 and 12, 2018. 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 matter at issue between them.

This arbitration results from a grievance filed by the Union on May 22, 2018 at Step 2 of the grievance procedure, and processed quickly to arbitration, since it relates to the denial of leaves intended to begin on August 1, 2018. At the request of the parties, this award has been expedited as well.

The grievance relates to requests by two Air Traffic Controllers in the High Level Specialty ("High") of Moncton Area Control Centre ("ACC"), part of Moncton Flight Information Region ("FIR") located in Moncton, New Brunswick. Moncton High controls movements above 29,000 feet, including both outbound and inbound trans-Atlantic flights between North American and Europe.

Both employees requested leaves for "the care and nurturing of pre-school age children" under paragraph 2) of clause 26.09 of the collective agreement. Both leaves were to begin on August 1, 2018, and although the end dates were slightly different, were for about one month's duration. It appears that both leaves were in respect of children about to begin school this autumn.

After somewhat protracted consideration, the reasons for which will appear below, management denied the leaves on the basis of "operational requirements". The grievance followed.

There is some context in relation to the bargaining history of the provision, which was referred to in argument and relied on by the Union. A provision for care and nurturing leave has been in collective agreements between these parties since before the creation of the Employer to operate the civilian air traffic control system formerly operated by a government department. Prior to the collective agreement effective from April 1, 2013 to March 31, 2016, however, there were no special provisions for leaves during the summer period under the care and nurturing provision. Any leave for this purpose, at any time of year, was at the option of the employee concerned, and was not subject to discretionary denial for any reason by management.

During the negotiation for that agreement, the Employer sought changes to the process of approval of care and nurturing leave during the summer period, defined as June 15 to September 15. The disputed matters which could not be agreed between the parties, including this Employer initiative, were determined by a board of arbitration established by the parties to resolve such issues without stoppage of work. The board of arbitration was chaired by arbitrator Michel Picher, and its award, dated April 8, 2013, sets out both the nature of the dispute and its resolution:

> The Company has asked for some relief in respect of the administration of care and nurturing leave. Care and nurturing leave is unpaid leave granted to the parent of any child or children of preschool age, to allow that employee to devote a period of time dedicated to the care and attention of a young child or children. The Company's concern is that more often than not care and nurturing leave is taken, as a matter of the employee's discretion, during the summer period when the workplace complement is already reduced by reason of scheduled annual leaves or vacation periods. NAV CANADA's representatives further note that traffic is at its highest during the summer months, the period during which it requires the highest number of shifts/days to deliver the necessary service. That, it submits, is compounded by the lowest availability of staff being experienced in the summer period, a problem which it stresses is to some degree exacerbated by employees who exercise their right to take

maternity/parental leave or other types of leave. According to the materials provided by the Company, in the ACCs in financial year 2012 care and nurturing constituted 19 percent of all leaves without pay taken by employees, while in towers, for the same period, care and nurturing accounted for 13 percent of unpaid leaves, all of these causing considerable hardship on the ability to schedule normal vacation leave.

To be sure there are conditions and limitations attaching to care and nurturing leave. That form of leave must be taken for a minimum of nine consecutive weeks, and only after a ten week notice period before the commencement of the leave. Additionally, an individual employee is entitled to no more than five years of care and nurturing leave over the period of his or her career.

Having heard the parties and considered the merits of the issue, we are satisfied that there is scope for some adjustment in the provisions respecting access to care and nurturing leave, particularly during the critical summer period. We therefore direct that the collective agreement be amended to provide that if an employee requests to take a period of care and nurturing leave which is for a duration of eighteen (18) [weeks] or less and falls in whole or in part within the period between June 15 and September 15, the request for such leave must fall within a notice period of between March 1 and March 15, it being understood that notification of approvals shall be made within a reasonable time thereafter. Care and nurturing leave may be declined where operational requirements do not allow it. However, in the event that the Company invokes operations requirements, it shall only be after a meaningful consultation between the Union's local representative, Union RVP and the General Manager of each FIR. Additionally, the collective agreement shall be amended to reflect that in the event of a care and nurturing leave for a period of eighteen weeks or less, such leave period must end on July 31 or begin on August 1.

This award was reduced to contractual language by the parties, so that the current provision is as follows:

26.09 **Leave without Pay for the Care and Nurturing of Pre-School Age Children**

The total leave granted under this clause shall not exceed five (5) years during an employee's total period of employment in NAV CANADA / the Public Service;

Employees may not, in a single leave year, submit requests under both Article 26.09(1) and 26.09(2) both of which include the period of June 15 to September 15 in whole or in part.

1) **For a leave request of greater than 18 weeks or for a leave request of 18 weeks or less falling completely outside of the summer period of June 15 to September 15:**

An employee shall be granted leave without pay for the care and nurturing of the employee's pre-school age children (including the children of the employee's spouse) in accordance with the following conditions:

(a) an employee shall notify NAV CANADA in writing ten (10) weeks in advance of the commencement date of such leave, unless because of an urgent or unforeseeable circumstance such notice cannot be given;

(b) leave granted under this clause shall be for a minimum period of nine (9) weeks;

(c) leave granted under this clause for a period of more than twelve (12) months shall be deducted from the calculation of "continuous employment" for the purpose of calculating severance pay and vacation leave;

(d) time spent on such leave shall not be counted for pay increment purposes.

2) **For a leave request of 18 weeks or less which falls in whole or in part within the summer period of June 15 to September 15**

An employee may request leave without pay for the care and nurturing of the employee's pre-school age children (including children of the employee's spouse) in accordance with the following conditions:

(a) An employee shall notify NAV CANADA in writing between March 1 and March 15 and notification of approvals shall be made within a reasonable period thereafter;

(b) Leave granted under this clause shall be for a minimum of nine (9) weeks;

(c) Care and nurturing leave may be declined due to operational requirements. In the event the Company invokes operational requirements, it shall only do so after a meaningful consultation between the Union's local representative, the Union RVP and the General Manager;

(d) An employee may only request to take a care and nurturing leave period that ends on or before July 31st or that begins on or after August 1;

(e) Time spent on such leave shall not be counted for pay increment purposes.

(f) Where an employee requests Care and Nurturing Leave in a year in which his/her youngest child attains school age, the

> requirement to take a minimum of nine (9) weeks of leave is waived provided the period of leave starts on August 1st and ends on the date on which the child commences school.

The first time the new provision was in effect was for the summer period of 2014. There has been only one previous denial of such summer leave since that time, in Montreal Capitale Specialty, and that denial was conceded by the Union in the consultation stage. The best estimate of the total number of applications for summer leave since 2014 is that of Mr. Peter Duffey, President of the Union, who thought there had been at least 40, of which about half were in Montreal. There have been applications in Moncton High, and indeed one was approved for the early summer period this year. The present cases were, of course, the first denials in Moncton FIR.

Three other contextual matters were introduced by the Union. The first was a change in weekly hours of work negotiated in the current collective agreement, from 36 hours to 34 hours, averaged over a 56 day period for the purposed of maximum hours of work under the Canada Labour Code, Part III, and the Regulations. This change became effective on December 4, 2017. The second was Letter of Understanding 2017-02, relating to summer overtime. The third was the introduction, some years ago, of a Corporate Staffing Strategy.

One result of the change in weekly hours was to induce the local parties in Moncton High to consider the possibility of a modified work schedule, as permitted under Appendix "G" of the collective agreement. Clause 16.02 provides a menu of shift cycles for employees in control positions, but Appendix "G" permits work schedules that depart from the menu where "operationally advantageous". The parties were able to reach an agreement on a new schedule, to be effective on March 26, 2018. The details of

this new schedule are not essential to this award, except to note that it was a five-day on, five-day off schedule of shifts of 9.71 hours, with an averaging period of 70 days. The balanced time on/time off ratio meant that the employees were divided into a "Side A" and a "Side B", one of which would be working while the other was off work. The implications of this new schedule for this dispute will become clearer below.

LOU 2017-02 was intended to provide the Employer with some relief from staffing issues during the summer period in 2017 and 2018, so it applied to the situation involving the present leave applications. The summer period was defined the same as in clause 26.09. During that period, the overtime banking provision, paragraph 20.02(a) was modified so that overtime worked could continue to be banked at two times the straight-time rate, but the Employer would not be required to grant time off in lieu of overtime during the summer period. On the other hand, employees who elected to have overtime paid out were compensated at an increased premium rate of 2.25 times the straight-time rate. The intention was to encourage voluntary overtime, but discourage banking of lieu days. Again, the implications of this initiative for the present dispute will become clearer below.

Finally, the Corporate Staffing Strategy was introduced at some unidentified point prior to 2010. As described by Mr. Duffey, it amounted to a decision to reduce the creation of new Air Traffic Controllers, and to rely more heavily on overtime to cover the staffing needs of the control operation. Air Traffic Controllers cost a lot of time and money to train, and even when overtime is paid at double time, there is a point where the economics of recruitment and training balances out the cost of meeting the same staffing needs through overtime. The Employer's witness, Mr. Wayne Nyman,

General Manager of Moncton FIR, pointed out that the policy was not a mandatory substitution of overtime for controller development, but a permissive instrument that allowed local management to design its own trade-offs. The implications of the existence of the policy for the present dispute will be discussed below.

With this context introduced, I turn to the process and the substance of the decision to deny the leaves. Both employees advised of their intention to apply for such leaves well in advance, so that management had considerable time to consider the applications even before the March 1 – 15 application window set out in clause 26.09.

I note that the Union objected to the admission of much of the evidence presented by the Employer on the basis that, since it was not arguing any bad faith in the Employer's decision, the evidence of good faith was irrelevant. I received the evidence under reserve. On further consideration, I conclude that the evidence is admissible in its entirety. While it does tend to demonstrate that the decision was made in good faith, it is also the only evidence that explains the reasons for the decision, and permits me to determine if the decision was taken in accordance with the collective agreement requirement that the refusal be "due to operational requirements".

In March, Mr. Nyman asked the Manager responsible for ATC Operational Requirements to study the feasibility of granting the requests. That Manager was new in the position, but his predecessor was available to consult on the issue. This was done by comparing the experience of summer 2017 with the anticipated resources available in summer 2018. There were some difficulties in making such a comparison, since the new shift schedule was to come into effect soon, and while it was expected to ease scheduling somewhat, some aspects of its operation were still speculative.

The staffing requirement for Moncton High was 54 qualified and available Air Traffic Controllers. That number is based on the anticipated traffic, and is a management determination based on the mathematics of staffing the required shifts over the year. The actual number of controllers required to be at work varies between summer, "shoulder seasons" and winter, with the greatest demand in the summer. As I understand the requirement, it is based on the expectation that absences will be covered by overtime; there is no relief component built in.

For some years, however, there have been a number of controllers "unavailable", usually due to medical issues, resulting in Maintenance of Salary or disability leave. Some of these persons are not expected to return to work in the near future or at all; others are expected to return, but the dates may be uncertain. A controller who has been off work for longer than a specified time must requalify to work in the specialty, and may thus not be immediately available.

It is important to note that controllers are not interchangeable outside a specialty. Even fully qualified controllers can only work in the specialty for which they are qualified; moving to a different specialty typically means classroom retraining and up to six months of on-the-job training during which the trainee works with a qualified controller and is supernumerary to the staffing requirement. New controllers (referred to as "*ab initio*") are also only available with very long lead times. A person selected must first complete training offered by the Employer, and is then assigned to on-the-job training which can last for two years or more before the *ab initio* trainee is fully qualified to work as a controller, and not every such trainee is successful in becoming qualified.

The number of "unavailable" controllers therefore has a significant effect on staffing that cannot quickly be remedied. There were currently eight controllers unavailable, and it was anticipated that a ninth, Mr. Ian Thomson, would be elected as Regional Vice-President and would take a full-time union leave, as in fact occurred. There were nine controllers-in-training, but there was no expectation that any of them would be qualified before the end of 2018, and perhaps not until later, or not at all.

There were three applications for care and nurturing leave for the summer of 2018, one to end on July 31 and two to begin on August 1. While the earlier leave was deemed possible, the August 1 leaves presented a different set of problems. One controller in Moncton High had successfully bid on a vacancy at another location, and was due to depart in August. Another had applied and been approved for parental leave to begin August 1. Both of the care and nurturing leave applicants were on Side A, so their absences would have to be covered at the same time. As a result, the overall staffing shortage would be exacerbated by circumstances not present in July, and by the situation of two care and nurturing leave applications for August as compared to one in July.

Another factor to be considered is vacation leave. Summer is the most popular vacation period, and demand typically takes up any supply. With the new shift schedule, there were five crews on each Side of the schedule, and five leave slots were made available every day. All of them were taken up in the bidding which took place early in the year. Those vacation days also contribute to the number of shifts which cannot be covered by the available controllers.

When actual available and qualified controllers are fewer than the staffing requirement, the process for staffing is to provide a draft schedule two weeks prior to the beginning of the schedule period (which corresponds to the averaging period for the Canada Labour Code standards). Controllers are assigned shifts, and the shifts not covered by the available controllers are shown as overtime opportunities. At Moncton, there has been a practice of relying on voluntary overtime as much as possible, and only resorting to assigning overtime on a mandatory basis when willing volunteers are insufficient and appeals for further persuadable volunteers have been unsuccessful.

Mr. Thomson, the new Regional Vice-President, gave evidence that illustrated the problem concisely. For the 70 day shift cycle that began on June 4, there were about 300 shifts not covered once all available controllers were assigned. The first round of volunteers was assigned, with any conflicts resolved by equitable distribution. That left 60 to 80 shifts open. Those shifts could be filled by later volunteers, or by persuaded volunteers; Mr. Thomson suggested that there was a general understanding that shifts had to be covered, and that controllers would, possibly reluctantly, agree to cover most of them. After that mandatory overtime could be assigned, or shifts could be extended either before or after the scheduled shift, although clause 20.04 limits total shift length to 12 hours except in an emergency, and the new shift schedule involves shifts that are already 9 hours and 42 minutes long.

It was Mr. Thomson's evidence that, despite these pressures, he was not aware of any case in which a controller had been called in on overtime. There was some confusion about what he meant by this, but he clarified that, while mandatory overtime had occurred, it had been prescheduled rather than on a call-in basis.

Scheduling of overtime, however, was further complicated by a letter of understanding dated March 26, 2017. The Employer agreed, subject to operational requirements "which may leave NAV CANADA with no other choice" to provide for a minimum of two consecutive days of rest, free of overtime; to protect vacation selections for employees who move to a new shift cycle, and not to schedule overtime on days of rest before and after vacation leave. The last provision means that, if a controller selected vacation for a full five day cycle, the five days off before that cycle and the five days off after that cycle would also be protected from scheduled overtime. While Mr. Thomson noted that this did not affect voluntary overtime, it clearly limited the extent to which holes in the schedule could be filled by mandatory overtime.

The above description relates only to what might be called systemic overtime, based on the disparity between staffing requirements and available staff, for whatever reason. There was also concern about unexpected absences which might arise for any of a number of reasons, but chiefly because of sick calls. In the summer of 2017, there were an average of 2.4 sick calls per day, each one of which left another shift uncovered. The evidence is that in the summer of 2017 there were a number of occasions when it was not possible to cover an absence, and the crew had to work short-handed. On some of these occasions, this led to air traffic control restrictions in the form of holding aircraft below 29,000 feet longer than usual, thus shifting control responsibilities to another Specialty and providing relief for Moncton High controllers. None of these restrictions resulted in significant delays in flight schedules, but might have increased fuel costs for the aircraft concerned. While the Employer conceded that these were the

most minor of restrictions, it nevertheless argued that they constituted an impact on operational efficiency which it was entitled to take into account.

The result of this initial consideration was that the Employer asked for a delay in making its decision on the August leaves. There were two reasons for this: the first was to wait to see the outcome of the election which could put Mr. Thomson on union leave, and the second was to see if there were any unintended consequences of the new shift schedule, under which the changeover from one Side to another would, from time to time, occur over a weekend.

This second issue requires some explanation. The Employer's experience in 2017 and perhaps in other years is that sick calls are "highly weighted" toward evening shifts on weekends. The new schedule included longer shifts which extended through the evening shift and into the former midnight shift, an assignment that is both unsocial and stressful, since much of the traffic is encountered then. Controllers, as a condition of maintaining their licenses, must report to work fully fit for duty. Management was thus concerned to see whether there was an additional risk of fatigue at the end of a cycle of five long shifts that would increase calls from controllers expressing themselves unfit for the last shift of the cycle. There also appears to have been a concern about the moral hazard inherent when either the last shift of the cycle or the first shift of the next cycle fell on a summer weekend.

It does not appear that the Union consented to this delay, but the only obligation in the provision is that the decision must be made "within a reasonable period" and the delay is not part of this grievance. There is no dispute that the "meaningful

consultation" required before invoking operational requirements took place, and continued up to and even after the decision to deny the applications.

By May 4, however, the "worst-case scenarios" had in fact become reality. Mr. Thomson was elected and went on union leave. No relief appeared from any other source to increase the number of available controllers. The experience of shift changeovers on weekends gave no grounds for optimism; there were some 17 sick calls over one such weekend, and air traffic restrictions had to be put in place. Mr. Nyman contacted the Manager and asked him to convey the denials to the applicants, and confirming e-mails were sent on May 7. The grievance followed.

The concept of "operational requirements" having an impact on rights or benefits is not new to these parties. There have been such provisions in the collective agreements for decades, since before the creation of NAV Canada, and there has been litigation and arbitral precedent about how to interpret the words for nearly as long, although never in this context, or under such circumstances. The authorities cited by the parties are, therefore, helpful for background principles, but not for interpreting the specific provision in issue.

Arbitrators early determined that "operational requirements" had to relate to the work required to be done, and not to a set of administrative rules drawn up by management (*Savage v. Treasury Board (Transport Canada)* (1981), PSSRB File 166-2-9734), or to the expense of covering the absence using overtime (*McGregor v. Treasury Board (Transport Canada)* (1992) PSSRB File 166-2-22489). It is not in dispute that there were no arbitrary administrative rules or any consideration of expense involved in the management decision under review here. It is also not in dispute that the Employer

bears the onus of establishing that the denial of the leaves was "due to operational requirements".

Some of the cases discuss the effect of chronic staff shortages on operational requirements. In *Degaris v. Treasury Board (Transport Canada)* (1993) PSSRB Files 166-2-22490, 166-2-22491, upheld on judicial review *Canada (Attorney General) v. Degaris,* [1994] 1. F.C. 374, [1993] F.C.J. No. 1011, the adjudicator summed up the jurisprudence on this point as follows:

> I have considered all of the evidence and arguments placed before me and have come to the conclusion that the employer has violated clause 10.09 of the collective agreement. I find as did my colleagues in the Graham decision (supra) and in the MacGregor decision (supra), that the employer must take into consideration their contractual obligations when determining the number of staff required.
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> In the case before me, not only did the employer admit that the short-staffing has been ongoing for a long period of time, but even when they used a multiplier to decide how many staff would be required to cover all of their needs, they did not factor in clause 10.09 or indeed clause 10.07.
>
> The employer has not convinced me that operational requirements were a proper reason for refusing leave to the grievor under clause 10.09. Short-staffing can only be used to justify the employer's refusal on the ground of operational requirements of an employee's request for a benefit under the collective agreement if the employer, through no fault of their own, find themselves short-staffed to the extent that they could not deliver the service required by their clients. In this case the employer has been short-staffed for many years and, even when the grievor was absent from January 1992 to July 1992, his position was not filled. Added to that is the fact that another supervisor was seconded out of the area by management and his position was also left vacant.
>
> The short-staffing problem was clearly brought about by the employer's lack of recruitment and retraining of qualified employees to ensure that they have sufficient staff to meet their obligations under the collective agreement as well as their service to the client.

> Counsel for the employer referred me to the Hollier and Willis decision (supra). In that case the adjudicator took into consideration the unknown factor that management was facing, due to a new computerized air traffic control system being introduced; as well management was awaiting the outcome of the Dubin Commission Report. These factors left management in a position of not knowing how many staff they would require to provide their services. Added to that was the unknown factor of what effect pending legislation dealing with early retirement would have on the number of staff required.
>
> In the case before me, these factors did not exist. The employer's representative testified that new trainees were about to take up their duties as air traffic controllers and the fact that they operated with two less supervisors while the grievor was away clearly demonstrates that the refusal of leave under clause 10.09 using operational requirements was not justified.

Degaris is a strange authority for the proposition that deliberate short staffing can lead to the conclusion that an employer cannot rely on operational requirements to deny a benefit. Indeed, it appears from the excerpt set out above that there really was no situation of short staffing at all, as the last paragraph seems to suggest. The arbitrator in that case also had the advantage that the denial was in the remote past, and the employer's assertion that permitting the leave requested would result in short staffing had been put to the proof, and had failed.

In two aviation cases (but not air traffic control situations) cited by the Employer, a much more expansive view of what can be taken into account as part of operational requirements is developed. In *Re Calgary Airport Authority and Public Service Alliance of Canada, Union of Canadian Transportation Employees Local 30301*, August 31, 2004 (Jones), the arbitrator found that the need to pay overtime could be considered in relation to operational requirements, while in *Re Vancouver International Airport Authority and Public Service Alliance of Canada, Local 20221,* March 29, 2007

(Greyell) the arbitrator appears to have rejected that proposition. Since the issue of cost is not in play in this case, it need not be further pursued.

The arbitrator in *Vancouver International Airport Authority* did provide, however, a helpful analysis of the impact of staffing on the operational requirements question:

> I accept the proposition put forward by the Union that the Employer must not create staffing levels which are artificially low such that the bargain it has struck with the Union in the collective agreement "to grant lieu days off at such times as the employee may request" has no real meaning and frustrates the collective bargaining agreement.
>
> However, in this case the evidence does not demonstrate that, given the unique nature of the work schedules of those employed in the operations centre, the Employer was seriously understaffed such that the wishes of the employees were being frustrated. The evidence which leads me to draw this conclusion arises from Exhibit 2, the Leave Request Summary which shows that a very high proportion of the leave requests are approved for both the Grievor and for the general employee complement in the Operation Centre. This conclusion is also supported by the fact that although the Union filed a number of grievances following the denial of the Griever's leave, most of those grievances were settled through discussions between the individual employees and his or her supervisor. "Subject to operational requirements" impliedly means that there are going to be times when leaves such as these are not granted. The Grievor acknowledged the time covered by the leave was a busy time for airport operations with high cruise ship passenger flow through, with an employee seconded to the cruise ships and with other employees seconded to noise suppression duties arising from one of the runways.

With these authorities in mind, I turn to the interpretation of the applicable language of the collective agreement. As noted above, an operational requirements test appears in several places in that agreement, in each case to limit access to an employee right or benefit at management's discretion, provided that the discretion is exercised on the specified basis only.

The Union points to the language of the Picher award quoted above, and notes that the arbitrator expressed the test as "where operational requirements do not allow it", and suggests that this is a very strong test, requiring a situation of impossibility, and nothing less. The parties did not, however, adopt this stringency when converting the award into the new language of clause 26.09, where they expressed the test only as "due to operational requirements". This does not appear to be even as strong as the language used in the March 28, 2017 letter of understanding, which contemplates operational requirements such as would leave the Employer "with no other choice but to" schedule work on the specified days. There was no evidence about how the language of clause 26.09 was chosen, but I am obliged to interpret the language of the collective agreement as agreed between the parties and renegotiated since in the same terms.

Considering the Union argument about the national Staffing Strategy next, I have come to the conclusion that, whether the strategy is a top-down substitution for adequate staffing or a permissive instruction to local managers, the correct focus for operational requirements is at the local workplace. The applications were made locally, and the denial was made locally, therefore the assessment of operational requirements must also be made locally. The national strategy may be a matter of significant concern for the Union, but it is the situation at Moncton High which must be considered.

The uncontradicted evidence is that, at least since the arrival of Mr. Nyman, there has been a concerted effort to increase staffing levels at Moncton FIR, including the High Specialty. There are nine trainees in place, and that is sufficient to reverse the impact of the unavailable list if all are successful. It is true that the number of unavailable controllers is very high, but steps are being taken to address that issue. And

in any case, that number is not within the control of management. Disability, medical unfitness, transfers out on a seniority bid or union leave are all independent contributors to unavailability, and have nothing to do with a deliberate program to reduce staffing "artificially" such that the care and nurturing benefit provided to employees "has no real meaning" and that the collective agreement is frustrated, as described in *Vancouver International Airport Authority.*

This is the only occasion on which such leave has been denied at Moncton High. Every other application has been approved, up to and including the July leave in 2018. These two applications were denied, not on the basis of an overall situation of short staffing, which the evidence demonstrates has been around for some time without requiring the denial of leave, but because of the special situation in August of additional unavailability coupled with the coincidence of two applications, rather than the one in July. In my view, the Employer has met the onus to demonstrate, on the balance of probabilities, that the denials were "due to operational requirements", at least as it defined the threshold for such requirements.

The Union, as already noted, argued for a much more stringent definition, amounting to impossibility. It referred to the Montreal Capitale denial, where as I understand it, both management and union representatives agreed that, if the leave were granted, it would be impossible to cover the absences due to the Canada Labour Code maximum hours of work restrictions. I note that the provision does not call for agreement between the parties, only for meaningful consultation. The clause contemplates not only that some leaves may be denied, but that the denials may take place in circumstances where the Union does not agree.

The present case is not one of impossibility. While the precise details of the staffing issues are too complex to set out here, and there was some disagreement between the witnesses as to how exactly to count staffing needs and resources, it is not necessary to make any firm determination on these points. Mr. Nyman conceded that "mathematically and legally" it would be just possible to cover the absences.

He questioned, however, what cost and what risks such a decision might entail. The costs he identified were mainly to the employee group as a whole, who already expressed disquiet at the amount of overtime being used, and particularly to the assignment of mandatory overtime shifts in summer 2017. He expressed concern both that morale and team spirit would be affected, thus reducing the willingness of controllers to assist in covering vacancies on a voluntary basis, and that operational efficiency would be affected by imposing ever heavier work schedules on controllers.

The Union argued that, as the exclusive bargaining agent, it is the sole protector of employee morale. I doubt that this is the meaning of the recognition clause, but in any case the Employer clearly has an interest in effects on operational efficiency, and if employees are both dispirited and overworked, it may be difficult to separate the two effects.

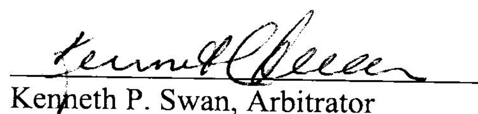
Staffing over the summer involves the balancing of vacation scheduling, the protection of consecutive days of rest and pre- and post-vacation days of rest, and care and nurturing leave. All three of these employee benefits are subject to a discretion on the basis of operational requirements. There is no clear reason to favour any one over the others, and given the language chosen by the parties in clause 26.09, certainly no reason to favour care and nurturing leave over the benefits protected by stronger language

in the letter of agreement of March 28, 2017. What is required is to strike a balance, and if the parties cannot agree on what that balance looks like, then it remains a management decision.

On the basis of all of the evidence and argument, I am satisfied that the Employer's interpretation of the operational requirement test is both reasonable in itself, and more reasonable than the more stringent test proposed by the Union. The Employer is entitled to take into account reasonably foreseeable risks to operational efficiency, and is not required to act only on mathematical "possibility". It is entitled to be prudent in making decisions based on real risks of harm to operational requirements, even if the likely effects may less than critical in most cases.

As a result, I have concluded that the grievance must be denied.

DATED AT TORONTO, ONTARIO this 23rd day of July, 2018.



Kenneth P. Swan, Arbitrator