ref.# Severance Pay

FINDINGS AND DECISION

IN A DISPUTE
Between

STEPHENVILLE AIRPORT CORPORATION
("the Employer")
and

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 904
("the Union")

Grievors:

Mr. Ron Higgins
Mr. Calvin Jesso

APPEARANCES:
For the Employer:
Presenter: Ms. Twila Reid, LLB.
Advisor: Mr. Larry Smith, Airport Manager
Witnesses: Mr. Larry Smith
Mr. Andy Murphy, Operations Manager
For the Union:
Presenter: Mr. Randall Earle, Q.C.
Advisor: Mr. Kevin Caines, Business Representative Local 904
Witness: Mr. Kevin Caines

Both grievances were heard as one. Statements of grievance were the same:
"Severance Pay"

The settlement requested was also the same in both cases, "full redress".

The grievances were heard on June 22, 2007 in Stephenville.

THE PARTIES AGREED THAT:

– The Arbitrator was properly appointed and had authority to hear the case.
– The Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict.
– All parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented.
– All matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived.
– There are no other points to be raised as to arbitrability or other preliminary objections.
– All witnesses were excluded until all their testimony had been heard.
– Issues of quantum will be considered separately, and if the parties are unable to reach agreement within sixty (60) calendar days after publication of the award they are to be referred back to the Arbitrator for determination;
- The Arbitrator will remain seised of the matter for period of sixty (60) calendar days after its publication should issues of interpretation of the Award arise.

ITEMS TAKEN INTO EVIDENCE:

Consent #1 The Collective Agreement ending March 30, 2004
" #2 Letter dated April 4, 2005 - Mr. Bernard to Mr. Caines
" #3 Grievance of Mr. Higgins dated October 20, 2006
" #4 Grievance of Mr. Jesso dated October 20, 2006
" #5 "Restructuring and Collective Agreement" March 21, 2005
" #6 Letter: Mr. Earle to Mr. Hutchings, April 4, 2005
" #7 Mr. Higgin's resignation, October 6, 2006
" #8 Mr. Jesso's resignation, October 6, 2006
KC #1 October 2006 schedule
AM #1 Stephenville Airport Corporation Board Meeting Minutes, Feb. 21, 2005
AM #2 Stephenville Airport Corporation Board Meeting Minutes, Mar. 2, 2005
JT #1 Copy of Station Journal, various dates from Jan. 6, 2006 to Sept. 6, 2006

ARTICLES FROM THE COLLECTIVE AGREEMENT CONSIDERED

4:01 **MANAGEMENT RIGHTS** - The Union recognises the Management's right to manage all aspects of the operation. The exercising of this right will not be inconsistent with the terms of this agreement.

ARTICLE 5:00 - EMPLOYEES DEFINED

5:01 **PROBATIONARY EMPLOYEES** - All new employees will be considered probationary for the first ninety (90) calendar days of employment. After ninety (90) days employment, an employee will become a regular employee. Regular employees shall be covered by all conditions of this Agreement.

5:02 **REGULAR FULL TIME EMPLOYEE** - A regular full time employee is any person employed on a full time permanent basis whose duties fall within the bargaining unit as defined in Article 2:00 of this Agreement and who has completed the probationary period.

5:03 **REGULAR PART TIME EMPLOYEE** - A regular part time employee is any person employed on a continuing basis for fewer than the standard hours of work or work week, whose duties fall within the bargaining unit as defined in Article 2:00 and who has completed the probationary period.

5:04 **TEMPORARY EMPLOYEE** -Temporary employees are persons hired to replace employees on leave of absence under Article 12:01, 12:03 and 12:04. Temporary employees shall not attain regular status during the period of their temporary employment. Temporary employees shall pay regular union dues and receive the wage rates and applicable benefits on a pro rata basis according to their paid hours worked.

5:05 **CASUAL EMPLOYEES** - Casual employees will only be hired after all regular full time, part time and temporary employees on the seniority list have been called back to work.

5:06 **DUTIES** - The Employer shall inform the employees in writing of their duties and shall identify those from whom they shall receive instructions as to the employer's policies and procedures.

ARTICLE 6.00 - HOURS OF WORK AND OVERTIME

6:01 **STANDARD DAY** - The standard work day and work week shall be, eight (8) hours per day, forty (40) hours per week.

A. Day Shift - The standard work day for employees working day shift shall be eight (8) hours per day Monday through Friday, 8:00 a.m. to 4:00 p.m.

B. Rotating Shift - The standard work day for employees working a rotating shift shall be eight (8) hours per day, forty (40) hours per week, Monday thru Sunday.

7:00 a.m. to 3:00 p.m. Day Shift
3:00 p.m. to 11:00 p.m. Evening Shift
11:00 p.m. to 7:00 a.m. Night Shift

Article 7: - SENIORITY

7:05 **LAY OFFS / REHIRE** - In the event of a reduction in the work force, the employer will follow the principle of "last on first off" in each classification; and, following a layoff, rehiring shall be executed on the principle of "last off first on" in each classification provided that, in both cases, the senior employee has the ability to carry out the work required in a competent and efficient manner.

7:11 **FORFEIT SENIORITY** - Seniority shall be forfeited if an employee:

A. Voluntarily terminates his or her employment;
B. Is discharged;
C. Is laid off in excess of thirty six (36) months or if time on layoff exceeds employee's seniority, whichever is greater;...

7:13 **CREW SIZE** - The Airfield Maintenance and Heavy Equipment crews will consist of a minimum of three (3) people to be employed as full-time employees in both the summer and winter operations

ARTICLE 15:00 - GRIEVANCE & ARBITRATION

15:01 **GRIEVANCE & ARBITRATION** - Grievance & arbitration procedures apply in respect of any matter relating to or involving:

A. The interpretation, application, or administration of the Collective Agreement;
B. An alleged violation of the Collective Agreement;
C. A question whether a matter is arbitrable may be the subject of a grievance.

Procedure:
A grievance must be filed in writing with the employer within five (5) days, excluding Saturday, Sunday, and statutory holidays, of the occurrence of the event giving rise to the grievance. If a grievance is not filed within this period, it shall be considered settled. The grievance must be filed and discussed with the employee's Foreman or Supervisor who will give a reply in writing within three (3) days. Failing settlement, the grievance shall be submitted within five (5) days to the Manager (and/or designate) and a meeting held. The grievor may have his or her Shop Steward and/or Business Manager (or designate) in attendance at that meeting. The Manager will give a written reply within five (5) days. Failing settlement with the Manager or his/her designate, the grievance maybe referred to arbitration within ten (10) days. Both parties shall, failing the above, either agree to a single arbitrator within ten (10) days; or one or both of the parties may apply to the Minister of Employment and Labour Relations to appoint a single arbitrator under the Labour Relations Act. The parties may, by mutual consent, refer the matter to a three (3) person Arbitration Board.

15:02 **ARBITRATOR** - The Arbitrator shall not have the power to alter, vary, modify, or amend any of the provisions of this Agreement or to substitute any provisions of this Agreement nor render a decision inconsistent therewith.

ARTICLE 20:00 - SEVERANCE

20:01 **SEVERANCE PAY** -An employee with a minimum of two (2) years' service who is laid off for a period exceeding his or her or (*sic*) right to recall (as set out in Article 7:11(c) above) shall be paid forty (40) hours pay for each year of service to a maximum of four hundred (400) hours, based on the then applicable rate of pay. Such an employee may elect to accept severance pay under the provisions of this Article before the expiry of his / her right to recall period, but in so doing shall forfeit all seniority rights accruing to him or her under this Agreement.

OPENING STATEMENTS

FOR THE UNION, Mr. Earle pointed out that the two grievances are identical in principle. The circumstances are quite simple. Mr. Higgins and Mr. Jesso were both employed by the Stephenville Airport Corporation as regular full time employees. The Corporation has had a rough time financially over the last number

of years. Consent #2 itemizes a series of seven areas in which the Union has given up significant benefits in order to help the Corporation through this financial difficulty.

In October, 2006 Mr. Higgins and Mr. Jesso were told that their shift would be reduced to a part time shift. They would be working 32 hours every second week and 40 hours in the alternate weeks. The law is clear that a substantial reduction in working hours constitutes a layoff. For these individuals, this was a substantial reduction in hours. Therefore, they were laid off.

Mr. Earle invited the Arbitrator to look at Article 20.01, which specifies the conditions under which severance pay is due in the event of layoff. As is clear from Consent #7 and Consent #8 that both Mr. Jesso and Mr. Higgins conform to the requirements set out in Article 20.01. Both forfeited their seniority in order to secure severance pay. The Union's argues that both were constructively laid off.

The Employer, however, has refused to pay the severance pay due these long serving individuals. For this reason the Union brings this grievance.

FOR THE EMPLOYER, Ms. Reid noted that this is not a scheduling grievance. The Union does not complain that the Employer was barred by the Agreement from scheduling work as it did. It is important to bear this fact in mind.

The severance policy itself is clear in requiring that an employee be laid off. This Employer's scheduling history is very clear. Stephenville Airport has always had some sort of rotating shift in place. If this schedule is calculated over a eight week pattern all employees are working for 38 hours per week.

Under no circumstances can a schedule of 38 hours per week reasonably be regarded as a constructive layoff. Case law does nor support such a claim. Such a reduction from 40 hours does not constitute a substantial reduction.

Further, Mr. Higgins' and Mr. Jesso's situations are not, in fact, the same. Mr. Higgins did not work the revised schedule at any point. He resigned before the schedule applied to him. The lay off certainly could not occur before he actually lost hours, even if it was a lay off. Mr. Higgins never lost any hours. It is therefore no violation of Article 20. There is no constructive lay off.

EVIDENCE

THE ONLY UNION WITNESS was Mr. Kevin Caines, Business Agent for the Operating Engineers, Local 904. Mr. Caines represents the employees of the Stephenville Airport Corporation. The current Collective Agreement ends on March 30, 2004, and there is currently no replacement for that Agreement. The bargaining unit has not engaged in a strike since March 30, 2004. There been no lock out.

Mr. Caines testified he had received a letter from Mr. Scott Bernard for Ernst & Young, trustee for the Stephenville Airport Corporation, dated April 4, 2005 (Consent #2). This sets out a series of changes which the Union had accepted by a vote of thirteen to six at a meeting held on March 21, 2005. The seven items cited in Consent #2 on which the Union voted agreement are:

- implementation of a new schedule
- allowing unionized workers to assist in duties outside of their primary duties
- a 15% wage reduction
- the discontinuation of the RRSP plan
- a reduction of statutory holidays
- the elimination of the "floater" holiday, and
- a reduction in sick days entitlement.

Mr. Caines confirmed he had had a conversation with Mr. George Kinsmen, as described in Mr. Bernard's letter. The vote had been as indicated, "thirteen to six in favour" of the changes proposed by the Employer.

All the bargaining unit members were called to a meeting, and we went through this list of things to be voted on, including the provision that heavy equipment operators would help as baggage handlers.

Mr. Caines's attention was directed to Consent #5 (at page 6) which sets out a similar list of proposed modifications to the Collective Agreement:

• the elimination of a provision for a floater, which is effectively an additional day of paid vacation
• administration of the RRSP and group insurance plans
• calculation of vacation pay (absolute number of days versus a percentage basis)
• the requirement to employ seasonal workers for a minimum of 14 weeks
• the ability of SAC to hire students
• the requirement to employ a minimum number of maintenance staff
• the elimination of the voluntary on call provision
• calculation of overtime.

Asked which of the proposed modifications affected the schedule, Mr. Caines did not deny that the first item cited in Consent #2 is "implementation of a new schedule", but said:

I did not agree to the flex schedule. My stand was forty hours and no reduction.

He denied speaking with Mr. Kinsmen about a new schedule. Asked if there had been any discussion with Mr. Bernard concerning schedules, Mr. Caines said:

He was looking at two and three hour shifts and split shifts. The airport was operating at 24 hours a day at that time, and there was no change in the hours of operation for the airport. There are two shifts per day: one from 7:00 am to 3:00 pm, and another from 3:00 pm to 11:00 pm. Then the balance of the hours was covered by on call employees until 3:00 am, and those coming on from 7:00 am were on call from 3:00 until 7:00.

Mr. Caines's commented on Article 6.0 dealing with shifts.

> Those schedules have not been worked since I went there ... He wanted short shifts. I said, No. There was no way, after what we did, would we be looking at anything on hours.

Asked what he understood to be Mr. Higgins' and Mr. Jesso's complaint, Mr. Caines answered:

> They were not offered and given forty hours a week. Mr. Higgins was working forty hours a week up to the time that the schedule came out that reduced him to 32. I knew nothing about the 38 hours a week. I can't even remember a schedule with 38 hours a week on it.

Mr. Caines identified as KC #1 a schedule for October 15 - 28, 2006. It had been sent to him unsolicited. The schedule shows some employees working 40 hours per week for two weeks, and others working one week at 32 hours and another at 40 hours. Mr. Caines said it was "because of a schedule" like KC #1 that Mr. Higgins learned his own work hours was being reduced. Mr. Higgins's name does not actually appear on KC #1 because:

> He was not there at the time. The entry against "Dave F." should actually have been R. Higgins and the entry showing Tony B. should actually have been Mr. Jesso. The schedule shows that they worked at 40 hours for two weeks and then for 32 hours for two weeks. That was less than they had been getting: their 40 hours a week.

Asked to comment on the fact that Consent #2 indicates changes were accepted, Mr. Caines said:

> Basically, it meant that the HEOs could help with ground handling, and there was a 15% reduction. That was 15¢ on the dollar. They also had contributions to an RRSP; that's gone too. And 12 stat holidays reduced to 9. They gave up 7 of their 15sick days, leaving only 8. All these changes were implemented. We allowed all these, and we were told by Ernst & Young that they would make things work.... Yes they were implemented. ... There were 19 unionized people employed at that time. Now there are 9, but 2 extra people come on in the Fall, so it goes to 11.

ON CROSS EXAMINATION Mr. Caines confirmed that Consent #5, was discussed at the Union meeting, and was voted on and accepted by the majority. The Union members accepted Consent #5.

Ms. Reid pointed to a section of Consent #5 (p. 3) entitled "Scheduling and Work Flexibility". Mr. Caines again confirmed that Consent #5 was discussed at the meeting and that the members voted in favour of Consent #5.

Mr. Caines also agreed that the pay period is every two weeks. Ms. Reid then led Mr Caines through calculations based on KC #1showing that, over an 8 week period, the actual number of hours averaged is 38 hours per week using a rotating eight week schedule. Mr. Caines acknowledged that Mr. Higgins never actually worked this schedule, and agreed, further, that the term "layoff" is not defined in the Collective Agreement.

ON REDIRECT EXAMINATION Mr. Caines testified that, in his view, the Collective Agreement does not allow for the reduction of a full time employee's hours. Mr. Caines also testified he understood that Mr. Higgins would be working 32 hours per week.

THE FIRST EMPLOYER WITNESS was Mr. Andy Murphy, Operations Manager for the Stephenville Airport Corporation. Mr. Murphy was a member of the bargaining unit until April, 2005, when he successfully applied for the Operations Manager's position.

Mr. Murphy described the financial status of the airport as "hanging by a thread", and described the basis for his knowledge of relevant events as based on the fact that he had been Shop Steward for the Union and employee representative on the Board of the Stephenville Airport Corporation. He attended meetings of

that Board, and was privy to all what was happening, including negotiations with the Provincial Government for a line of credit.

> To secure that line of credit we had to get our budgetary problems supervised by Ernst & Young.

Mr. Murphy identified as AM #1 the minutes of a February 2005 Board meeting; and as AM #2 the minutes of a March 2005 meeting. He had attended these Board meetings and the minutes are an accurate record of what occurred at the meetings.

> At the February 21st meeting we discussed the idea of closing at length. There was some discussion of Ernst & Young coming in, and the vote is recorded (on p. 2) to approve in principle a resolution to file for protection under the Bankruptcy and Insolvency *Act*. All the parties were present: the provincial government, Mr. Hutchings for the Airport Authority, Mel Dean attended *via* a conference call, and Ernst & Young. The March minutes reveal that the Board decided to go for bankruptcy protection.

Mr. Murphy described the atmosphere as

> ... hell. No one knew from day to day what was going to happen. Ernst & Young continued to function and produced the March 21, 2005 document (Consent #5)... Mr. Hutchings was Airport Manager at the time, and Scott Bernard was appointed by Ernst & Young as trustee to oversee the bankruptcy protection. The purpose was to streamline so that we could operate under a government line of credit under the provisions of Consent #5... There were 19 at the meeting with the Union held on March 31, 2005. It was called by the Union and management, Tom Hutchings and Scott Bernard. Consent #5 was discussed at the meeting, and a vote was held to accept the document and stay open, or to close.

Mr. Murphy himself attended the meeting and confirmed that the majority voted in favour of the document.

> That was effective in securing the line of credit with the government. They kept it in place. But we had to streamline the operation by looking at shifts, and by heavy equipment operators actually helping with the refuelling. Before that the refueller would have been a ground handler.

Asked whether a change of scheduling was required, Mr. Murphy said:

> Yes. The airport was effectively operating for 16 hours a day at the time. That was not really satisfactory to the government and Ernst & Young according to this document. They wanted split shifts and part time shifts. They wanted to cut the employees' time. Basically, we had two full timers and all the rest were on call. The schedule would let us keep 16 hour service by having employees on call. The net effect was that there was a reduction in workers: two full time people and two scheduled for 28 hours a week. All others were on call.

Asked whether other members of the bargaining unit worked less than 40 hours per week before Consent #5 was adopted, Mr. Murphy answered:

> Yes. Regularly scheduled for less. They were regularly scheduled for fewer than 40 hours a week on a rotating shift schedule. On the refueller's side, Yes; on the heavy equipment operator's side, No. There was a rotating shift. Rotation worked out at 40 hours one week, 32 the next week, then another 32 hours a week and then back to 40 hour a week.

Asked whether the 32 hour periods ever occurred in the same pay period, Mr. Murphy said, Not to my knowledge. He confirmed that, over an eight week stretch, the average hours per week works out at 38 hours per week.

Asked how he would describe the Union's response to Consent #5, Mr. Murphy said:

> No one was happy with it. The Union did what it had to do. The effect of the vote was that the schedule changed. The HEO schedule had been Monday to Friday 8:00 to 4:00. After the Consent #5 schedule was approved, the heavy equipment operators worked the same shift. There was no change in their shift, not right away. Under

bankruptcy protection we were still able to advertise 24 hour coverage. We had to come up with a schedule. At the time there was only one scheduled flight a day. We had flights dropping in at any time. Advertizing 24 hours a day lets us sell fuel. If we did not stay within the line of credit, we'd close. Operating requirements had to match the line of credit or close. We introduced the schedule for the winter of 2005. We tried dozens of shifts. The one we decided on was the only one that would keep us in the good graces of Ernst & Young and the Provincial Government. We were keeping 9 or 12 people at full time hours in 2006.

In October of 2006 Mr. Higgins and Mr. Jesso resigned. Then the KC #1 schedule shift was implemented. The only difference is that Mr. Higgins would have got the rotation instead of the 8:00 to 4:00 full time 40 hours that he was working. He would have worked an average of 38 hours per period. Mr. Higgins himself never actually worked that schedule. Before the 15th of October, every week he was scheduled for was 40 hours. Mr. Higgins resigned prior to KC #1 coming into effect.

Mr. Jesso was on a rotating shift in the summer of 2006. He was working the 40, 32, 32, 40 shift which works out at 38 hour per week average.

Mr. Murphy confirmed he is familiar with the Collective Agreement, and that, so far as he knows, it has no definition of layoff. Asked what he takes the word "layoff to mean," Mr. Murphy said: You have no work.

Asked if he has an administrative role in allocating overtime, he said:

Yes. Basically on call is to be distributed evenly. Sometimes people on call aren't available, so I have to decide who gets called in. I am responsible to keep track of the call ins. If we need a call in, we have a weather station open 24 hours, seven days a week, and they phone for the call out to be brought in. I'll call them, and they will call the appropriate person. They will make the call. Either I will tell them who, or the schedule will... It's all recorded at the weather station... If, for instance, someone were scheduled from 3:00 to 11:00, they were then responsible to be available for overtime for the 11:00 to 3:00

> shift. If anyone is needed after 3:00 then the 7:00 to 3:00 shift is called in to cover.

Asked whether he had himself called Mr. Higgins and Mr. Jesso in during this period, Mr. Murphy answered:

> Yes. Three times each. They refused. It was in late August.

No heavy equipment operator junior to Mr. Higgins was scheduled more hours than Mr. Higgins, and no one junior to Mr. Jesso had been scheduled more hours than Mr. Jesso.

ON CROSS EXAMINATION Mr. Murphy testified that the Union accepted a 15% reduction in wages.

> It happened, yes and more of course... The RRSP contribution also dropped, as did holidays and sick days... After bankruptcy protection was established, HEOs and others provided backup support on ramp duties... There was considerable flexibility in scheduling, including short shifts and even split shifts, but, by and large, people got their hours. The HEOs, unlike the ramp attendants, regularly got their 40 hours. Then last October the HEOs were moved onto the same shift as ramp people... Up until that point a senior HEO had always got his 40 hours. In October Mr. Higgins learned he would be facing a 32 hour week followed by a 40 hour week... Yes (he spoke to me about it) briefly. I told him that was the shift plan. His comment was: If you take one hour out of my time I'm out of here... Over the last few years there have been no raises, and there have been losses, including the loss of the RRSP... The average loss is two hours per week,

Mr. Murphy acknowledged that it is not really the average that matters since in one week the employee only works four days, which means he loses a day's pay every two weeks. Mr. Murphy said he had never had cause to consider how many hours an employee had to lose before he or she would be considered laid off. Mr. Jesso, as the next senior operator, would have got all days Monday to Friday at 40 hours, if Mr. Higgins had decided to resign during the month of August.

> During the winter of 2005 - 2006 Mr. Higgins got 40 hours a week and so did Mr. Jesso... Mr. Jesso was working before October 13th. He was working the rotating shift for one of the ramp workers... The shift plan is posted five days prior to the effective date of any shift. Refuellers and ramp attendants cannot do HEO work. But right now we do have some who have heavy equipment licences.

THE SECOND EMPLOYER WITNESS was Mr. John Kendall Tilley, Airport Operator at the airport radio station. Mr. Tilley explained that:

> We do weather and all the calls for other departments not on shift. If there is a request, we get a call for someone to come. It could be 2:00 am. I call ramp personnel, security personnel, maintenance personnel as required, so that right people are here.
>
> Mr. Tilley is not responsible for overtime allocation.
>
> No, we only do what is requested. We do the calling. We have a list: Team 1, Team 2, Team A, Team B. The calls are all logged... We sign the log each day, noting the call outs and the replies.

Mr. Tilley identified JT #1 as a copy of pages taken from the station journal log from the period January 6, 2006 until September 6, 2006. He noted that

> On January 11th there is an entry against the name "Calvin" with the comment at 10:30. The comment reads, "No answer."

ON CROSS EXAMINATION Mr. Tilley said that

> It is a 50/50 chance to find people home on their day off.

THE THIRD EMPLOYER WITNESS was Mr. Larry Smith, Airport Manager. Mr. Smith testified that generally he

> ... and Mr. Murphy discuss shift plans and whether to implement changes and if its agreed we implement it... I am only aware by hearsay of what happened in this regard prior to July 22, 2006 when I was asked to take on the job. At that point I met with the provincial government representative and the Chair of the Board and the Mayor of the town to see what they wanted to do with the airport. I was not

sure they wanted it to continue to operate. They said they wanted to keep it going, so I said that I'd try to help. At that time there were 23 safety deficiencies. Within two or three months they were all resolved. The concern was for a fuel supply problem. There is no revenue when we did not have a steady fuel supply.

Mr. Smith's role in respect of scheduling was:

... to oversee all of it. The bottom line is everything is my responsibility, but we certainly know that the employees have carried it. When I went there I was given the documents entered into evidence here today and the orders from the board and from Ernst & Young. Simply put, the order was Do not spend money. There was a $25,000 ceiling per two weeks wages. It was a real problem. The provincial government and members of the Board wanted to reduce employees's time. It was hard to maintain the people we have with sufficient hours. One of the big things is that we have to provide a service. A lot of business people like a quick turn around – twenty to thirty minutes turn around maximum – and we have to have people here to do that. At that time both HEOs were scheduled 8:00 to 4:00 up to October when the new shift plan was implemented. And then it went four days on and two days off, four evenings on and two days off. That came into effect on October 15, 2006... It would have been temporary. The schedule changed when the first fall of snow: basically from the last part of December for fourteen weeks. That's in the contract, and it could be longer... The schedule was 40, 32, 32, 40 with an average of 38 hours per week when calculated over an eight week schedule...

Mr. Higgins never actually worked the revised schedule. He did not work any schedule less than 40 hours a week, not to my knowledge. Mr. Higgins came to the office sometime between the 1st of September and the 15th and asked for a lay off, but I said I wouldn't and I couldn't. The least senior people would have to be laid off first.

Calvin also came in next and I said that under the Collective Agreement I couldn't give him a layoff, and didn't want to. I'd have to lay off lower seniority people. I respected their position. They came in and thanked me and then left. That was prior to the middle of October: probably that day or within a day or two of the letter.

Mr. Smith confirmed that "layoff" is not defined in the Agreement and offered it as his understanding of "layoff" that:

> ... if they were laid off there was no work for them. The Collective Agreement does not have a guarantee of any particular number of hours a week. There is nothing to require a maximum or a minimum number of hours a week.

Asked whether someone who resigns can be laid off, Mr. Smith said: In my opinion it cannot be both.

ON CROSS EXAMINATION Mr. Smith confirmed that Mr. Higgins was a full time regular employee. He acknowledged that Article 6.01 defines the standard work day as 8 hours, and the standard work week as 40 hours. Asked what he considers full time work to be under the Collective Agreement, Mr. Smith said:

> I consider anything more than 35 hours a week full time. The standard is defined by the Collective Agreement, but nothing in here guarantees it. Mr. Higgins never worked less than 40 hours a week.

Mr. Smith confirmed that Mr. Murphy and he had posted the shift plan that reduced Mr. Higgins' hours in October 2006.

> Mr. Higgins had contacted me about that. He questioned it. I told him that was all we had to offer, and that I went along with what was posted.

Mr. Smith testified he had worked with Transport Canada for 33 years. He had been Flight Manager at the Stephenville Airport Corporation and, before that, at Charlottetown, PEI. He had retired in October of 1995. Mr. Smith said:

> I certainly understand the employees have made a large financial sacrifice to keep the airport open. I acknowledge that when I get a chance.

Asked whether he would consider a full time person as laid off if that person had been working 40 hours a week and was told he would be cut to 35 hours, Mr. Smith said:

> Personally, no. I certainly could agree that it would be acceptable for him to quit ... But for two hours a week I can't go along with it. To grieve the severance end of it is a bit much. I'd accept a grievance on the basis of hours of work, but not the severance.

ON REDIRECT EXAMINATION, Mr. Smith was asked whether he considers 38 hours per week full or part time. Mr. Smith answered:

> I consider it full time. None of us was trying to reduce hours, but based on the situation.... We'd already been threatened with the line of credit being withdrawn.

ARGUMENT

FOR THE UNION Mr. Earle described the matter as simple. The question simply is: Were Mr. Higgins and Mr. Jesso laid off? Under the Collective Agreement a layoff gives the employee a right to severance pay under Article 20.01. When there is a dispute the parties must abide by Article 15.01 which sets out the grievance and arbitration procedures.

The Employer is trying to produce a small minded technical argument to deny the grievors their rights. Mr. Higgins was told that his hours were to be reduced. He worked until that schedule came into effect and then effectively said: If you aren't going to employ me as the Collective Agreement requires then I am laid off, and I want the benefits the Collective Agreement says are due to someone who is laid off.

Mr. Higgins was a full time regular employee and the Agreement provides a standard work day and a standard work week. How can anyone be a full time employee if he is not working those full time hours?

Mr. Higgins had suffered a huge change in his status from full time to less than full time work week. Ms. Reid points out that the reduction is only two hours. It is important that the Arbitrator hold that thought. It is not only two hours. It is not only eight hours in one week. It is much more fundamental. It is a complete change from full time to part time status.

The Collective Agreement defines regular full time and regular part time at Article 5.02 and 5.03. Article 5.03 leaves us in no doubt as to what full time status is and the courts tell us that a layoff is constituted when there is a "substantial" reduction in hours. The leading case in this is the Supreme Court of Canada's decision in *Battlefords and District Co-operatives Ltd. v. R.W.D.S.U., Local* 544 (1998), 160 D.L.R. (4th) 29.

Mr. Higgins was one of two employees whose full time status was eroded. Article 7:05 in this Collective Agreement shows that we are not dealing with classification seniority. Mr. Higgins was not the junior working person. This was a constructive lay off and it's a fundamental law as is set out in the *Battlefords* decision.

Another leading case is *Nova Scotia v. I.B.E.W., Local* 1928, 96 L.A.C. (4th) 257. Mr. Higgins has, in fact, been reduced to part time without any regard to his seniority. The N*ova Scotia v. I.B.E.W.* case stands for the proposition that an arbitrator should view the matter in context. The reduction to 32 hours in a week is very substantial erosion of a full time person's work hours. If a part time employee were regularly getting much more work, and only lost a couple of hours, then there is no change in status.

But this is a person who has had a change in status, a status that he has held for a long time. He has already, by agreement, given up substantial benefits in his

job, including the 15% cut in pay, lost holidays, lost RRSP and lost sick days. The question is Where does one draw the line? What we have in this case is exactly the same situation as set out in *Battlefords*.

From Mr. Higgins' view, the point had been reached where, in effect, the job was gone, including all the economic benefits and the full time status, the hours that go with it constitute the job. It is very clear that this does not relate to someone who is turning down work, or for whom there is work available to take. The calls are to someone, the third or fourth or fifth on call when someone else is doing standby, or in the middle of the day off. People do not and cannot simply sit by the phone waiting for calls perhaps to come.

In Mr. Jesso's case he is entitled, as well as Mr. Higgins, to full time regular status. He was the next senior HEO, and was entitled to forty hours work week as senior operator. When he went to work on a new shift he was denied that status. He was being treated the same as Mr. Higgins was being treated. If Mr. Higgins had left in August, then Mr. Jesso would have succeeded Mr. Higgins' position. It goes to the next senior equipment operator.

The suggestion was made that when the revisions to the Agreement under the Ernst & Young provisions were agreed there was some alteration to the hours of employees. But that is not borne out in Consent #5. Mr. Murphy and Mr. Caines have testified accurately that what was sustained by the agreement over Consent #5 was flexibility, including split and short shifts. But they did not ask for a reduction in the hours of full time permanent employees. The Collective Agreement provides for part time employees. If they cannot be on part time then lay off a full time employee and allow that employee to take his or her options under the Collective Agreement.

FOR THE EMPLOYER, Ms. Reid called attention to the fact that context is crucial in this dispute. The context in this situation is survival under critically adverse limitations.

The Employer was required to stay open 24 hours a day in order to survive with a bi-weekly budget of $25,000. The fact is that there was a rotating eight week schedule which reduced the hours by approximately two hours a week. Mr. Higgins lost no time. He always worked 40 hours a week, and Consent #5 was voted on and accepted. That document included provisions that allowed flexibility in scheduling.

The heavy equipment operators on the rotating schedule were treated exactly the same. No one below Mr. Higgins or Mr. Jesso were getting any more hours. This is very different from the cases put forward by the Union.

There was no work available. It was not a matter of reducing hours. There was absolutely no evidence provided that the change from full time to part time status either occurred or has any relevance. Nor is there any case law or evidence to suggest that a rotating schedule changes anyone's status in any way.

In fact, the 2002 award by Arbitrator Oakley in a grievance between the same parties shows a rotating schedule has been in effect for some time. There is no evidence to support any complaints concerning a change of status. In fact, there is no evidence at any stage that anyone was reduced in status at all.

Article 20 provides the severance provisions. Mr. Earle argues that a reduced work week constitutes a layoff and triggers severance pay. But if one looks properly at Article 20.01 and Article 7.11(c) one see this cannot be sustained by the Collective Agreement. It simply does not make any sense. It is not logical.

Ms. Reid invited the Arbitrator to look at *Canadian Labour Arbitration* 4th edition, Browne & Beatty, Article 6:2200. A rotating shift does not trigger layoff. Ms. Reid also cited *Community Child Care and Development Studies Inc. v. C.U.P.E., Local* 3677-2, 65 L.A.C. 4th at p. 289 and *Canada Safeway Ltd. v. R.W.D.S.U., Local* 454. Both cases make it clear, in the Employer's submission, that Mr. Higgins is not eligible for any severance pay. He did not lose time.

Mr. Jesso's case requires the Arbitrator to look at *Air-Care Ltd. v. U.S.W.A.*, [1976] S.C.R. 2 and note particularly (at p.4) the article which bears a strong resemblance to the article in the instant Collective Agreement. Clearly there is a right in the company to reduce hours without lay off.

There is case law, of course, dealing with substantial reduction in work hours, and showing that there can be constructive layoff. But that has no bearing on this situation, since 2 hours per week over an 8 week cycle cannot be regarded as a substantial reduction in time.

In *Battlefords,* the average hours remaining to the Grievor was only 13 hours out of 35. That is a different matter. Further, in cases where constructive layoff is found there is some interference with seniority rights: for instance, a junior employee getting more hours than the grievor. But that has nothing to do with the instant situation. No junior employees were getting more hours

It is also important to consider not just the significance of the seniority issues but whether the changes in reduced hours are temporary or permanent. This was clearly temporary, not permanent, lasting until the winter schedule began.

Ms. Reid invited the Arbitrator to look at the facts in the context of the case law concerning constructive layoff and seniority rights. There is no layoff in this situation, in the Employer's view. Therefore there is no grievance to answer.

IN REBUTTAL ARGUMENT FOR THE UNION, Mr. Earle pointed out that keeping the context in mind is very much to the forefront of the Union's argument in this matter. The employees have done a lot to enable the airport to stay alive. If they rely on their rights that is to be respected. There is no grounds for revoking rights arbitrarily. $5,000.00 is not going to put the airport out of business.

It is certainly not illogical to argue that when hours are reduced there is a constructive layoff. Constructive lay off has to be asserted. Ms. Reid's assertion that there is no guarantee of hours simply ignores the fact that the Agreement says otherwise. *Air-Care* is worth looking at in this particular regard. There is a benefit to full time status. The Arbitrator should look at Article 7.13 on this.

The fact that this may or may not have been a permanent change is really quite irrelevant. Mr. Jesso and Mr. Higgins had no way of knowing that. The Employer responded to their concerns by saying, That's what we have to offer - That's the schedule. No one informed Mr. Jesso or Mr. Higgins that it was to be temporary. Mr. Higgins had lost a great deal, including reduced salary, sick leave, and other important benefits, including full time permanent status. He is left to wonder what is the next step. Mr. Higgins and Mr. Jesso did the logical thing. They came to expect their entitlement.

CONSIDERATIONS

At issue between the Parties are two grievances simply stating "Severance pay" and requesting "full redress".

The Union argues that the Employer has denied the Grievors severance pay due them under Article 20:01 as a result of what the Union sees as a constructive layoff arising from the reduction in the Grievors' hours of work.

The Union claims that the Collective Agreement's definition of "standard work day and work week" in Article 6.01, when read in light of Articles 5.02 and 5.03, provides a clear limitation on the Employer's right to reduce the hours of a regular full time employee to those of a part time employee. To do so, in its view, constitutes a layoff of a regular full time employee. The Union also claims that it is not simply a matter of hours but of status too, as reflected in Article 7:13.

The Employer denies severance pay is due to either Grievor. One Grievor, Mr. Higgins, resigned before the schedule complained of came into effect. Therefore he is not eligible for severance pay under the provisions of Article 20.01. Also since he did not work the new schedule, it is not possible that the reduction in hours could be held to be constructive layoff.

The Employer argues that Mr. Jesso had worked rotating schedules similar to the one complained of, and that his resignation also placed him beyond the provisions of Article 20.01 which requires the employee be "laid off."

Finally the Employer argues, in light of the Arbitral Jurisprudence, that the actual reduction in hours, (2 hours per week calculated over an 8 week cycle) is not substantial enough to justify the Union's claim of constructive layoff in either Grievor's case, especially since the Union's agreed to "implementation of a new schedule" (Consent #2) or "Scheduling and Work Flexibility" (Consent #5 p. 3).

The Arbitrator is required (Article 15:02) to render a decision not inconsistent with any provisions of the Collective Agreement. The decision in matters such as these is determined on the balance of probabilities.

Layoff is not defined in the instant Collective Agreement, and I am therefore required (*Battlefords* para. 15) to interpret the term in the context of the entire agreement.

The Evidence (Consents # 7 & 8) establishes that Mr. Higgins and Mr. Jesso both resigned their positions by letters dated October 6, 2006. I note that Brown & Beatty *Canadian Labour Arbitration*, 4th Edition reads, in part, as follows at 6:2200 "Layoff":

> ... The Supreme Court of Canada has distilled the essence of a layoff as a "disruption" or "cessation" of work, initiated by an employer, as a way of responding to a lack of available work....
>
> On this general definition, employees cannot claim to have been laid off if there has been no break or interruption of employment or loss of work. A layoff would be assumed to commence when the employee begins to lose time and not the day the notice is issued...

As Article 20:01 applies to "an employee ... who is laid off" which is a distinct category, on the face of the language of the Collective Agreement, from those who resign, the question of whether severance is due shifts to determination of the Union's claim that their resignations should not exclude them since a reduction of hours announced on the schedule (KC #1) to come into effect on October 15, 2006 constituted constructive layoff, arguably bringing one or both of grievors within the scope of Article 20:01.

I note that the Collective Agreement does not define the term layoff. I also note that the Grievances allege, and claim redress for, a "severance pay" violation, not improper hours of work or scheduling. I am limited by the statement of grievance. Therefore, I will consider hours of work and scheduling issues raised in evidence for the purpose of assessing the Union's allegation that the new schedule and reduced hours was a constructive layoff in the circumstances.

The Arbitral Jurisprudence: Brown & Beatty *Canadian Labour Arbitration*, 4th Edition reads, in part:

6:2210 Reduction of hours

Layoffs are not an employer's only option when faced with a cut-back in production and consequent decline in its need for labour. Sometimes employers prefer to adopt a work-sharing approach, and reduce the hours of all employees, to the alternative of severing, even temporarily, the employment of some. Assuming that there is no language in the agreement limiting an employer's freedom to adopt such a strategy, arbitrators have upheld its use. Except when the reduction in hours amounts to a unilateral alteration of the regular, agreed-to schedule or normal operations, ordinary clauses that delineate the regular or normal working day or work week have not been regarded as an impediment. They have been interpreted, almost without exception, to regulate the payment of overtime premiums and not to guarantee a certain number of hours of work for employees...

Similarly, arbitrators have not been sympathetic to the claim that a unilateral reduction of hours of work by an employer violates the seniority and layoff provisions of an agreement. The Supreme Court of Canada has ruled very clearly that layoffs and the reduction of hours are two different but equally legitimate employment strategies, and arbitrators have consistently upheld the legitimacy of the latter so long as the employer shares the available work equally and does not retain some of its workforce on a full-time or regular basis. According to one arbitrator, the distinction is consistent with the idea that layoff and seniority clauses are designed to ensure that junior employees are not given preference over their more senior counterparts, rather than to ensure that special preference will be given to senior employees. Moreover, this distinction has been held to prevail even where the reduction of hours was a partial one, was invoked only for a few days or weeks in the year, or was instituted on a staggered basis, as long as all employees were treated equally in the work opportunities made available to them.

At the same time, however, arbitrators have been vigilant in ensuring that a reduction in hours is carried out properly and in a way that respects the integrity of any layoff procedures. It is a basic, long-standing principle of arbitration law that if a reduction in hours is done selectively, it will be treated as a layoff and made to respect the seniority rights of the employees who are affected. Again, the arbitral jurisprudence has been affirmed by the Supreme Court of Canada in its ruling that, in certain circumstances, a significant reduction of hours can give rise to a constructive layoff.

The Union urged the Arbitrator note the Supreme Court of Canada's decision in *Battlefords and District Co-operatives Ltd. v. R.W.D.S.U., Local* 544 (1998), 160 D.L.R. (4th) 29, which, in the Union's submission, stands for the principle, among others, that "a layoff can occur without there having been a total elimination of an individual's work hours."

The Union argued that this principle should be applied in the instant case since the Grievors had already given up so much including salary cuts, partial loss of vacation and sick leave entitlements, RRSP contributions and other benefits. The Union argued that, taken in the context of these other losses, the reduction of regular full time employees' hours by one full day each bi-weekly payday should be seen as a layoff, thus bringing the Grievors within the scope of severance pay rights provided by Article 20:01.

With respect, I am not persuaded by the Union's position. It is clear that the circumstances set out in *Battlefords* are quite different. In *Battlefords* the loss of hours was much more substantial, amounting to upwards of half of the original hours. I also note that in *Battlefords,* the Supreme Court found that "employees had their hours of work substantially reduced while more junior employees replaced them". The unchallenged Employer position is that no junior employees worked more hours than either of the Grievors. The Supreme Court's decision (at para. 15) to sustain *Battlefords* finding that "the reduction in hours amounted to a constructive layoff in the circumstances" is to be distinguished from what I find to be the different circumstances in the instant matter before me.

Seniority issues were particularly in play in *Battlefords*, and I note that the number of hours lost in the instant case is a much smaller fraction of the original or standard hours than those lost in the *Battlefords* case. Whether we use the

Union's preferred description, (1 day per pay period), or the Employer's preferred description (2 hours per week calculated over an 8 week cycle), the proportion of lost time does not approach the levels of proportionate loss that the Supreme Court clearly considered substantial in *Battlefords*.

I recognise that the employees of the Stephenville Airport Corporation, as confirmed more than once by Employer witnesses, have shouldered a very large portion of the load needed to keep the Airport open and functioning. I note that the Grievors' loss of hours is one more erosion of the remuneration and benefits package that the Grievors had already seen diminish over the previous years. I also note the Union's argument that the loss of "full time" status involved in a move to less than full time hours is not an insignificant issue.

I note, however, that the grievance complains specifically about severance pay violation. Severance pay rights are set out in Article 20:01, which speaks of rights held by those who are "laid off", not by those who lose status or less than a "substantial" portion of their working hours. With respect, I can not attach weight in these considerations to collateral issues such as prior erosion of benefits or status. I am bound by what the Collective Agreement specifies.

The Collective Agreement:

I note that the Union argued that the Agreement does define regular full time and part time employees (in Article 5), and invokes the standard work day and work week as these are prescribed in Article 6:01 which reads, in part:

> The standard work day and work week shall be, eight (8) hours per day, forty (40) hours per week...

Article 5:03 defines a "regular part time employee" as "any person employed on a continuing basis for fewer than the standard hours of work or work week..." Thus,

the Union asked how the Grievors could be held to continue as "regular full time" employees while working "fewer than the standard hours of work or work week"? In the Union's view the Grievors were laid off as "regular full time" employees.

In addressing the question, I note that the Collective Agreement's definition of regular full time employees (Article 5:02) does not itself actually invoke "the standard work day and work week" as Article does 5:03 in defining a "regular part time employee". I note, again, the comment of Brown & Beatty *Canadian Labour Arbitration*, 4th Edition at para. 6:2200 (quoted above):

> ... ordinary clauses that delineate the regular or normal working day or work week have not been regarded as an impediment. They have been interpreted, almost without exception, to regulate the payment of overtime premiums and not to guarantee a certain number of hours of work for employees ...

I note the 2002 award of Arbitrator Oakley in a group grievance between these same Parties over "Change in Work Schedule". That award touched on Articles 5:00 and 6:00. I note that the award dealt with hours of work and did not address issues of layoff or severance. The import of these articles, as canvassed in that award, appears to be to "regulate ... payment" as suggested above in Brown & Beatty at para. 6:2200.

Having reviewed the Supreme Court of Canada's ruling in *Air-Care Ltd. v. U.S.W.A.*, [1976] S.C.R. 2 (at para. 8) I find that I am in agreement with this view in the instant circumstances. I find Article 5 does not fix the hours of work for regular full time employees that would prevent management from exercising Management's right "to manage ... the operation " in a manner "not ... inconsistent with the terms of this agreement" (Article 4:01). I see nothing in how Management

managed the reduction in hours that was inconsistent with Article 7:13 – or any other article of the Agreement – cited.

I have also considered the background provided in the extensive review of relevant Arbitral Jurisprudence in *Nova Scotia v. I.B.E.W. Local* 1928, 96 L.A.C. (4th) 257. I find that the seniority-related circumstances and Collective Agreement language at issue in that particular case, however, do not bear on the specific "severance pay" issues before me in the instant matter.

In summary, I find that the Collective Agreement does not provide the Grievors the right to "severance pay" claimed for them by the Union, since the Grievors were not laid off as that term is used in Article 20:01 when read in light of the Collective Agreement as a whole and in light of the prevailing arbitral jurisprudence.

DECISION

In light of the foregoing considerations, I find that

THE GRIEVANCES ARE DENIED.

Respectfully submitted as the decision of the Arbitrator.

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John A. Scott, Arbitrator

September 25, 2007