

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS ACT, 1995*

THE PARTIES:

NAV CANADA

(The "Company" or "Nav Canada")

- and -

CATCA, UNIFOR LOCAL 5445

(The "Union" or "CATCA")

- and -

MR. ROBERT HAMMOND

(The "Grievor")

FINAL AWARD

RE: GRIEVANCE OF MR. ROBERT HAMMOND

BEFORE: SYDNEY BAXTER SOLE ARBITRATOR

HELD AT: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 30, APRIL 1, 14, 21, MAY 5,
JUNE 8, 10, JULY 6, 8, 13, 15,
SEPTEMBER 16, OCTOBER 6,
NOVEMBER 2 and 19, 2021

FOR THE EMPLOYER: MS. KECIA PODETZ
MR. SPENCER KNIBUTAT

FOR THE UNION: MS. JENNIFER DUFF
MR. KARTY SINGH

FOR THE GRIEVOR: MR. MICHEL C. POIRIER

This matter arises as a result of a decision of the Canada Industrial Relations Board (the "CIRB") in which it concluded that the Canadian Air Traffic Controllers' Association (the "Union" or "CATCA") had violated Section 37 of the Canada Labour Code (the "Code") in its representation of Mr. Robert Hammond (the "Grievor") during events related to a workplace investigation into his conduct and subsequent resignation.

Section 37 of the Code sets out the Union's Duty of Fair Representation as follows:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

NAV Canada (the "Company") investigated the complaint against the Grievor in March and April 2015. His Union, CATCA, represented the Grievor during the investigation. However, the CIRB concluded that the Union acted in an arbitrary and bad faith manner in its representation of the Grievor.

Before exercising its powers concerning remedy, the CIRB referred the matter to an Industrial Relations Officer with the CIRB so that she might assist the parties in finding common ground on the issue of remedy. The parties were unable to find common ground on the issue of remedy. In a subsequent decision, dated October 21, 2020, (2020 CIRB 946), the CIRB ordered, among other things, that a grievance relating to the end of the Grievor's employment, including the threatened dismissal, the resignation and, the circumstances that led to them was to proceed directly to arbitration. It further ordered that any applicable time limits in the collective agreement be waived.

Moreover, the CIRB ordered that the Grievor was entitled to engage Counsel of his choice to represent him during the arbitration process. The Union was to pay reasonable legal

fees and expenses of his Counsel and assume the Union's share of the arbitrator's fees. Finally, should the appointed arbitrator allow the grievance and order compensation to reimburse the Grievor the Union would be responsible for payment of all compensation ordered for the period between April 17, 2015, the date of his resignation, and March 27, 2020, the date the CIRB issued award number 2020 CIRB 920.

I was appointed as arbitrator to hear the matter by agreement of the parties.

Before any scheduled hearing dates, Counsel for the Union contacted me seeking status as a party to the proceedings. The Grievor, through his lawyer, objected to the Union's involvement in the hearing.

In a preliminary decision dated December 30, 2020, I ruled that the Union was entitled to party status at the arbitration hearing and would be permitted to participate fully in matters related solely to compensation.

BACKGROUND

The Grievor was an Air Traffic Controller ("ATC") and supervisor at the Moncton Area Control Centre (the "ACC"). He was a member of the bargaining unit. ATCs operate in three specialties out of the same building at the Moncton ACC. They are the following:

1. Low-Level also referred to as Maritime, covers 28,000 feet to the ground
2. Halifax Terminal – the airspace 35 miles around the Halifax airport.
3. High-Level – covers 29,000 feet and above.

ATCs at the Moncton ACC are generally qualified to work in one specialty only. Halifax Terminal Controllers work the day and evening shifts, not the night shift; therefore, the controllers working the low-level specialty assume control of the Halifax Terminal duties during the midnight shift.

As a team supervisor, the Grievor directed other ATCs on shift concerning the duties they are to perform.

In 2013 the Company announced that it intended to amalgamate the low-level and Halifax specialties at the Moncton ACC. The goal was to have a group of ATCs qualified to work in both specialties. The ATCs as a whole were not receptive to the concept of amalgamation. There was significant push back which led to a working environment that was both toxic and divided. As a result, a compromise was reached. The existing ATCs would not be forced to become dual qualified but could volunteer for dual qualification. Twelve volunteers were sought, but fewer than twelve volunteered. The Grievor was one of the volunteers.

Around about this time, the Company made significant management changes at the Moncton facility. Mr. Wayne Nyman was appointed as General Manager (the "GM"), and Mr. Bax Vokey was appointed as the Manager Area Control Centre Operations (the "MACCO")

Soon after they assumed their new positions, Mr. Nyman and Mr. Vokey put the amalgamation process on hold to consider the best way forward. They decided that ATCs who wanted to continue with dual qualification could continue to do so, but no new dual qualification training was to take place.

The circumstances that give rise to these proceedings stem from a formal complaint filed on February 26, 2015, by an ATC (the "Complainant"), against the Grievor.

As part of the dual qualification training, the Complainant qualified in low-level. He previously was a Halifax terminal ATC. However, he subsequently elected to requalify back to Halifax Terminal.

The Complainant alleged in his complaint that the Grievor was the source of rumours circulated about him. They included: 1) that the Complainant was trying to win favour with

management to give himself a leg up in a competition to become a new supervisor, 2) that the Complainant had difficulty finding an On-the-Job Instructor ("OJI"), and 3) that the Complainant could not be trusted.

The parties called seven witnesses to testify in these proceedings: Mr. Wayne Nyman, who held the position of the Company's GM at the Moncton Air Traffic Control Centre from September 2014 until this retirement. Mr. Nyman is referred to throughout by his name or as the GM. Ms. Leanne Murphy, the Company's Human Resources (HR) Business Partner, Ms. Theresa Mein, the Company's Employee Relations Specialist, Mr. Steve Steeves, a supervisor in the Maritime Specialty, Mr. Doug Best, currently the union's National President, Mr. Stephane Blanchard, a Training Support Specialist, and Mr. Robert Hammond, the Grievor.

I would also note that the terms retirement/ resignation and retire/resign are used interchangeably throughout the evidence, argument, and decision.

TESTIMONY OF MR. WAYNE NYMAN

Mr. Nyman worked for the Company for twenty-eight and a half years. He was appointed as the GM at the Moncton Air Traffic Control Centre in September/October 2014.

Mr. Nyman testified that the Company provides air traffic control services for Canadian air traffic and airspace. To become an ATC, one needs a license which the Company issues after ATC training has been approved by Transport Canada.

Mr. Nyman explained that an individual training plan is created when an ATC returns to his specialty after a substantial absence. The plan may include on-the-job training with an instructor for a while. The starting point is one day of training for every twenty-eight days of absence from the previous specialty. The OJI would determine the amount of time needed.

Mr. Nyman said that supervisors have to direct the workplace for their area of responsibility. They often are close to the workstations. As air traffic increases, they would open up more sections to handle the workload. The supervisors also oversee the maintenance of ATCs' licenses. Exams must be written every six months to ensure the ATCs have retained the required knowledge. Supervisors are also subject to the same program. They must maintain currency as an ATC as they may be called on to perform part of their shift as an ATC. They are also expected to take care of the basic workplace issues during a shift. This may include conflict between ATCs.

Mr. Nyman testified that when he arrived in Moncton, he found the Complainant to be very welcoming. He would recommend restaurants or places to visit. Sometimes they would have conversations about the ATC operations as Mr. Nyman wished to familiarize himself with the nuances of the Moncton operation.

The amalgamation plan had been put on hold when Mr. Nyman arrived in Moncton. He said one of his priorities was to create a plan for moving forward with the two specialties (low-level and Halifax). He knew that it had been the cause of much conflict.

Eventually, Mr. Nyman and Mr. Vokey felt that great efficiency was to be gained by promoting dual qualification to enable Maritime qualified ATCs to work Halifax specialty during the day rather than just during the midnight shift. However, he said he did not reach this decision until long after the Complainant filed his complaint. In the interim, he said, we were working as normal.

Mr. Nyman was asked about the Company's Hazard Identification and Risk Assessment ("HIRA"). He explained that the HIRA is a component of the Company's Safety Management System ("SMS"). It is a tool used to ensure that safety implications are understood as much as possible when introducing an operational change.

Essentially brainstorming sessions are convened involving a group of employees selected to represent as many aspects of the operation as possible. Once the change is described,

the group is asked to list what could go wrong. When an item that could go wrong is identified, it is assigned one of two scores: 1) How bad could the event be, from not bad at all to very bad, in other words, an accident, 2) Predict how likely it is that the event will occur from almost certain to extremely remote. Then a risk assessment takes place by asking, how can the severity of the risk be mitigated? Finally, the following is considered: Depending on circumstances, should an attempt be made to implement the mitigation?

Mr. Nyman identified the Maritime, Halifax Terminal HIRA, which was put in place to identify any risk and mitigation to potentially reduce risk during the amalgamation of the Maritime and Halifax specialties, which he said happened before his time. It became a reference document as it was put in limbo like the amalgamation itself.

Turning to the complaint, Mr. Nyman said he had discussions with the Complainant about what he was enduring on the work floor. He advised the Complainant to bring his complaints through formal channels.

In early March, Mr. Nyman received a call from labour relations that the Complainant had filed a complaint.

Mr. Nyman said that he had very little involvement in the complaint other than the support role of coordinating the parties who needed to be involved.

Mr. Nyman was informed that Mr. Gary Roach, the Regional Vice President for the Union, would be recusing himself from involvement in the investigation and that Mr. Best would take over from Mr. Roach.

Mr. Nyman said that the shift managers needed to be kept in the loop as appropriate. They would be responsible for coordinating the employees' schedules to support the investigation. Mr. Nyman also wanted to provide guidance to the shift managers on what was appropriate to communicate to the employees concerning the investigation.

Mr. Nyman confirmed that the Grievor was placed on leave with pay during the complaint investigation. He said that because of the severity of the complaint, if it were true, it would be challenging to have both the Grievor and the Complainant on the work floor while the investigation was taking place because the workplace is a safety-sensitive environment. Mr. Nyman said that he became concerned about the length of time to complete the investigation. He wanted to know whether it was necessary to receive the Grievor's response before deciding the outcome. In other words, if Ms. Mein had interviewed enough witnesses, why did the investigation need the Grievor's feedback? The climate on the floor, he said, was very tense, and he wanted the investigation completed promptly, regardless of the outcome.

Mr. Nyman added that Mr. Vokey was concerned about the level of distraction in the workplace that the investigation was causing and the potential effect on safety. Further, they were short-staffed, and he believed it was putting an enormous burden on the staff to maintain service.

When he heard from Ms. Murphy that the Grievor was requesting items from his locker, he expressed his frustration. He believed that many things the Grievor asked had nothing to do with the investigation. It seemed to him that requests were coming from the Grievor just for its sake, that management was being made to jump through hoops.

Mr. Nyman said he was told very little about the substance of the investigation. Mr. Vokey, Ms. Murphy, and he talked to Mr. Roach about the allegations. He spoke to Mr. Roach about logistics. Mr. Roach needed to know what was going on to counsel his members.

Eventually, Ms. Mein provided Mr. Nyman with a copy of her investigation report and her findings. He first discussed the matter with his boss, Trevor Johnson, then with Elizabeth Cameron, the Assistant Vice President of Labour Relations. Mr. Nyman's opinion was to dismiss the Grievor as he could not see, based on the report, how the Grievor could return to the workplace. The Complainant had been absent from work from the date he filed the

complaint. Mr. Nyman said that he wanted to return the Complainant to a safe and healthy workplace.

Mr. Nyman received an email dated April 17, 2015, from Ms. Cameron in which she informed Mr. Nyman that she had heard from the Union. Mr. Best, she said, asked whether the Company would allow the Grievor to return to work in a non-operational job until March 2016, when he would retire with 35 years' service. She informed Mr. Nyman that she told Mr. Best, "absolutely not." However, she asked Mr. Nyman whether he would agree to permit the Grievor to use some of his sick leave and severance pay to provide him with salary continuance until he reached his 35 years' service. He would then receive a full pension without ever returning to work.

Mr. Nyman was not agreeable to this suggestion. He said he felt it was extremely generous to allow the Grievor to resign and receive his total severance and unused sick leave payout rather than be terminated immediately. He said that if the Grievor had taken responsibility and accountability for his actions, he might have felt different.

Mr. Nyman attended a meeting with the Grievor, and Ms. Murphy at 10:00 am on April 17, 2015. Mr. Best and Ms. Mein joined by phone. The purpose of the meeting was to discuss the harassment investigation report. A further meeting was scheduled for 3:00 pm the same day. Before the afternoon meeting took place, the Grievor resigned.

Mr. Nyman said that when he read Ms. Mein's report, he found it to be clear and concise. It had a definitive finding on which the Company could act.

After the completion of the investigation and the Grievor's retirement, Mr. Nyman testified that the workplace remained unsettled. There was an "appetite" to make a big deal of the Grievor's retirement. When posters were put up announcing the retirement party and an invite sent via an email chain, Mr. Nyman believed that it had the optics that this was coming from the Union. It was felt, Mr. Nyman testified, that this was ongoing harassment and bullying of the Complainant. Therefore, a joint staff memo was issued dated May 1,

2015, to explain that the Union and the Company had worked through the investigation and agreed with the outcome and the final actions taken.

Counsel for the Company asked Mr. Nyman about a letter he received from the Grievor dated May 22, 2015, in which he stated in part:

Sadly I have since learned of activity on the part of NAV Canada, which causes me great concern. Communications made to controllers and non-control staff have falsely implied seriously inappropriate physical harassment behaviour on my part.

The Grievor referred to the staff memo dated May 2015 signed by Mr. Vokey and Mr. Wonnocott, the Union local branch President, concerning the investigation findings.

Mr. Nyman replied that he and Mr. Vokey were curious about where this was coming from because of their efforts to protect everyone's confidentiality. He felt they were doing their very best in this regard and respecting the process.

Under cross-examination, the Grievor's Counsel asked Mr. Nyman several questions concerning supervisors' duties. He agreed that it would be normal for a supervisor to monitor and coach on the job. He further agreed that a supervisor's job is to assess training and OJI interaction; to assess student progress and problems. Staff allocation, he agreed, is part of a supervisor's function.

Mr. Nyman was asked when may a supervisor be required to jump in and perform ATC functions? He replied that when the air traffic increases to a level the ATC could not safely handle on his own.

Mr. Nyman agreed that safety is the Company's product. It is the number one priority. He agreed that if an ATC operates in more than one specialty, he must maintain proficiency in both. It is a condition of the Canadian Aviation Regulations ("CARS").

Mr. Nyman agreed that ATCs have many responsibilities. He agreed that not directing air traffic appropriately can lead to catastrophe and that ATCs would need to be qualified to do what they are doing.

Counsel asked Mr. Nyman, "Does NAV Canada have a safety management system?" He replied, "Yes." Counsel further asked, "And this arises out of CARS?" Mr. Nyman replied, "Yes."

Mr. Nyman was asked to identify a directive dated March 20, 2015, updating the Maritime Airspace modernization project staff. It states in part:

- The old project for amalgamation, as we know it, has been terminated
- All activities associated with the old project, such as the HIRA mitigations and cross-training courses, have also ceased
- Current dual-qualified persons have been consulted, and they will remain dual-qualified

He agreed that he would have supported the memo.

Mr. Nyman agreed that there is no mandatory retirement age at the Company.

Counsel asked Mr. Nyman if a supervisor identified a deficiency with an ATC performance would he discuss it with fellow supervisors? He replied that he was not sure, but a manager would eventually decide.

Mr. Nyman was adamant that he had no conversations with any Union representatives regarding his decision to terminate the Grievor.

Counsel asked Mr. Nyman whether mediation was considered? Mr. Nyman replied, "I don't believe it was raised as an option before the investigation." He said that it was not considered afterward.

CATCA Counsel asked Mr. Nyman the following questions:

Concerning your testimony about the staff memo that indicated management and the Union aligned on the outcome of the investigation, you do not know whether CATCA National agreed with Ms. Mein's findings? Mr. Nyman replied, "No."

Are you aware that the Union National did not approve the message in the staff memo? Mr. Nyman said that he was not aware. He said that he assumed both sides received approval before signing.

In re-examination, Mr. Nyman explained that when an ATC such as the Complainant returns to a specialty he was previously trained to perform, it is called "Refam" (Re-familiarization). Depending on the amount of time one is away, it may entail an individual training plan or much more informal training.

Mr. Nyman said that the reason for issuing the memo titled "Maritime Airspace Modernization Project" dated March 20, 2015, was to let the staff know the status of the amalgamation and the vision of the path forward for Terminal and Maritime specialties. A lot of questions about and references to HIRA mitigations were being raised. Therefore, he said, we felt it best to put an end to it all and start fresh with a new direction.

Counsel asked Mr. Nyman what he meant by "put an end to it all?" He replied that he didn't understand the HIRA; it was confusing. We had put amalgamation on hold, yet there was still ongoing confusion. At first, it seemed straightforward that matters were on hold, but it did not appear clear to the staff.

TESTIMONY OF MS. LEANNE MURPHY

Ms. Leanne Murphy testified that she is the face of Human Resources (HR) Services for the Moncton flight information region. In her function as HR Business Partner, she deals with the Regional Vice President of the Union. In 2015 that was Mr. Gary Roach.

CATCA, Ms. Murphy said, is her largest working group. Most inquiries or questions come from that group. Therefore, she focuses on regularly touching base with CATCA to make sure everyone is happy and that the relationship is good.

Ms. Murphy said that she works closely with the Grievor's stepdaughter, the Manager of Business Services and Shift Optimization. Ms. Murphy helped her get her first job as a co-op student in HR and was later instrumental and excited to have her hired at the Company.

Ms. Murphy said that she was involved in the discussions to amalgamate Halifax Terminal and low-level specialties when Steve Hunt was GM. She said that she had many conversations with employees who would bring concerns to her. She also was involved in numerous conversations with Mr. Roach.

Ms. Murphy said the workplace was the worst she had ever seen during amalgamation. Employees would let doors shut on others coming behind. She personally had two flat tires during this time.

During the period of unrest, Ms. Murphy encouraged the manager in charge of amalgamation, Mr. Ted Davis, to schedule working group sessions. She also encouraged the GM to meet with the employees and explain his rationale. She continually liaised with Mr. Roach to monitor events, and she encouraged employees to visit her to discuss matters.

Ms. Murphy said that she understood that the Halifax Terminal ATCs perceived their work to be under threat. The Grievor was in the Terminal specialty. In Ms. Murphy's view, the Grievor was the face or the lead to the opposition of the amalgamation process.

Ms. Murphy confirmed that when Mr. Nyman and Mr. Vokey arrived, the amalgamation came to a stop.

Ms. Murphy recalled the Complainant bringing a complaint to her under the Code of Business Conduct (COBC). She further described the Complainant as a very shaken young man who sat down in her office. He appeared nervous and uncomfortable.

Ms. Murphy took notes of the information forwarded by the Complainant and had him sign them. She next spoke to Isabel Tsevi-Fanson, the Manager of Employee Relations, as Ms. Murphy wished to hand off the file due to her leaving on vacation.

Ms. Murphy said it was always hopeful that complaints could be resolved at the lowest level by a conversation with the parties and an apology.

Ms. Murphy was asked whether situations arose where complaints could not be resolved informally? She replied that some people complain and do not want to be involved because of fear.

Ms. Murphy explained the process for dealing with complaints as follows: If it is a valid complaint, not just two people not getting along, she takes the information provided and reviews it. If the complaint is a violation of the COBC or the harassment policy, she would review in collaboration with employee relations, have the complainant sign off on the notes, and provide them to the respondent. The respondent would have a chance to reply. If any witnesses were involved, she would interview them. Then give a written response on the decision on whether or not there was a valid complaint.

Ms. Murphy said that mediation would be considered at any stage if both parties said they would like to work through the situation. Or if the respondent wished to apologize and take accountability. She said she would suggest mediation provided both parties agreed to the mediation. She added that mediation is inappropriate when one person is not sincere and does not wish to participate truly but is just trying to circumvent discipline. In other words, when one person cannot or does not see how their actions contributed to the situation.

Ms. Murphy testified that the COBC applies to all employees at the Company. It is the foundation of how all employees need to conduct themselves at work. It is the standards and principles of conduct.

Ms. Murphy was not involved in the investigation of the complaint. She had a supporting role by coordinating the contact for employees to be interviewed. She helped Ms. Mein, the investigator, gather information for the Grievor.

Ms. Murphy testified that she was the GM's point of contact for HR. Mr. Nyman was concerned about the timeliness of the investigation. In other words, "Hurry up and get it done." She enquired of Ms. Mein whether she could conclude matters quickly? A process like this, she said, causes much unrest with the labour force. Everyone knew what was going on even though the issues were supposed to be confidential. Also, an employee, the Complainant, was on sick leave, which was of great concern.

The GM, she said, based on the Grievor's requests for information, was beginning to believe that the matter was starting to be about the amalgamation rather than the harassment complaint. That is why, she said, the GM questioned some of the information that the Grievor requested.

When Ms. Murphy received Ms. Mein's report, she said that she was upset that such conduct had taken place in the professional workplace at the Company. She was disappointed and remembered feeling bad for the Complainant. After reading the report,

she didn't think that the Grievor should remain in the workplace. She said it struck her as horrible that the Grievor was a supervisor, and his role was to prevent this type of thing from happening. Yet, he was one of the lead perpetrators.

Ms. Murphy confirmed that Ms. Cameron gave the approval to meet with the Grievor on April 17, 2015, and told her if nothing new comes up at the meeting, call the Grievor to a meeting later that day and terminate.

Counsel asked Ms. Murphy what her understanding was of the phrase, "if nothing new comes up?" She replied that taking accountability or showing remorse could affect the end outcome. Had such a thing occurred, management may want to stop and discuss the level of discipline. However, no new information was forthcoming from the Grievor at the meeting on the morning of April 17, 2015.

Ms. Murphy explained that the Grievor would receive severance pay and cash out for unused sick leave by retiring instead of being terminated. When she was informed of the Grievor's resignation, she said that she felt that he was walking away whole and would not be held accountable for what he had done to the Complainant, who would have no closure on the matter. Ms. Murphy said that the only person she spoke to about the Union's request to permit the Grievor to retire was Mr. Nyman.

Ms. Murphy said that Mike Thomson, a supervisor, was also a respondent to the complaint. He took accountability for his part and was remorseful for his role in how his actions affected the Complainant. As a result, he was demoted. Ms. Murphy said that the Complainant returned to work after the Grievor's departure. However, the Complainant is currently on sick leave, and when Ms. Murphy was asked if he would speak at the arbitration about his involvement in the investigation, she said that he was not well enough to be a part.

Ms. Murphy said that from 2015 until the present, it is a delight to work at the Moncton ACC. There is no division between management and the workforce. They both work together for the same goals.

Ms. Murphy was asked what impact the CIRB proceedings had on the workplace. She replied that it brought the complaint back to life. ATCs started talking and giving their opinions. Someone took a photograph of the CIRB complaint lodged by the Grievor and distributed copies around the building. The Company removed them quickly. Once again, the Complainant was being exposed to abuse. He did not have closure to his complaint. She said she has concerns about the Grievor returning to the workplace because of the polarization it would cause within the workgroup. People would be supporting and not supporting him, and how would this play out with the Complainant.

Under cross-examination, Ms. Murphy said that she would welcome the Grievor back if he were reinstated.

Ms. Murphy agreed that in her experience, one has to hear from both parties to a dispute prior to commencing an investigation.

When asked by Counsel for the Grievor, did the Grievor's 35 years of service not factor into the decision to take discipline in line with the progressive discipline outlined in the Collective Agreement? She replied that to correct behaviour, one must take accountability for one's actions. She said that she saw nothing in The Grievor's response to the allegations conveying remorse or responsibility.

Counsel asked Ms. Murphy whether she would agree from reading the Grievor's response that he was willing to work on a process? She replied that she saw nothing whereby he was ready to acknowledge his behaviour and apologize to the Complainant. "He was willing to move forward but not acknowledge his behaviour" she said.

Ms. Murphy said she did not communicate with Mr. Roach on the Grievor's file as she was not involved with it.

Ms. Murphy agreed that an investigation should not be discussed outside of the investigation process. However, peripheral issues may arise, such as employees on the floor talking about the investigation, and management may wish to talk to those employees. Ms. Murphy, when asked, said that she did not recall Mr. Dunnett being part of the complaint. She was aware that Mr. Dunnett was demoted to ATC.

Ms. Murphy was asked about a series of emails dated March 10 and 11, 2015, from Mr. Nyman to her and from her to Ms. Mein concerning an attempt to expedite the investigation. She said that Mr. Nyman would not have known a lot about the human resources process unless explained to him.

In Mr. Nyman's email to Ms. Murphy, he asks, "My question for you is, would it not be possible to determine that the allegations are founded even without their response?" Counsel asked, "What does he mean?" Ms. Murphy replied that it appeared to her that Mr. Nyman was saying, Help me out here. Can someone explain the process? Can't you do it this way? Mr. Nyman was frustrated that she would drop off documents to the Grievor on a Saturday. R. Nyman felt that the information about the amalgamation from previous years was muddying the waters. According to Ms. Murphy, this frustration was reflected in several other emails from Mr. Nyman to Ms. Mein, copying her. She said that her involvement in the matter was trying to keep her GM calm when he didn't understand the process. GMs, she said, often get very frustrated with the human resources process.

Asked about the staff memo dated May 1, 2015, referred to above, Ms. Murphy said that she had no input in drafting it. To her, it was to inform the staff that an investigation had taken place. It was nothing to do with the finalizing of the investigation.

The Grievor's Counsel asked Ms. Murphy whether paragraph 3 of the May 1, 2015, staff memo was normal to issue?

Paragraph 3 of the staff memo states:

CATCA and Nav Canada management jointly came to a resolution. In relation to these findings and both fully agree on actions taken as a result. To respect confidentiality in the matter it would be inappropriate for any of us to discuss any specifics regarding either the complaint or outcome

She replied, "Yes, it is. We had issues before with discrimination. We wrote out a joint memo with CATCA to inform the workforce and calm them."

In re-examination, Ms. Murphy was asked if the arbitrator's finding that the Grievor was to be reinstated would change her view about his return to the workplace? She replied that it would not. The Grievor's return, she said, would be disruptive. He has circumvented the discipline process by retiring at that time. He had had a chance to move on. It would be putting into question what, in her view, was a very fair process.

Ms. Murphy said that she counsels the Complainant and knows how he feels. She is very concerned about him. He has had no closure in this matter.

Concerning the Grievor's seniority, she said that if reinstated, he would be at the top of the seniority list leading to the displacement of a junior employee who would be placed on the surplus list, which would add to the unsettledness and turmoil in the workplace.

Ms. Murphy reiterated that the Grievor did not apologize at the meeting on April 7. Of this, she said, she is 100% sure.

TESTIMONY OF MS. THERESA MEIN

Ms. Theresa Mein is the Company's Employee Relationship Specialist who conducted the investigation into the allegations against the Grievor in 2015. Ms. Mein testified that she had taken several investigation courses during her career with the Company.

Ms. Mein was informed of the complaint by her manager Ms. Isobel Tsevi-Fanson. Ms. Murphy provided the complaint details to Ms. Mein and Ms. Tsevi-Fanson by telephone on February 26, 2015. As a result, Ms. Tsevi-Fanson gave Ms. Mein the mandate to travel to Moncton to conduct the investigation. When asked whether mediation was considered, she said that she could not recall.

Ms. Mein identified the final version of the complaint, which I accepted into evidence subject to proof of its content.

Ms. Mein testified that after she received the initial complaint from Ms. Murphy, she would have talked to the Complainant to go over his complaint to ensure she had a solid understanding of its contents. After this meeting, Ms. Mein said that she would have fine-tuned the complaint.

From Ms. Mein's testimony, it was obvious that several versions of the complaint were drafted by her based on her discussions with the Complainant until a final version was finalized on March 3, 2015.

The next step, Ms. Mein said, was to meet with the Grievor to make sure he was aware of the complaint and the allegations against him.

When the complaint was finalized, Ms. Mein sent it to the GM, Ms. Murphy, and Mr. Phil Valois, who replaced Ms. Murphy while she was on vacation. She also copied Mr. Roach but subsequently received an email stating that he had recused himself from the file. The GM, Ms. Mein testified, wanted to issue a memo to all shift managers to inform them that if any employee were to discuss the matter, that is the complaint, in the workplace, to intervene. Her advice to the GM was not to issue a memo but rather trust everyone on the work floor to do the right thing, and if the issue arose, deal with it on a case-by-case basis.

On March 8, 2015, Ms. Murphy sent the Grievor a letter summarizing the allegations raised by the Complainant. She said it was the Company's practice to provide only a complaint summary to a respondent. The Grievor asked for more detailed information, which he was provided, including the entire complaint.

Ms. Mein was asked, who comprises the Tripartite Committee, referenced in the Company's Harassment Policy and Alternative Dispute Resolution Process? She replied that it consisted of the GM, the local Employee Relations Manager, and herself.

Ms. Mein said that the Tripartite Committee looks at the complaint and determines how to deal with it. For example, does the complaint meet the threshold for harassment? She said she believed that the Tripartite Committee looked at the complaint and thought the Company should investigate it.

Ms. Mein said that in her letter to the Grievor dated March 8, 2015, she informed him that she would meet with him in Moncton on March 10, 2015, to gather information. After completing the meeting with the Grievor, she sent an email to Ms. Tsevi-Fanson, Ms. Wilson, Mr. Valois, and Ms. Murphy informing them that the Grievor thought that the Company was heavy-handed by putting him on administrative leave.

Ms. Mein said that although it was Company policy not to provide the entire complaint to a respondent, it was decided to give the Grievor, in this case, the whole complaint as his request appeared fair and reasonable.

Ms. Mein said that the witnesses to the complaint were identified by letters of the alphabet, which she referred to as a witness key.

At the meeting on March 10, 2015, Ms. Mein said the Grievor arrived with his lawyer, Mr. Poirier. After some time, Mr. Best advised the lawyer that he would not be permitted to remain. After he left, she rejoined the meeting.

Ms. Mein made notes of what was said at the meeting of March 10, 2015. At the outset, the Grievor informed Ms. Mein that he needed more time and more information to respond to the complaint adequately. It was, therefore, decided that the parties would meet again on March 23, 2015. She also noted that the Grievor wanted access to his emails.

Ms. Mein was asked about an email she received from the GM dated March 10, 2015, in which he stated, "I assume you will continue with all of the other interviewees as scheduled. My question to you is, would it not be feasible to determine if the allegations are founded even without their response?" Counsel asked Ms. Mein what she did in response to this email? She replied that she probably smiled or chuckled to herself. She said that she took this as the GM's frustration regarding timeliness [of the investigation]. She was emphatic that it did not change how she conducted the investigation.

Counsel for the Company asked Ms. Mein about an email she received from Ms. Murphy on March 11, 2015, stating:

Do you think we will be able to turn things around within 24 hours (unless Rob has more witnesses) after we get Rob's response? Wayne is very concerned about the timelines of the process, as you see below.

Ms. Mein said that after receiving the email from Ms. Murphy, she either spoke to her or sent her an email. However, Ms. Murphy's email did not change Ms. Mein's process. She added that those emails from labour relations are not unusual. It's not uncommon for people to wish things to be wrapped up quickly.

Ms. Mein said that when she communicated with the GM and Ms. Murphy, it was to inform them that meetings had occurred, not what was discussed. The GM wanted to be notified of the status of the information being provided to the Grievor. Ms. Mein believed that all information requested by the Grievor should be provided. Contrary to the GM's view, Ms. Mein did not believe that the Grievor was attempting to drag things out. She said that the Company provided him with everything for which he asked. However, she wrote to tell

him that the Company did not provide witness names in an investigation to ensure confidentiality.

Ms. Mein said that when she received the Grievor's response to the complaint, she read it thoroughly. Her overall impression was that it was very technical and operational in substance. Further, he was adamant in denying the behavioural allegations.

Ms. Mein believed that the Grievor was incorrect when he said in his response, "This complaint appears to have been filed immediately after [the Complainant] failed to requalify for Terminal with his OJI on March 1, 2015."

The Grievor, she said, denied each of the allegations brought against him.

Asked what she believed the Grievor meant when he stated in his response, "I am more than willing to participate and facilitate this process as reasonably required to restore harmony to the workplace"? She replied that she assumed that he was referring to mediation. Ms. Mein said that on reading his final paragraph, it was her view that he felt there was no merit to the complaint and that the Company should dismiss it immediately.

Ms. Mein was asked again about the March 26, 2015, meeting. She said that she asked the Grievor directly about the allegations at the meeting. She said that he strongly denied them. He proceeded to provide information on the operational and procedural guidelines with the Company. He shared information on his view of the HIRA. Further, he shared information on the role of a supervisor as well as specific administrative procedures. He spent only twenty-five to thirty percent of the meeting time responding to the allegations.

Following the meeting, Ms. Mein's understanding of the Grievor's response was that he denied the allegations and maintained that everything he did concerning the Complainant was professional interaction and his job requirement.

Ms. Mein said that she met with Mr. Thomson, the other respondent to the Complainant's complaint, on March 13. Mr. Best was in attendance. After that meeting, Mr. Thomson requested a second meeting. He provided a statement and said that he had a chance to think about everything that occurred after the first meeting. He felt regret for some of his participation in some of the events.

Ms. Mein said that the interviews with the witnesses were conducted at hotels for the most part with a couple by telephone. She formulated questions for each witness based on the statements provided by the Complainant and the Grievor and both interviews.

During the interviews with the various witnesses, Ms. Mein took notes. At the end of the interview, she summarized the notes verbally to the witness. She then asked whether she had accurately captured what they told her?

Ms. Mein was asked to identify the notes which she recorded during the interviews with the numerous witnesses, which she did.

Ms. Mein testified that after she interviewed the witnesses, the Complainant, and the Grievor, she reviewed, analyzed, assessed her notes, and wrote her report. She determined that it would be based on the harassment definition in the Company's COBC. She then wrote the report to determine whether, on the balance of probabilities, harassment occurred. To do so, she asked herself whether the actions alleged created an offensive, intimidating, or hostile work environment such that a reasonable person should have known such behaviour would be unwelcome. She concluded that some of the allegations, such as rumours and statements to discredit the Complainant were well-founded. She further concluded that the allegation that the Grievor worked with Mr. Thomson to block the Complainant's training was unfounded.

When Ms. Mein finalized her draft report, she asked Ms. Tsevi-Fanson to review it. She then sent it to Ms. Murphy, the GM, and Mr. Best.

Ms. Mein explained how she structured her final report.

Counsel asked Ms. Mein how she considered the Grievor's claim that he was merely acting as a supervisor? She replied that the information she had gathered demonstrated that he did not act professionally when using the comments directed to the Complainant. She asked herself, what would a reasonable person feel in this case? She found that a reasonable person would consider the remarks unwelcome. The comments, she believed, created a hostile work environment.

Ms. Mein said that after she sent the report to Ms. Murphy, the GM, and Mr. Best, she provided a copy to the Complainant and The Grievor.

At the meeting on March 17, 2015, which she attended by phone, she confirmed her findings to the Grievor and asked him to read the report that she believed he had in his possession.

Ms. Mein said that the flow chart for the ADR Policy is a firm guideline that is generally followed. However, it is flexible, and she gave the example of her allowing the Grievor more time to martial his response. Further, the guideline provides for an investigation to be completed in one month. That being said, it generally takes more than a month to complete. Also, a summary of the allegations is usually provided to a respondent. In this case, the Grievor was provided with the entire complaint.

Under cross-examination, Ms. Mein agreed that if someone is properly discharging their supervisory duties, it is an exclusion to a claim of harassment.

Counsel for the Grievor suggested to Ms. Mein that mediation was never considered? Ms. Mein replied that it was considered in her mind, but it was not felt appropriate.

Ms. Mein said mediation was not possible because of the Complainant's state of mind and demeanor. He was under stress and not sleeping. Mediation would only happen when both parties were agreeable to participate.

Ms. Mein said that everyone she interviewed was asked whether they wished union representation. If someone chose not to, she honoured that.

Ms. Mein agreed that she did not have a signed and dated complaint from the Complainant, nor signed statements from the witnesses, only her notes. Ms. Mein agreed that the policy states that a response from the respondent is needed before an investigation is launched.

Ms. Mein further agreed that the collective agreement still applies to the complaint.

Counsel said to Ms. Mein, "I put it to you that the Tripartite Committee was not operational?" She replied that it might have discussed the complaint via telephone.

Ms. Mein agreed that she did not provide the witness key to the Grievor. She further agreed that the key identified Mr. Thomson as witness "C" and "U." She said this was an error. She agreed that a reasonable person might be affected by this. She acknowledged that the Grievor would not have known this in 2015.

Ms. Mein agreed that she did not speak to the Grievor after interviewing him on March 26, 2015. Ms. Mein also agreed that although she did not tell the Grievor, her investigation continued beyond March 26, 2015.

Counsel asked Ms. Mein the following questions concerning the various versions of the complaint:

Why would you take a complaint and change it? She answered that she did not change the complaint but asked questions to thoroughly understand and flesh out the complaint.

Why is Darrin Halohan mentioned five times in the original complaint document, but he is

mentioned fifteen times in the edited version? Is it a normal part of the process for you to draft the complaint? Ms. Mein replied, we reviewed the complaint and put it in a clear and concise memo.

Counsel asked why Ms. Mein would edit a call from a witness from an earlier version of the complaint to a later version? She replied that she did not recall.

Counsel asked Ms. Mein whether she felt that she was in a conflict in beefing up the complaint? She replied that part of her role was to understand the allegations fully. What the Complainant had provided to Ms. Murphy was not complete. Part of her role is to meet with the Complainant to see what he has provided, and in many cases, she said that she has questions that need to be answered. She said that, in her view, there is no difference in investigating and helping to prepare the complaint. She agreed she had back and forth conversations with the Complainant before the complaint was finalized.

Ms. Mein agreed that she was aware that Mr. Roach had recused himself from the case. She agreed that she wrote to him on March 4, 2015, asking him to check in with the Complainant to see how he was. Following this, Ms. Mein received an email from the Complainant giving her direction on how to investigate a witness. She said that she was not concerned by this email.

Counsel asked Ms. Mein whether she reviewed the "Guide for the ATC Supervisor," one of the documents requested by the Grievor as part of her investigation? She replied that she did not recall. She was not looking into a supervisor's roles or responsibilities rather specific behaviour.

Ms. Mein agreed that supervisors supervise and sometimes make decisions that might not be pleasant, and that part of that role is to move people around.

Ms. Mein recalled the Grievor asking for a copy of the minutes of the supervisory meeting of February 23, 2015. She identified some handwritten notes of the meeting she received

from Mr. Cote but did not recall why she didn't send them to the Grievor. She said she did not remember that meeting as very important to her investigation.

Counsel asked Ms. Mein whether it concerned her that the CIRB found that the Grievor did not have fair representation during the investigative process? She replied that she wanted the process to be fair and added that it was concerning, but it would not have affected her outcome.

Ms. Mein was directed to the findings in her report, in which she said she broke the allegations into four. However, Counsel pointed out that the first paragraph merely lists three allegations. In her first paragraph, she said that she used the word rumours. Therefore, she investigated more than one rumour. She agreed it would have been better to list all the rumours. She added that when the Grievor received her letter of March 8, 2015, with an outline of the complaint, he said that it did not contain enough information, so she provided him with the complete complaint. Consequently, he would have seen everything.

In re-examination, Ms. Mein said she conducted one investigation into the allegations against Mr. Thomson and the Grievor. There was but one allegation connecting both; they worked in concert to block the Complainant's training.

Ms. Mein said that the context of the complaint changed over time because of the answers the Complainant provided to her questions. He agreed to the final version, which was given to the Grievor. The correspondence with the Complainant was by email, which was taken as his approval. Ms. Mein said that she often works with complainants to obtain clarity of their allegations before the allegations are given to a respondent. It is not unusual. Rather than helping an individual, she is assisting with the creation of the statement.

Ms. Mein said she emailed Mr. Roach suggesting he contact the Complainant because she knew Mr. Roach to be his friend. She said that the Complainant was extremely stressed and upset. Out of empathy, she wished Mr. Roach to reach out to him.

Ms. Mein said that she did not perceive the Complainant's emails as directions for conducting her investigation.

Ms. Mein was adamant that in her investigation of the Grievor, she was investigating behaviour not contained in the supervisor's manual. Instead, behaviour from one employee to another, not behaviour viewed through the lens of responsibilities as a supervisor.

Ms. Mein said that the Tripartite Committee does use phone calls to discuss matters. It is a relatively informal process. She testified that mediation is often considered to try to get the protagonists to resolve matters at the lowest level. However, it was not appropriate in this case because of the Complainant's state of mind. His allegations were made against three supervisors. Therefore, there was a perceived power differential.

Counsel for the Company asked Ms. Mein whether her conclusions would have been different were she aware Mike Thomson appeared as two different witnesses in the witness key? She replied that her findings would not have been any different.

Counsel asked Ms. Mein why she did not send Mr. Cote's notes of February 23, 2015, supervisor's meeting to the Grievor? She replied that they were "a little bit of chicken scratches," and she could not see their relevance. She said she did not recall that meeting being significant to her investigation.

Ms. Mein said that she had no concerns about Mr. Best's representation of the Grievor during her investigation. Mr. Best nor any other Union official influenced the process of the investigation or her findings.

TESTIMONY OF MR. STEVE STEEVES

Mr. Steeves testified under subpoena. He is a team supervisor in the Maritime specialty. He has been an employee of the Company for over twenty-nine years. Mr. Steeves said that in 2015 he was a supervisor at the Moncton ACC and knew the Grievor well. He also knew the Complainant. Mr. Steeves noted that he was aware that the Complainant wanted to return to the Halifax specialty. Mr. Steeves had no concerns about the Complainant's return to the Halifax specialty.

Mr. Steeves explained that when an ATC wishes to return to a previous specialty, his role in the matter is minimal. He may pair him with an OJI. The assumption is that the ATC will "do okay" as they previously performed the functions. It is a matter of bringing that person back up to speed in the previous specialty. After pairing the ATC with the OJI, Mr. Steeves' contact would be almost nil from then on.

Mr. Steeves testified that he attended a supervisors' meeting on February 23, 2015. The Grievor, Mr. Mike Thomson, Mr. Bill Dunnett, and Mr. Dave Anderson were in attendance. He was unsure whether Mr. Bob Loring or Mr. Phil Muir were in attendance. Representing management was Mr. Box Vokey.

Mr. Steeves testified that, prior to the meeting, events were occurring that caused him to believe that there would be conflict at the meeting. People were talking about the Complainant behind his back. He said that this was rampant, and although he does not like conflict, he knew that he could not fall in line. He said that people were passing on rumours about the Complainant's motives for cross-training. Therefore, he was certain that the topic of the Complainant's training would be raised at the meeting. All of which caused him to have a sleepless night before the meeting. Leading up to the meeting, he said there was significant resistance to the Complainant's cross-training back to the Halifax specialty.

At the meeting, Mr. Steeves recalled the Grievor supported by Mike Thomson, questioning the Complainant's training to return to the Halifax specialty.

To Mr. Steeves, the consensus between the Grievor and Mr. Thomson was to stop the Complainant's training to return to Halifax specialty. When Mr. Vokey left the meeting, Mr. Steeves challenged the Grievor about where he was going with the Complainant's training. He told the Grievor that Mr. Mark Nause was a low-level specialty controller trained in Halifax specialty and was given permission to cross-train in his original specialty, but no one talked about him. Yet the Complainant's training was raising a lot of ire.

Mr. Steeves said that Dave Anderson supported him in his challenge to the Grievor. The Grievor then agreed with Mr. Steeves's assertion that he might be delegitimizing himself from performing quality control checks on ATCs if he is biased towards one particular ATC. After a fairly tense conversation, Mr. Steeves said this was a moment of decompression.

Mr. Steeves said that he recalled his meeting with Ms. Mein. He said, however, that he did not remember in fine detail anything that they discussed. He remembered the setup of the room and Mr. Best attending by phone.

When confronted by Ms. Mein's notes of their conversation, Mr. Steeves said they accurately reflected what he and Ms. Mein discussed. However, his memory was vague when the Company counsel drew his attention to specifics. The following are examples of answers he gave to questions on the specific details of the report: "I don't recall making this statement," "I don't recall talking to her about Jamie Halford," "I don't recall this discussion with Theresa" [Ms. Mein].

Mr. Steeves recalled a prevailing rumour that the Complainant would be promoted if he helped smooth out the amalgamation project. Counsel asked Mr. Steeves how this

rumour came to his attention, and she directed his attention to Ms. Mein's notes which show the initials RH next to this allegation. Mr. Steeves said that he did not recall.

Counsel drew Mr. Steeves's attention to two other sections of Ms. Mein's notes. He said, first, "I don't recall specifically what this is about" and, second, "I don't recall stating this to Theresa" [Ms. Mein]

Mr. Steeves related a couple of instances that he believed were connected to his participation in the investigation into the complaint. Both occurred after the Grievor departed from the Company.

The first occurred a couple of days after the Grievor's departure and involved Mr. Dunnett. Mr. Steeves said that he and Mr. Dunnett had been friendly. However, Mr. Dunnett was sitting next to him on this occasion, but not two social words were spoken. It appeared Mr. Dunnett was uncomfortable in Mr. Steeves's presence. Mr. Steeves described it as "being dead to Mr. Dunnett." Mr. Dunnett left the Company shortly after that, and when Mr. Steeves encountered him at a restaurant some months later and said, "Hi Bill," Mr. Dunnett, according to Mr. Steeves, pinched off a smile and said nothing.

Two other instances Mr. Steeves said occurred, which made him believe that there was a "target on his back." In the first instance, one of his colleagues, Russell Whitney, "lit into him" in a seething rage and accused and threatened Mr. Steeves of unfairly treating him because he had to stay and perform an extra sit at the air traffic controls. Later, when something similar occurred with Mr. Whitney, Mr. Steeves reported the incident to management. Management suggested that Mr. Steeves have a conversation with Mr. Whitney. This incident happened a few weeks after Mr. Steeves had given his evidence to Ms. Mein. Consequently, Mr. Steeves made a connection because of the proximity of events.

Mr. Steeves said that Gary Wallace, the local Union secretary, told the Halifax Tower that Mr. Steeves was incompetent because he had not provided him with a document in a

timely fashion. When Mr. Steeves confronted Mr. Wallace, he apologized and said it would not happen again.

Under cross-examination, Mr. Steeves agreed that he did not volunteer to be part of the amalgamation.

TESTIMONY OF MR. DOUG BEST

Mr. Best testified under subpoena. He is currently the National President of CATCA. In 2015 he was the National Executive Vice-President. At that time, Mr. Peter Duffy was the National President.

Before the Complainant filed his COBC complaint, Mr. Roach alerted Mr. Best that a member versus member COBC complaint would be filed in the Moncton ACC. Mr. Roach further advised that he wished to be recused from the file. Moncton was where Mr. Roach held his substantive position, and he felt that he was too close to all individuals involved. Following a discussion between Mr. Best and Mr. Duffy, it was agreed Mr. Best would step in and be the Union Representative.

Mr. Best said that, typically, CATCA is there to listen to members' grievances and issues. However, It is different when the situation is a member versus a member.

Mr. Best said that at the time, he knew the Grievor but did not know the Complainant. Mr. Best was in attendance when the Grievor received the complaint. He was not aware that the Grievor had requested full disclosure of the allegations against him. Mr. Best said that his primary involvement was when the Grievor asked for his assistance if he could not obtain some of the requested documents. Counsel for the Company asked to what extent the Grievor sought Mr. Best's advice. He reiterated that no advice was sought other than assistance in obtaining material that the Grievor requested. Mr. Best said he was not involved in preparing the Grievor's response to the complaint other than getting materials.

Mr. Best recalled attending the meetings with all but two bargaining unit members when interviewed by Ms. Mein. Some he attended in person, but most by telephone.

Mr. Best said that when he received Ms. Mein's report on April 16, 2015, he was attending an arbitration. He checked the report to ensure it was factual in that it reflected the statements given by the witnesses when he was in attendance. Immediately following the arbitration, he sent the report to the Grievor.

Mr. Best said that he did not know Ms. Mein's findings before receiving the report. On receiving them, he consulted with Mr. Duffy and Abe Rosner, CATCAs Labour relations director at the time. They had several discussions during one of which Mr. Duffy advised Mr. Best that the Company had contacted him to inform him that the Company would terminate the Grievor the next day. Following his discussions, Mr. Best called the Grievor, and they discussed the report. He advised the Grievor of the Company's decision to terminate.

Mr. Best described the telephone call with Grievor as being very difficult. He acknowledged that such would be the case when a member faces termination. He said they did a walk-through of the process and discussed the "what ifs." The Grievor asked Mr. Best whether, from what he had heard during the witness interviews, the report overall was correct? Mr. Best said it was not his role to give such an opinion, but he was pressed pretty hard by the Grievor. Therefore, he told the Grievor that some of the things he heard were damaging.

Mr. Best said that they discussed filing a grievance. He told the Grievor that the union would have to carry out its investigation because he was not in attendance during all the witness interviews. However, if a grievance was filed, it would have the full weight of CATCA behind it.

Mr. Best said that he shared his experience of the arbitration process with the Grievor. He told the Grievor that he professed a lack of confidence at times on how things would

unfold. Depending on the arbitrator appointed and the performance of Counsel on either side, success would be 50/50.

Mr. Best testified that he and the Grievor also discussed some things that could occur, such as early retirement. Mr. Best said that for five years prior, CATCA was able to persuade the Company to permit members to retire rather than be terminated in some instances, which had a financial benefit to the member because of the partial payout of unused sick leave. They talked, Mr. Best said, of the financial aspects in weighing the options. They also spoke of the meeting scheduled with the Company for the following morning.

The following morning, Mr. Best said he received an email from the Grievor outlining the different reasons why a grievance could be successful at arbitration. He also asked Mr. Best whether he could broker a deal, permitting him to stay employed until March 2016, when he would retire. According to Mr. Best, the Grievor had indicated this date previously to the Company as the date he intended to retire.

Mr. Best contacted Ms. Cameron and discussed the Grievor's request. Shortly after, he received an answer, saying, "No, thank you."

Mr. Best relayed Ms. Cameron's answer to the Grievor. They continued their discussions concerning the Grievor's options and what his decision might be. To Mr. Best's understanding, the purpose of the first meeting on April 17, 2015, was to explain the results of Ms. Mein's report. The second meeting set for 3:00 pm was to terminate, so Mr. Best said there was still time to discuss possible retirement.

Following Mr. Best's call with the Grievor, he had a call with Ms. Murphy and Mr. Nyman, during which Mr. Best raised immediate retirement as an option to termination.

At the 10:00 am meeting were Ms. Murphy, Ms. Mein, Mr. Nyman, and the Grievor. Mr. Best attended by phone. During the meeting, the Grievor informed the Company that

he was retiring. He was told that it would be necessary to put his intention in writing following the meeting. Mr. Best discussed the wording of the retirement letter with the Grievor. Mr. Best did not recall whether the Grievor told him why he decided to retire.

Mr. Best identified an email sent by the Grievor to Mr. Roach dated May 22, 2015, requesting retired membership in CATCA and requesting that he receive the IFATCA magazine subscription.

Under cross-examination, Mr. Best denied that he represented both the Grievor and the complainant during the investigation. He said he did not sit in on any meetings with the Company and the Complainant. Mr. Best said that the Complainant did not want his complaint to fall under Article 14 of the Collective Agreement, the harassment article, as he wanted no part of the ADR process. Instead, he wanted his complaint conducted under the COBC.

Mr. Best emphatically denied communicating with Mr. Roach throughout the investigation concerning its merits. Mr. Best said had CATCA known at the time that Mr. Roach was in contact with Mr. Nyman about the complaint, after recusing himself, he would have been disciplined.

Mr. Best was referred to the following from decision 2020 CIRB 946, *supra*:

When cross-examined, Mr. Best testified that if Mr. Roach was continuing to be involved with Mr. Nyman, discussing frustrations about delays as well as possible outcomes, when he was recused from the investigation, he did not consider this to be acceptable.

Mr. Best agreed with this and said it is his perspective today. He stressed the word "if."

Counsel for the Grievor referred Mr. Best to yet another section of the same CIRB decision and asked, "Does this reflect your recollection that you were exchanging information with Mr. Roach?" Mr. Best replied that he did not share information about the

Grievor with Mr. Roach. He had many communications with Mr. Roach as Regional Vice President, as is his usual practice on all other matters. He said his communications concerning the Grievor were with Mr. Rosner and Mr. Duffy.

Mr. Best agreed that during his discussions with the Grievor on April 16, 2015, he did not inform him that he did not attend all of the interviews with witnesses. He agreed that he did not say that he did not attend the interviews with non-bargaining unit members.

Counsel asked Mr. Best whether the investigation continued after March 26, 2015? He reflected that he could not say whether those interviews concerned the Grievor. He agreed he did not tell the Grievor that there were subsequent interviews.

Counsel asked Mr. Best about his testimony in chief when he said the Grievor told management before April 16, 2015, that he intended to retire. Mr. Best said that this was part of his conversation with the Grievor. Counsel suggested that Mr. Best was wrong in this regard and offered that no conversation along those lines took place. Mr. Best said the Grievor spoke to him about his intention and asked whether he could get a deal.

Counsel drew Mr. Best's attention to the staff memo issued on May 1, 2015.

Mr. Best said the National Office of CATCA did not approve of the memo. That it was wrong to put it out, he said the National Office did not feel that they were bound by it, but he accepted that Mr. Wonnocott, the Moncton local branch president, signed it.

Counsel for CATCA. Asked Mr. Best the following questions:

Would it be normal for you to sit in on interviews with non CATCA members? Mr. Best replied, "No, it would not."

During the phone call on the night of April 16, 2015, what was the conversation concerning the Grievor's intention to retire? Mr. Best answered that they talked about the

possibility of the Company's practice of accepting retirement. Mr. Best said that he told the Grievor this could happen as the Company had gone down this road before. Mr. Best added that the Grievor spoke of his original intention to retire in 2016.

When was it communicated to you that the Company was willing to accept retirement? Mr. Best said that it was the morning of April 17, 2015, during his conversation with Ms. Murphy and Mr. Nyman.

Mr. Best was shown an announcement congratulating the Grievor on his retirement. He said CATCA had no role in its publication, that the Grievor prepared it.

TESTIMONY OF MR. STEPHANE BLANCHARD

Mr. Blanchard attended as a witness by subpoena. He started his career with the Company in Sudbury in 1995 as an ATC Terminal Specialty. He next worked in Montreal for two years on the Ottawa and Quebec Terminal specialty.

In 2006, Mr. Blanchard transferred to Moncton, where he trained in the low-level specialty. He worked low level until 2015 when he moved to Halifax Terminal specialty.

Six years ago, Mr. Blanchard was diagnosed with stage four cancer. For a year after his diagnosis, he was on sick leave, undergoing immunotherapy treatment. Mr. Blanchard was integrated back into the workforce as a training support specialist.

In 2015 Mr. Blanchard said that he agreed to be the Complainant's OJI. An OJI he said follows protocol from beginning to end with the trainee. The trainee sits with the OJI. If there is a mishap during the training, the entire responsibility is on the OJI. The trainee is working under the OJI's license. The OJI is always plugged in beside the trainee to step in if something unsafe occurs.

Mr. Blanchard said that the OJI gradually exposes the trainee to higher intensity or more complex air traffic. The aim is to slowly bring the trainee to the level of skills and confidence to obtain the qualifications in the specialty.

Mr. Blanchard testified that in his view, the Complainant's requalification would be easy because he had worked in Halifax Terminal specialty for eight years. To Mr. Blanchard, it was more of a confidence check than requalification with the Complainant.

Mr. Blanchard explained that a low-level ATC works with much larger airspace with fewer aircraft coming in and out than a Terminal ATC. In Terminal, the density of aircraft is higher. It is a more involved control situation. In Terminal, the aircraft are closer together; therefore, there is much more ATC involvement. The sequence for the runway with aircraft lined up to land is important. The ATC has to keep the planes at a safe separation.

Mr. Blanchard testified that sometime after he agreed to be the Complainant's OJI, he was sitting next to the Grievor in the computer room when the Grievor said he heard Mr. Blanchard had agreed to be the Complainant's OJI. Mr. Blanchard confirmed this. The Grievor commented that this went against the HIRA. He then told Mr. Blanchard that he was not the Complainant's first choice for OJI. The Grievor then said something about the Complainant trying to gain favour with management to become a supervisor in the future. Mr. Blanchard told the Grievor that this was news to him and added that it was none of his [Mr. Blanchard's] business if the Complainant wanted to increase his chances of becoming a supervisor.

Mr. Blanchard said that the Complainant's training began towards the end of February 2015. The first day of training was an early afternoon shift. Mr. Blanchard stated that he and the Complainant took over a position at 2:00 pm. After starting the session, air traffic started to get moderately busy. There were weather issues and lighting issues on the runways. In winter, often only one runway is kept clear. It started to become a complex situation. It was the busiest Mr. Blanchard had observed that winter. Therefore, the Complainant required his full attention.

Mr. Blanchard testified that as the session progressed, he noted that the low-level supervisor, Mr. Mike Thomson, was sitting in the Cape Breton control sector. The Cape Breton sector is usually the quietest in low-level. Mr. Blanchard arose from his chair and whispered to Mr. Russell Whitney in the Moncton low-level control sector. Shortly after, the Grievor entered the control room and sat at an unused radar display terminal between the Cape Breton and Moncton sectors. The Grievor proceeded to bring up the images of the Halifax Terminal on the radar screen that, previous to his opening, had not been in use. Mr. Thomson then went over and spoke to the Grievor. According to Mr. Blanchard, they both appeared to be taking pleasure in the Complainant's struggles, working hard with the traffic situation in the Halifax Terminal.

Mr. Blanchard testified that it went on for a while, and from their body language and how the Grievor and Mr. Thomson were whispering, he [Mr. Blanchard] said he "knew what he saw." He added that it was very unprofessional in his 26 years at the Company, the worst that he had seen.

Mr. Blanchard said that he and his colleagues work in a difficult job. There is a lot of teasing, but the control room is very safety-oriented, not the place for personal differences when it comes to the operational side. He said that when he was trained in Ottawa, the supervisors acted as mentors, coaches, and gatekeepers. They would have been hovering to see how they could help if a situation became busy. Therefore, to witness two supervisors appearing to take pleasure in a co-worker struggling left him very uncomfortable. He said the Grievor did not speak to him at the time about the Complainant's situation with the Halifax Terminal, despite being a training supervisor.

Mr. Blanchard said that the incident left him distraught, and he spoke to Mr. Dwayne Burse, a Terminal ATC, who was working beside the Halifax Terminal to determine whether Mr. Burse had heard anything.

At the debrief with the Complainant, Mr. Blanchard raised his concerns. His initial plan was to discuss the matter with the Grievor and Mr. Thomson. However, the Complainant said that he would take care of it.

Mr. Blanchard said that most ATCs, including himself, were against the amalgamation project. He believed that a number of the low-level ATCs would never meet the requirements to succeed in the Halifax Terminal specialty. He said, however, if the Company wished the ATCs to be dual qualified and he was asked to participate, he had no issue with that.

Under cross-examination, Mr. Blanchard agreed that he was a friend of the Complainant. He said that on the day that he testified concerning the Complainant's training, he hoped that the Complainant was not picking up on what was going on.

Counsel for the Grievor referred Mr. Blanchard to Ms. Mein's notes of the interview with him. He said that his notes reflected that the Complainant did not notice the Grievor's behaviour as he was focused. Mr. Blanchard stated that he stands by that statement today.

Mr. Blanchard agreed that the work that day for the Complainant was intense. He added that he felt that the Complainant was keeping his head above water. He was working very hard, and Mr. Blanchard had no concerns.

Mr. Blanchard was asked about the layout of the screens in the control room. Counsel asked, "There are four screens together?" Mr. Blanchard replied, "Yes, and one empty screen that the Grievor went to."

TESTIMONY OF THE GRIEVOR

The Grievor began his career with the Company in 1980. In June 1981, he qualified as an ATC and eventually worked in St. John's, Newfoundland. In 1986 he moved to the

Halifax Tower as a Halifax Unit-Operator Specialist. In 1988 he moved to Moncton to train as a low-level ATC. Qualifying in 1989, he worked in that position for eight years. In 1996 he trained as a Halifax Terminal ATC. In 1997 he was appointed as an acting supervisor and later obtained a substantive supervisor's position, which he held for eighteen years until his departure from the Company in 2015. As a supervisor, he predominately performed training.

In 2013 when the amalgamation project was announced, the Grievor offered to be trained as a dual-qualified ATC. He qualified in low-level in October 2014 and worked as a low-level ATC and supervisor for the remainder of his career. He said that he was the only supervisor who trained for dual qualification and could work in three different positions, low-level ATC, Halifax Terminal ATC, and at the supervisor desk, overseeing both specialties.

The Grievor's attention was directed to the job description for Team Supervisor and was taken through it, by Counsel, in some detail. He explained that MANOPS in the job description is short for the Manual of Operation for ATCs.

Counsel next drew the Grievor's attention to sections of the Canadian Aviation Regulation (CARS), particularly the section dealing with the Air Traffic Service Operator Certificate. He said that the CARS is the basis for procedures, manuals, and operating procedures. Under the CARS, the Company must establish a Safety Management System.

The Grievor testified that as a result of the judicial inquiry into the 1989 Dryden Air Crash, one of the actions recommended was that the Government of Canada consider a form of self-regulation for airlines and Air Traffic Control Systems. As part of that process, the Company must have a method to identify hazards to aviation safety and manage associated risks. The HIRA is how the Company complies with this obligation.

The Grievor explained that in 2012, the Company initiated a Team Supervisor Leadership Program. He also said that Maritime was the name given to Halifax Terminal and low-level specialties combined due to the amalgamation.

Counsel for the Grievor asked, "What were the rules and procedures in the amalgamation that you were trying to enforce?" He said that the HIRA came up often, and he was very conscious of mitigating the risks.

Counsel next drew the Grievor's attention to the Guide for ATC Supervisor manual. He said that safety is everything at the Company. It has an excellent safety record with one of the safest systems in the world. The Company's only product, he said, is safety. He referred to the numerous references to safety in the guide for ATC supervisors. In particular, he highlighted the section which states that the supervisor will evaluate controller performance as per the Air Traffic Services Administrator Manual.

Concerning the section of the Guide for ATC supervisors dealing with shift manipulation, the Grievor explained that the March break is very relevant. If an ATC is given short notice of a shift change, the Company will bear a monetary penalty.

The Grievor stated that he accepted and agreed with his obligation to enforce policies and procedures as a supervisor. He added that the supervisor is the guardian of safety in the workplace. Safety is achieved by compliance with the policies and procedures set out in the ATC supervisor's guide.

Counsel asked the Grievor a series of questions about the Electronic Scheduling System (ESS).

The Grievor said there is no stand-back supervisor in the Halifax Terminal Specialty. As a supervisor in the Halifax Terminal, he was always expected to work traffic.

The Grievor testified that the company initially informed the supervisors of the HIRA's creation at a meeting on January 8, 2013, which he did not attend. Mr. Davis told him that the amalgamation had been announced.

Over the following 24 months, there would be one specialty, called Maritime, where all low-level and Terminal ATCs would be required to do both jobs. At the time, the MACCO, requested volunteers for an amalgamation committee to which the Grievor volunteered. After many months of meetings, the committee was at an impasse.

On August 23, 2013, the committee, the Grievor said, made a presentation to Mr. Trevor Johnson, an assistant vice-president of the Company. Afterward, the committee was to work on a plan to recruit twelve volunteers for the amalgamation initiative. Two problems had been identified of the original plan to have every low-level and Terminal ATCs perform both functions: 1) What would happen to the ATCs who could not qualify in both, and 2) How do the qualified ATCs maintain proficiency in both specialties? This, the Grievor said, is where the HIRA came into play. The HIRA he said always applied until March 2015, when it was discontinued. It applied to all ATCs performing dual qualifications, as someone could find themselves with a disproportionate number of shifts in their old specialty.

At one point, Mr. Jamie Halford, who qualified in both specialties, informed the Grievor that he was returning to his original specialty. The Grievor was concerned about the HIRA and asked Mr. Ted Davis to add the issue to the upcoming supervisor's meeting agenda. The meeting was subsequently cancelled. The Grievor raised the issue again in an email to Mr. Davis dated October 1, 2014. He copied Mr. Vokey, who had been appointed as MACCO, on the email.

The Grievor testified that he was not aware the HIRA had been cancelled until sometime after he was placed on administrative leave on March 8, 2015. A memo dated March 20, 2015, which stated that the HIRA was cancelled, was dropped in his mailbox around

April 10, 2015. He did not have the memo when he responded to Ms. Mein on March 20, 2015.

The Grievor recalled in late January 2015, meeting Mr. Blanchard near the internet kiosk just off the lunchroom. He asked Mr. Blanchard, in the context of the HIRA when the Complainant's training to return to the Halifax specialty was to begin? Mr. Blanchard replied, "March," which satisfied the Grievor's concerns.

The Grievor attended the supervisor's meeting on February 23, 2015. Mr. Dunnett, and Mr. Thomson, the Grievor said, had concerns about the Complainant's training commencing immediately before the March break because of the high leave demand during March break. They raised the issue at the meeting and suggested the training be delayed until after the March break. The Grievor said that he expressed a few words of support for this suggestion. Mr. Vokey agreed to change the date for the Complainant's training.

During a break in the meeting, the Grievor remained in the room with Mr. Steeves and Mr. Dunnett, at which point Mr. Steeves said that he disagreed with the suggestion to change the date for the commencement of the Complainant's training. Mr. Steeves added that, in his view, the Complainant's training was coming under more scrutiny than others undergoing dual qualification, such as Mr. Nause. The Grievor told Mr. Steeves that he had not observed any difference whatsoever and that a few extra days in low-level could only be to the Complainant's benefit. That ended the discussion.

The Grievor said that during Ms. Mein's COBC investigation, he requested the minutes of the supervisor's meeting of February 23, 2015, on two occasions. Ms. Mein did not provide them.

On the Complainant's first training day with Mr. Blanchard, the Grievor said he was scheduled to work at 3:00 pm. When he arrived at work, he proceeded to the low-level supervisor's desk, where Mr. Duke was seated. Mr. Duke advised that there was a surplus

of ATCs at that moment and asked him to leave the operations room and return at 4:00 PM. When he returned to the operations room at 4:00 pm, he went again to the supervisor's desk and chatted with Mr. Duke. According to the Grievor, Mr. Thomson, seated at a low-level workstation, the Cape Breton Sector, got up and approached the Grievor. He said in a whisper that the Complainant was getting his baptism by fire; the Halifax tower had just closed a runway, and the Complainant's aircraft were diverting. The Grievor noticed that the Complainant and Mr. Blanchard were seated at the Halifax workstation immediately to the right of Mr. Thomson's workstation. The Grievor stated that Mr. Thomson returned to his workstation. He [the Grievor] looked over at the Halifax sector and saw the Grievor seated, working his traffic, and Mr. Blanchard standing behind him, periodically talking to him.

Mr. Duke then asked the Grievor to relieve Mr. Thomson. The Grievor walked over to the Cape Breton workstation, put his headset on, and stood to the left of Mr. Thomson. He said that he was standing between Mr. Thomson and the left workstation. Mr. Thomson and his workstation were to the Grievor's right; an unoccupied workstation was to his left. The Grievor testified that his purpose in being at Mr. Thomson's workstation was to accept his handover briefing and assume control of the duties at the Cape Breton sector.

The Grievor said that he stood to the left of Mr. Thomson, talked to him, and received his briefing. Mr. Thomson then unplugged, and the Grievor plugged in. He testified that he had no other conversation with Mr. Thomson other than what he previously related. As he relieved Mr. Thomson, Mr. Murphy And Mr. Larocque came into the control room and relieved the Complainant and Mr. Blanchard. The Grievor said that he had no emotional reaction or expression of any to the situation.

The Grievor testified that after receiving a copy of the complaint, he provided a response setting out his position on the matter, which he maintains until today. On March 26, 2015, he met with Ms. Mein and presented his case. Afterward, Ms. Mein exited the room, leaving him with Mr. Best. He said to Mr. Best, "I am not guilty of any of this." Mr. Best

replied that it seemed like a fair investigation, not a witch hunt, and added that he had been to the interviews.

On April 14, 2015, the Grievor called Mr. Best inquiring why the investigation was taking so long. By that point, he had been on administrative leave for four weeks. On April 16, at approximately 4:00 pm, he received a call from Mr. Best to inform him that the report was completed and that the Company would be terminating him the following day. Mr. Best said he would forward the report to the Grievor as soon as possible.

The Grievor said that he was shocked as he fully expected to hear that the Company had dismissed the complaint and that he was returning to work. Later that day, Ms. Murphy dropped off the report and two letters at his house. One of the letters informed him that he was to report to the workplace the following day at 10:00 am to discuss the report's contents. Just after 5:00 pm, he received an email from Mr. Best with a copy of the report.

The Grievor and his wife reviewed the report, and he wrote an email to Mr. Best at 9:10 pm requesting Mr. Best to call him. He assumed that Mr. Best was in transit to Moncton to represent him at the following day's meeting. Mr. Best called at 10:45 pm that evening. According to the Grievor, Mr. Best told him that the report was accurate based on his attendance at interviews. The Grievor replied that he thought it was inaccurate and began to explain why. Mr. Best then said that if the Grievor was unhappy with the report, he could file a grievance and that the Union would support the grievance. However, Mr. Best added that CATCA would have to perform its investigation. The Grievor said this perplexed him because Mr. Best had just stated that the report was accurate.

The Grievor said that Mr. Best informed him that in some instances, as an alternative to being fired, one might be able to retire. Mr. Best further told him that he would lose the payout of accumulated sick leave and other entitlements if discharged.

The Grievor said that he tried to broach three subjects with Mr. Best: 1) The contents of the report; 2) The lack of progressive discipline, and 3) The arbitration process. However,

Mr. Best said that he would only have such a discussion after a grievance had been filed, to which the Grievor said, "You mean after I am fired?" and Mr. Best replied, "Yes." That concluded their conversation.

The Grievor testified that he stayed awake the rest of the night and composed a nine-point letter which he emailed to Mr. Best on April 17, 2015, at 6:29 am. Atlantic time. He did this because he was frustrated with the conversation of the previous evening and felt that putting his concerns in writing would make his frustration evident to Mr. Best. It was also to empower Mr. Best to broker a deal with the Company to permit him to continue his employment until 2016, when he would retire instead of being terminated on April 17, 2015. He said that was his objective, to convince Mr. Best that he had a strong chance of succeeding at arbitration and that from that position, the Company may consider his proposal.

The Grievor said that he had no plans to retire on April 13, 2015, before receiving Ms. Mein's report. Instead, he had every intention of working into the future. He said that at no time had he given written notice to the Company of his intention to retire.

The Grievor said he received a call from Mr. Best at around 8:30 am. Mr. Best said, in the phone conversation, that he [the Grievor] was trying to introduce new evidence in the case. He responded that his objective was to empower Mr. Best to assist him in brokering a deal that he remained employed until 2016.

When the Grievor arrived at the Company's premises on April 17, 2015, he could not gain access. He first called Mr. Nyman but got no response. He then called Mr. Best, who said he would arrange access. Mr. Best added that the Company had rejected the proposal to continue his employment until 2016.

Mr. Best then said that if the Grievor agreed to retire immediately, he would not have to return at 3:00 pm that afternoon to be terminated. Mr. Best also noted that if he were

terminated, he would lose his sick leave payout and benefits and made a sound like "phsst" and said, "gone."

Mr. Vokey eventually escorted the Grievor into the building. Present in the meeting room were Ms. Murphy and Mr. Nyman. The Grievor asked, "Where is Mr. Best?" A voice said, "I am here by phone." This surprised the Grievor. He expected Mr. Best to be there in person. Ms. Mein also attended by phone.

Ms. Mein was first to speak, stating that the meeting was to discuss whether The Grievor identified any gross errors in her report. The Grievor replied that he found the report highly flawed with numerous mistakes and bad conclusions. As he began to elaborate, Ms. Mein said that we would not be having such a discussion and that there is no appeal process at the Company. The Grievor then sat silently, waiting for Mr. Best to say something. He did not, nor did anyone else. After a few seconds had passed, the Grievor turned to Mr. Nyman and said, "I guess that's it then, I will agree to retire."

The Grievor left the Company's premises, returned home, and discussed the matters with his wife. He told her that the Company had rejected the offer to extend his employment. And he was given two options. To leave as a fired employee or leave as a retired employee.

The Grievor later emailed Mr. Best what he had typed as a retirement letter. Mr. Best called a few minutes later to discuss the wording and make a few suggestions. Mr. Best mentioned that it was an agreement, and the Grievor said that it was his understanding that he would receive a payout of his benefits.

Ms. Murphy initially said that she would pick up the retirement letter but later advised the Grievor to address it to Mr. Nyman but email it to her.

The Grievor's letter of retirement is worded as follows:

The following letter is written to confirm my agreement with Nav Canada to retire, effective immediately. I understand that in addition to my pension I will be paid as per the Collective Agreement for my accumulated sick leave, severance, unused lieu and annual leave credits and any other entitlements owed me.

Counsel asked the Grievor whether he was given the witness key used to identify the witnesses that Ms. Mein interviewed as part of her investigation? He replied that he was not. The first time he saw it was with the Company's disclosure in preparation for the arbitration.

The Grievor said that he was extremely upset by the memos circulated to the Company employees concerning the investigation of the complaint. In particular, the one distributed two weeks after his retirement when he still had the right to grieve. He said all witnesses would have read that the Company and Union agreed that he was guilty.

Before this complaint, the Grievor said that he never had a discipline issue.

The Grievor testified that he sat on the amalgamation committee and recruited ATCs to volunteer for dual qualification; he also served as a shop steward for CATCA. He explained that there was no resistance to the amalgamation project but rather a lack of comprehension of how it would work. There was fear that if ATCs failed in the other specialty, they would have to relocate or be terminated.

The Grievor said that if he is reinstated to his employment, he is prepared and willing to work with his co-workers, including the Complainant.

Finally, the Grievor testified that when talking with Mr. Best on April 16 and 17, he was not aware that Mr. Best did not attend the interviews with all witnesses. He said that Mr. Best told him that it [the investigation] was a good process, a fair process, not a witch

hunt based on his attendance at the interviews. The Grievor said, "How can he make those statements? He didn't attend seven of them."

Under cross-examination, the Grievor said that he and his wife reviewed Ms. Mein's report several times. He said that he assumed Mr. Best had attended all of the interviews because he said the investigation was fair and not a witch hunt.

The Grievor agreed that Mr. Best told him that he could file a grievance and that the union would support the grievance. He added that he asked Mr. Best whether the Union would support the grievance at arbitration, to which Mr. Best answered that he would only have that discussion after a grievance was filed. To which the Grievor said, "You mean after I am fired?" and Mr. Best replied, "Yes."

The Grievor agreed that Mr. Best told him that in some cases, because of past experience, resignation may be an alternative to dismissal.

The Grievor agreed that the deal Mr. Best brokered for him enabled him to retire. And, as a result of the agreement, he was paid severance pay and sick leave pay. It also enabled him to be eligible for post-retirement benefits for which he applied. In exchange for being permitted to retire, he agreed not to file a grievance.

The Grievor said that his first choice was to be permitted to retire in 2016, which was a date he had told Mr. Vokey he would retire in a social setting, some years previous.

The Grievor agreed that Mr. Best told him that his employment would cease. The Grievor added that he did not want his job to end, and if Mr. Best had committed to pursuing a grievance through to arbitration, he would have filed a grievance.

The Grievor agreed that nothing Mr. Best said suggested that the Union would not file a grievance on his behalf. He further agreed that although he may have disagreed with the Company's decision, there was never any suggestion from Mr. Best that the Company would not proceed to dismiss him absent his resignation.

The Grievor said that he believed he had a strong chance of winning his grievance at arbitration as the conclusions in Ms. Mein's report did not justify termination. He felt that her report was a poor report with flawed findings. Company Counsel then asked the Grievor, "Yet you elected to retire?" He replied, "I accepted the offer from the Company to avoid being fired."

The Grievor was adamant that he did not harass the Complainant. He said he believed and still believes that the Complainant lied about the effect his [the Grievor's] actions had. The Complainant, the Grievor noted, was looking for an excuse to save his professional reputation.

When asked by Counsel whether he felt that being fired could have affected his ability to do other things, such as start a new business in Moncton or work as an ATC in Baghdad? The Grievor replied, "Perhaps." He agreed that his record with Nav Canada remained unblemished because he was allowed to resign

The Grievor agreed that he sought legal advice from when he received the complaint until he retired.

The Grievor testified that at the meeting on April 17, 2015, he told Ms. Mein that her report was highly flawed and, at 10:20 am during the meeting, he said he would agree to resign.

The Grievor agreed he sent an email to Mr. Roach on April 27, 2015, applying for the post-retirement health care plan. He further agreed that on May 22, 2015, he applied for retirement membership with CATCA. On May 5, 20215, he attended a celebration in his honour at the Five Bridges restaurant.

The Grievor identified an advertisement that he drafted and placed in a newspaper announcing his retirement from Nav Canada. He said that he prepared it two weeks after he left his employment, and it was published a week after that. He further identified an article written by his wife, Shawn, published in June 2015 in the Canadian Pilots

Association newspaper, a national publication. He agreed that this article contains a statement that he provided notice of retirement to Nav Canada.

The Grievor agreed that he did not contact anyone at the Company to rescind his decision to retire before filing the DFR complaint against the Union.

Counsel asked the Grievor several questions about his union activities. He testified that he was a Union steward for two years when he worked in St. John's, Newfoundland. In Moncton, he was a Union steward for two years, the local vice chair for two years, and the local treasurer. He agreed that he would have represented employees at disciplinary hearings and other such meetings in his various union roles. However, he added a more senior Union official would have been present at meetings involving severe discipline. He said he did not attend any grievance hearings.

Concerning the events of February 25, 2015, the first day the Complainant began training with his OJI, Mr. Blanchard, the Grievor, said that he was standing to the left of Mr. Thomson. He disagreed with Mr. Blanchard's testimony that he was sitting to the right of Mr. Thomson. He further disagreed with Mr. Blanchard's testimony that he opened an unoccupied workstation terminal and brought up images of the Halifax terminal the Grievor was working.

In answer to a question from the Union's Counsel, the Grievor said that his understanding was that Mr. Best should have attended all of the interviews conducted by Ms. Mein as his representative. However, he agreed that he at no time represented a non-bargaining unit person at an interview as a Union representative.

The Grievor further agreed that at no time did he contact anyone from CATCA or the Company to rescind his resignation.

COLLECTIVE AGREEMENT ARTICLES

The parties referred to the following Articles in the Collective Agreement:

ARTICLE 11

GRIEVANCE AND ARBITRATION PROCEDURE

11.01 Definition of Grievance

A grievance shall be defined as any dispute between NAV CANADA (hereafter referred to as “the Company”) and the Union (on behalf of an employee group of employees or on its own behalf) concerning the interpretation, application or administration of the Collective Agreement, and shall include individual employee grievances, group grievances, policy grievances, union grievances and Company grievances.

ARTICLE 12

DISCIPLINE

12.01 Corrective Discipline

Generally, discipline is intended to correct undesired behaviour and conduct and, where appropriate, shall be progressive in nature. The process leading to, and including, the imposition of discipline shall be completed expeditiously.

ARTICLE 13

JUST CAUSE

13.01 No employee shall be disciplined or terminated except for just cause. However, the termination of a probationary employee for non-disciplinary reasons may be carried out at the discretion of NAV CANADA at any time during the probationary period. NAV CANADA’s discretion must be exercised in good faith, without discrimination and in a non-arbitrary fashion.

ARTICLE 14

NO DISCRIMINATION OR HARASSMENT

- 14.01** There shall be no discrimination, interference, restriction, coercion, harassment, intimidation or any disciplinary action exercised or practiced with respect to an employee by reason of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, conviction for which a pardon has been granted, or union affiliation.
- 14.02** Grievances arising from Article 14.01 shall first be dealt with through an alternate dispute resolution process (ADR) as agreed to by the parties. Once alternate dispute resolution mechanisms are agreed to by the parties, the grievance will be held in abeyance pending the results of the ADR process. Furthermore, employees are precluded from other avenues of redress, save and except applicable legislative procedures, until the ADR process has concluded. The ADR process shall not result in any unreasonable delay.
- 14.03** Any level in the grievance procedure shall be waived if a person hearing the grievance is the subject of the complaint.

THE COMPANY'S ARGUMENT

Counsel for the Company began her argument by stating that the grievance before me due to the order by the CIRB requires the Company to mount a response several years after the Grievor retired. It was her position that the Grievor's employment came to an end because of his voluntary retirement on April 17, 2015.

The Company submitted that the issue I have to decide might appear complicated because of the evidence of how the grievance ended up before me. However, it is not complicated. The facts demonstrate that the Grievor voluntarily resigned to avoid dismissal, which would have deemed him ineligible for benefits and could have had a reputational impact on him. While the evidence presented concerning the attempted amalgamation at the Moncton ACC provides context, Counsel argued it is not relevant to the issue of the Grievor's voluntary retirement.

The Company submitted that the documents in evidence from April 16 through May 22, 2015, along with the two publications about the Grievor's retirement, are critical to the issue of voluntary retirement. No evidence, Counsel argued, was presented to justify vitiating the Grievor's decision to retire.

Next, the Company Counsel reviewed the evidence in detail, highlighting the relevant and undisputed facts. In particular, the facts arising from the conversations between the Grievor and Mr. Best on April 16, 2015.

The Company maintained that the law is well established in cases where employees seek to rescind a resignation. The act of resigning from one's employment has a subjective and objective element.

Further, Counsel argued that some arbitrators have held there is an immediate shift on the onus to the Grievor where a letter of resignation exists.

Counsel for the Company argued that the Grievor presented no medical impairment evidence to indicate that the Grievor did not know what he was doing. He had a significant amount of time to weigh the pros and cons of resignation and discuss the matter with Mr. Best and his wife without the Company's interference. Counsel reminded me that the Grievor requested Mr. Best to ask Nav Canada to permit him to retire to avoid the negative consequences that would flow from a termination. He came up with a proposal for Best to present to Nav Canada.

The Grievor was not forced to resign. He may not have liked either option, retire or be terminated, but his choice was more beneficial under the circumstances. It enabled him to tell his own story about the retirement, and it ensured he did not have a discharge on his record.

The fact that the Grievor testified that he did not want his employment at Nav Canada to end is not relevant to whether he voluntarily retired. The option to resign did not originate with the Company. Instead, it was a thought-out decision on his part.

Counsel for the Company pointed out that the Grievor benefited from Union representation and access to legal advice as early as March 10, 2015, when he attended the first meeting with Ms. Mein. The Grievor also acknowledged that he spoke to Mr. Poirier, his counsel, between March 10 and April 17, 2015.

The Company submitted that this was not a heat of the moment resignation. The Grievor knew of the allegations six weeks before the day he resigned. He immediately sought independent legal advice, emphasizing that he knew the allegations were serious. Almost six weeks later, he had ample time to consider his options. Mr. Best told him at 4:00 pm on April 16, 2015, that the Company intended to terminate his employment. Almost 24 hours expired before he tendered his resignation in writing just after 3:00 pm on April 17, 2015.

Turning to the evidence of objective conduct, Counsel submitted that arbitrators have found a resignation letter persuasive evidence of objectivity. Further, the Grievor's active steps following his retirement to obtain the benefits of retirement, his attendance at his retirement party, and the significant passage of time are important factors to be considered.

The Company argued that while the CIRB decision found that CATCA failed in its duty of fair representation, it does not vitiate the voluntariness of the Grievor's retirement from Nav Canada. Citing, *Re Heritage Nursing Home Hotel v SEIU, Local 204*, 1978 CarswellOnt 2018 (Abbott) as authority, the Company argued that the CIRB decision should not be viewed as a transcript of the hearing. Further, even if the CIRB ruled that Mr. Best had given bad advice or were I to determine that he gave poor advice, numerous authorities stand for the proposition that negligent union advice does not negate the voluntariness of an employee's decision to resign. It is enough to know that a grievor

received advice. In any event, Counsel argued, the findings of the CIRB are merely background and not relevant to the issue of whether there was a valid resignation.

The Grievor was aware that he could grieve but chose not to, despite his evidence that he believed and still believes that the Company did not have just cause to dismiss him.

Next, Counsel touched on the credibility of the Grievor, citing the decision by Arbitrator MacDowell in *Redpath Sugar Ltd. and UNIFOR Local 2003 (Jacques)*, 2017 CanLII 68359 (ONLA) for the factors an arbitrator should consider in assessing credibility. Counsel urged me to carefully consider the Grievor's evidence, and where it differs from that of other witnesses, the evidence of the other witnesses ought to be preferred.

In support of its argument concerning the validity of the Grievor's resignation/retirement, the Company relied on the following text and authorities: *Canadian Labour Arbitration 5th Edition* (2019) *Chapter 7:7100* (Brown and Beatty); *Canada Port Corp. v. APOC*, 2011 CarswellNat 5454 (Can. Arb) (Baxter); *Re Reena and OPSEU Local 554* (Rozario) 2017 CarswellOnt 5623 (Ont. Arb.) (Tims); *Ottawa (City) v C.U.P.E, Local 503* (2008). 179 L.A.C (4th) 214 (Dissanayake); *Re Ontario (Ministry of Community Safety and Correctional Services) and OPSEU* (2015) 268 L.A.C (4th) 1 (Petryshen); *Re Motorways Direct and Teamsters Union, Local 880* (1988), 35 L.A.C (3rd) 11 (Picher); *Teck Highland Valley Copper v. U.S.W., Local 7619* (2010), 193 L.A.C. (4th) 369 (Phillips); *Re Calgary (City) and CPA* (Bassett) (2021), 325 L.A.C. (4th) 299 (Asbell); *Hassard v Deputy Head (Correctional Service of Canada)* 2016 PSLREB 39; *Re Aspen View Public School Division No. 78 and CUPE, Local 4575* (2015), 273 L.A.C. (4th) 263 (Wallace).

Turning to the issue of whether the Company had just cause to terminate the Grievor had he not voluntarily resigned, the Company maintained that it had just cause to discharge. Counsel argued that there is no basis to reject Ms. Mein's findings which the Grievor did not challenge by filing a grievance at the time. Because he did not grieve in 2015, it deprived the Company of the opportunity to defend itself properly when memories were fresh.

Ms. Mein, Counsel argued, concluded that three out of four allegations against the Grievor were substantiated. There was evidence that he was spreading rumours about the Complainant. Ms. Mein concluded that the Grievor's behaviour created a hostile work environment that a reasonable person would have known was unwelcome. The Grievor's evidence of what occurred on February 26th conflicted with that of Mr. Blanchard on several vital points, and Counsel asked me to prefer Mr. Blanchard's evidence over the Grievor. She reminded me that the Grievor could have called Mr. Thomson in support of his version of events. The Grievor chose not to call him.

The Company argued that the arbitral awards support the notion that spreading rumours is a form of harassment and subject to discipline. Further, there is arbitral support for holding supervisors to a higher standard, particularly regarding harassment.

The Company submitted that corrective discipline was not appropriate in this case because the Grievor failed to acknowledge that he had done anything wrong. He remained steadfast in the view that the allegations did not occur. Therefore, Counsel asked me to find just cause for termination were I not to find that the Grievor resigned.

In support of its argument that there existed just cause to support the Grievor's termination were I to find that he did not resign, the Company relied on the following text and arbitral decisions: *Canadian Labour Arbitration supra.*, Chapter 3:4205; *Kitchener (City) v. Kitchener Professional Firefighters Assn.*, 2008 CarswellOnt 10317 (Ont. Arb., Luborsky); *Re USW, Local 9042-102 and Shopping Channel Division of Rogers Broadcasting Ltd. (Powell)* (2019), 311 L.A.C. (4th) 386 (Anderson); *Hassard v Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32, 18 C.L.A.S. 161; *Re LIUNA, Local 1208 and Construction Labour Relations Association of Newfoundland and Labrador, Inc. (White)* (2020), 321 L.A.C. (4th) 149 (Montgomery).

Finally, the Company submitted that were I to find that the Grievor did not voluntarily resign, and the Company did not have just cause to terminate, I should award damages instead of reinstatement.

Counsel argued that in determining this matter, I should take into account the following:

1. Ms. Murphy's concerns about the Grievor's return to the workplace, including disruption to the employees, the polarization of the workplace, and the effect on the Complainant.
2. The lack of trust evidence before me. In this regard, I should note that the Grievor took the position before the CIRB that Nav Canada conspired to force his retirement. Further, the Grievor maintains his critique about the investigation, the report, and the end of his employment.
3. The Grievor remains steadfast in his view that his conduct at all times was within his duties as a supervisor, and the Complainant was merely subject to the Grievor's professional level of supervision and scrutiny. In cross-examination, he adamantly said that the Complainant failed to requalify in the Halifax specialty, which was not his [the Grievor's] fault. No evidence, Counsel argued, was presented that the Complainant failed to qualify.
4. The Grievor continued, before me, to push the discussion to what was wrong with the amalgamation.
5. The Grievor's animosity to Mr. Steeves and the Complainant as illustrated in his reply to the accusation dated March 20, 2015, and his nine-point memo to Mr. Best dated April 17, 2015.
6. The evidence of Ms. Murphy concerning the conditions at the workplace during and following Ms. Mein's investigation and during the CIRB proceedings.

Finally, Counsel argued that the Grievor's ability to retrain as an ATC at Nav Canada is by no means certain. There would be an extended retraining period with no guarantee the Grievor would be returned to active duty.

In support of the argument that the Grievor should not be reinstated but awarded monetary compensation in lieu, the Company relied on the following cases: *de Havilland Inc. v CAW-Canada Local 112* (1999), 83 L.A.C. (4th) 157 (Rayner); *Re Humber River Hospital and ONA (Cherubino)* 2017 CarswellOnt 14060 (Ont. Arb., Steinberg); *Re*

Children's Hospital of Eastern Ontario and OPSEU (2015), 260 L.A.C. (4th) 147 (Parmar);
Peterborough Regional Health Centre v. ONA (2012), 219 L.A.C. (4th) 285 (Starkman);
Re Winchester and Bank of Nova Scotia, 1997 CarswellNat 5271 (Can. Arb., Kaufman).

THE GRIEVOR'S ARGUMENT

Counsel for the Grievor began his argument by stating that the violation of Section 37 of the Code, that is, the failure of the union to fairly represent the Grievor began before the investigation into the COBC in February 2015; it continued during the investigation up to and including the resignation on April 2015 and after to the agreed memo between CATCA and the Company.

The grievance, Counsel argued, was delayed because the surreptitious acts of the union were only divulged in February 2018. The Grievor then filed his complaint before the CIRB to regain his job.

The Grievor submitted that he did not file a grievance in 2015 because he lacked the knowledge of the circumstances surrounding the tainted COBC investigation, the compromised advice, and the compromised representation the Union provided him at the time. The Grievor argued that if he had known the reality of the events in the background of the COBC process, he would never have agreed to resign on April 17, 2015.

The Grievor argued that the Company had not met the burden to establish just cause to terminate his employment and urged me to conduct my deliberations through the lens of the injustice at the heart of his grievance. Therefore, he maintained, I must consider a complete and full determination of the legal validity and effect of Nav Canada's decision to terminate the Grievor's employment, including Collective Agreement breaches, investigation process issues, the results of the Section 37 DFR Complaint, the flawed investigation report and inducements by the Company.

The Grievor submitted that the Company has confused its independent managerial right to investigate and discipline in and of itself with the negotiated exercise of its managerial rights under the Collective Agreement.

Counsel argued that the failure to bring the Complainant and the majority of employees interviewed by Ms. Mein before this board should seriously bring into question the Company's claim that it had just cause to terminate the Grievor.

The resignation retirement letter, which referred to an agreement with Nav Canada, was a product of double illegality. Namely 1) a breach of the ADR process, arbitrariness, and a lack of good faith on the part of Nav Canada, and 2) a bad faith and arbitrary DFR by Union executive members.

Counsel argued that at the heart of my decision lies the interpretation of the Collective Agreement Articles 11, 12, 13, and 14.

Counsel argued that under the harassment policy, which in his opinion is incorporated into the Collective Agreement, the Grievor was entitled to be represented throughout all the proceedings including all of the interviews. However, the evidence was that Mr. Best did not attend all the interviews. Therefore, non-compliance with the policy would render the Grievor's discharge void *ab initio*.

At this point in his argument Counsel identified what he considered to be discrepancies in Ms. Mein's investigation process that would render her to be less than impartial in the process, which favoured the Complainant. To support this thread of his argument he directed my attention to *Robitaille v. Deputy Head (Department of Transport)*, [2010] C.P.S.L.R.B. No. 79. Further, he argued that mediation under the ADR policy was not considered, once again violating the Grievor's right to a resolution of the complaint against him. The policy, he argued, clearly says that where possible, the Grievor has a right to participate in mediation.

Further, Counsel argued that Nav Canada launched an investigation before obtaining the Grievor's version of events contrary to the policy.

Therefore, Counsel argued that the procedural unfairness during the investigation and the violations of the ADR policy justify a trial *de novo* before me. Add to this, Counsel submitted, the determination that the Grievor did not have fair Union representation reinforces the case for a trial *de novo*.

Counsel for the Grievor argued that the arbitrariness of Ms. Mein in not providing the Grievor with the notes of the supervisor's meeting taken by Mr. Cote As well as the substantive flaws in her investigation, and the fact that she continued to investigate until April 10, 2015, when the date on her report stated that the investigation ended on March 26, 2015, are factors to be considered.

Counsel reminded me that in the Company's opening statement, it was alleged that the Grievor was the leader of the opposition to the amalgamation. He said this shows the Company's feelings towards the Grievor that he was a problem, which should persuade me to have a full hearing on the merits of the case before me.

To summarize, Counsel argued it is imperative that in my deliberations, I make a determination on the ADR process and Ms. Mein's report in determining whether Nav Canada discharged its obligations under the Collective Agreement to fulfill its discretion in good faith and in a non-arbitrary manner. This, he argued, is an integral part of the analysis in determining if the Grievor's resignation should be vitiated.

In deciding on the merits of the termination, Counsel reminded me that the case law is clear; notes, such as Ms. Mein's report, are prejudicial hearsay and not to be considered without the testimony of the witnesses before me.

In support of the thread of his argument, Counsel relied on the following cases: *Canadian Merchant Service Guild v. Marine Atlantic Inc.*, 2016 Can L11 95889 (CA LA); *British*

Columbia Institute Of Technology (Pacific Marine Training Campus) v. British Columbia Government and Services Employees' Union, 1995 CanL11 18000 (BC LA) (Blasina).

Counsel for the Grievor maintained that the Grievor was merely performing his duties within the framework of the procedures and policies at Nav Canada that he was mandated to follow. He was acting as a training supervisor at all times. There was no violation of the COBC established before me. The Grievor was following the directives he was given, particularly regarding the HIRA. There is no evidence that the Complainant was treated differently in his training or eligibility to become a supervisor.

In Nav Canada's rush to judgment, Counsel argued, it did not follow the principles of progressive discipline. The Grievor had no previous discipline on his file.

If I were to accede to Nav Canada's request to uphold the termination or the resignation in these circumstances, such an approach, Counsel argued, would cause too much prejudice to the Grievor's substantive rights under the Collective Agreement. The fair approach for all parties would be to allow the Grievor to revoke his resignation and proceed with an independent determination of whether Nav Canada has proven just cause for termination.

When considering the appropriate penalty in this case, Counsel asked me to be mindful that because of Nav Canada's monopoly on air traffic control, the Grievor's prospects of future employment as an ATC in Canada are practically nil. A mitigating factor which Arbitrator Thistle considered in *Canadian Air Traffic Association v. Nav Canada* (Kelly Grievance) (1999), (unreported).

Regarding the circumstances of the Grievor's resignation, Counsel argued that the subjective intent has been vitiated by the circumstances surrounding and leading up to the resignation.

It was Counsel's submission that Nav Canada gave the Grievor a choice, agree to resign or be fired by 3:00 pm. The Grievor did not mandate Mr. Best to negotiate for an immediate resignation option. It was decided by Mr. Best and communicated to the Grievor on the morning of April 17, 2015. The resulting climate of animosity and injustice had an effect on the Grievor's subjective intent to resign. But for the notice of termination, he would not have resigned.

It was Counsel's further position that the Grievor was induced to resign. He was not aware of the DFR and not aware of the breaches in the ADR process. There existed significant misrepresentations by Nav Canada influencing the Grievor to agree to retire because Nav Canada threatened dismissal. The Company offered the inducement to pay him close to \$130,000 if he agreed to resign.

In reality, Counsel argued, the Company effectively terminated the Grievor on April 16, 2015, when he was orally informed he was terminated. Nav Canada delivered a clear and unambiguous notice on April 16, which was confirmed on April 17, 2015. The option to resign at that point was no longer his legal and voluntary right. The Company cannot rely on the resignation because the decision was made to terminate. In support of this argument, the Grievor relied on *Little Leaf v. Peigan Board of Education*, 2002 CarswellNat 3651; *Teck Coal Limited v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union 7884* 2015 Can L11 63963 (BC LRB), *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76.

Further Counsel argued, notice of dismissal does not have to be in writing but can be oral. In support of this proposition, he relied on *Parapatics v. 509433 Ontario Ltd.*, 2010 CarswellOnt 1200, (Ont. SCJ)

Counsel next dealt with the impact of the DFR and how I should apply it. He argued that the substantive rights of the Grievor should be applied to the investigation and termination by resignation. The CIRB found that the Union pursued a course of action to cause the

Grievor harm. Therefore, the effect of the CIRB's decision is to vitiate the presumptive right to rely on the fact that the Grievor had Union representation. Counsel cited *Re Eldorado Nuclear Ltd., (Re), C.I.R.B.* [1980] 3 Can LRBR 491. He argued Mr. Best was passive in his representation of the Grievor. The Grievor did not have proper advice. His rights were not respected as called for under the Collective Agreement.

Part of the remedy in the CIRB's decision on the Grievor's DFR is that the Grievor receives a fair and impartial review of the evidence. Therefore I must determine the issue of just cause. Part of making the Grievor whole is to undo the violation of the DFR in his representation. Counsel submitted that the CIRB found that the Union provided the mere appearance of representation for the Grievor up to his resignation.

Therefore, Counsel argued the right thing to do is reinstate the Grievor. Employees need to know that they will not be bound by illegal labour code violations by the Union and that the Union will be accountable for failing to protect their bargaining unit rights. Reinstatement of the Grievor will send the correct signal that workers' rights are real and will be respected in the grievance arbitration process.

In support of his argument that I should consider all of the circumstances surrounding the Grievor's departure from the Company, the Grievor relied on: *Frémy v. Attorney General of Canada*, 2018 FC434; *Attorney General of Canada v. Frémy*, 2019 FCA 26 (CanLII).

The Grievor also relied in support of his argument on the following text and cases: *Canadian Labour Arbitration supra.*, Chapters 2:3223, 4:1440, and 7:2140, *Chan v. Dencan Restaurants Inc.*, 2011 BCSC 1439; *Mordowanec v. O.N.A.*, 1984 CarswellOnt 1136 (Ont L.R.B.); *Teamsters Local Union No. 31 v. Quick Coach Lines Ltd.*, 2001 CIRB 144; *Deters v. Prince Albert Fraser House Inc.*, 1991 CanLII 7933 (SK CA); *Ewasidk v. Estevan Area Home Care District 9 Inc.*, 1985 CanLII 2827 (SK QB); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R.; *Alberta Health Services v. United Nurses of Alberta, LOCAL 409*, 2018 CanLII 53479 (AB GAA); *Hamilton Health Sciences v. Ontario Nurses' Association*, 2012 CanLII 50998 (ON LA); *Canada Post Corp. v. A.P.O.C.*, 109 C.L.A.S.

47; *Beacon Hill Lodge, Ottawa v. O.N.A.*, [1985] 17 L.A.C. (3d) 65; *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76; *I.B.T., Local 880 v. Reimer Express Lines Ltd.*, 8 L.A.C. 341 (Schwenger); *Little Leaf v. Peigan Board of Education*, 2002 FCT 1300; *Buchanan v. Continental Bank of Canada*, 58 N.B.R. (2d) 333 (N.B. Q.B.); *Parapatics v. 509433 Ontario Ltd.*, 2010 CarswellOnt 1200 (Ont SCJ); *Re Purolator Courier Ltd. (Re) I.C.L.R.B.R.* (NS) 38 [1982] (C.L.R.B.); *Backman v. Hyundai Auto Canada Inc.*, 1990 CanLII 4087 (NS SC); *Office & Technical Employees' Union, Local 378 v British Columbia*, 1988 CarswellBC 891, (B.C.C.A.).

THE UNION'S ARGUMENT

Counsel for the Union began her argument by stating that the ADR provisions under Article 14 of the Collective Agreement were not applicable in the present case. There is no evidence that the Complainant filed his complaint under the Collective Agreement. It was filed, and the investigation was conducted under an entirely different process. Therefore any perceived failure under the ADR process was not a breach of the Collective Agreement.

What is clear, counsel argued, is that the Grievor made an informed decision to retire. The Union's actions in the events leading up to his resignation in no way vitiate his decision to retire. He formed both the subjective and objective intent.

Counsel referred me to the seminal case on the law of resignation by Professor Finkelman in *Re Anchor Cap & Closure Corp. of Canada, Ltd., and U.E.W. Local 512* (1949), 1 L.A.C. 222.

Given the evidence before me, Counsel argued it is clear that in light of the Grievor's verbal announcement and letter of resignation, the onus is on the Grievor to demonstrate his resignation was not voluntary and amounted to a termination. The fact that the Grievor is unhappy or he may have realized after the fact that he made the wrong decision does not amount to circumstances that he made an invalid resignation. In support of this

argument, Counsel referred me to the decision of Adjudicator Bilson in *Mangat v. Canada Revenue Agency*, 2010 CarswellNat 3145 (PSLRB).

The Union argued that the law establishes that an arbitrator will only intervene in cases where a grievor did not intend to resign. In the instant case, the Grievor's conduct on numerous occasions after he left Nav Canada, indicated that he resigned. His conduct throughout demonstrated his intention to resign both subjectively and objectively. Therefore, it would require cogent and compelling evidence to show the Grievor did not form the requisite intent to resign.

Counsel for the Union took issue with the Grievor's argument that he would not have resigned if he had known what was going on behind the scenes. She drew my attention to the fact that that question was never put to the Grievor; the Grievor established no evidence to support such an argument. Further, no evidence was adduced to bring into question the Grievor's capacity to resign. He did not resign in a fit of anger or sought shortly afterward to retract his words. Instead, the Grievor argued that the violation of the DFR in and of itself vitiates his intention to retire.

Faced with a difficult decision between termination and resignation does not in and of itself constitute coercion. There was simply no coercion in the case before me. The Grievor's decision was neither spontaneous nor taken on the spur of the moment.

Counsel for the Union argued that even if the representation by the Union amounted to providing the Grievor with inaccurate information or if the Union made a bad call could not in and of itself vitiate intent to resign. In support, Counsel referred me to the decision by Arbitrator Bendel in *Community Lifecare Inc. v. U.F.C.W., Local 175*, 2008 CarswellOnt 7799 (Ont. Arb.)

The Union argued that there was no evidence before me that Mr. Best conducted himself improperly in the days leading up to the Grievor's retirement that would in any way negate the Grievor's informed decision to retire. There are no cases to support the Grievor's

argument that the Union's bad faith caused by the breach of the DFR makes this different. There are no degrees of a breach of DFR. Counsel further took issue with the Grievor's argument that the resulting climate of animosity and injustice affected the Grievor's subjective intent to resign. No evidence, she argued, was presented to support this proposition.

It was appropriate for Mr. Best to raise the issue of retirement given the fact that the Union had obtained retirement for members in the past who were faced with termination.

There is no evidence, Counsel argued, that Mr. Best misled the Grievor in any way. He told the Grievor that Ms. Mein's report was accurate based on the interviews he had attended. He also informed the Grievor that if he was terminated, he would have the full weight of the Union behind his grievance. Mr. Best properly advised the Grievor that the Union would have to conduct its own investigation before any referral to arbitration. The Grievor does not have the absolute right to have his grievance proceed to arbitration. No member of a union does. Counsel reminded me that this is not a case where a grievor was faced with a refusal by the Union to advance his grievance to arbitration.

Counsel, in conclusion, reiterated her point that the violation of the DFR does not in and of itself vitiate the resignation. Were that the state of the law, the CIRB would not have referred the issue of resignation to me. Under its wide discretionary powers, the CIRB could have ruled the resignation invalid and only put the determination of the Grievor's threatened dismissal before me. The CIRB did not do that in this case, unlike the decision in *Walker v. C.U.P.E. Local 1* 1980 CarswellOnt 1087, where the Ontario Labour Relations Board ordered as remedy the Grievor's reinstatement.

The CIRB neither ordered the Grievor to be reinstated nor his resignation to be set aside. It left me to decide the matter on the evidence presented before me.

In support of its argument, the Union also relied on the following cases: *Ottawa (City) v. C.U.P.E., Local 503*, 2008 CarswellOnt 10133, (Ont. Arb.); *Re Aspen View Public School*

Division No 78 and CUPE, Local 4575 (P.H.) 2016 CarswellAlta 2640; Judd v. CEP, Local 2000, 2003 CanLII 62912 (BC LRB); Mordowanec, supra; Windsor Western Hospital Centre Inc. v. Mordowanec (1986), 56 O.R. (2nd) 297 (Div. Ct.).

THE GRIEVOR'S REPLY ARGUMENT

The Grievor, in reply to the argument that the CIRB had the power to reinstate, argued that the CIRB's power was limited to referring the matter to arbitration.

THE COMPANY'S REPLY ARGUMENT

The Company in reply argued that the Grievor's submission that he was terminated before he resigned is an improper expansion of the grievance. There is no evidence to support this assertion.

Counsel for the company argued that not only is there an absence of authority to support the notion that I need to determine whether there was just cause to terminate before I decide whether the resignation was valid, but such an approach would cause problems for employers. Why would employers permit employees to resign in such circumstances? Such an approach would set a dangerous precedent for labour relations.

Counsel for the Company reminded me that the Grievor did not provide a single authority to support the position that the finding of a failure of DFR automatically vitiates a resignation. The Union and the Company directed me to cases where a contrary finding was made, including my decision in *Re Canada Post, supra*.

Further, Counsel argued there is no evidence that Nav Canada engaged in any illegal or unlawful conduct, nor did the Grievor present any evidence of bad faith.

Counsel admitted that Ms. Mein's report may not have been perfect, but that does not make it unlawful, nor does it mean the outcome would have been any different.

Concerning the ADR policy, Counsel argued that there is no evidence before me that it was an agreed-upon policy. The Complainant chose not to follow the process under Article 14.02; he chose a different route. The ADR policy, in any event, is not incorporated by reference into the Collective Agreement.

As to the Grievor's argument that I should conduct my deliberations through "the lens of injustice," Counsel argued that is not my task. It is to determine whether the resignation was voluntary. If not, then and only then do I consider the other issues. There is no evidence whatsoever before me, despite the cross-examination of the Company's witnesses, that Nav Canada was improperly colluding with the Union in the background.

Finally, Counsel for the Company called my attention to the fact that I did not hear anything from the Grievor's Counsel by way of argument or authority to counter the fact that the Grievor voluntarily resigned from his employment.

DECISION

The CIRB. Determination and Direction

In view of several arguments advanced by the Grievor's Counsel, concerning the nature of the CIRB's decision which I will set out below, I wish to re-emphasize that the matter now before me was the result of the CIRB decision that the Union's conduct regarding the Grievor during the Company's investigation was in breach of the Grievor's DFR.

Among other things, the CIRB ordered the following :

A grievance relating to the end of the complainant's employment, including the threatened dismissal, the resignation, and the circumstances that led to them, is to proceed directly to arbitration, and any applicable time limits in the Collective Agreement are waived;

In so ordering, the CIRB agreed with the Grievor's request that the threatened dismissal and his resulting settlement involving his resignation be referred directly to arbitration to determine whether there was just cause for dismissal and whether the resignation ought to be struck as non-binding. And further, that any issues relating to whether the complainant ought to be reinstated or compensated, any related mitigation issues, and any issues relating to whether the complainant intended to retire in 2015 would therefore be for the grievance arbitrator to hear and decide.

I would point out that the CIRB, with this direction, retained no further or continuing jurisdiction over the foregoing issues.

And with no further or continuing jurisdiction, the CIRB completed its task regarding the DFR complaint.

The CIRB Remedial Powers

The Supreme Court of Canada was clear in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 that the scope of the CIRB's remedial authority is very broad:

In examining the legislation itself it is apparent that Parliament has clearly given the Canada Labour Relations Board [the Board's predecessor] a wide remedial role. The wording of s. 99(2) does not place precise limits on the Board's jurisdiction. In fact, the Board may order anything that is "equitable" for a party to do or refrain from doing in order to fulfil the objectives of the *Code*. In my view, this was done to give the Board the flexibility necessary to address the ever changing circumstances that present themselves in the wide variety of disputes which come before it in the sensitive field of labour relations. The aims of the *Canada Labour Code* include the constructive resolution of labour disputes for the benefit of the parties and the public. The expert and experienced labour boards were set up to achieve these goals.
(Para LV)

S. 16 of the Code. Sets out the CIRB'S jurisdiction to make remedial orders. I refer in particular to the following

(l.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

(m) to abridge or extend the time for doing any act, filing any document or presenting any evidence in connection with a proceeding;

Jurisdiction of the Arbitrator

In its essential character, the Grievor's grievance alleges a Collective Agreement violation and thus falls squarely within the arbitrator's mandate.

In *Northern Regional Health Authority v. Horricks*, 2021 SCC 42, the Supreme Court affirmed that where labour legislation provides for final settlement of disputes arising from a collective agreement, the jurisdiction of the decision-maker empowered by that legislation, generally a labour arbitrator is exclusive. Further, an arbitrator's exclusive jurisdiction extends only to disputes that expressly or inferentially arise from the Collective Agreement.

Properly understood, the decided cases indicate that where labour legislation provides for the final settlement of disputes arising from the Collective Agreement, the jurisdiction of the arbitrator or other decision-maker empowered by this legislation is exclusive.

Given the CIRB's direction and applying the foregoing principles to the case at hand, I am of the opinion, that in deciding this matter, I have exclusive jurisdiction to determine the issues related to the grievor's departure from Nav Canada.

Collateral Attack

I now turn to an argument advanced by Counsel for the Grievor concerning *issue estoppel*, collateral attack, and abuse of process.

During the course of the hearing, Counsel for the Grievor argued that the calling of Mr. Best's evidence amounted to a collateral attack on the CIRB'S decision on the Grievor's DFR issue, which would lead to an abuse of process because the Company was in effect asking me to redetermine the matter of the Grievor's DFR.

After a review of the jurisprudence provided by the parties, I concluded that the Company was not launching a collateral attack on the CIRB's proceedings.

To summarize my findings, which were given to the parties orally, I ruled that my mandate was first to determine whether the Grievor's resignation was valid.

Both CATCA and the Company take no issue with the CIRB's decision that the Grievor's DFR was breached, nor are they asking me to re-decide that issue. Nor do I take issue with the CIRB's findings.

However, to understand the subjectivity of the Grievor's decision to retire, I ruled that the evidence of Mr. Best's discussions with the Grievor on April 16 and 17, 2015, is critical to deliberations on this matter. It matters not, I ruled, whether Mr. Best's advice was good, bad, or indifferent. To fully explore and consider whether the Grievor formed the requisite subjective intent to resign, I must have all the relevant material facts before me. In my role as a trier of fact, any representation or advice Mr. Best gave to the Grievor is material to the task at hand.

It is not unusual that overlapping evidence between different forums may occur. See, for example, *Danyluk v Ainsworth Technologies.*, [2001] SCC44.

In the case before me, there is a clear overlap of evidence between the hearing of the CIRB when it found a breach of the Grievor's DFR and my deliberations over the question of the Grievor's resignation. Provided one is not relitigating the same issue, I am of the view that overlapping evidence is permissible and necessary in certain circumstances, this being one.

Order of Proceedings

In the instant case, Counsel for the Grievor argued that because the CIRB found that the Union had breached the Grievor's DFR during the investigation up to and including his decision to retire, the breach vitiates the presumptive right to rely on the fact that the Grievor had Union representation. And further, that I must conduct my investigation through the lens of the injustice of the DFR ruling.

Accordingly, Counsel argued in order to comply with the decision of the CIRB, I must conduct a fair and impartial view of the evidence. In other words, before considering the issue of the Grievor's resignation, I must satisfy myself that the Company had just cause to terminate.

Not only is there an absence of authority to support the Grievor's argument, but such an approach, in my view, would overturn decades of arbitral jurisprudence and send a chilling message to the labour relations community as a whole. One can only ask, why would employers permit employees to resign in such circumstances? Instead, employers would move directly to discharge with no warning, thus negating an employee's opportunity to avail himself of the resignation option. An option that would enable an employee to avoid the stigma of termination and walk away with his reputation unblemished, thus enabling him to find other employment. In some instances, this would permit the employee to obtain benefits unavailable to a discharged employee.

In the context of these parties, the evidence disclosed that the Union was able to obtain resignation as a substitute for termination on several occasions previously. Therefore, there can be no doubt that the finding that the Grievor seeks in this regard could substantially negatively impact the members of the CATCA bargaining unit as a whole.

Counsel for the Grievor referred to several cases to support this argument. Having regard to each of the cases, I am of the view that each of them is distinguishable from the specific facts of the instant case.

For example, in *Frémy supra*, Mr. Frémy, an RCMP member, was issued an ultimatum by the RCMP; to submit a request for voluntary discharge; otherwise, a discharge procedure would be initiated. It was clearly the RCMP and not Mr. Frémy who initiated the discussion on resignation. Further, Mr. Frémy sought judicial review of the RCMP Level 11 adjudicator's decision under the *Royal Canadian Mounted Police Act*, RSC 1985,c R-10.

In referring the matter to a different adjudicator for hearing, the Federal Court stated that the adjudicator would have to determine whether the resignation was valid based on the common law test for economic duress, taking into account all of the circumstances, including the nature of the reasons that led the RCMP to choose between resignation and discharge.

In *Office and Technical Employees Union*, the employer told Mr. deMoor, the Grievor, that it could not permit him to continue in his employment but that it would permit him to resign to avoid a blot on his record. The arbitrator found as a jurisdictional issue that the grievor had resigned and did not consider the merits of the reason for dismissal.

On review, the BC Court of Appeal confirmed the decision of the Supreme Court of British Columbia, which had upheld the decision of the BC Industrial Relations Council quashing the decision by the arbitrator. In its ruling to order the matter back to be heard on the merits of the discharge, the Industrial Relations Council cited various sections of the BC Industrial Relations Act for authority to do so.

In affirming the decision of the Industrial Relations Tribunal, the Court of Appeal said:

Clearly, there are the strongest of policy considerations militating against construing dismissal in s. 93 in a narrow technical sense which would permit employers, by persuading their employees to resign, to

thus deprive them of the right to security of employment which is so firmly established by legislation. (emphasis added)

In the instant case, the Grievor and not the Company raised the possibility of retirement. The Company did not persuade the Grievor to resign. Further, there is no evidence to support the argument that the Grievor faced any threats, economic duress, or coercion from the Company up until the point his resignation.

Turning then to consideration of the issue of resignation before me, this will involve a careful review of the evidence and argument. I have reviewed the extensive amount of case law that the parties have provided, some of which were helpful in my deliberations. Still, I would note, many were distinguishable from the factual circumstances of the case before me.

Arbitral Jurisprudence

In cases where an employee has resigned in the face of impending termination and later sought to set aside the resignation, arbitrators have consistently first considered the validity of the resignation before proceeding if necessary, to the merits of the termination.

Indeed, that was precisely the approach that I followed in *Re Canada Post, supra*. The circumstances, in that case, were similar to those before me. The CIRB, after finding a violation of the Grievor's DFR, ordered that the time limits be waived for the filing of the Grievor's discharge grievance and that she be entitled to be represented by counsel of her choosing, paid for by the union.

The arbitral jurisprudence concerning the validity of a resignation has not significantly changed since I rendered my decision in *Canada Post supra*. In that case, the CIRB found that the Association had breached the Grievor's DFR and ordered a grievance filed by the Union.

After a careful review of the relevant jurisprudence as it existed at the time, I stated the following at paragraph 52:

I find that the cases cited above reflect that the first issue an arbitrator must determine is whether the Grievor formed the subjective intent to resign, if the elements present do not satisfy the arbitrator that the subjective intent was formed, as in a case where the Grievor was under severe stress or lacked the mental capacity to form the requisite intent to resign, the resignation must be rescinded, and one need go no further. If, on the other hand, an arbitrator concludes that the Grievor had the mental capacity to effect a resignation, the arbitrator, in such circumstances, must take further steps to convince himself that the Grievor's true intention was to resign. In so doing, arbitrators consider a Grievor's post resignation behavior to determine if the subsequent conduct illustrates a true intention to resign. Put another way, the arbitrator in determining whether the Grievor's subjective statement is made under circumstances that bring into question the Grievor's true intention, must be satisfied that there is objective, confirmatory evidence showing that the Grievor truly intended to resign.

Relevant to our purposes is the following passage from *Canadian Labour Arbitration, supra*:

In determining whether or not an employee has quit his or her employment, arbitrators are generally agreed that the basic task confronting them is to ascertain the "true" intention of the employee involved. That is, the arbitrator must determine whether or not the employee actually intended voluntarily to sever the employment relationship. In answering that question, from the earliest cases, arbitrators have insisted that the act of quitting embraces both a subjective intention to leave one's employ and some objective conduct which manifests a continuing effort to carry that intention into effect.

In the award of Arbitrator Tims in *Reena, supra*, the Grievor signed a letter of resignation. At arbitration, she testified that she did not know she had any choice and did not understand the options or the consequences. She said that she was "very upset" and "emotionally distraught." She said that she did not want to resign. She contacted the Union the next day in an attempt to rescind her resignation, but the Union representative told her "it is done."

In the absence of any threats or duress by the Employer, Arbitrator Tims found the Grievor's state of mind not to be a factor in her decision to uphold the resignation. She noted as follows at paragraph 82:

I note that there is no evidence before me of threats or duress by the Employer. Rather, the grievor's state of mind on May 5 must be attributed to what Arbitrator Picher characterized in *Motorways, supra*, as "the pressure of external circumstances." As the arbitrator noted there, "life often involves making hard choices," and "in many cases, it will be difficult to draw a causal link between the sheer hardship of the employee's circumstances and the voluntariness of his or her decision to resign."

Arbitrator Picher's oft-quoted award in *Re Motorways, supra* cited, by Arbitrator Tims in *Reena, supra*, helps provide guidance concerning the weight to be given to the stress an employee encounters when he or she decides to tender their resignation in the face of imminent dismissal

In the case, before Arbitrator Picher, the Grievor was charged with pedophilia. Prior to his trial, the Company representative met with the Grievor and informed him that he had an option to consider prior to being found guilty. He may be sentenced to jail time, and the Company would consider him absent without leave and terminate his services. Alternatively, he may wish to consider resignation to take effect prior to conviction or sentence. In which case, his record would show a voluntary resignation for personal reasons. This, it was explained to the Grievor, would be to his advantage in the pursuit of future employment after he had served his sentence. The Grievor asked for time to consult his lawyer, which was granted. Three days later, he wished to tender his resignation, which the Company refused because the Grievor had not consulted his lawyer. Subsequently, the Grievor advised the Company representative that he had consulted his lawyer, who advised against resignation. The Company representative did not suggest that the Grievor resign against his lawyer's wishes, nor did he exert any pressure on the Grievor with respect to the decision to resign.

Some nine or ten days later, the Grievor tendered a written notice of resignation, which the Company only accepted after a union steward witnessed it.

The Grievor later sought to rescind his resignation, referring to pressure, coercion, and intimidation by the Company to effect his resignation. The Grievor felt that the Company had taken advantage of his stressful and depressed state of mind.

Arbitrator Picher found a significant distinction between stress suffered when someone is called on to make a difficult choice with pressure or duress due to threats or inducements.

Critical here is Arbitrator Picher's comments at paragraph 18:

Reluctant resignation is not involuntary resignation merely because it represents an outcome not of the employee's own desiring. The true question is whether the employee did exercise a sufficient degree of independent judgment in the circumstances. Such factors as the time afforded to the employee, the availability of independent advice whether through a union representative, legal counsel or otherwise, and the expression of threats or promises by an employer, as well as all of the statements and conduct of the employee immediately before, during and after his or her resignation are pieces of evidence to be weighed in the over-all determination of whether he or she had the capacity to formulate an independent intention to resign and voluntarily did so. ...

...The central issue is whether in the circumstances confronting the grievor at or about the time he tendered his resignation effective January 5, 1987, he can be said to have been in such a state of mind and emotion that his act in so doing was not free and voluntary. In cases of this kind, it is critical to recall the distinction between the stress that any individual faces when he or she is called upon to make a difficult choice in trying circumstances, and the pressure or duress which impacts on an employee as a result of threats or inducements, either expressed or implied, by his or her employer. In the first instance the employee may be under pressure, but it is the pressure of external circumstance, usually not of the employer's making. Life often involves making hard choices. While in dealing with such issues it is unwise to generalize, in many cases it will be difficult to draw a causal link between the sheer hardship of the employee's circumstances and the voluntariness of his or her decision to resign.

Further, the following passage at paragraph 32 is instructive because of the circumstances that transpired long after the Grievor, in the instant case, tendered his resignation

In summary, the evidence discloses that the grievor was not pressed by his employer to make a hasty decision, was not subjected to duress, coercion or undue influence by the making of threats, the holding out inducements or otherwise, and was, on the contrary, encouraged repeatedly by the company's officers to think through his decision and obtain the assistance of his lawyer in considering his option. While there is no doubt that the grievor was forced to make a choice which he did not relish, having regard to the totality of the evidence, the arbitrator is satisfied that his choice was freely made and that, effective January 5, 1987, he had and communicated a full and unconditional intention to resign his position. His resignation was accepted by the company. At that point in time the grievor, by his own volition, ceased to be an employee of the company. The fact that subsequent events unfolded in a way which he had not anticipated, and that he was not sentenced and taken immediately to prison cannot change the quality of his action of January 5, 1987, and in particular the freely expressed decision to resign his employment. For these reasons the arbitrator is compelled to conclude that the grievor voluntarily resigned his employment, effective January 5, 1987. For all of these reasons the grievance must be dismissed.

In *Re City of Ottawa, supra*, the Grievor, after resigning, concluded that he was not particularly well represented by his union representative whom the Grievor felt should have pushed harder on his behalf and put up an argument against the allegations which were made. Arbitrator Dissanayake dealt with this argument thus at paragraph 18:

The grievor explicitly testified that he realized that night at home that he had made "a mistake" by submitting his resignation. He also concluded that his union representative had not represented him particularly well. Does that evidence suggest that the grievor did not subjectively intend to resign at the time? I think not.

Arbitrator Dissanayake further found that incorrect information provided to the Grievor by the union concerning his eligibility to obtain unemployment insurance did not detract from his decision to resign:

In the present case, assuming that the grievor's decision to resign was influenced by incorrect information he received from his union representative as to his eligibility for employment insurance benefits, that does not detract from the fact that he decided to resign, albeit based on incorrect information. (paragraph 19)

In *Re Ontario (Ministry of Community Safety and Correctional Services)*, *supra*, Arbitrator Petryshen dealt with a situation where the Grievor's was of the opinion that she really did not have a choice but was forced to resign. Finding that she may have been faced with a difficult choice, Arbitrator Petryshen concluded the following at paragraph 56:

A reasonable assessment of the facts leads me to conclude that she did have a choice and that she was not forced to resign. Mr. Pitfield told her that it was up to her to decide what she wanted to do given the options available to her. There is no doubt that she was confronted with making a difficult choice in trying circumstances. She nonetheless made a choice that she felt at the time was best for her in the circumstances. She chose to have a quit rather than a termination recorded on her employment record with the NBJ. She also chose an option that resulted in no report being made to the CNO. She was not forced to resign because it is clear that she was in a position to exercise her free will to choose the best option available.

In *Re Hamilton Health Services*, *supra*, citing as authority, *Community Lifecare Inc. (Community Nursing Home, Warkworth) v. United Food and Commercial Workers Union Canada, Local 175*, 2008 Can LII 31349 (ON LA) (Bendel), and Arbitrator Picher's decision in *Motorways*, Arbitrator Albertyn found that arbitral authority distinguishes between threats and inducements, which vitiate intent and the pressure inherent in the circumstances, which does not. He went on to find that the Grievor, upon being told that her Long Term Disability benefits were at an end, decided to take her early retirement disability pension with the Healthcare of Ontario Pension Plan.

Arbitrator Albertyn dealt with the Union's argument that the Grievor was forced to retire and that she did not have the subjective intent to do so in the following way at paragraph 16:

I find there was no duress, no inducement, nothing obliging the Grievor to retire, other than the pressing necessities of her daily life. She made

the decision carefully and rationally. As Employer counsel argues, the Grievor's retirement was not taken in anger, not spur of the moment. It was a well-reasoned decision.

In *Mangat supra.*, Adjudicator Bilson found that a resignation given when it is clear that termination is the alternative does not itself constitute coercion.

Finally, in *Community Lifecare Inc. supra.*, citing as authority, *Canada Packers Inc. v. U.F.C.W., Local 114-p* (1984), 17 L.A.C. (3RD) 1 (Rayner), Arbitrator Bendel found that arbitrators are reluctant to set aside a resignation where a union steward has represented the employee.

After a careful review of the currently applicable case law, I also hold to the view that the authorities demonstrate an arbitrator must ascertain the true intention of the employee in determining whether he resigned from his employment. In other words, did the employee actually intend to sever the employment relationship? In making such a determination, it is clear that arbitrators view that the act of resigning from one's employment involves both a subjective intention to resign and objective conduct after that, demonstrating the continued intention to resign.

In particular, when assessing whether an employee formed the subjective intention to resign, arbitrators ask themselves whether the employee was in such a state of mind that his decision was free and voluntary. Or was the employee subject to coercion, pressure, or duress, which would call into question the voluntariness of the resignation? In this regard, arbitrators distinguish between the stress when one is called on to make a difficult choice in trying circumstances and the pressure or duress that impacts an employee due to threats or inducements, either expressed or implied by his or her employer.

The jurisprudence also establishes that an employee's access to and advice from a union representative before he decides to resign is a significant factor, even if the advice is considered poor or incorrect.

Did the Grievor Intend to Resign

I turn now to consider the evidence of the events leading to the Grievor's decision to resign.

The evidence of the interaction between the Grievor and Mr. Best is taken wholly from the Grievor's testimony.

According to the Grievor's evidence, on April 16, 2015, at approximately 4:00 PM, he received a call from Mr. Best to inform him that Ms. Mein's report was completed and that the Company would be terminating his employment the following day. Later that day, Ms. Murphy dropped Ms. Mein's report off at the Grievor's residence with two letters. One of which informed the Grievor that he was to attend the Company's premises the following morning, April 17, 2015, at 10:00 AM to discuss the report's contents. (emphasis added)

The Grievor and his wife reviewed the report. Mr. Best called the Grievor at 10:15 PM that evening. Mr. Best told the Grievor that the report was accurate based on his attendance at the interviews. The Grievor replied that he thought it was inaccurate. Mr. Best told the Grievor that if he was unhappy with the report, he could file a grievance and that the Union would support the grievance. Mr. Best added that CATCA would have to perform its investigation.

Mr. Best informed the Grievor that as an alternative to being discharged, one might be able to retire in some instances. He further informed the Grievor that he would lose the payout of accumulated sick leave and other entitlements if discharged.

The Grievor composed a nine-point letter that he emailed to Mr. Best on April 17, 2015, at 6:29 am. It was, the Grievor said, to empower Mr. Best to broker a deal with the

Company to permit the Grievor to retire in March 2016. The subject line of the Grievor's letter reads:

Union Grievance versus voluntary retirement.

The Grievor concluded his letter in the following way:

With reference to our conversation of last evening, I had asked you to consider a couple of things which would smooth my exit. Upon reflection and for the sake of clarity, I will reduce this to one suggestion.

I had originally planned to retire on March of 2016 and once relayed this verbally to Paul Vokey. Given that my case appears to have a strong chance of winning at arbitration, perhaps from that position you could argue this morning on my behalf that I be allowed to retire a few months from now, in March of 2016. In the interim I would be happy to accept non-op duties, temporarily re-locate or otherwise continue my employment with Nav Canada in a manner acceptable to them.

I appreciate your time and look forward to discussing this with you later this morning.

Mr. Best testified that he discussed the Grievor's proposal with Ms. Cameron, the Assistant Vice President of Labour Relations. Ms. Cameron rejected the Grievor's offer but tried to fashion a remedy that would have permitted the Grievor to retire with full pension in March 2016 without returning to work at Nav Canada. Mr. Nyman did not accept her proposal.

When informed that Nav Canada was not amenable to the Grievor's proposal, Mr. Best said he raised the issue of immediate retirement with Ms. Murphy and Mr. Nyman. On April 17, 2015, he informed the Grievor that the Company had rejected his proposal and added that if the Grievor retired immediately, he would not have to return for a meeting at 3:00 pm to be terminated.

During the meeting at 10:00 am on April 17, 2015, the Grievor said he would agree to resign. The Grievor, at the Company's request, provided a letter of resignation which I have set out above.

It is also important to note that at no time did the Company threaten to discharge the Grievor unless he resigned. Instead, the Company, on receipt of Ms. Mein's report, informed the Union that it intended to terminate the Grievor on April 17, 2015. The evidence revealed that the Company was prepared to consider a lesser form of disciplinary penalty if the Grievor was prepared to take ownership for his alleged actions against the Complainant and show contrition. Ms. Murphy testified that Ms. Cameron gave the approval to meet with the Grievor on the morning of April 17, 2015, and if "nothing new came up," to terminate later in the day. Ms. Murphy said that had the Grievor taken accountability for his actions, management may wish to stop and discuss the level of discipline. Indeed, the evidence revealed that Mr. Thomson, another employee who was named in the complaint, showed contrition and apologized. He was not discharged. Instead, he was demoted from supervisor to ATC.

The Grievor argued that he was orally informed in a clear and unequivocal manner of his discharge on April 16, 2015, and that any option to resign after that date was no longer legal or valid. Relying on *Little Leaf supra.*, *Teck Coal supra.*, *Beggs, supra.*, and *Parapetics supra.*, in support of this argument.

As I view the facts, I am satisfied that the Grievor's discharge had not crystalized on April 16, 2015. No one from the Company communicated anything orally or in writing to the Grievor that he was discharged. That information came from Mr. Duffy, the Union National President, through Mr. Best.

Further, the evidence of Ms. Murphy on this point is clear. She testified that had the Grievor taken ownership of his actions towards the Complainant and shown contrition at the meeting on the morning of April 17, 2015, the Company was prepared to revisit the discipline to be imposed in the afternoon.

The Grievor's 9 point email to Mr. Best reveals that the Grievor instructed Mr. Best to attempt to negotiate a deal to "smooth his exit." The Grievor, for all intents and purposes at this point in time, had made up his mind to retire or, as he put it, "exit" from his employment at Nav Canada. He would have preferred to do so a year hence. However, the deal brokered enabled him to retire, be paid severance pay, sick leave pay, and be eligible for post-retirement benefits for which he applied. It also allowed him to control the agenda of his departure from the Company, thus avoiding the stigma of termination, which he readily admitted might have prevented him from finding other employment or starting a small business and diminished his standing in the community. After hearing the Grievor's testimony and reviewing the advertisement he placed in a newspaper post-retirement as well as the article written by his wife Shawn, published in the Canadian Owners and Pilots ("COPA") magazine, I am left with no doubt that the Grievor's reputation was of utmost importance to him.

As such, when it became clear that the Company had rejected the deal to permit him to retire in 2016, the Grievor, faced with the stigma of termination and the loss of benefits, made a decision that was best for him under the circumstances. He opted for the lesser choice of immediate retirement on April 17, 2015, which the Company accepted, albeit reluctantly.

Ms. Murphy testified that when she was informed that the Grievor was permitted to resign, she felt like he was walking away whole and would not be held accountable for what he had done to the Complainant, who would have no closure on the matter.

Mr. Nyman testified that he felt the Company was extremely generous to allow the Grievor to resign and receive his total severance and unused sick leave rather than be terminated immediately.

Undoubtedly, the Grievor was faced with a difficult choice in trying circumstances to paraphrase Arbitrator Picher in *Re Motorways, supra*. The pressure he was under, however, was not of the Company's making. He made a free and voluntary choice to

retire., Before making his decision to retire, the Grievor had the benefit of advice from his Union Representative. He discussed the matter with his wife. His lawyer, who had represented him in this matter throughout, was but a phone call away. The fact that he did not want to retire does not vitiate his resignation. It was, in my view, a carefully thought out decision, as evidenced by his letter to Mr. Best looking for a better way to smooth his exit from the Company.

The Grievor argued that had he known the reality of the events in the background of the COBC process, he would never have agreed to resign. I have carefully reviewed the Grievor's evidence, and this argument is not supported by any evidence whatsoever. That was not the Grievor's testimony. Instead, the Grievor was adamant that had he been guaranteed that his grievance would advance to arbitration, he would not have resigned.

In this respect, I agree with the Counsel for the Union that the Grievor does not have an absolute right to have his grievance proceed to arbitration. No union member does. However, this is not a case where the Union refused to advance the grievance to arbitration. That decision had not been considered before the Grievor retired. There is no evidence that the Grievor was given any indication that his grievance would not proceed to arbitration. Mr. Best properly said that the Union would have to do its investigation, which is not an uncommon practice prior to deciding on the costly arbitration route. What is clear from the evidence is that were a grievance to have been filed, it would have had the full backing of the Union.

The cases submitted by the Grievor in which employees were given the choice of resigning or being discharged were not helpful in my deliberation as they are clearly distinguishable on the facts. See for example, the following cases: *Backman supra*, *Ewasidk supra*, *Deters supra*, and *Chan supra*, among others.

In the case before me, it bears repeating that the Grievor and not the Company raised the possibility of resignation as an alternative to termination. Nav Canada did not, as the Grievor submitted, give him a choice to resign or be terminated.

Having regard then to all of the foregoing, it is quite clear that the evidence does not support in any way the Grievor's argument that he was induced to resign when the Company offered to pay him \$130,000. Instead, it was Mr. Best who raised the issue of the Grievor's severance and paid sick leave.

The evidence is overwhelming. The Grievor clearly decided to retire, which he now seeks to withdraw because he says it was not the right decision.

This, however, does not assist the Grievor as there is a distinct difference between a bad decision and an involuntary one. Bad wrong or negligent advice does not affect the voluntariness of the decision. (see *Hansard, supra.*)

For all of the above reasons, I find that the Grievor formed the subjective intent to resign from his position at Nav Canada on April 17, 2015.

I turn now to consider the Grievor's subsequent actions to satisfy myself that there was objective conduct on his part of a continuing nature confirming his intention

The question that I must ask is whether the evidence discloses any subsequent conduct on the part of the Grievor to show a continued intention to resign.

Having regard to the evidence, I have concluded that the evidence of objective intent on the part of the Grievor is ample.

I set out the following indicators of the Grievor's actions following the events of April 17, 2015.

The Grievor signed a letter of resignation.

The Grievor applied for his pension and retirement benefits.

The Grievor attended a party in honour of his retirement.

The Grievor applied for retirement membership with the Union.

The Grievor placed an advertisement in a newspaper three weeks after he resigned, announcing that he was retiring from Nav Canada to pursue other interests after 35 successful years of service.

The Grievor's wife, Shawn, penned an article which was published in June 2015 in the COPA magazine titled "Longtime COPA member retires from a stellar 35-year stint with Transport Canada, Nav Can."

The Grievor worked as an ATC in Baghdad for a year after his departure from Nav Canada.

In applying the arbitral jurisprudence, to the above factors, I am satisfied that the evidence confirms the Grievor's objective intention to resign.

Conclusion

In summary, it is my finding that the Grievor formed the requisite intention to retire from his employment. On April 17, 2015.

I find there was no coercion or inducement established that would vitiate the Grievor's subjective intention to resign. No evidence was adduced that the Grievor did not have the mental capacity to resign nor that it was a spur-of-the-moment utterance later quickly regretted by him.

The Grievor's resignation was a carefully thought out decision to avoid the stigma of termination and to obtain the monetary benefits attached to a retirement that would not be available were he to be discharged.

Further, there is ample objective evidence to support his continued intention to resign.

Having reached this conclusion, it is not necessary for me to address the arguments concerning the investigative process and the threatened dismissal.

For all of the above reasons, the grievance is dismissed.

ADDENDUM

Before leaving this decision, I think it is necessary to comment on the following argument made by the Grievor:

The resignation was a product of a double illegality: 1) The breach of the Grievor's DFR. 2) A breach of the ADR process, particularly the lack of an attempt to mediate a settlement by the Company.

The breach of the Grievor's DFR, as I stated above, was dealt with by the CIRB, which granted the Grievor the remedy he sought to have the matter of his departure from the Company dealt with by an arbitrator for determination.

As for the failure to invoke mediation, for mediation to work, it requires the participation of both parties. It is clear from the evidence that the Complainant wanted no part of mediation. Having practiced mediation/arbitration for over two decades, I can say with authority that to attempt mediation when both sides are not in agreement with the process would be an act of futility. To quote the old adage, "It takes two to tango."

As such, any argument that the Company's failure to invoke mediation and the Union's violation of the Grievor's DFR somehow vitiates his resignation is, in my view, completely without foundation.

DATED AT OTTAWA ONTARIO, THIS 10th DAY OF DECEMBER 2021.

A handwritten signature in black ink, appearing to read 'S. Baxter', written in a cursive style.

SYDNEY BAXTER