

IN THE MATTER OF AN ARBITRATION

BETWEEN

**NAV CANADA
(the “Company”)**

and

**CAW LOCAL 2245
(AIR TRAFFIC SPECIALISTS)
(the “Union”)**

RE: GRIEVANCE RE ARTICLE 38.19

Arbitrator: Michel G. Picher

Appearances for the Company:

Mary J. Gleason, Ogilvy Renault, Counsel
Daphne Fedoruk, Articling Student, Ogilvy Renault
Brent Clary, Manager – Labour Relations, NAV CANADA
Barbara Gagné, Manager – Compensation Programs, NAV CANADA

Appearances for the Union:

Abe Rosner, National Representative, CAW
Joel Fournier, CAW
Ron Smith, National Representative, CAW
Derek Yakielashek, President – CAW Local 2245 ATS
Paul Mekis, CAW

Hearings in this matter were held in Ottawa on December 5, 2003, January 6 and January 21, 2004.

A W A R D

This arbitration concerns a grievance whereby the Union alleges that the Company violated its obligation with respect to establishing a new classification system as provided within Article 38.19 of the collective agreement. The article in question provides as follows:

38.19 Classification System

If, during the life of the present Collective Agreement, the Company introduces a new classification system and standards and once it is agreed to by the Company and the Association, it shall form the basis for joint consultation for the purposes of its implementation and determination of appropriate annual rates of pay (Appendix "A"). Any disagreement between the Company and the Association concerning its application as it relates to salaries shall be subject to the grievance and arbitration procedure. Until such time as any new classification system and standards have been implemented and the salary structure determined, the classification system and standards existing upon signature of the Collective Agreement shall remain in place.

The foregoing provision is augmented by the provisions of LETTER OF UNDERSTANDING NO. 17 (L.O.U. 17). It reads as follow:

Re: Classification Review

Notwithstanding Article 38.19 of the Collective Agreement, it is the Company's intention to initiate a review of the bargaining unit classification standard during the life of the present agreement. It is understood, however, that the Company may defer such review if consolidation of bargaining units proceedings affecting the present bargaining unit are undertaken.

It is also agreed that NAV CANADA shall undertake a study of:

- (a) duties and responsibilities, present volume, complexity and workload of FSS positions and any changes that have taken place therein;
- (b) the comparison of the duties and responsibilities of FSS positions to AI-1 and AI-2 duties and responsibilities.

The study shall be completed by April 30, 2001.

The facts pertinent to the grievance are not in substantial dispute. For the term of the collective agreement expiring on April 30, 2001, the Air Traffic Specialists within the bargaining unit continued to operate under a classification standard system dating back to the period before the establishment of NAV CANADA when the employees were under the employment direction of the Treasury Board of Canada. It is not disputed that during the term of that collective agreement, the Company was not under a contractual obligation to initiate a review of the bargaining unit classification standard or to introduce a new classification system. In fact no initiative to do so was undertaken by the Company before the nominal expiry of the collective agreement on April 30, 2001, or during the initial

period of the ensuing statutory freeze of the collective agreement. The provisions of the instant collective agreement concerning the introduction of a new classification system are to be distinguished, for example, from the collective agreement governing the separate bargaining unit of the Canadian Air Traffic Control Association. Under that collective agreement, Article 32.23 makes it mandatory for NAV CANADA to introduce a new classification system and standards. (See *NAV CANADA v. Canadian Air Traffic Control Association* [2001] C.L.A.D. No. 295 (Keller), award dated June 15, 2001.)

The record reveals that negotiations did not proceed successfully for a substantial period of time. While the parties were in the open period, the unfortunate events of September 11, 2001, intervened. The negative impact on the aviation industry and the potential fallout for the revenues of NAV CANADA caused the Company to propose an effective wage freeze to govern all of its bargaining units, a position from which it relented after a time. It appears that delays in the bargaining process were also encountered by reason of outstanding applications before the Canada Industrial Relations Board concerning the ultimate scope of the rights of strike and lockout. The record reveals that as little progress was being made in negotiations through the end of 2001 and the early part of 2002, Union spokesperson Gary Fane

communicated to the Company's representatives that there would be little progress with respect to resolving any outstanding issues until the matter of classifications was dealt with. In that regard, it may be noted that as of June 15, 2001, the Union had grieved an alleged violation of L.O.U. 17 by the Company, motivated in part by its dissatisfaction with a report on FSS duties and responsibilities tabled by the Employer on or about May 16, 2001.

The Company took the Union's concerns to heart and, on May 11, 2002, it tabled the outline of a proposed classification plan. That document, which shall be referred to as the structure, reads as follows:

NAV CANADA – Proposed Classification Plan

Trainee Rate

Operating Employees – Grouping 1

A LEVEL – below 1.44% of Traffic (Itinerant and Local)
(currently 20,000)

B LEVEL – 1.44% to 3.25% of Traffic (Itinerant and Local) (currently 20,000 to 45,000) OR 1.08% of Traffic (Itinerant and Local) (currently 15,000) of which 50% is IFR

B Plus LEVEL – above 3.25% of Traffic (Itinerant and Local) (currently 45,000 plus)

C LEVEL – Flight Information Centres

Operating Employees – Grouping 2**A LEVEL – IFSS and Weather Desk****Non-Operating Employees – per Whole Job Rating Program****D LEVEL****E LEVEL****Supervisory Premium – All levels (if applicable) – 5.0%****May 11, 2002**

By way of background it should be noted that at the time it tabled the proposed classification structure, the Company, having received no support for its proposed wage freeze, had tabled a wage proposal. Apparently made to all bargaining units, the proposal called for a lump sum increase of .2% for the period between the expiry of the collective agreement and August 31, 2002. Thereafter, the Company proposed increases of 2.5% per year for three years. That offer, made in June of 2002, was contemporaneous with the next step between these parties concerning classification.

The record before the Arbitrator confirms that upon the tabling of the classification structure document, the Union requested information as to what the costing of the proposal would be, in other words, how the proposal

would impact the wage levels of the various classifications and the resulting increase in cost. Costing information was then prepared by the Company and was provided to the Union on July 3, 2002, shortly after the tabling of the Company's proposed wage increase. The cost of the reclassification, exclusive of any economic pay increases, was calculated at approximately \$1,600,000. It is not disputed that in communicating that information, the Company's representatives made it clear to the Union that the reclassification proposal was tied to and conditional upon resolution of all issues at the bargaining table, including acceptance of the Company's wage proposal of a lump sum of .2% per month to August 31, 2002 (check), and 2.5% per year for the three years to follow. During his testimony, the Company's spokesperson, Mr. Tor Veltheim, stressed that the Company's position was clearly communicated as "a total package deal".

The Union did not accept the Company's proposal on reclassification, either at the time the structure document was first tabled or when the costing figures were provided. Its representatives registered three concerns with the Company, relating to the classification of positions at Gander, Newfoundland, the treatment of weather desk positions, and the payment of the supervisory premium. It appears that the parties subsequently visited Gander in efforts to resolve concerns relating to positions at that location.

It appears that, perhaps in large part due to the parties awaiting determinations by the CIRB, little or no constructive bargaining occurred after July 3, 2002, save for two days on September 10 and 12, 2002. Events, however, did overtake the parties. In March of 2003, the Company became aware of the possibility of a pending bankruptcy or financial protection application by Air Canada. As Air Canada is the single biggest client of the Company, said to be responsible for 40% of its revenues, the possibility of Air Canada going into a form of receivership or financial reorganization was extremely serious. The evidence indicates that there was some discussion between Company representatives and Union representatives concerning the possibility of Air Canada filing for protection under the *Companies Creditors Arrangement Act*, and an indication that the Company delivered to the Union's chief spokesperson a copy of a memorandum of agreement, signed by the Company, essentially incorporating the Company's offers to that point, it being understood that the Company's position would change should Air Canada go into bankruptcy protection.

While the evidence does not confirm that in fact the memorandum document was received by the Union's representative, the Arbitrator is satisfied that nothing material turns on that. What is clear is that on April 3,

2003, the Company withdrew its offers to the Union. Its notification of withdrawal took the form of the following letter addressed to the Union's then Acting President, Mr. Derek Yakielashek, and its Transportation Director, Mr. Gary Fane, dated April 3, 2003:

Dear Mr. Yakielashek and Mr. Fane:

As you are aware, on April 1, 2003 Air Canada, our largest customer, filed for bankruptcy protection under the Companies Creditors Arrangement Act (CCAA). The adverse impact of this new development on NAV CANADA's financial situation coupled with the significant reduction in travel as a result of the outbreak of war in Iraq, are material events, the magnitude of which were not previously foreseen.

The cumulative effect of the air traffic downturn following the events of September 11, 2001, the general economic uncertainty, the war in Iraq, the SARS outbreaks and this action by Air Canada is such that NAV CANADA's ability to provide negotiated wage increases for our unionized employees or compensation adjustments for management personnel is severely impaired. During the past weekend and again on April 1, 2003, while the situation at Air Canada was still unclear, NAV CANADA's negotiators attempted to conclude agreements with its bargaining agents on the basis of offers that provided for a lump sum amount of 0.2% of base salary for each month from the expiry of the first agreement between the parties up to August 31, 2002 and 2.5% for each of 3 years from September 1, 2002 to September 1, 2004. However, NAV CANADA was able to achieve settlements with only 2 of its 8 bargaining agents and these settlements are pending ratification.

After careful consideration of the company's financial situation and the overall state of the industry that it serves, NAV CANADA has reached the conclusion that it can no longer afford to provide the wage increases or lump sum payments that

it had offered up to April 1, 2003 for those bargaining agents who had not concluded agreements by that date.

Accordingly, please be advised that NAV CANADA hereby formally withdraws the offer of a 2.5% wage increase per year for each of 3 years effective September 1, 2002 as well as the lump sum payments and classification plan revisions that had been offered to your bargaining group. However, NAV CANADA hereby invites you and such representatives of your union as you feel are appropriate to discuss with NAV CANADA's negotiators such alternatives as may be possible in order to conclude collective agreements under the current, more difficult, circumstances.

Given the seriousness of the situation, we are prepared to meet on an urgent basis at your convenience.

Sincerely,

Richard J. Dixon
Vice President and Human
Resources Officer

Notwithstanding the foregoing communication, some six months later, on September 10, 2003, the Union directed a letter to the Company's Director, Labour Relations, Mr. Tor Veltheim, purporting to accept the classification plan presented by the Company. That letter reads as follows:

Re: Union Grievance on LOU 17

Dear Mr. Veltheim

This letter is to advise Nav Canada that the union withdraws the above noted grievance and accepts the classification plan as presented in May, 2002.

We are requesting dates to meet and consult on the implementation and determine the appropriate annual rate of pay in "Appendix A" of the collective agreement.

Please advise as soon as possible as to dates, time and location of the above meetings.

Yours truly,

Derek Yakielashek
A/President

In fact, the first notification of the Union's acceptance was included in a written proposal under the heading "Salary and Premium" tabled in bargaining on August 26, 2003. The proposal in question reads, in part:

In addition to the above the union accepts an interim reclassification with distribution of monies to be agreed to by the parties which would take effect April 30, 2001 with retroactivity.

The record is clear, as reflected in Minutes of the Meeting of the negotiations between the parties on August 26, 2003, that the Company's representatives took the view that there was no longer anything on the table

for the Union to accept with respect to an interim reclassification. It is at that point that the issue is joined for the purposes of this grievance. The Union maintains that what transpired in April of 2003 was a notification by Mr. Dixon of the withdrawal of monetary proposals by the Company, including the monies which might be attached to the reclassification structure document first tabled on May 11, 2002. The Company takes the view that Mr. Dixon's letter clearly placed the Union on notice that all of its proposals in relation to reclassification were taken off the table by the letter issued by Vice-President Dixon on April 3, 2003. That, its counsel submits, is reflected in the first sentence of the penultimate paragraph, where reference is made to "...as well as the lump sum payments and **classification plan revisions** that had been offered to your bargaining group." (emphasis added)

The positions of the two parties flow from two very different conceptual premises. The Company clearly viewed the raising of the classification issue during the open period, at the bargaining table, by the Union as another of many collective bargaining issues to be resolved in the negotiation of the collective agreement renewal. From the Employer's standpoint, it is in that framework that its offer of both a reclassification structure and the related costing were made. It submits that it was at liberty to withdraw those offers in light of serious changing circumstances and that

the CCAA filing by Air Canada on April 1, 2003 clearly was such a circumstance. On that basis, the Company maintains that there was no offer on reclassification to be accepted by the Union after April 3, 2003.

The Union comes from an entirely different perspective. It maintains that the discussions concerning reclassification were not part of the process of bargaining for the renewal of the collective agreement. In its view, those discussions flowed from the operation of the process contemplated under Article 38.19 of the collective agreement. Its representative submits that during the period of the statutory freeze, the Company remained obliged to respect the provisions of the collective agreement. Therefore, he argues, if the employer did table a proposal for a classification, it must be doing so under the terms of L.O.U. 17 and the provisions of Article 38.19 of the collective agreement. In that circumstance, the Union's representative argues, it was not open to the Company to simply withdraw the proposal which was tabled in the same manner as it might withdraw a bargaining proposal. In his view, in light of the language and spirit of Article 38.19, the ability of the Company to resile from an initially proposed reclassification structure must turn on an event of major significance, such as the frustration of the possible change by the closure of certain operations, for example.

The Union does not dispute that the letter of Mr. Dixon would have properly communicated a withdrawal of the monetary or cost dimension of the Company's proposed classification plan. It argues, however, that the structure of the plan, which its witnesses refer to as "the template" tabled on May 11, 2002, was not intended to be withdrawn by the letter of Mr. Dixon and remained on the table for the Union to accept, as it purported to do in bargaining on August 26, 2003, and in the letter of the President of the Local dated September 10, 2003. In its submission from that point on, the process contemplated under Article 38.19 was triggered, and it has since then been for the parties to negotiate the wage adjustments relating to the new structure and, failing agreement, to proceed to arbitration on the merits of that issue.

Counsel for the Company argues that the perception advanced by the Union is simply not supportable. Firstly, she submits that Article 38.19 contemplates that the Company may, without obligation, make a proposal with respect to classification "...during the life of the present Collective Agreement". In her submission, having regard to the framework of the collective agreement and the express reference to the closing date of the term of the agreement, April 30, 2001, within the text of L.O.U. 17, it must be concluded that the proposal for a new classification system and standards must, in keeping with these provisions, be made during the life of the

collective agreement, which means up to and not beyond April 30, 2001. She submits that that is especially clear from a purposive point of view, as it seems to involve the possibility of interest arbitration under the provisions of Article 38.19 during the open period, when the parties themselves might be compelled to interest arbitration for the renewal of the provisions of their collective agreement. She argues that that contemplates an overlap and possible conflict of process that would not have been intended by the parties. In support of her position, she draws to the Arbitrator's attention certain labour board decisions confirming that, notwithstanding the statutory freeze, for some purposes the terms and conditions of a collective agreement may not operate beyond the end of its contractual term. In that regard, reference is made to the decision of the Ontario Labour Relations Board in The Toronto Jewellery Manufacturers' Association, [1979] OLRB Rep. July 719. With respect to the application of the *Canada Labour Code*, reference is made to the decision of the Alberta Court of Queen's Bench in Amalgamated Transit Union Division 1374 v. Canadian Coachways (Alberta) Ltd., Greyhound Lines of Canada Ltd. [1980] 32 A.R. 474. Finally, arbitral jurisprudence is referred to in Re CNCP Telecommunications and Canadian Association of Communications & Allied Workers (1987) 31 L.A.C. (3d) 344 (Freedman).

As an alternative argument, counsel for the Company submits that even if it could be said that the offer of reclassification was made under the terms of Article 38.19 of the collective agreement, the Company was under no obligation to initiate any classification change, and there was no fetter upon it to modify any proposal which it might choose to make, or to withdraw any proposal made prior to its acceptance by the Union. She submits that the Company was at all times at liberty to exercise such a withdrawal.

That leads to her third argument, which is that the Union must discharge the two-fold obligation of showing that an offer was made and that there was an acceptance of that offer by the Union. She stresses that both elements are necessary to engage the conditions of Article 38.19. On the evidence, she stresses that the Company's position that the offer put forward in June of 2002 was clearly characterized as a "package deal". In that circumstance, she submits, there could be no doubt but that the withdrawal of the monetary package by virtue of the letter of Mr. Dixon dated April 3, 2003, there could be nothing left with respect to the Company's proposal regarding classification. As that proposal had not then been accepted by the Union, even accepting that the process was engendered under the terms of Article 38.19, there was nothing left between the parties for the purposes of

any further operation of that Article. She submits, moreover, that the suggestion that the classification structure, as distinguished from its cost, could be accepted by the Union is in any event entirely unrealistic. She maintains that there is no evidence to suggest that the structure or “template” was ever independently offered, apart from any financial costing. In effect, she submits, the Company never intended to place on the table an offer in respect of which it could have no precise understanding or control concerning its ultimate cost. Counsel maintains that cost is, in any event, inherent in any structural change, and that it is unrealistically technical and artificial to suggest, as the Union would have it, that the reclassification structure could be accepted in isolation from its financial costs.

Counsel for the Company further submits that there is nothing in the letter of Mr. Dixon to suggest, as the Union argues, that all that was removed from the table was only the financial component of the reclassification. She argues that the term “revisions” should be understood in its natural and logical sense to encompass the revised structure as well as the financial consequences that would flow from it.

Finally, counsel notes that the conduct of the Union itself was inconsistent with the position which it now takes. She stresses that on

August 26, 2003, in the proposals which the Union then tabled, in addition to the “salary and premium” package referred to above, the Union tabled a page of proposals on classification, the terms of which involved engaging an outside firm to receive submissions from both sides, following which the firm was to evaluate the positions in the bargaining unit and “... produce a proposed new classification system and standards, with a target for completion being one year after the signing of the collective agreement.”

Under that proposal, the parties were then to discuss the consultant’s proposal to endeavour to come to their own agreement, failing which they might proceed to binding interest arbitration, albeit nothing would be implemented until the next collective agreement was signed by the parties.

Counsel submits that it is simply inconsistent for the Union to have tabled that demand while now claiming that the Company’s original classification proposal nevertheless remained on the table for the Union’s acceptance.

Counsel submits that at a minimum, what transpired was a clear counter-offer by the Union, the effect of which was to negate any possibility of accepting the offer previously made by the Company, assuming for the sake of argument that it had not been withdrawn.

After carefully consideration of all of the evidence and submissions, the Arbitrator is left in substantial difficulty with the merits of the position

argued by the Union. In light of the conclusions drawn below, I do not consider it necessary to deal with the issue of whether the Company's proposal could be made only prior to the contractual end date of the collective agreement, and not during the freeze period. I am satisfied that the dispute can be resolved by assuming, without necessarily finding, that the Company's proposal did take place within the framework of Article 38.19, and not in the broader framework of bargaining for the renewal of the collective agreement.

What, then, does Article 38.19 contemplate? As stressed by counsel for the Company, under that Article before the parties can proceed to the joint consultation process, or arbitration, two conditions must be satisfied. There must first be the introduction of a new classification system and standards by the Company. Secondly, there must be an agreement to that proposal by the Company and the Association.

What does the evidence disclose in that regard? Firstly, there can be little doubt but that there was the tabling of both a structure and a cost-specific wage grid by the Company. The first condition was clearly met. The all-important question becomes whether the second condition was met, and the related question of whether the Company was at liberty to withdraw its

proposal, assuming that it was made under the terms of Article 38.19 of the collective agreement.

As a matter of first principle, the Arbitrator has substantial difficulty with the suggestion that the Company could not, having tabled a proposal, ever withdraw it. If that were so, the Union could place the Employer in the position of not accepting a proposal tabled, and holding the Company in the invidious position of being unable to change or withdraw its proposal. Such a binding circumstance would, in my view, require clear and unequivocal language to support its operation. Indeed, the Union does not itself advance the argument that under no circumstances could the Company withdraw a proposal made under Article 38.19 of the collective agreement. Its representative argues that such withdrawal must, however, be predicated upon highly unusual circumstances.

Even if the Arbitrator were to accept that analysis, I am satisfied that the standard argued by the Union's representative would be met in the case at hand. What would constitute such extraordinary circumstances? In the instant case, the Company, having made a proposal which, in its view, involved a total cost over three years in excess of \$1 million, received notice that its largest client, Air Canada, which is described as responsible for more

than 40% of its revenues, was moving into financial trusteeship. The consequences for the Company's receivables and future revenues were, to say the least, extraordinary and extremely dubious.

I am satisfied that a purposive understanding of the provisions of Article 38.19, as augmented by L.O.U. 17, would clearly relieve the Company from any obligation to maintain an offer which was tabled and which had not yet been accepted by the Association. Nor am I persuaded that the conclusion is any different if I should accept, as the Union argues, that only the monetary dimension of the Company's proposal was withdrawn by the letter of Mr. Dixon (a conclusion which I expressly do not accept). Even under the "template only" scenario, what would the Company be facing? At best, it would be facing the possibility of unsuccessful negotiations with the Union concerning the cost and wage adjustments to be made in relation to the new classification structure, and the ominous unknown of an interest arbitration process which would ultimately resolve any dispute between the parties. In other words, faced with the possible bankruptcy of its principal client, and enormous financial uncertainty, the Company would be compelled into a process in which it could neither know, nor control, the ultimate costs to be associated with the reclassification of its employees. Even if this case is to be resolved on the basis of an analysis that all that

remained on the table for the Union to accept was the bare structure, under the terms of Article 38.19 of the collective agreement the Company was nevertheless facing extremely serious and unknown consequences by leaving its “structure only” offer on the table. I am satisfied that it was within the Company’s rights, assuming that the structure and the costing could be viewed as severable offers, to remove the classification structure from the table, as I am satisfied it intended to do in the letter of Mr. Dixon.

Alternatively, the Arbitrator is ultimately persuaded by the final argument made by counsel for the Company. On a careful review of the evidence, it becomes clear that following the letter of Mr. Dixon on April 3, 2003, the Union, by its own conduct, demonstrated that it did not, in its own mind, view the Company’s proposal as being on the table for acceptance. I find it impossible to characterize the Union’s new proposal on reclassification, tabled on August 26, 2003, as other than a clear counter proposal for an entirely new classification structure, apparently to be devised by an independent consulting firm, and thereafter discussed and/or arbitrated by the parties. Moreover, the language under the heading “Salary and Premium” in the Union’s proposals for negotiation of August 26, 2003, falls far short of a clear acceptance of the classification structure proposed by the Company on May 11, 2002. It simply states that “... the Union accepts an

interim reclassification ... to be agreed to by the parties ...” That, in my view, falls far short of a clear acceptance of the reclassification already tabled by the Company. Any doubt in that regard is resolved by reference to the elaborate process of engaging an independent consultant to propose a classification system found on the next page of the Union’s document. On the whole, therefore, I cannot conclude that what the Union did in August of 2002 constituted acceptance of a still outstanding offer made by the Company.

Nor can the Union’s position be any stronger on September 10, 2003, when Mr. Yakielashek purported to advise Mr. Veltheim that the Union “... accepts the classification plan as presented in May, 2002.” If there had been any doubt in the mind of the Union on August 26, 2003, as to the status of the Company’s previous offer, there could be none after that date. The Minutes of the Meeting of August 26th plainly reflect the Company’s message to the Union that it had withdrawn the proposed structure, and not just the related monies, through the letter of Mr. Dixon on April 3, 2003. The Union’s proposals on August 26th did not, for the reasons related above, constitute an acceptance of the Company’s structure proposal, and with the reiteration of the removal of everything from the table by the Company as

articulated in the Minutes of August 26, 2003, the Union could not purport to turn the clock back to May of 2002 in its letter of September 10, 2003.

Finally, and most fundamentally, in the Arbitrator's view, this dispute does properly turn on the meaning of the letter addressed to the Union by Mr. Dixon on April 3, 2003. What was that letter communicating, in substance? Clearly, in the Arbitrator's view, the message was simple. Faced with the possible bankruptcy of Air Canada, the Company found itself in a perilous financial situation. In that extraordinary circumstance, it was withdrawing from the table the wage offer which it had previously made. In the context of the withdrawal of that monetary offer, Mr. Dixon made it clear that it was also withdrawing the "classification plans revisions that had been offered". The clear message was, in my view, that anything, including the reclassification, which might have substantial cost ramifications, was off the table. As noted above, even the bare "template" or structure of classification tabled on May 11, 2002, must, through the unknown of eventual arbitration, bear the risk of substantial cost to the Company. In that context, I am satisfied that the better view is that the Company was making it clear that all aspects of the reclassification were immediately withdrawn

from the Company's offer to the Association. From that time there was, very simply, nothing left to accept.

For all of the foregoing reasons, the grievance must be dismissed.

DATED at TORONTO this 16th day of February, 2004.

“Michel G. Picher” (signed)

Michel G. Picher, Arbitrator