Files: 166-2-28314, 28419,
28420, 28421.

Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**ADRIO TAUCER, JOHN TAYLOR,
MARIO SAUCIER, E. EARLE DEPASS**

Grievors

and

**TREASURY BOARD
(Transport Canada)**

Employer

Before: J. Barry Turner, Board Member

For the Grievors: Jock Hazeldean, Professional Institute of the Public Service of Canada, Employment Relations Officer;
Jim Shields, Counsel, International Brotherhood of Electrical Workers

For the Employer: Jock Climie

Heard at Ottawa, Ontario,
May 21, 1998.

The four grievances before me deal with essentially the same issue, even though the grievors are represented by two different bargaining agents. The parties agreed however, that I would render one decision for all four grievances, with the understanding that I would hear the Adrio Taucer grievance (Board file 166-2-28314) first, followed by the John Taylor, Mario Saucier and Earle DePass grievances (Board files 166-2-28419, 28420, 28421) respectively.

Adrio Taucer, a former Transport Canada (TC) employee who went to work with Nav Canada and returned to TC, is grieving the fact that his previous years of employment in the Public Service are not being considered in calculation of leave entitlements. His grievance reads:

> *I grieve the fact that all my service with the Federal Government is not being considered for the calculation of leave entitlements, in accordance with the collective agreement, the definition of continuous service and other documents and correspondence.*

The relevant facts are set out in the Agreed Statement of Facts signed by Mr. Hazeldean on behalf of the grievor and Mr. Climie, the employer's representative, which provides:

> *AGREED STATEMENT OF FACTS*
>
> *The following facts are agreed to by the parties with respect to the grievances (sic) of Mr. Adrio Taucer.*
>
> 1. *At the time he filed his grievance, Mr. Taucer was employed by Transport Canada in Ottawa and occupied a position classified in the Engineering and Land Survey group, Engineering sub-group, level 4 (EN-ENG-04).*
>
> 2. *As such, his terms and conditions of employment were governed by the Engineering and Land Survey group (EN) collective agreement between the Treasury Board of Canada and the Professional Institute of the Public Service of Canada signed on September 13, 1991 and expiring on September 21, 1997 in accordance with legislated extensions.*
>
> 3. *The employee's work history that is relevant to this reference is as follows:*
>
>   - *He initially joined Transport Canada and the Public Service on May 19, 1987 in a position classified in*

the Engineering and Land Survey occupational group and remained with Transport Canada until his appointment with NAV CANADA.

- *He accepted employment with NAV CANADA on November 1st, 1996 and remained with NAV CANADA until January 30, 1997.*
- *He was appointed to the position which he presently occupies in Transport Canada on January 31, 1997.*
- *Prior to accepting employment with NAV CANADA on November 1st, 1996, he had 9 years and 5 months of service in the Public Service.*

4. *Prior to his transfer to NAV CANADA, the employee was working in the Air Navigation Services, the organization that was transferred to NAV CANADA and was therefore designated to transfer to NAV CANADA under the Civil Air Navigation Services Commercialization Act.*

5. *In accordance with Section 70 of the Civil Air Navigation Services Commercialization Act, as a designated employee who accepted an offer of employment with NAV CANADA, the employee received upon ceasing to be an employee in the Public Service, a severance payment under article 27 of the EN group collective agreement.*

The above facts are agreed without limiting the right of either party from presenting additional evidence or facts.

Agreed to this 21st day of May, 1998.

Mr. Taucer is requesting the following corrective action:

To have all my service with the Federal Government considered for the calculation of leave entitlements.

The relevant references to the Engineering and Land Survey Group collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada, Code: 210/91 are as follows:

ARTICLE 21

VACATION LEAVE

21.01 Accumulation of Vacation Leave

> *An employee who has earned at least ten (10) days' pay for each calendar month of a fiscal year shall earn vacation leave at the following rates:*
>
> *(a) ...*
>
> *(b) one and two-thirds (1 2/3) days per month commencing with the month in which his eighth (8th) anniversary of service occurs;*
>
> *21.03 For the purpose of this Article, "**service**" means all periods of employment in the Public Service, whether continuous or discontinuous, except where a person who on leaving the Public Service, takes or has taken severance pay, retiring leave or a cash gratuity in lieu thereof. However, the above exception shall not apply to an employee who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.*

Article 27, Severance Pay has the following headings:

> *27.01 ...*
>
> *(a)* ***Lay-Off***
>
> *...*
>
> *(b)* ***Resignation***
>
> *...*
>
> *(c)* ***Rejection on Probation***
>
> *...*
>
> *(d)* ***Retirement***
>
> *...*
>
> *(e)* ***Death***
>
> *...*
>
> *(f)* ***Release Under Section 31 - Public Service Employment Act***

Messrs. Taylor, Saucier and DePass are also grieving the fact that their previous years of employment in the Public Service are not being considered in the calculation of their respective vacation leave entitlements. Mr. Taylor's grievance reads:

> *After a meeting with Pay & Benefits, I was advised that my annual leave credits would be calculated as being a new employee.*
>
> *Having worked for Transport Canada for 23 years, as the result of layoff, the clause 17.02(h) and other provisions of the EL collective agreement should apply (return to Public Service within one year).*

Mr. Saucier's grievance reads:

> *Following a meeting with the Pay & Benefit Dept., I was informed that my annual leave would be calculated same as for a new employee.*
>
> *Having worked for the Public Service (Transport Canada) for 14 years and left as a result of layoff, the clause 17.02(h) and other provisions of the EL collective agreement should apply (return to Public Service within one year).*

Mr. DePass' grievance reads:

> *After returning to the Federal Public Service on October 31, 1997, within one year of being effectively laid off, I have been informed by the Pay and Benefits section of Transport Canada that my benefits for such entitlements as annual and sick leave will be calculated as if I was a new employee.*

The relevant facts are set out in the Agreed Statement of Facts signed by Mr. Shields on behalf of the grievors and by Mr. Climie for the employer.

AGREED STATEMENT OF FACTS

> *The following facts are agreed to by the parties with respect to the grievances of Messrs. Earle E. DePass, Mario Saucier and John Taylor.*
>
> 1. *At the time they filed their grievances, Messrs. Saucier, Taylor and DePass were employed by Transport Canada in Ottawa and occupied positions classified in the Electronics occupational group, level 8 (EL-08).*
>
> 2. *As such, their terms and conditions of employment were governed by the Electronics group (EL) collective agreement between the Treasury Board of Canada and the International Brotherhood of Electrical Workers signed on December 20, 1989 and expiring on August 31, 1997 in accordance with legislated extensions.*

3. *The three employees have a similar work history in that they all joined Transport Canada in the late 1970's or early 1980's, they left Transport Canada to transfer to NAV CANADA on November 1, 1996 and, in late October 1997, they were appointed back to the positions in Transport Canada, which they now hold and held at the time of filing of the present grievances. The following table describes each employee's work history that is relevant to their present grievances.*

	Earle E. DePass	*Mario Saucier*	*John Taylor*
Initially Joined Transport Canada in the EL group and remained with Transport Canada until their transfer to NAV CANADA	*1981-08-31 to 1996-10-31*	*1982-07-19 to 1996-10-31*	*1975-01-20 to 1996-10-31*
Accepted employment with NAV CANADA and remained there until their return to Transport Canada	*1996-11-01 to 1997-10-31*	*1996-11-01 to 1997-10-29*	*1996-11-01 to 1997-10-30*
Appointed to present position with Transport Canada	*1997-10-31*	*1997-10-29*	*1997-10-30*
Years of service with the Public Service prior to transfer to NAV CANADA	*15 yrs and 2 mths*	*14 yrs and 3.5 mths*	*21 yrs and 1.5 mths*

4. *Prior to their transfer to NAVCANADA, the employees were working in the Air Navigation Services, the organization that was transferred to NAVCANADA and were consequently designated to transfer to NAVCANADA under the Civil Air Navigation Services, Commercialization Act. Each grievor applied for their current positions in October 1996 and did not receive a job offer until October 21, 1997.*

5. *In accordance with Section 70 of the Civil Air Navigation Services Commercialization Act, as designated employees who accepted an offer of employment with NAVCANADA, the employees received upon ceasing to be employees in the Public Service, a severance payment under article 22 of the EL group collective agreement.*

> *The above facts are agreed without limiting the right of either party from presenting additional evidence or facts.*
>
> *Agreed to this 21st day of May, 1998.*

Messrs. Taylor and Saucier are requesting the following corrective action:

> *I request to have all my service or continuous employment considered for the calculation of my leave entitlements.*

Mr. DePass is requesting similar corrective action:

> *I request that my continuous 15 years of service from September 1981 to October 31, 1996 be considered for the calculation of my leave entitlements as per clause 17.02(h) of the EL collective agreement.*

The relevant provisions of the collective agreement between the Treasury Board and Local 2228 of IBEW covering all employees in the Electronics group, Code 404/89 and of a Letter of Understanding regarding Vacation Leave Articles signed between the IBEW and the Treasury Board on May 30, 1991 provide:

> *17.02 Accumulation of Vacation Leave*
>
> *Effective Date of Signing*
>
> *An employee who has earned at least ten (10) days' pay for each calendar month of a fiscal year shall earn vacation leave of:*
>
> *...*
>
> *(c) twenty (20) working days per fiscal year if he/she has completed eight (8) years of continuous employment;*
>
> ****
>
> *(d) twenty-five (25) working days per fiscal year if he/she has completed nineteen (19) years of continuous employment except that an employee who has received or is entitled to receive furlough leave shall accumulate twenty (20) working days only per fiscal year in his/her twenty-first (21st), twenty-second (22nd), twenty-third (23rd), twenty-fourth (24th) and twenty-fifth (25th) year of continuous employment;*

Article 22, Severance Pay, has the following headings:

> *22.02 Lay-Off*

...

22.03 Resignation

...

22.04 Retirement

...

22.05 Release from Employment

...

22.06 Death

...

22.07 Rejection on Probation

...

LETTER OF UNDERSTANDING

RE-OPENING OF THE ELECTRONICS GROUP
COLLECTIVE AGREEMENT SIGNED ON DECEMBER 20, 1989

In accordance with the understanding reached during the last round of bargaining and pursuant to Articles 58 and 41 of the current Collective Agreement, the Treasury Board and the International Brotherhood of Electrical Workers Local 2228 hereby agree to re-open the Agreement for the sole purpose of amending the Agreement as specified below:

VACATION LEAVE ARTICLES

1. *Accumulation of Vacation Leave*

   Effective December 20, 1989, the following clauses shall be added to clause 17.02 of the current Agreement:

   17.02(g) "continuous employment" in this clause to be changed to "service".

   17.02(h)(i) For the purpose of clause 17.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay.

> *However, the above exception shall not apply to an employee who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.*

The hearing lasted one-half day with one witness testifying and six exhibits submitted into evidence.

I am being asked to decide if the grievors' previous years of employment in the Public Service should be considered with respect to their current vacation leave entitlements.

Mr. Hazeldean proceeded first with the Taucer grievance by referring me to the first level response in Board file 166-2-28314 dated 3 June 1997, signed by Douglas Mein, Director, Air Navigation Services and Airspace and the final level response in the same file dated 7 January 1998, signed by Lynette Cox, Director General, Human Resources, Transport Canada.

1. Adrio Taucer, who is now working at Transport Canada (TC), qualified for four weeks of annual leave when he left TC in the fall of 1996. In July 1996 he received a Letter of Designation (Exhibit G-1), and a Letter of Offer from Nav Canada (Exhibit G-2). He testified as per Exhibit G-1, that his employment in the Public Service ceased on October 31, 1996 and that he was deemed to be laid off exclusively for the calculation of severance payments. Mr. Taucer accepted an offer of employment from Nav Canada on August 20, 1996 (Exhibit G-2). There was a competition for the position which he currently occupies in the federal Public Service (Exhibit G-3); he applied for this position on October 15, 1996 (Exhibit G-4) and was offered an indeterminate appointment that he accepted on January 30, 1997 (Exhibit G-5). Technically, Mr. Taucer was at Nav Canada from November 1, 1996 until March 6, 1997 but his break in employment with TC was from November 1, 1996 until January 30, 1997.

Mr. Taucer testified that when he returned to TC in February 1997, he spoke to someone about his leave entitlements and was told his previous employment in the Public Service would not qualify. He said he disagreed, and advised TC he would grieve TC's interpretation. He did not have a problem with his superannuation. His

vacation leave at Nav Canada was not calculated based on years of prior employment in the Public Service.

During cross-examination Mr. Taucer said that, he was on leave without pay from TC after he returned to TC in 1997 in order to finish a Nav Canada project. With respect to his new Nav Canada position, he said he went to his same desk, in the same building, doing the same work, but he had a new identification card.

During re-examination, Mr. Taucer said that when he left TC in the fall of 1996, he had to take severance pay.

Argument for Grievor Taucer

Mr. Hazeldean referred to the final level grievance response from Lynette Cox on page 2, that reads in part:

> *Regarding the issue of sick leave reinstatement, I have carefully considered this matter and I have determined that you had continuous employment under the meaning of Section 3 of the Public Service Terms and Conditions of Employment Regulations. Consequently, you are entitled to have your previously earned but unused sick leave credits reinstated on your reappointment with the Public Service in accordance with Section 15 of those Regulations since the period of time between your two periods of employment did not exceed three months. Therefore, the Compensation Operations Section will be advised to credit your sick leave bank with the appropriate credits. This portion of your grievance is allowed.*

Mr. Hazeldean argued this was good news. However, for the reinstatement of vacation leave, Mr. Hazeldean argued TC took a different approach by saying since Mr. Taucer took severance pay, his previous employment in the federal Public Service could not count towards vacation leave entitlements. He argued that severance pay was in fact "thrust upon Mr. Taucer."

Mr. Hazeldean reminded me the employer claims Mr. Taucer was deemed to be laid off as per paragraph 27.01(a) of the collective agreement; therefore it paid him severance pay. He referred me to clause 21.03 of the collective agreement that uses the word "lay-off", and said the employer claims Mr. Taucer was not laid off, only deemed to be laid off. Mr. Taucer returned to TC after a three month absence and,

since he received severance pay, he should therefore be deemed to have continuous service for vacation leave entitlements. He argued someone is either laid off or he is not, but cannot be deemed to be laid off.

Mr. Hazeldean referred to the *Civil Air Navigation Services Commercialization Act* (hereinafter referred to as CANSCA), sections 70, 71 and 72 that read:

Severance Pay

70. Notwithstanding section 67, a designated employee referred to in section 58 is entitled to severance pay in accordance with

(a) any collective agreement or arbitral award that is binding on the designated employee immediately before the transfer date, or

(b) any terms and conditions of employment applicable to the designated employee immediately before the transfer date,

on the day the designated employee ceases to be employed in the Public Service pursuant to this Act.

71. Notwithstanding section 67, when a designated employee is entitled to severance pay from the Corporation pursuant to a collective agreement, an arbitral award or terms and conditions of employment, the period for which the designated employee is entitled to severance pay is deemed not to include any period of employment for which the designated employee is entitled to severance pay under section 70.

72. Designated employees are deemed to be laid off from the Public Service on the day they cease to be employed in the Public Service pursuant to this Act for the sole purpose of entitlement to severance pay from Her Majesty in right of Canada as represented by the Treasury Board.

Mr. Hazeldean agreed that Mr. Taucer was a designated employee, who ceased to be employed, and who was deemed to be laid off by the employer for the sole purpose of entitlement to severance pay. However, he referred me to Exhibit G-1, the Letter of Designation sent by the employer to Mr. Taucer, at page 2, paragraphs two, three and four and argued these three paragraphs are the same conditions for someone who is laid off. Paragraphs two, three and four read:

> *By choosing to accept the offer from NAV CANADA you will be concluding your service with the Public Service of Canada in all respects. Many of you have been with the Public Service for a number of years and I can appreciate the impact that this decision will have on your professional and personal lives. This has by no means been lost on me. As a result, every effort has been made to ensure that if you choose to accept the offer from NAV CANADA, you will experience a seamless transition to the new organization.*
>
> *If you choose not to accept the offer, you will remain employed by Transport Canada for six months from July 17, 1996 your date of designation, after which time you will cease to be an employee of the Public Service. You will not, however, be eligible for the ERI or EDI packages nor the other provisions of Work Force Adjustment. Should you choose to voluntarily leave within those six months, no payments will be provided for the remaining portion of the six months. If you are a term employee, your employment with the Public Service will cease upon the transfer date.*
>
> *However, if you are an indeterminate employee, you will be eligible, for a period of one year, to be considered for appointments within the Public Service for which you have been deemed qualified by the Public Service Commission, in the same order of priority as if you had been laid off in accordance with Section 29 of the Public Service Employment Act. Your eligibility for these provisions will begin after the completion of your six months notice period or earlier if you so request. You will also be able, during this one year period, to enter any Public Service competitions for which you would have been eligible, had you remained an employee of the Public Service.*

Mr. Hazeldean concluded therefore that this was not a deemed lay-off for Mr. Taucer, but a real lay-off, and this is why he received severance pay. He argued that if "it looks like a duck, walks like a duck, and quacks like a duck, it is a duck", and asked me to conclude the grievor was actually laid off from TC, returned within three months and should therefore have his previous employment in the Public Service count for the purposes of vacation leave entitlements.

Mr. Hazeldean entered as Exhibit G-6, a response from the Director, Income Tax Ruling and Interpretations Directorate, Revenue Canada dated December 13, 1995, to an inquiry from the Assistant Deputy Minister, Finance and Administration, TC. In particular, he referred me to page 2, paragraphs 5, 6 and 7 that read:

Proposed Transactions

5. *As part of the entire commercialization endeavour, the Minister of Transport intends to introduce legislation which will provide for, inter alia, statutory successor rights. The current collective agreements between the various unions representing the employees involved in the ANS and Treasury Board, as the employer, will be continued with the new employer, Nav Canada, with no hiatus. Nav Canada will be deemed to be bound by the collective agreements as a party thereto. The legislation will also include a Deemed Layoff Section 72, that will state that designated employees are deemed to be laid off from the Public Service on the Day they cease to be employed in the Public Service for the sole purpose of entitlements to severance pay from Her Majesty in right of Canada as represented by Treasury Board.*

6. *In accordance with the Memorandum of Understanding, approximately 6,400 employees identified by Transport Canada as working for or in support of the ANS (hereinafter referred to as the "Employees") will cease to be employed in the Public Service and Nav Canada will make an offer of employment to the Employees with pay, benefits, recognition of service and work conditions equivalent to that which they had prior to the sale of the ANS assets by Transport Canada to Nav Canada. In addition, the applicable collective agreements will continue to apply to Nav Canada.*

7. *Transport Canada will pay severance pay to the Employees whether or not they are represented by a union. Employees covered by a collective agreement will be paid severance pay in accordance with the particular collective agreement. In the case of Employees not covered by a collective agreement, it is expected that the severance pay will be computed on the basis of two weeks of pay for the first complete year of continuous Public Service employment and one week of pay for each additional complete year of continuous Public Service Employment. The particular payment received by each of the Employees from Transport Canada will reduce any future liability of Nav Canada that may be triggered at the time of the particular Employee's severance from Nav Canada, which would otherwise be based on the particular Employee's combined service with the Public Service and Nav Canada. The payments paid to the Employees by Transport Canada will not include any amount for accrued sick leave, accrued vacation pay or any other regular employment benefits.*

He noted the Ruling on page 3 of Exhibit G-6 allows the severance to be put into an instrument such as a registered retirement savings plan. Part of the Ruling reads:

> *A. The severance payment referred to in paragraph 7 above received by each of the Employees will be a retiring allowance pursuant to the definition of retiring allowance in subsection 248(1) of the Act.*

Mr. Hazeldean concluded therefore that Mr. Taucer should not have to suffer vacation leave entitlement losses for what happened to him when he went from TC to Nav Canada and back to TC, especially since he was forced to take a severance package.

Argument for Grievors Taylor, Saucier and DePass

Mr. Shields reviewed the relevant information before me with respect to the Taylor, Saucier and DePass grievances. In particular; he referred to the Agreed Statement of Facts recorded earlier; a copy of a Letter of Understanding regarding Vacation Leave Articles for the IBEW Local 2228; all three grievors remained in their same positions and performed the same duties for Nav Canada on November 1, 1996 as they had done for TC; they all received the same letters Mr. Taucer received, that is Exhibits G-1 and G-2. Mr. Shields asked me to review the two grievance responses in the Board files sent to all three grievors; one from Art Laflamme, Acting Director General, Civil Aviation, and the other from Lynette Cox, Employer's Representative, TC Human Resources.

Mr. Climie agreed that the above information referred to by Mr. Shields was applicable to the three grievors.

Mr. Shields argued all three grievors were designated for transfer from TC to Nav Canada, and did not initiate such transfers themselves. He argued because of Exhibits G-1 and G-2, they were left with no choice but to accept the Nav Canada offer; otherwise other steps would have occurred to end their Public Service employment.

Mr. Shields argued Exhibit G-1, the letter of designation is clear. TC was ending all employer/employee relationships with all designated employees but had to be careful in doing so. TC made it clear in Exhibit G-1, page 2, paragraph 2 that anyone who accepted the Nav Canada offer would be concluding their *"service with the Public*

Service of Canada in all respects". To see what this means, Mr. Shields referred to the final level response to the grievances signed by Lynette Cox on February 20, 1998 that reads in part: *"... this termination of employment was not a lay off ..."* as being contrary to Revenue Canada's letter (Exhibit G-6) that reads in part on page 2, paragraph 4 *"... severance pay is payable to represented employees who are laid off ..."*

Mr. Shields argued that the employer did not call evidence to argue that the terminations were not lay-offs, and there is no evidence before me that describes how the terminations actually took place.

Mr. Shields said I have to look at: Exhibit G-6 that says Justice Canada gave TC a legal opinion that departing employees would be entitled to severance pay; at section 70 of CANSCA that speaks of severance pay, and Article 22 of the IBEW collective agreement that also speaks of severance pay, all of which had to be subject to the lay-off provision only in order for severance pay to be made. He concluded that Ms. Cox's final level reply, that says their terminations were not lay-offs, is totally untrue, and there are no facts before me to say it was not a lay-off or what it was.

Mr. Shields referred to the Letter of Understanding, in particular, a portion of subparagraph 17.02(h)(i) that reads:

> *17.02(h)(i)* *... However, the above exception shall not apply to an employee who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.*

He argued all three grievors qualify for the exception since all received severance pay under the lay-off provision of their collective agreement, and not for 'resignation', 'retirement', 'release from employment', 'death' or 'rejection on probation', and all returned to the Public Service within one year following their date of lay-off.

Mr. Shields said the issue before me is now clear. Did the grievors receive severance and were they laid off? He argued they did and they were, and reminded me that arbitrators normally conclude the parties intended the words they used within a collective agreement to have clear ordinary meaning. He argued even CANSCA, section 70, refers to *"any collective agreement".* He argued the reference in

section 72 to "*deemed to be laid off"* is irrelevant under subparagraph 17.02(h)(i) of the collective agreement since they were still laid off.

He concluded the Cox final level reply is merely a "*linguistic game"* and asked me to recognize the grievors' rights under the collective agreement.

Argument by the Employer for all four grievances

Mr. Climie argued that according to clause 21.03 of the PIPSC collective agreement, once an employee takes severance pay, his employment in the Public Service ends. He argued that I can look at the intent of collective agreement language, but more importantly I must restrict myself to the language in its normal or ordinary sense. Mr. Climie referred me to *Canadian Labour Arbitration*, Brown & Beatty, Third Edition 4-32, that reads in part:

> *In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. Furthermore, where there are French and English versions the interpretation to be sought is one which is coherent in both texts. It has been stated, however, that where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement, notwithstanding that the result may be unfair or oppressive, or that they were deliberately vague to permit continuing consensual adjustments.*

He argued that both representatives before me are trying to turn language into something else since there is no ambiguity before me in these matters. He argued section 72 of CANSCA is clear language by an Act of Parliament that could have referred to lay-off but said "*deemed to be laid off"*, and I cannot alter this. He added Mr. Shields is correct, in that the employer did not present evidence that its action was not a lay-off because it did not have to since "*deemed to be laid off"* is the law before me.

Mr. Climie argued that section 58 of CANSCA is what happened to all four grievors. In effect, Parliament terminated them. Section 58 reads:

> *58. Every designated employee who has accepted an offer of employment from the Corporation before the transfer date ceases to be employed in the Public Service on the expiration of the day immediately before the transfer date.*

He argued what was before Parliament was a unique situation and Parliament issued a unique response. He argued Parliament was trying to effect a transition and sever ties to the Public Service when employees went to Nav Canada, but it also wanted to make sure that employees got some benefits, especially severance pay; therefore Parliament looked at the collective agreement and built a bridge with CANSCA as a generous way to give severance.

Mr. Climie said the grievors are now saying they want their vacation leave entitlements by arguing they were laid off. He argued if a deemed lay-off is a lay-off, then why are the grievors not asking for all Public Service benefits applicable to those allegedly laid off. Because, he responded, they were not laid off. He argued the first sentence of Exhibit G-1, page 2, paragraph 2 is very clear. It reads:

> *By choosing to accept the offer from NAV CANADA you will be concluding your service with the Public Service of Canada in all respects.*

Mr. Climie agreed that, if an employee is laid off, he is entitled to certain provisions but in the cases before me they were not laid off and there is no evidence to show me that they were. Mr. Climie reinforced his argument by referring again to Exhibit G-1, page 2, last paragraph that reads in part:

> *... The Civil Air Navigation Services Commercialization Act ensures that employees are deemed to be laid-off exclusively for the calculation of severance payments. ...*

Mr. Climie asked me to give no weight to Exhibit G-6 since it was written before CANSCA received Royal Assent on June 20, 1996. Also, Exhibit G-6 does not set out TC's position.

Mr. Climie also argued that before I can give any effect to Mr. Shield's attempt to link subparagraph 17.02(h)(i) from the IBEW Letter of Understanding, to Article 22 of the collective agreement, I must first find that the grievors were laid off.

He also argued that dates are not important before me since Exhibit G-1 is clear in that, if the grievors accepted the Nav Canada offer, they ceased to be public servants. He argued the grievors had a clear choice: accept the Nav Canada offer or go on a priority list.

Mr. Climie argued it was fair for the grievors to get severance when they moved on, but it would be unfair to get all benefits when they came back to TC as if they never left. He concluded that, since Parliament is supreme, I have no option but to deny the grievances.

In rebuttal argument, Mr. Hazeldean argued on behalf of grievor Taucer that I am not being asked to amend an Act of Parliament, but to apply the collective agreement provisions relating to vacation leave. He agreed the grievor was no longer a public servant as per section 58 of CANSCA, but he said the issue is how he was severed. He added the something new created by Parliament escaped him and said the only conclusion I can draw is that Mr. Taucer was laid off. He argued that Mr. Taucer's function at TC was discontinued; therefore he meets the definition of "lay-off" in the collective agreement, under Article 2. Article 2.01(m) reads:

> *2.01 ...*
>
> *...*
>
> *(m) **"lay-off"** means the termination of an employee's employment because of lack of work or because of the discontinuance of a function;*

Mr. Hazeldean argued that according to section 62.(1) of CANSCA, all elements of the grievor's collective agreement continued in force for him. Subsection 62.(1) reads:

> *62. (1) Every collective agreement or arbitral award that applies to a designated employee referred to in section 58 and that is in force immediately before the transfer date continues in force until its term expires.*

He reminded me the employer concluded Mr. Taucer had continuous employment under the meaning of section 3 of the *Public Service Terms and Condition of Employment Regulations* for sick leave credit reinstatement as Ms. Cox wrote in the

final level response. Mr. Hazeldean concluded that Mr. Taucer should not forfeit his leave entitlements because he got severance pay.

In his rebuttal argument, Mr. Shields reminded me the real issue before me lies in subparagraph 17.02(h)(i) in that I have to decide whether or not the exception applies. That is, did grievors Taylor, Saucier and DePass get severance pay on lay-off. He argued that sections 70 and 72 of CANSCA are clear, that severance payment is for a lay-off. He argued severance pay and lay-off are intertwined in section 72 just as they are in subparagraph 17.02(h)(i).

He concluded that the basis of their severance pay is section 72 of CANSCA and they were laid off.

Decision

I agree with Mr. Climie. Parliament is the supreme law maker in the land. However, I also believe what I am dealing with in the grievances before me, is a 'duck' to quote Mr. Hazeldean's metaphor, a lame duck on the part of the employer, and a healthy duck on the part of the bargaining agents.

The evidence establishes that the grievors ceased to be employed in the federal Public Service because of the transfer of the air navigation services function to the private sector; in other words, this function was discontinued in the Public Service. The grievors did not choose to leave the Public Service voluntarily; rather, it was thrust upon them. Accordingly, I am satisfied that they were subject to a *de facto* lay-off, at least for the limited purpose of determining their entitlements under the relevant collective agreements upon their re-employment in the Public Service.

Mr. Taucer is therefore entitled to have his previous years of service in the Public Service recognized for vacation leave entitlements. The exception in clause 21.03 of his collective agreement does not apply since he received severance on lay-off, and was reappointed to the Public Service within one year following his date of lay-off.

Mr. Taucer's grievance is therefore allowed.

As for grievors Taylor, Saucier and DePass, I am of the same opinion. The exception in subparagraph 17.02(h)(i) of their collective agreement does not apply either, since they also received severance pay on lay-off. All three grievors are therefore eligible for all vacation leave entitlements since they also returned to the Public Service within one year following their dates of lay-off.

Their grievances are therefore allowed.

J. Barry Turner,
Board Member.

OTTAWA, June 17, 1998.