IN THE MATTER OF AN ARBITRATION

BETWEEN:

NAV CANADA

(The Employer)

- and -

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION, UNIFOR LOCAL 5454

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF LEGEIN ET AL.; VANCOUVER ACC, RELATING TO NATIONAL LEAVE POLICY

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the Employer: Kecia Podetz, Counsel
Noel Platte, Counsel
Matthew Malcolm, Senior Legal Counsel
Sheri King, Director, Labour Relations
Terry Cruse, General Manager, Vancouver FIR

For the Union: Jennifer Duff, Counsel
Nick von Schoenberg, National President
James Legein, Chair, Vancouver ACC Branch
Karty Singh, Labour Relations Advisor

AWARD

A hearing in this matter was heard by videoconference on February 16, June 7, July 5 & 12, October 7 & 14, and November 3, 25 & 30, 2022. There were no issues raised as to the appointment of the arbitrator, nor as to my jurisdiction to hear and determine the present grievance.

The grievance was filed on March 24, 2021 on behalf of James Legein and all CATCA members at Vancouver ACC. The statement of the grievance is as follows:

> - The employer has implemented a National Leave Policy as per multiple discussions with site manager.
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> - It has been clearly stated the branch, on behalf of the ACC members, does not agree with the calculations and limitations on leave proposed by this policy.
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> - The imposed leave policy does not provide adequate numbers of leave opportunities for the amount of leave possessed by the employees. Further, the leave policy/guidelines do not allow vacation leave to be scheduled at times that are desired or acceptable to the employees.
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> - On March 8, 2021, the YVR MACCO published a staff memo which outlined the calculations and process to be followed for the leave year 2021-22 without the agreement of the CATCA branch executive and without due consideration of the concerns raised by them with respect to this policy.
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> As a result of the employer's unilateral implementation of this National Leave Policy, the employer is not making every reasonable effort to schedule vacations in a manner acceptable to the employees of the unit. The employer has violated Article 27.06, 28.03 and all other related articles of the Collective Agreement

Although there were several days of evidence from both parties, there is really little dispute about the facts on which this matter is to be decided. What dispute there is relates to the perceptions of each of the parties as to the conduct of the other; where

those disputes are material to the outcome of this arbitration, I shall deal with them in the course of the narrative in which I shall set out the facts. There are also disputes about what legal conclusions should be drawn from the facts; I shall deal with them in my summary of the arguments and the law.

The two clauses of the collective agreement referred to in the grievance are best considered in the context of where they appear in that document. Article 27 is the vacation provision. After setting out the vacation leave entitlements based on years of continuous employment, the provision deals with the procedural aspect of vacation scheduling:

> 27.04 Subject to operational requirements NAV CANADA shall make every reasonable effort to schedule an employee's vacation leave during the vacation year it is earned. Where in any vacation year NAV CANADA has not scheduled all of the vacation leave credited to an employee, the unused portion of the employee's vacation leave shall be carried over into the following vacation year.
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> 27.05 Employees shall take vacation leave on the basis of the schedule being worked.
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> 27.06 (a) The vacation year extends from April 1 to March 31 and vacation may be scheduled by NAV CANADA at any time during this period.
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> (b) Local representatives of the Union shall be given the opportunity to consult with representatives of NAV CANADA on vacation schedules. Consistent with efficient operating requirements NAV CANADA shall make every reasonable effort to schedule vacations in a manner acceptable to employees.
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> (c) It is agreed by the parties, in accordance with the intent of Article 27 that it is both appropriate and desirable that each employee utilize their full vacation entitlement during the vacation year in which such vacation entitlement is earned. However, an employee may elect, to carry forward into the next vacation year unused vacation and lieu leave up to a maximum of twenty-one (21) working days. The twenty-one days shall be reduced by the number of days, if any, carried over from the prior leave year.

Leave carry over shall also be subject to the following conditions:

(i) that any vacation period carried forward from the previous vacation year and utilized by any employee does not disrupt vacation schedules in the current vacation year nor prevent another employee from taking their regularly scheduled vacation for that year;

(ii) that the days which are carried over from the previous vacation year are taken at a time which is acceptable to both NAV CANADA and the employee;

(iii) that an employee's vacation earned in the vacation year will be utilized before days carried forward from the previous vacation year;

(iv) that in cases where vacation credits from the previous vacation year have not been fully utilized by the end of the next vacation year any outstanding carry-over vacation credits will be paid off at the employee's straight-time rate of pay in effect at that time.

Article 28 is the holiday provision, setting out the designated holidays to which all employees are entitled. For operational employees in air traffic control, such as the members of the grievor group here, work is normally performed on a 24/7 basis on shift rotations, and therefore many holidays are work days, paid at a premium rate and entitling the employee to days off in lieu. The procedural aspect of scheduling those days is set out in clause 28.03:

28.03 **Lieu Leave**

(a) On April 1 of each year, an employee shall be credited with eighty-eight (88) hours of lieu leave.

(b) Lieu leave may be scheduled as an extension to vacation leave or as occasional leave and shall be charged against the lieu leave credits on an hour-for-hour basis.

(c) Consistent with operational requirements and subject to adequate notice, NAV CANADA shall make every reasonable effort to schedule lieu leave at times desired by the employee.

> For employees in non-control positions that are normally unstaffed on a holiday, NAV CANADA may schedule an employee's lieu leave on the holiday. In the event that the holiday falls on the employee's day of rest, lieu leave may be scheduled on the first scheduled working day following their day of rest.
>
> (d) Where in any vacation year an employee has not utilized all of the lieu leave credited to them, the employee may elect to carry forward into the next vacation year the unused portion of their lieu leave in conjunction with annual leave subject to article 27.06 (c).
>
> (e) Lieu leave earned in the vacation year will be utilized before lieu leave carried forward from the previous vacation year.
>
> (f) At the employee's option, any lieu leave which cannot be liquidated by the end of the vacation year in which it is earned will be paid off at the employee's straight-time rate of pay in effect at that time. Unused lieu leave will be carried over into the following vacation year excepting only where the employee requests in writing that it be paid out, subject to clause (g) below.
>
> (g) In cases where lieu leave from the previous vacation year has not been fully utilized by the end of the current vacation year, any outstanding carry-over lieu leave credits will be paid off at the employee's straight-time rate of pay in effect at that time.
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> ***[Note: for 2021-22, the amount in paragraph (a) was increased to 96 hours because of an amendment to the Canada Labour Code declaring the National Day of Truth and Reconciliation as a public holiday]***

There have been discussions resulting in both agreement and disagreement over the years about how to apply these provisions. The evidence ranged over some of these discussions, but to simplify and focus the present analysis, some salient events can be highlighted. For the 2002/2003 vacation year, the parties entered into a letter of understanding (LOU) to set out some of the principles that had been applied to that point. The LOU set out the process, including the following principles:

1. Vacation Leave and Lieu Leave were combined for the purposes of scheduling and utilizing leave, but not leave carried over from a previous year.
2. The total leave entitlement was calculated for each unit, based on the entitlements set out in the collective agreement, which was then divided by 365 to calculate the approved leave slots per day. Fractions were rounded up to the nearest ½ to provide the additional days needed for flexibility; certain units were permitted to continue past practices that differed from this approach.
3. The additional days generated by the rounding up were used to deal with overlaps of selected leave cycles, to permit employees to take leave in full work cycles preceded by and followed by days off in the cycle.
4. Selection of available slots was done by seniority within the unit; leave carried over from previous years could only be scheduled once the general selection was finished.

The LOU was expressly only for that leave year and was not renewed. There is no LOU on leave allocation in the current agreement, but the general outline of leave planning, at least in Vancouver ACC, still resembles what was in that LOU.

The 2021-22 leave year discussions took place in difficult circumstances. During the leave year consultations for 2019-20, the Employer had sought certain changes to the structure of the leave plan. The Union had objected since the parties were in

negotiations, and the statutory freeze on terms and conditions of employment applied. The employer had reluctantly abandoned its proposals.

By 2020, the COVID-19 pandemic resulted in a serious reduction in air traffic around the world, and special measures were put in place to minimize the possibility of infection at the workplace, which remained in operation as an essential service. The usual shift schedules were replaced by a "crew system" in which the operational workforce was divided into two crews each of which always worked together, and did not intermingle, on a five day on, five day off cycle, to reduce the possibility of the spread of infection. This schedule required a special leave planning structure, which was implemented by LOU; for that reason, there was no need for leave planning consultation and document for 2020-21. At the time of the 2021-22 consultations, it was anticipated that the crew system would operate until October 2021, unless earlier terminated by the Employer by notice, as it was entitled to do.

Because of the crew system and the reduction in air traffic, there were more employees on shift at some times than were required to perform the work available. The Employer introduced a system of "spares", under which employees were officially on duty but were not required to attend at work unless called in. That appears to have provided extra relief capacity during the summer season of 2020.

During the same time frame, possibly driven by the pressures of the pandemic but also by general concerns about staffing levels, the Employer engaged in an exercise of workforce planning with a view to preparing for the situation which would result from the end of the pandemic and the return of normal air traffic volumes. This exercise was carried out under the direction of Ms. Samantha Robertson, Director,

Workforce Planning. She described the purpose as to ensure that the right number of employees were available at the right place, at the right time, with the right qualifications to meet the Employer's objectives, and that this be achieved at the right cost.

Staffing operational positions for NAV CANADA is a daunting challenge, as Ms. Robertson testified. Air Traffic Controllers (ATC) are highly trained and specialized employees. Training a new ATC takes from 2.5 to 3 years, and the successful completion rate of that training may be as low as 50%. The cost ranges from $1.5 to $2 million per employee for the training alone. The Employer is both the only domestic market for such skills, and also the only training provider. An ATC must meet stringent health standards, and may lose the license to work, temporarily or permanently, if those standards are compromised.

ATCs perform their control duties at Air Control Centres (ACC) or at Control Towers. At each ACC there are several units or "specialties", each covering a designated part of the controlled airspace, for which specific qualifications are required. While an ATC may move from one specialty to another, each move requires further training and an endorsement on the license. Qualifications are generally not interchangeable except within the specialty.

Air traffic patterns are generally predictable, since they are based on demand for travel, and peak during the summer months. While the pandemic significantly reduced the overall level of air traffic, the pattern still persisted with a similar seasonal peak, although at a much lower level.

While there are mechanisms available to respond to the seasonal peak, such as scheduling non-control duty assignments and training to the off-peak periods to

ensure that the maximum number of ATCs are working in operational roles to meet the peak, there are other pressures to be managed. Long-term leaves of various kinds, including parental leaves, are required under the collective agreement, and cannot be scheduled to accommodate traffic peaks. Shorter term leaves such as sick leave and injury on duty leave cannot be predicted, and must be covered by other resources, including overtime. The Canada Labour Code provides limits on the amount of overtime that can be worked to respond to unforeseen shortages. The workforce planning exercise involved creating resilience in the staffing model to ensure that service reductions would not result from sudden unexpected challenges.

As a result, part of the workforce planning exercise looked at the scheduling of leave. The objective of permitting leave scheduling "in a manner acceptable to employees" as set out in clause 27.06 is complicated by the fact that the most popular times for vacation are also the times when air traffic demands required the highest operational staffing levels. The summer months, and to a lesser degree the Christmas – New Year season and the winter school breaks, are obviously the most desirable times for vacation. The workforce planning exercise therefore took a careful look at vacation and leave scheduling to attempt to balance those demands.

Ms. Robertson was tasked in September 2020 to develop a policy on leave planning, incorporating the concept of optimal staffing as well as best practices developed through local consultation over the years. Her draft was circulated to the General Managers of the seven Flight Information Regions (FIR) for review and comment, and that input was added to the draft, which was then reviewed by upper management and Labour Relations. It appears that the Labour Relations review changed the focus of the

document somewhat; while before it had been prescriptive in tone, it was amended to cast its recommendations as proposals for consideration in the course of local consultation with the Union, with an acknowledgement that the recommended considerations might not be adopted in their entirety at some locations. That document, entitled National Annual/Lieu Leave Planning Guidelines for LY 2021-2022 (hereafter the National Guidelines) was generated in January 2021 and shared with the Union, but it appears that the earlier, more prescriptive draft had already reached the Union, and had generated opposition and some animosity. It was in this context that the local parties at the Vancouver ACC entered discussions to determine the Annual Leave Guidelines for the leave year April 2021 to March 2022.

Mr. James Legein, the Chair of the Branch Executive at the ACC, testified that he had been involved in the leave planning process for some years, and that the usual practice was to schedule meetings in the previous November and December with the objective of releasing the Guidelines document before the end of the calendar year, after which the administration of the leave selection would be carried out by volunteers from among the ATCs. The basis for the discussions was typically the Guideline document from the previous year, to be confirmed or amended based on the discussions between the parties.

Vancouver ACC had six specialities when consultation began, but one of those was expected to be amalgamated into a national unit, and the ATCs were to be redistributed to the other five. Under the 2019-20 leave plan, on which the consultation was to be based, the leave allocation was done separately for each specialty, and separately for ATCs and supervisors. The principles for determining how many

employees would be permitted to be on leave on any one day included the following; I note that there were a number of other issues dealt with, but these were some of the points of contention during the consultations:

1. Total leave credits for vacation and lieu days were added together, and then divided by 365; supervisors and ATCs were listed separately.
2. The resulting fraction was rounded-up to the next .25 increment, provided that the minimum increase was at least .25. For example, if the calculation was 1.99, the rounded-up result would be 2.25, an increase of 0.26. If the calculation was 2.01, the rounded-up result would be 2.50, an increase of 0.49. I note that the rounding-up is variously described as intended to provide for carry over of leave from the previous year, or to accommodate overlaps of shift cycles and permit both overlapping cycles to be taken as a complete selection. In any case, the rounding-up created flexibility, and increased the number of available leave slots.
3. Overlap days, to permit taking a full cycle of leave where leave slots were not available due to overlapping shifts, were allocated at 1.5 per ATC. Supervisors were in a separate group for overlap days.

The National Guidelines would have removed the rounding-up calculation, and would have reduced the overlap to 1.0 days per controller. There would have been a 10% increase in total leave entitlement to accommodate leave carried over from a previous year. It would have restricted the availability of leave slots in the summer

period, June 15 to September 15, to the highest whole number generated by the daily leave calculation; additional leave slots per day resulting from fractional results would be scheduled at other times of the year.

At the National level, the Union sent a letter of objection dated January 22, 2021 setting out its concerns with what it perceived to be the issues with the new national leave policy, apparently based on the "leaked" draft document. The Employer responded on February 12, 2021 to the effect that there was no national policy, but only guidelines to assist local management in consultation with the union to achieve consistency across the system and better balancing of leave throughout the year. There was scope for variations in the outcomes of local consultations, and a statement that "conditions are not being laid down".

The final National Guideline was then forwarded to the Union. It is helpful to reproduce that document in full:

> **ATC - NATIONAL ANNUAL/LIEU LEAVE PLANNING GUIDELINES FOR LY2021-2022**
> January 2021
>
> ***The purpose of this document is to share with union representatives the following information, for consideration during upcoming local management/union leave consultations:***
>
> As part of the ATS Optimal Staffing Strategy, NAV CANADA is recommending National Annual/Lieu Leave Planning Guidelines to GMFIRs for the purpose of informing and guiding local management teams as they consult with their local union representative(s) to determine the local leave guidelines for LY 2021-2022 for their unit(s).
>
> The purpose of the National Annual/Lieu Leave Planning Guidelines is to increase national consistency in the way the daily allotment of leave is determined and distributed annually, as well as increase consistency in the way leave matters are administered. Furthermore, the purpose of the planning guidelines is to continue in the organization's efforts of reducing

costs as much as possible by avoiding unwarranted overtime as well as ensuring that every unit has enough available employees in all periods throughout the year.

It is recommended that the following parameters be considered during upcoming management/union consultations:

1) Consider including only current and available employees in the calculation for daily allotment;

2) Consider increasing the calculation for daily allotment by 10% to account for carry-over;

3) Consider calculating the daily allotment using the following methodology: divide the daily allotment by 365 days and do not round up or down. (Ex. if the result is 3.41 this means that there should be 215 days at 3 and 150 days at 4);

4) Consider allocating the additional leave above a whole number on an annual basis following this recommendation: daily allotment should not be increased during summer period. Summer period is defined as June 15th to September 15th. (Ex. if the daily leave allotment calculation comes out to 3.95, this means that there should be 20 days at 3 and 345 days at 4. The 20 days at 3 should fall during the summer period, the remaining portion of the summer should be at 4);

5) Consider that daily leave allotment for UOS and supervisors be separate from the daily leave allotment of controllers. Recommendation is that the daily leave allotment of UOS and supervisors should be limited to one (1) allotment per day, all year long; except if daily allotment exceeds 365. Furthermore, recommendation is that UOS and supervisors daily leave allotment should not be automatically transferable to another position if it goes unued [*sic*];

6) Consider limiting personal “overlap” following this recommendation: each employee should be allowed one (1) “overlap” leave shifts per year to complete a first or second work-cycle of leave in a peak-vacation period. There should also be a maximum of one (1) overlap possible per day permissible by position type;

7) Consider including guidelines regarding employees who were not included in the Annual Planning Process due to new qualification, re-qualification or long-term sick-related absence. Upon (re-)qualification, they should be permitted to choose annual leave according to the following recommended guidelines:

> a. If the employee has less than 16 years seniority: choose up to one (1) full cycle of leave
> (no more than six (6) calendar days) of leave within peak-summer vacation period;
> b. If the employee has more than 16 years seniority: choose up to two (2) full cycles of leave (no more than twelve (12) calendar days total) of leave within peak-summer vacation period;
>
> 8) Consider that once leave is approved, cancellation should be at management's discretion; and
>
> 9) Consider that if an employee is absent from the Unit during the period they have chosen leave or if an employee cancels leave, the leave slot should be reclaimed by management and should no longer be available for other employees to request leave upon.

At the local level at Vancouver ACC, the consultations began late, and the management team, led by Mr. Greg Down, the Manager of ACC Operations, presented a draft agreement based on the previous guidelines, but amended to reflect some of the national objectives. The rounding-up was proposed at 15%, rather than the recommended 10%, and the previous rounding-up formula was deleted. Overlap days were limited to 1.0 per ATC and per supervisor per specialty. It was explained that the changes were made in response to the National Guidelines, although there were departures from those recommendations. The union objected to the introduction of national standards into what had always been local consultations, but indicated willingness to consider the proposals and respond. A number of meetings and a lengthy exchange of e-mails followed. It is fair to say that these communications were sometimes heated and agreement was grudgingly reached, if at all.

These discussions ranged over the topics noted above, and over other issues as well. Double overlap, where both an ATC and a supervisor wanted to use an overlap day at the same time, was discussed. A major issue, however, was rounding-up.

While the Employer was prepared to move to 15% from the nationally proposed 10%, the Union insisted that it needed a minimum of 20% across the ACC and 35% in the Victoria Terminal specialty because of special concerns there. Another major issue was overlap days; the Employer was resisting the Union's 1.5 day proposal. Other issues became either resolved or faded against the importance of the central disputes.

On March 5, 2021 Mr. Legein made what he called a "Hail Mary" proposal: rounding-up to 20% and 1.5 overlap days. Mr. Down rejected this and reiterated the 15% and 1.0 days already offered. He also committed to a standard that had been developed outside the consultations by Mr. Terry Cruse, General Manager of the Vancouver FIR, and Mr. Nick von Schoenberg, Vice-President for the Pacific Region of the Union. They had agreed that it would be reasonable to expect that every employee should be able to secure two complete cycles of leave during the June 15 – September 15 summer period. Mr. Down committed the Employer to "reviewing" any instances where this standard had not been met.

The Union found this unacceptable, but recognized that the Employer would proceed anyway. As a result, the Union declined to participate in the administration of the leave process, and management appointed its own members to carry out the leave plan.

It is fair to say, in my view, that the local parties had very different views on the nature of the leave planning process. Mr. Legein used language throughout his testimony and in his correspondence which suggested that the process should be one where the parties reached a full agreement on all issues. He referred to the experience in

the past where, at least in his view, that had always been the case, and suggested that this new national initiative broke faith with the Union's expectations.

Mr. Down did not testify, but his correspondence suggested that the only obligation on management in the collective agreement was consultation, and that a failure to agree was merely a predictable consequence of incompatible positions, and that when that occurred, management had to proceed unilaterally to meet its obligations under the collective agreement. Mr. Cruse, to whom Mr. Down reported, testified that economic conditions and the need to deploy operational staff economically and effectively to meet the Employer's obligations to its customers meant that past leave planning practices had to be revisited, and if not justified, changed.

While Mr. Cruse did not participate in the consultations, apart from attending at the first one or two meetings, he did play a role in guiding the consultation through regular contact with Mr. Down, and a role outside the consultation in his discussions with Mr. von Schoenberg. He testified that he had been consulted as a General Manager about the draft National Guidelines, but that he could not recall if he responded to them or what any response might have been. In his discussions with other General Managers, he concluded that the Vancouver ACC rounding-up process was unique, and he testified that because of the stepping of the rounding-up by increments of .25, the effective percentage equivalent varied from specialty to specialty between about 18 % to 35%, producing a higher number of leave slots than can be managed while still maintaining full operations. The percentage approach to rounding-up adds slots on a more rational basis, and it was his judgment that 15% was a workable number, although higher than recommended in the National Guidelines. He also testified that the overlap

day proposal was reasonable, since a 1.5 day allowance could create shortages on particular days that could not easily be covered.

He also testified that the National Guideline recommendation that extra leave slots not be scheduled in the summer period was not appropriate, and that it was not followed in the final leave plan issued. He considered that the demand for extra leave coverage in the summer could be managed by restricting assignments to non-control duties.

The result of the outcome of the Vancouver consultation was that the present grievance was filed. Other grievances were filed at two other British Columbia units but were placed in abeyance pending the determination of the Vancouver grievance. No national grievance was filed.

The Union argued that there were breaches of two provisions of the collective agreement, paragraphs 27.06(b) and 28.03(b). The provisions are very similar in one respect; that they require that the Employer "shall make every reasonable effort" in scheduling, but paragraph 27.06(b) provides that effort to be directed to "schedule vacations in a manner acceptable to employees", while paragraph 28.03(b) requires that lieu leave be scheduled "at times desired by the employee". There are also minor distinctions in the limitations on that obligation: paragraph 27.06 makes it subject to be "consistent with efficient operating requirements" while paragraph 28.03(b) states "consistent with operational requirements and subject to adequate notice".

Apart from that distinction, clause 27.06(b) includes an obligation to consult with the local Union about vacation schedules. The union claims a breach of the consultation obligation, and a breach of the "every reasonable effort" requirements.

Neither party identified any real significance to the differences in language between the two provisions. The obligation to consult, while strictly applicable only to vacation schedules, applies in practice to lieu day scheduling because the two kinds of leave are scheduled together. The differences in language between the two obligations to "make every reasonable effort" also did not feature in either party's submissions. The major differences between the parties in how to approach the provisions related to onus of proof, and whether the provisions are one obligation to consult and make every effort, or two.

There appears to be no doubt that, by the time of final argument, the Union accepted that generally the onus was on it to establish the facts that would support a finding of a breach of the collective agreement. That is consistent with the past jurisprudence between the parties: see ***Barry and Treasury Board (Transport Canada),*** *[1995] C.P.S.S.R.B. No. 66.*

The Union relied, however, on an award by arbitrator Christie which appeared to recognize a shifting in the onus where the employer relied on operating requirements as a justification for a particular leave decision: see ***C.A.T.C.A. v. NAV Canada,*** 1998 CarswellNat 5604, [1998] C.L.A.D. No. 734, 54 C.L.A.S. 275 (Christie), para. 70 – 71 and 74 - 75. While it isn't entirely clear that arbitrator Christie was invoking a true shift in onus, a requirement that both parties must prove what they allege is not an unusual approach.

As to whether the consultation obligation and the "every reasonable effort" obligation are one requirement or two, I agree with the Union that the two requirements must inform each other, since all provisions of the collective agreement must be read

together to achieve a harmonious interpretation. However, the obligations are different, in that the consultation requirement is a procedural one, and the "every reasonable effort" requirement is based on the outcome of the application of scheduling. I shall deal with them as separate obligations for the purpose of assessing the evidence; that approach is consistent with that taken by arbitrator Christie in ***C.A.T.C.A. v. NAV Canada,*** *supra*.

The Union's view of the consultation process is that the Employer came to the Union with a new National position on leave scheduling, insisted that it would shape the design of leave scheduling in the coming leave year, and refused to depart from that position. With respect, the facts do not bear out that characterization.

While the Union received unofficially a version of the National Guidelines that was not meant to be the final approach, and had not yet been reviewed by Labour Relations, that was not the document on which the local consultations were to take place. The final document clearly did not attempt to enforce a national approach to leave scheduling; it set out aspirations only and expressly left room for local differences.

There is no reason why the development of a national approach was offensive to the local consultation process, provided that there is no arbitrary imposition of a national standard: see ***C.A.T.C.A. v. Canada (Treasury Board),*** *1992 CarswellNat 1652, 27 C.L.A.S. 571 (Burke).* There was a general effort underway to develop a staffing strategy that would make the best use of available resources, and identify how those resources should be enhanced and managed, including the administration of leave. Such an effort was clearly within the rights of management as set out in Article 4 of the collective agreement:

> 4.01 The Union recognizes and acknowledges that NAV CANADA has and shall retain the exclusive right and responsibility to manage and operate

> NAV CANADA's business in all respects including, but not limited to, the following:
>
> (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning NAV CANADA's business, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
>
> (b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge, and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of NAV CANADA.

That broad reservation of management rights clearly included the right to schedule vacations, including the right to set policy objectives relating to such scheduling. The language of the leave provisions reinforces this conclusion. Vacation leave may be scheduled "by NAV CANADA at any time during" the vacation year (27.06(a)), and the obligations to "make every reasonable effort" are cast as limitations on a general authority to manage vacation scheduling.

The evidence also does not support the assertion that the local management team took the position that the National Guidelines were a "take it or leave it" proposition. The initial position advanced by local management was already a modification of the National Guidelines in respect of the rounding up percentage of 15% compared to the suggested 10%. And over the course of the consultations, the Union conceded that of the nine recommendations in the National Guidelines, four of the more contentious were adjusted in favour of the Union position or not implemented, including the critical proposal to put extra leave slots in the off-peak periods rather than in the summer, which local management abandoned.

The evidence also does not support the assertion that management's participation in consultation was less than attentive. There were at least five consultation sessions, and a long and vigorous e-mail communication between those sessions. Taking and holding a position on a particular topic does not constitute a refusal to engage in consultation. Even if it did, the Union was equally adamant in its position that the previous scheduling approaches should not be departed from, as was management that those practices were illogical and excessive and needed to change.

The present arbitrator dealt with the nature of the obligation to consult in ***NAV Canada and CATCA (Denial of Care), Re,*** 2018 CarswellNat 8251, 137 C.L.A.S. 99, 295 L.A.C. (4th) 1 (Swan). That award dealt with "care and nurturing leave" under clause 26.09, which permitted a leave under that provision to be denied due to operational requirements, but only after "meaningful consultation" at the local level. On the issue of what consultation requires, the award stated:

> I note that the provision does not call for agreement between the parties, only for meaningful consultation. The clause contemplates not only that some leaves may be denied, but that the denials may take place in circumstances where the Union does not agree.

Similarly, here there is no obligation for the parties to agree, and the Union, while it hinted that past practice of always reaching agreement on all aspects of leave planning (a proposition not entirely borne out by the evidence) might create an obligation to agree on this occasion, it did not when pressed advance a formal requirement for agreement in the nature of an estoppel. Indeed, there is jurisprudence that a local practice cannot effectively modify the national agreement*:* ***NAV Canada and CATCA,*** *1997 CarswellNat 4924, [1997] C.L.A.D. No. 687, 50 C.L.A.S. 330 (Bird),* at para. 95.

The Union asserted a specific instance of Employer conduct that suggested a failure to respect the need for consultation. At one point in the discussions the Union made a point about an issue of double overlap (where both a supervisor and an ATC seek an overlap on the same day) and asked for data about the use of overlap days during the summer season in previous years. It is common ground that the management team undertook to look into this, but ultimately did not provide the data. Rather than a failure of consultation, however, the failure to provide the data was based on the difficulty in assembling it and analyzing it, and the fact that the issue was rendered moot by the continuation of the crew system, with its LOU specifically dealing with leave, so that double overlap during the summer of 2021 was no longer an issue.

I have concluded that there was no breach of the obligation to engage the local Union in consultation before finalizing the leave planning document for Vancouver ACC.

The second aspect of the Union's case, therefore, requires an examination of the extent to which the leave plan ultimately implemented unilaterally by the Employer "made every reasonable effort to schedule vacations in a manner acceptable to employees". In my view, while there is interaction between the consultation obligation and this obligation, this obligation stands alone once the consultation is over and the plan is promulgated. The "every reasonable effort" requirement extends both to the design of the plan itself, and to its implementation.

The first important consideration is that, at the point of designing the plan, there can be no possibility of a requirement that the vacation schedule be acceptable to individual employees. There are many limitations on how a plan can be structured which

have the effect of making some employee interests subordinate to others. One of the main restrictions on a particular employee having leave in a desirable cycle is seniority. Unless the employee is very senior, the subjective wishes of the employee will be subject to availability of designated vacation slots after more senior employees have exercised their right to select first, and selection is done in rounds, so that in each round more junior employees can affect by their choices what is left for senior employees in the next round. This obligation must be understood to require that the plan offer reasonable access to leave opportunities, that it be fairly administered among the employees competing for those opportunities, and that there be enough flexibility in the administration to allow correction of unfairness.

In addition to the limitations imposed by the competing rights of the employees, there is the overarching importance of efficient operating requirements. Determining operating requirements is clearly a management right, and here management is entitled to ensure efficiency as well as simply meeting operational obligations. Whether management has made every effort to schedule vacations in a manner acceptable to employees must therefore permit management to set off against what employees would find acceptable the competing interests of operating efficiently.

I agree that, as stated by arbitrators in several of the awards relied on by the Union, that the Employer's obligation is not merely to act reasonably, but to make <u>every</u> reasonable effort. In some of the awards, a failure to ensure adequate staffing is cited as a failure to make every reasonable effort; in others a refusal to pay overtime to replace an employee taking leave is identified as failing to meet the test.

It is important to note that the earlier authorities between these parties or their predecessors dealt not with the overall effect of a vacation scheduling plan on a local workforce, but with a particular instance of denial of leave to an individual. Here, only two individual employees were called to testify about the effect of the plan on them, and Mr. Legein's experience with vacation selection was also in evidence as part of his testimony. I shall deal first with the overall effect and return below to the individual cases.

The Union argued that the effect of the imposed plan was to provide too few vacation slots to deal with the entitlements of individuals; that assertion is also set out in the grievance. It was conceded by witnesses, and later in argument, that this did not mean that there were not enough leave slots overall, but that there were not enough leave slots in the periods when employees wanted to take them, presumably mostly in the preferred periods when most employees would want leave. As noted, the final management position did not shift extra slots out of the summer period and into less desirable times, and the evidence was that removal of ATCs from non-control duties to perform operational duties provided an additional increase in staffing during the peak demand.

There was also an argument that there had been chronic short staffing at the ACC, and it was conceded by Employer witnesses that some specialties had indeed been understaffed in the past. At the time of the grievance, however, there were two factors which tended to reduce the influence of this history.

Because of the pandemic, commercial air travel had plummeted. While there was some increase in 2021, it was difficult to predict whether that would last, or when it would resume historical levels. The new staffing initiatives introduced in 2020 were based on estimates of a return in traffic to 80% of 2019 levels, which took some of the

urgency to increase staff out of the calculations. With the dissolution of one specialty in favour of a national unit to perform the same functions, a group of unassigned ATCs was available to boost numbers in other specialties to reduce staffing problems. Whether that would be enough remained to be seen, but the evidence suggests that at the time the assumptions used were reasonable. In my view, it is very difficult to see any direct influence of historical staffing decisions on the immediate events from which the grievance arose.

There is a suggestion in the Union evidence that there was an Employer refusal to pay overtime to cover leave. This was vigorously rebutted by the Employer evidence to the effect that overtime was regularly used to cover leave, to the extent that overall overtime numbers were a concern to the local management and union both. There are statutory limits to how much overtime an employee can work, and once those limits are reached that employee is no longer available to cover leave or other absences. There is also the issue of compelling overtime; local practice was to have employees willing to work overtime sign up as available for particular shifts. What the Union described as a refusal to pay overtime was an unavailability of volunteers to work overtime at a particular time, and a refusal by the Employer to impose a compulsory shift change, at an additional cost, both in money and morale, to cover a leave. Management was willing to permit leave where the applicant could switch shifts or find a volunteer to work the shift on overtime, but not to make short notice shift changes. Placing the obligation on employees to find someone to switch shifts was justified as appropriate in ***Barry***, *supra*. I note that the two individual employees who testified about their own leave experiences raised such an alleged refusal to pay overtime, but the evidence does not support any such general refusal.

Those employees were Mr. Tony Schollen and Mr. Gerad Woroniecki. Both were ATCs at Vancouver ACC during the 2021-22 leave year, and selected their leave under the plan which is the subject of the grievance.

Mr. Schollen came into the leave year with entitlement to 30 days of vacation and 12 lieu days, plus 21 days carried over from the previous year, a total of 63 days covered by the provisions at issue. He complained that he was only able to obtain 17 days of leave during the first half of the leave year, and that later in the year he was frustrated in his efforts to obtain leave on specific days.

This complaint must be viewed against the circumstances. First, the leave in the first half of the leave year was not covered by the leave plan which is the subject of the grievance; the crew system, with its own leave structure, was in place until October. Second, he was at the top of the seniority list in his specialty, and so chose first in each round of leave selection. In the first round, he got both of his selections, a cycle in July and one in August, which was the maximum permitted in that round by the bidding system which was essentially the same as in previous years. In the second round, he selected and got a cycle in September. This amounted to the 17 days, or 15 shifts because of his schedule, that he complained was too little, but was the maximum he could have chosen at that stage in the selection. He did not ask for summer days in the third round, but got all his choices. It was only in the fourth round that he asked for three additional days in August, which were refused because the leave slots on those dates were already fully subscribed. It is not clear if he could have had those dates had he selected them earlier, but the fact is that he did not.

In the fourth round he selected a cycle in March 2022, in the fifth round a cycle in February, in the sixth round a cycle in November-December. In the seventh round, he declined to make a selection from the choices available, and kept the days to be used ad hoc, although the next day he asked for and got two days in May as his seventh round selections. At that point he had selected 40 days, all but two of his entitlement for that year, and he was therefore dealing with carryover leave from the previous year, which is subject to the much more stringent conditions set out in Paragraph 27.06 (c), where scheduling is by mutual consent, and the "every reasonable effort" obligation does not apply.

To summarize, Mr. Schollen got two cycles of leave during the summer period in the first round, and did not bid again for that period until the fourth round. While he complained about the lack of available slots in desirable periods, that was not particular to his situation. I am unable to find from Mr. Schollen's testimony anything to support that the Employer was in breach of its obligations.

Mr. Woroniecki had some 20 years of seniority. He selected leave throughout the cycles, but also saved some leave to apply ad hoc. By the end of bidding, he had scheduled 35 days of leave. He also elected to carry over some leave, and had some paid out. By August 25, 2021 he reported having only four days of leave left to schedule, and he asked for those four days in February 2022 for a ski holiday. He complained that changes in the process for selecting ad hoc leave had made matters uncertain, but he did get the leave, although it was withdrawn later by his manager because of a staff memo issued in the summer, which the evidence indicates had subsequently been withdrawn, since it was only issued to deal with approval of ad hoc leave while the crew schedule was

still in operation. While this apparent error was not clarified, when he complained that he had already booked flights he was granted the requested leave after all.

Mr. Woroniecki therefore had a full cycle of leave in July and another in August, and further leave periods in May, June and September. It is not clear if the June and September days were within the summer leave period, or just adjacent to it. The rest of the leave he received included March break. It is clear that he was frustrated by some of the administration of the leave policy, but there is nothing in his evidence to support that the Employer was in breach of its obligations.

I note that there was an informal agreement between Mr. Cruse and Mr. von Schoenberg that an appropriate test of whether there were adequate leave slots available was whether all employees received at least two cycles of leave during the summer months. I have noted that the two individual witnesses both received that amount of prime period leave, and possibly more. The same appears to be true of Mr. Legein. But that metric was in any case irrelevant because the summer of 2021 operated on the crew system, and leave for that period was allotted pursuant to the LOU, and not on the 2021-22 leave plan. Similarly, the dispute about overlap days was significantly diminished in importance because of the crew system: overlap days are not needed in the crew system since everyone is working on a 5 day on, 5 day off cycle, and there is no overlap problem to book a full cycle of leave.

It may be that the special circumstances of 2021-22 made it impossible to demonstrate clearly whether or not the Employer met the "every reasonable effort" test. In any case, my conclusion is that the Union did not succeed in such a demonstration. There was no doubt frustration and animosity from employees whose expectations of more

available leave slots were not satisfied. But "every reasonable effort" is subject to "efficient operating requirements", and the Employer made a plausible case that the reduction in total leave slots was justified by operational considerations.

In the result, the grievance is denied.

DATED AT TORONTO, ONTARIO this 6th day of November, 2023.

Kenneth P. Swan, Arbitrator