

IN THE MATTER OF ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Services Act*

Employer

- and -

THE UNION OF NORTHERN WORKERS

Union

Grievance re: Flora Abraham (05-627)

AWARD

BEFORE: Thomas Jolliffe, Q.C.

FOR THE EMPLOYER: Brad Patzer

FOR THE UNION: Debra Seaboyer

HEARING LOCATION: Yellowknife, NWT

HEARING DATE AND ORAL DECISION: June 27, 28, 2007

DATE AWARD ISSUED:
October 29, 2007

This arbitration matter raises the issue of whether the aggrieved employee's application for paid special leave to cover two days time lost from work due to an alleged extreme event in the nature of road closure of the Dempster Highway, was wrongly denied. The pertinent language of the Collective Agreement read as follows:

19.02(2) - The Deputy Head may grant an employee special leave with pay for a period of up to five (5) consecutive working days:

- (b) where special circumstances not directly attributed to the employee prevent his/her reporting to duty including:**
- (ii) a transportation problem caused by weather if the employee makes every reasonable effort to report for duty;**
- - -
- (d) Such leave will not unreasonably withheld .**

Counsel also cited the Regulations to the *Public Service Act* as generally applicable to all employees of the Government of the Northwest Territories, in particular sec. 31 dealing with special leave which in part reads as follows:

- 31. A Deputy Minister may grant an employee special leave with pay for a period of up to one week, to the extent that it has been earned, under the following circumstances:**
- (ii) a general transportation tie-up caused by weather if the employee makes every reasonable effort to report for duty from his or her usual residence, but where transportation delays prevent an employee from reporting for duty from other than his or her usual residence, the circumstances may be considered attributable to the employee and the time should be charged to vacation leave or leave without pay.**

The Employer takes the view that sec.31, (d), (ii) of the Regulations must be read together with art.19.02 of the Collective Agreement and should not be seen as a matter of

applying the contract language alone. Rather, one can be taken as supplementing the other and suggests that in such cases where special leave is denied in a situation where circumstances have been considered attributable to the employee slowing in her return from a trip, it is not unreasonable to withhold the requested paid leave.

It is also perhaps worthy of note that under art.19.01, not reproduced herein, employees earn special leave credits up to a maximum of 30 days at the rate of .5 day per calendar month in which he or she receives pay for at least 10 days, or .25 day per calendar month in which he or she receives pay for less than 10 days. Ultimately, it can be seen that it would take a full time employee five years to earn the maximum accumulated paid leave credits, , to be drawn out by reference to the language in art.19.02.

The parties also made reference to the collectively bargained language dealing with conflicting provisions. It reads as follows:

5.03 Where there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

In brief, the grievor is a court worker with the Department of Justice positioned in the Legal Aid office in Inuvik. In October, 2005, she together with her teenage son, and co-worker Candace Seddon Davies, planned to take a driving trip in the co-worker's van on the Dempster and Klondike highways, to Whitehorse and back, to be completed over the Thanksgiving Day long weekend. They had arranged to leave work early on Friday afternoon, October 7. It meant their traveling along some 736 Kilometres of gravel roadway and another 496 kilometres of paved highway in order to reach Whitehorse which was expected by them to take as long as 16 hours, perhaps another hour or two, in good seasonal driving conditions. They were counting in it taking roughly the same amount of time to return home along the same and only route. In short, the whole driving trip amounted to approximately 2464 kilometers (1531 miles) expected to be completed between Friday

afternoon and late Monday evening in order that the two co-workers could be back at their desks on Tuesday morning. She said that they did time calculations and felt comfortable that the return trip could be done in the time available, even leaving them two days planned visiting time with their friends in Whitehorse. By the grievor's version given in testimony, they considered the possibility of having a flat tire on the gravel road and accordingly took two spare tires with them.

By the grievor's description, they left Inuvik on Friday by about 5:00pm and took their first rest and refueling break at Eagle Plains, 367 kms along the gravel road, reached at about 11:00pm, after making two ferry crossings at Tsiigehtchic and Fort McPherson. With one or other of them driving throughout the night, they reached the Klondike Highway corner, some 40 km east of Dawson City at about 7:00am. Shortly thereafter took another refueling stop and were able to complete the last leg to Whitehorse by about 10:00am, all done without incident or delay. They had spent 17 hours on the road including rest stops.

The grievor testified that at she had at least a "vague" recollection of checking the road conditions prior to leaving Inuvik for the type of weather they would be facing both ways, and fully accepting the she was expected back to work on Tuesday morning. She said she had every confidence in fulfilling that expectation. By the grievor's description, there were no concerns presented in reference to the weather forecast, having checked with CBC North, the weather information source, and having made sure the ferry companies were running. She had verified their schedule. She said they had no concerns over the weather forecast, seasonable, with good driving conditions, and she was "confident" they would make their round trip successfully. The grievor saw themselves as having taken "all the necessary steps and preparations" in order for the driving trip to put them, successfully, back in Inuvik by late Monday evening.

The grievor testified that on Sunday mid-day they checked the likely weather for the return trip and discovered that a bulletin had been issued earlier that day regarding a road closure. It was placed in evidence as an archived bulletin from the Highways Department,

and reads as follows:

Sunday, October 9, 2005 - The Dempster Highway is closed between Eagle Plains and McPherson due to high winds and heavy snow drifting. The remainder of the highway is open and is in fair winter driving condition. Please watch for and slow down at rough and slippery sections throughout.

By the grievor's recollection, on becoming aware on Sunday that a road closure had been instituted by the Highways Department due to high winds and heavy snow drifting, she reasoned that it could open at any time, hopefully by the time they left for home on their return trip, or at least by the time they got to Eagle Plains, some ten hours into their drive. The grievor said that they decided against flying back to Inuvik at that point due the expense and also the fact that there was no expectation on their part that the winds and blowing snow might last for days. The snow clearing could be completed at any moment, they reasoned, and the road opened from Eagle Plains to the north. Further it made no sense to start back immediately on Sunday as the road was already closed waiting to be opened.

According to the grievor, on having visited with their friends, they prepared to leave for home on Monday at about 5:30am, and were planning on being able to reach Eagle Plains by about 4:30pm, where they would learn whether the road was yet opened. With the possibility existing that the road could open at any time, she said they were still expecting to reach Inuvik around midnight. They had set aside 18 hours for the return trip. Another way to put it, they were hoping for the best. The grievor and her co-worker started out making better time on the return trip, reaching Eagle Plains by about 3:30pm that afternoon. Had everything continued according to plan, they would have been back in Inuvik in about another 6 hours, which is to say by 10:00pm. However they discovered at that point that the Dempster Highway was still closed at Eagle Plains, no northbound traffic yet permitted from that point forward.

As matters developed, according the grievor, all the while they were sitting in Eagle Plains, they were thinking that the highway would open at any time, that road equipment

would finish clearing whatever blowing snow or drifts had accumulated. Some vehicles, they observed, even went beyond the road closure which they considered was not an appropriate approach. They ultimately sat there for two days. The highway did not open until Wednesday, mid afternoon, almost 48 hours later. At that point, setting off northbound even with the traffic considerably backed up, they were able to get home by about 8:30pm on Wednesday evening, which is to say two days after they would have arrived had it not been for the road closure. It had caused them to miss two days work.

In cross-examination the grievor held fast to her version that she and Ms. Seddon-Davies reasoned there was no point in leaving Whitehorse early in such circumstances as they had until at least 6:00pm on Monday afternoon to reach Eagle Plains in order to still get back to Inuvik by midnight were the road to have opened, which would have presented no problem in getting to work the next morning. The grievor's co-worker had taken the precaution of phoning their office on Monday afternoon to advise that due to the road closure they were "stuck" at Eagle Plains which was going to slow down their return trip. There was only an emergency landing strip at that location and no scheduled flights out. Unless they returned to Whitehorse or drove to Yellowknife in order to fly home, which they did not see as reasonable as the road could open at any time, they were stuck there for at least some period of time, hopefully only a few hours. However, the wind kept blowing, and the snow continued to pile up until it could be sufficiently cleared away to open the road two days later.

Subsequent to her reporting for work on Thursday morning after having gotten back to her home on the previous evening, the grievor applied for two days special leave with pay to cover the missed Tuesday and Wednesday, October 11 and 12. Thereon she stated the facts simply as she knew them to be namely, "the Dempster Highway closure prevented me from returning to work" and referencing on the request form "S-10 for bad weather". It is noted that only she, and not her co-worker, Candace Seddon-Davies, applied for the special leave. Her co-worker is an excluded employee, not a bargaining unit member, and

accordingly, would have had no access to the collectively bargained language.

The grievor's paid leave application was denied by her immediate superior, Lucy Austin, the Executive Director of the Northwest Territories Legal Services Board. She was aware that the grievor had some history in having failed to successfully deal with adverse weather, which had come to mind when the grievor made her application for paid special leave to cover the two days. In the course of her testimony the grievor acknowledged that approximately a month earlier, while returning to Inuvik by car from her annual leave spent in Fort Smith, she had miscalculated the length of the drive and had arrived back home late enough at night that she slept through her alarm the next morning. She requested 2 ½ hours paid annual leave. By the grievor's description, on this earlier trip, she had miscalculated the distance, and had been driving in foggy and rainy conditions, which resulted in a slower drive than she had anticipated. She was advised by Ms. Austin on this previous occasion that annual and special leave were not applicable to cover her arriving in Inuvik several hours later than she expected, and her sleeping through her alarm the next morning. The grievor testified that she saw no comparison with the current circumstance, where she felt comfortable with her co-worker as the main driver who was familiar with the highway, the distance involved and the travel time. She said they fully expected to be back in Inuvik early enough to report for work the next morning and would have, had it not been for the road closure.

The grievor's superior, Ms. Austin, in her testimony remarked upon the significance to the community of having the Inuvik legal aid office where the grievor and her non-bargaining unit co-worker were positioned, properly staffed during work days. When the grievor and Ms. Seddon-Davies successfully applied on Thursday to leave work early on Friday afternoon for their planned driving trip to Whitehorse and back over the long weekend, she pointed out to both that such an application involving the last 1 ½ hours of the work day should have been made well in advance, and that there should be no assumptions about such leave being approved in the future. She said that she made her preference clear

that she wanted them both there for the whole day, not wanting their remaining co-worker left alone in the office. Ms. Austin was plain enough in communicating her view at hearing that when the grievor only a month previously had been 2 ½ hours late for work after returning from a driving trip, there had been no satisfactory reason. She had stated in her assessment to the grievor at that time in a follow up e-mail that her lateness amounted to her having been absent without leave. The grievor had later applied for the missed 2 ½ hours to be considered as annual leave, which Ms. Austin knew had to be applied for in advance. The missed time in that previous instance was ultimately marked down as periodic leave without pay which the grievor accepted.

Ms. Austin in her testimony was clear enough that the grievor and Ms. Seddon-Davies heading off to Whitehorse on a driving trip over the Thanksgiving Day long weekend, left her concerned over their possibility of their not being back at work at 8:30am on Tuesday morning, and looking back to the previous occasion which she thought had been caused by the uncertain driving conditions existing on the Dempster Highway the previous month. She admittedly did not like the idea of her two staff members driving that far over the long weekend. She had observed that neither of them had asked for leave to carry them through to Wednesday or Thursday. After their leaving Inuvik, the next thing Ms. Austin heard was a voice mail message left for her on Monday by Ms. Seddon-Davis indicating that they were experiencing a road closure difficulty. Following their return home, admittedly, she was not about to approve any paid special leave due to what she described as “the entire circumstances”, including that they had apparently planned the trip at the last minute as indicated by them seeking 1 ½ half hours leave on Friday afternoon. They had been prepared to run the risk of being on the road over a great distance during the time of year when difficult weather conditions might be expected to materialize, and were apparently unconcerned that any kind of a problem encountered over such a long drive could cause a real difficulty returning on time. In short, they left no margin for error, as had occurred only a month earlier when the grievor had experienced some extreme distance difficulties in

driving back from Fort Smith and had arrived 2 ½ hours late for her first day back to work. Ms. Austin also recalled that before heading off on Friday afternoon, the grievor had assured her she would be back at work on Tuesday morning. In her view they should have made other arrangements or taken a different type of leave. Subsequent to the grievor's return, she recalled, they discussed the type she should be seeking with her indicating that she was not prepared to approve special leave. She knew that the grievor had signed a form seeking annual leave, or leave without pay, previously in September, a similar enough situation as she knew it. Eventually with annual leave having been turned down, the application for paid special leave was made and denied.

Ms. Austin acknowledged that on being told the highway was closed, she had no reason to doubt that event having occurred. She had never driven the Dempster Highway herself but thought that the event of a road closure was a possibility for one driving it in October. She also believed that the trip had not been reasonably planned, and was a "last minute hastily made decision - somewhat ill advised". In her cross-examination, Ms. Austin also admitted that she had no recollection of either the grievor or co-worker, Ms. Seddon-Davies, having applied for paid special leave in the past. She also admitted not being aware of any past driving plans or previous lengthy road trips for the co-worker although she understood that Ms. Seddon-Davies had suffered flat tires before on the road, which had not caused her to be late for work.

Following the denial of the grievor's application for paid special leave made under art.19.02(2) (b) (ii), the Union grieved on the basis that it had been reasonably withheld. The Employer responded at the final grievance level that the grievor's superior, Ms. Austin, had specifically raised her concern with the grievor prior to her leaving for Whitehorse. She had doubted the grievor's ability to report for work on Tuesday, given the unpredictability of the road conditions along the Dempster Highway. In the grievance denial letter, it was pointed out that most residents realize that transportation throughout the north, whether by air or by ground, can be difficult due to a number of factors including weather conditions, road

conditions, ferry operations and mechanical problems. For the employer, it meant that “when traveling, employees are expected to schedule sufficient travel time to ensure that they are able to return to work as planned”, making specific reference to the language in art. 19.02 (2)(b)(ii). It was pointed out that even in ideal conditions, traveling the distance between Whitehorse and Inuvik would take approximately 15 hours. Further, it was said that the grievor should have fully understood the risks associated with traveling the Dempster Highway during the winter where “severe weather conditions and the highway closures along the Dempster are considered the norm during the winter, rather than the exception”. The Employer took the grievor not to have allowed herself sufficient time to account for the probable delays. She was said not to have satisfied the provisions of the Collective Agreement in order to qualify for the leave, which is to say special circumstances not directly attributable to the employee and the employee makes every reasonable effort to report for duty. The denial asserted that she had chose to take the risk of traveling in unpredictable highway conditions, had allowed herself very little time to do so, and ought to have reasonably known that a delay was likely, as presumably would anyone living in the North who sought to travel at a seasonally unfavorable time. Interestingly, the Employer in its denial did not seek to rely on the Regulation under the *Public Service Act*, asserting only the grievor’s alleged failure to have come within the provisions of the Collective Agreement so as not to qualify for the type of leave sought.

In argument on behalf of the Union, Ms. Seaboyer viewed the facts of the matter as disclosing that the grievor and her co-worker had put in place a sufficient and reasonable plan to have made their round trip over the Thanksgiving Day long weekend. The blowing snow and strong winds which caused the Dempster Highway to be closed at Eagle Plains sometime on Sunday, still closed when the grievor reached that point in her return trip the following afternoon should be taken as special circumstances not directly attributable to the employee. The resulting road closure prevented her reporting for work as scheduled on Tuesday morning. As such it was said to have qualified her for paid special leave to cover

a transportation problem caused by weather in that she had made every reasonable effort to report for duty in the circumstances. She could hardly have done anything else but to have waited for the road to open, which could have occurred at any moment. Most importantly, she had set aside enough time for the return trip with no reasonable alternative available in the circumstances, including that travelers plainly were not told on Sunday afternoon that the road was going to be closed for the next three days. The grievor had no reasonable expectation that by the time she would reach Eagle Plains in the late afternoon of the next day, it would still not be open. Realistically, on being stuck at Eagle Plains as with the other travelers, they waited it out and made the appropriate telephone call to indicate that they could not get home until the road opened. They were by then two thirds of the way home along with numerous other vehicles positioned at the road closure. With no other road to Inuvik, it would have hardly been suitable for them to have retraced their travel to fly. Again, there was no indication that the road would be closed for three days. Realistically, as with other travelers stuck at the road closure in Eagle Plains, they were forced to wait it out. The grievor should have taken to have made every reasonable effort in dealing with a situation beyond her control. The Union sees the previous occasion as irrelevant to the situation at hand. A month earlier, due to her own miscalculation of distance, the grievor had arrived home so late at night that she had slept through her alarm clock the next morning. She did not allege at the time that there were any special circumstances not directly attributable to her which prevented her from being at work at 8:30am the next morning and had not applied for paid special leave. It was hardly the same thing as having the Highways Department close the road and strand all travelers at that point until the road was reopened, except for the few foolhardy travelers who had apparently snuck through the road closure to advance what distance, and at what peril, is unknown. The earned accumulated special leave benefits were not something that the grievor had ever claimed before nor was there any indication she has done so since. Given the circumstances presented, Ms. Seaboyer submitted, the special leave application should be considered as unreasonably withheld

contrary to Article 19.02(2). She tabled arbitrator Hope's decision in GNWT and UNW (1997) 65 LAC (4) 211 being a case dealing with another kind of earned monetary benefit, vacation travel assistance, where the arbitrator accepted that the contractual provision was capable of being interpreted on the basis of the ordinary meaning of the language in dealing with qualifying for payment of earned benefits.

In argument on behalf of the Employer, Mr. Patzer stated that from the Employer's view point the trip itself was "foolhardy..., ill advised..., not reasonable", the grievor and a co-worker had left too little a time margin to cover any difficulties which might arise on such a significant journey needing to be completed over a long weekend. There were many things that could go wrong with their planned return to Inuvik by late Monday night, much that could have upset their timing. With the onus resting on the employee to show entitlement, he/she should have to demonstrate that adequate plans were made to cover a reasonably unforeseen event, which, given the time of year should not have excluded the possibility of a weather related, possibly lengthy, road closure. Circumstances suggested that such a trip should not be undertaken without planning that several days travel time might be needed for the full round trip of almost 2500kms. The employer, he said, was well within its rights to have withheld the payment which should not be considered a violation of the Article 19.02 as being somehow unreasonable.

Further, Mr. Patzer, submitted the art.19.02 special leave language could be read in conjunction with, or "together with" sec. 31 (b) (ii) of the Regulations under the *Public Service Act* which allows the Employer not to grant paid special leave where a transportation delay prevents one's reporting for duty from other than her usual residence, as being attributable to the employee. While the Employer acknowledges that where a conflict exists, art. 5.03, would apply, in the current circumstances, there is none in that the Regulation should be considered supplementary. In support, Mr. Patzer cited arbitrator, Marcotte's's decision in Re: Toronto District School Board and O.E.C.T.A. (Toronto Elementary Catholic Teachers)(2000), (88LAC)(4)(7) as judicially reviewed by the Ontario Court of Appeal, cited

at (2001), 55O.R. (737) which reinstated the arbitrator's awards following the Divisional Court having overturned them. The case involved a collectively bargained stipulation dealing with the length of a teacher's lunch break to be no less than 40 consecutive minutes or in accordance with a certain regulation under the *Education Act* in Ontario. While the factual situation itself does not bear on this case, the union there held to the view that while the employer determined its own policies and rules, they could not be inconsistent or contrary to the contract language, or inconsistent with provincial acts and regulations, in particular, the regulation dealing with lunch breaks having been referenced by the collective agreement. Following his lengthy discussion addressing the construction of the collectively bargained provisions in the same general vein as considered at topic 4:2100 in *Brown and Beatty*, Canadian Labour Arbitration (loose leaf 3rd) and numbers of arbitration awards which acknowledge the significance of the Supreme Court of Canada's decision McLeod v. Egan [1975] 1 S.C.R. 517, arbitrator Marcotte concluded that arbitrators can refer to statutes dealing with employment issues as an aid to interpreting the contract language and may be obliged where the language is capable of two constructions, if not outright ambiguous, to choose the one which is consistent, and not in conflict, with the statute or regulation. Having dealt with the case law presented, and having distinguished some of it on the basis of the matter, and nature of statute made law when placed alongside the contract language, the arbitrator stated at page 11 of the award, that "...relevant for our purposes, however, is the arbitral recognition therein of the requirement for consistency between collective agreement provisions and statutory provisions that address the same subject, for interpretation of language in the former requires the interpretation of statutory or regulatory language such that the collective agreement provision must be consistent with the regulatory language" which is to say acknowledging the regulatory regime under which the school board managed its responsibilities. However, as the Union pointed out here, it might be noted that under art.5.03 of the relevant contract language negotiated by the parties, they have agreed that where there is any conflict between the collective agreement and any regulation, the

collectively bargained language shall prevail. In her reply, Ms. Seaboyer submitted that the Toronto Catholic District School Board case had no application to the current circumstances. There was no issue here, she said, of the language presenting two meanings needing to be reconciled, nor the regulation somehow supplementing or ever displacing art.19.02, which governs certain working life circumstances of this bargaining unit employee. She said that while the Union has no say in how the Employer promulgates its policies and rules, or regulations, and applies them to non-bargaining unit employees, those outside rules cannot go below the base line negotiated contract language with respect to bargaining unit employees, or contravene it, including art.19.02, which is not so limiting as the Regulation itself. It might well be viewed, she said, as a specific clause, a more favorable negotiated provision, than contained in the Regulations and capable of having its own reasonable interpretation. A determination is required based on whether in all the circumstances, involving the grievor's weather driven transportation difficulties, did she make every reasonable effort to report for duty and was the requested leave somehow unreasonably withheld. It was not being a determination, she said, governed by whether it was a transportation problem encountered away from home. If any such limitations exists for bargaining unite employees to be found within the contract language causing one's entitlement to special leave with pay.

Having now set out the factual circumstances of the matter, and the parties respective positions taken in argument, as I mentioned at hearing, it is appropriate for me to consider that within the Public Service, at least federally, there has been a well developed history of applying the negotiated paid special leave provision for such things as domestic and community emergencies, and transportation difficulties caused by severe weather conditions, dependent on the factual circumstances. The language in this current contract can be seen to be rooted in the old Treasury Board negotiated provisions dating from at least the 1970's, including the Canada Post language. As was the case decades ago, it still provides that paid special leave may be granted when circumstances not directly attributable an employee

prevent his reporting for duty, and further that such leave shall not be unreasonably withheld. Over the years, that kind of language has often been considered in the arbitration process. There is a group of awards, a large number of them, collectively known as the so-called "snow-storm" cases. They have generally concerned the failure of employees to have returned to work in timely fashion, supposedly due to deteriorated driving or flying conditions brought about by stormy weather, including in those many areas of Canada well known for the severity and unpredictability of winter conditions. Indeed, it has been observed by arbitrators from time to time that an impassable road situation delaying one's driving trip is a winter-time reality in much of our vast nation. It has also regularly been said that the snow-storm cases are decided on their particular circumstances.

For comparison purposes, I will describe at least a few of these cases disclosing the same kind of contract language as here, dealing as they do with snow-storm generated delays in areas of the country where crippling winter weather conditions can easily develop. In the earlier of these two cases, which I provide as examples, House and Treasury Board (Transport Canada) [1982] 2 PSSRB Decisions 18, PSSRB File No. 166-2-10320, MacLean, the adjudicator in opening remarks referred to the matter as "another of the so called snow-storm cases that surface from time to time in the Public Service". There, the employee had become snow bound on the east coast of Labrador in February, 1980, where his free lancing activities as a pilot with an outside employer had taken him on his rotational days off. He became snow bound in Nain when "the weather had closed in" preventing his timely return to work despite the fact that he would have had plenty of time to get back to his home base in Goose Bay for his first scheduled work day had the weather held up. It was an admitted fact in that case that when the employee had flown to Nain, the weather had been clear with no indication from the available weather services that it would dramatically close in overnight, albeit when it did, it was enough to strand the employee at that location for the next four days, making him a day late in so far as he had only three rotational days left before having to report. The adjudicator noted in that case that apparently, it had been the

employer's position that it did not matter what amount of time the employee had allowed himself to complete his "extramural pursuits", as he had taken the winter travel upon himself and should be accepting the consequences. Interestingly, the adjudicator harkened back to the existing line of PSSRB reasoning, including the remarks from Deputy Chairman Kates in Barrett and Treasury Board, PSSRB File No.166-2-7738, where he had observed that the employer not knowing the efforts the employee could have reasonably made to mitigate whatever contingencies he might encounter on his wintertime motor trip had been relying solely on the incident itself having caused the delay, which would have wrongly amounted to holding the employee strictly liable. Mr. Kates in his award had remarked at p.14 concerning the exercise of care and foresight in undertaking winter trips.

...In the instant case where a lengthy motor trip is taken in a short space of time, the failure by an employee to anticipate the delays that might be occasioned by adverse weather conditions and allow himself sufficient lead time to permit his scheduled return to work is a factor that ought to be deemed to be within his control. Failure to allow for such contingencies is in itself a reckless venture that ought not normally in the exercise of the employer's discretion to give rise to benefits under special leave article....

...the intention of the collective agreement is not to sacrifice legitimate requests for special leave when foresight and care are exercised and, notwithstanding the employee's recourse to appropriate and reasonable measures, the worst of contingencies do in fact occur. If that be the case, then the employee is duty bound to make a sincere effort to mitigate the adverse effects occasioned by such unforeseen contingencies. In such circumstances, the employer, once having addressed itself to all the prevailing factors, must act reasonably in resolving the legitimacy of

the prevailing factors, must act reasonably in resolving the legitimacy of the employee's request for special leave. In substance, delays caused by adverse weather conditions cannot be used by the employer in such a way as to raise a strict and rigid bar to the special leave benefits negotiated by the parties under the terms of the collective agreement. If such were the case, then no excuse for a failure to report to work attributable to adverse weather conditions could be entertained under special leave provisions. The imposition of strict liability upon an employee in making a claim is not an interpretation accorded by this Board to the special leave provisions of the collective agreement and it is not an interpretation that can be construed as having been anticipated by the drafters of the article. Or more precisely, such a fettered application of the provision would be an unreasonable interpretation of the scope of the discretion to be exercised by the employer.

Adjudicator MacLean in House had noted that the employee's superior well knew the employee to have been stranded on the coast, and was aware that the initial attempt to deal with his delayed return had been through an employee requested shift exchange which had been denied. The employer had advanced two reasons for the special leave denial; firstly, the employee had applied for special leave previously when snowbound, and secondly, he had created the risk with his outside piloting pursuits.

The adjudicator rejected the employer's position that it had been the employee's second vocation which was the pertinent cause of his failure to get back to work by the start of his next shift. He said that while some causal relationship may have existed with his second job, it was not the kind to be determinative of the issue. In his opinion the "causa causans" was not his flying out to the other community, but rather it was the snow storm preventing his return home. Had the reason for the delay been related to a cause associated

or cargo, it would have been a different matter. There, despite the employee's readiness to return home and his ability, otherwise, to have gotten there on time, it was the weather which had prevented his returning on time. The adjudicator in looking at the circumstances of the matter noted the long duration of the snow storm which had left him stranded for the final three days of his days off, and the first two scheduled days of work, and his having left himself some margin for returning. The employee, he reasoned, could not have anticipated that the snow storm would have lasted so long which point had not been considered by the employer, and making its decision to deny special leave unreasonable.

In another PSSRB case decided at about the same time, Critch and Treasury Board (Canada Transport) [1983] 3 PSSRB Decisions 20 (Digest), PSSRB File No. 166-2-13526, Mayes, the employee had driven from Gander to St. John's, Newfoundland near the end of January, at least a five hour drive, to visit relatives and intending on driving back to Gander over the same three days off work in order to be back at his desk for his next scheduled shift. While in St. John's, he observed the weather getting worse including freezing rain, making the roads slushy and slippery. It led to him leaving for home earlier than he otherwise would have done, and even when he pulled off the road at one point, he still had "ample time" to make the return trip. Suffice to say, the weather only worsened, and eventually the snow fall blocked the road, delaying his return trip some 2 ½ days. As with many special leave cases, the specific facts and circumstances disclosed on the evidence were poured over and discussed with great particularity as to what the employee could have done, or may have done. However, there was no dispute that a storm occurred, resulting in the roads being closed for a time. Interestingly, in that case, with all the circumstances presented in evidence, the employer argued it was not the snow, nor the weather or road conditions which had really prevented the employee from reporting to work as scheduled, rather the real cause was directly attributable to him, namely that he was not caught completely unaware by the possible impending snow storm. It had been his decision to take a lengthy road trip during the time of year when weather and road conditions could deteriorate very quickly. It was

submitted there that once he made the decision to make the trip, he was under an obligation to be extra cautious regarding his return, it being likely that he could have become stranded at any point because of the distance between the two cities. The employer had argued that where an employee took such a risk and “did not make it back on time, while he might not necessarily face discipline, he should at least not qualify for paid leave”. Further, the employer contended that in any event, he should have allowed himself “enough leave time” to make sure he would be reporting as scheduled, whatever the weather. By attempting to return by road in the manner done, he had cut himself off from other modes of transportation which he could have used to get home on time. He did not avail himself of the option to fly home, a decision which the employer saw to be directly attributable to him. The employer submitted that his failed judgment in assessing all aspects of the trip, including time and distance, and possibilities for mishap, made him the “author of his own misfortune”. The highway itself was known, as the employee had admitted, to be in bad shape and subject to high winds and therefore drifting snow. The employer contended that it had addressed all the “normal considerations”, and in exercising its discretion regarding paid special leave had not acted arbitrarily. In his consideration of the matter, adjudicator Mayes cited Deputy Chairman Leon Mitchell’s decision in Meldrum and Treasury Board, PSSRB File No. 166-2-9156 with respect to whether the circumstances preventing an employee from reporting for work were or were not directly attributable to him, and whether the employer had acted reasonably in exercising its discretion to withhold the requested paid leave. It was noted that the employer’s conclusion must be arrived at “reasonably on the basis of the information obtained” after review and diligent inquiry on its part. Interestingly in the Critch case, the employer’s denial response had relied on its stated policy that special leave was not available for employees who had been traveling from their normal place of residence and were unable to return to duty on a timely basis, which the adjudicator did not view as determinative of the issue in any way. However, he did look at the issue of an employee intending on traveling by vehicle over a lengthy distance in a relatively short period of time, during wintertime. He

quoted adjudicator Kates from the earlier Barrett award already mentioned in this award, and in particular with respect to this lengthy trip/short time frame issue, as previously mentioned herein.

Ultimately for adjudicator Mayes in Critch, he saw it to be a matter of recognizing that the employer, if to act reasonably, itself, had to “make a serious and diligent inquiry as to the material facts before rendering a decision”. In that regard, he cited adjudicator Beatty from the Benson et al. case PSSRB Files No. 166-2-155721565, where as he put it “if (the) decision was made without a reasonable inquiry into the facts of each case, it would be an unreasonable one”. Adjudicator Beatty had gone on to observe that “the manner in which the decision is made, as well as the basis for it, may be sufficient to establish that special leave was unreasonably withheld”. On the facts presented before adjudicator Mayes, in upholding the grievance, he did not conclude that the manager, or anyone else, had conducted the type of diligent inquiry contemplated by the case law in that the real reason for the denial was as stated in the grievance reply document, namely, that employees who travel away from their normal place of residence and are unable to return to duty on a timely basis are not provided with special leave. The employer’s view that the employee had placed himself in a position where he might not have been able to report for work on time making the kind of trip he had contemplated on his days off, and that he should bear the consequences of his decision which eventually left him stranded in a snow storm, was rejected. That he might have expected some difficulty in getting back to work in the event that a seasonal storm occurred was not considered to be determinative of the issue on the circumstances presented there.

Turning now to the facts of this matter, there is nothing about the language of the special leave provision on its face, which suggests that it is somehow inapplicable to bargaining employees who are storm bound and prevented from attending work from other than their residences. The pertinent contract language does not exclude bargaining unit employees who are away from their community on a driving trip at any particular time of the year, whether during a seasonably difficult time period ,or not. Certainly one can be

expected to properly plan for reasonably foreseeable contingencies, obvious possible delays on a reasonableness basis, but not on any absolute foreseeability test. The reasoning of the many adjudicators over the years who have dealt with snow storm cases in the context of very similar contract language is helpful, no doubt. One should note adjudicator Kates' remarks made about long trips over short periods of time. One might observe note however that road trips, on being planned, are invariably time measured to a real degree, it being unlikely that any road traveler sets aside a bundle of days on either side of the expected usual travel time to accommodate a possible multi-day closure, or some other time crippling event, once having checked and confirmed fair weather and good road conditions on a personal safety basis.. The addition of the "every reasonable effort" language here adds little to the case law analysis as that obligation has long since been implied into the employee's side of the equation. Under the circumstances here, given the distance involved and the time of the year, the grievor might well have been expected to have allowed at least some extra time for her return, another day perhaps, somewhat more is at least debatable. But even had the grievor and her companion been able to leave Inuvik on Wednesday or Thursday, not Friday, and had they left for home early on Sunday morning, not Monday, to give themselves a full two days to have made the sixteen hour return drive, not just one, they still would have been caught by the road closure. That event could not have been expected and was not foretold, given the uneventful nature of their drive to Whitehorse from Friday afternoon through to Saturday mid-morning. The weather service report was favourable at the time they left Whitehorse. They were not expecting that the eventual drifting snow, closing the highway as it did, would take so long to clear. There was no hard evidence that anything like that was expected by anyone, whatever the unpredictable nature of traveling over the Dempster Highway in early October. At the same time, the inquiry into their delay was questionable. It was obvious that Ms. Austin had not wanted them making the trip in the first place, and the fact that they had not arrived back in Inuvik on time was enough for her. I also accept that Ms. Ausitn's thoughts at the time were tainted by the fact of the grievor having arrived

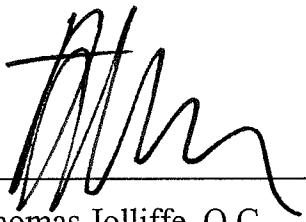
Inuvik from Fort Smith only a month earlier, showing up for work late the next morning after having slept through her alarm clock. That consideration, on the circumstances presented here, was irrelevant, and in any event, the earlier event did not give rise to any claim for special leave at the time. Indeed the grievor had never before applied for special leave with pay. There was no indication of anyone having questioned the grievor over the nature of the road closure, or expected duration, or when they found out about it, or possible alternatives. Ms. Austin would seem to have had it in mind that were the two colleagues to leave Inuvik over the long weekend on their driving trip which she considered have been ill planned, no excuses would be entertained if they failed to arrive back at work at 8:30am on Tuesday morning. The fact is they were held up by drifting snow in Eagle Plains, which lasted longer than they would have expected. Some further lead time probably still would have left them stranded at the point of closure, unless as Ms. Austin's evidence would indicate, employees should not be making long October drives away from Inuvik, which is not addressed in that fashion by the contract language.

At the same time, I do not see that in these circumstances there is any application of the Regulation. It was not mentioned in the grievance denial document which made specific reference only to the contract language of art. 19.02 and the assertion that the grievor should have fully understood the risks associated with traveling the Dempster Highway during the winter where severe winter conditions and highway closures might have been expected. Frankly the Regulation in any event would have only doubtful application in a situation such as here, where the parties have chosen to negotiate express language covering special leave with pay for bargaining unit employees, and where its application might be seen as conflicting with it, especially having regard to the way such a contract provision has been interpreted in the past by the federal sector adjudicators dealing with very similar language. They have long since reasoned that the fact of an employee being caught in a snow storm while away from home on a trip does not constitute a valid distinguishing factor, except for the planning aspect which can be significantly more important than in a situation where a

person is delayed getting to work from his or her place of residence, also with respect to planning a lengthy winter trip to be taken over a relatively short period of time. Policies meant to limit the effect of art. 19.02 type language have been found to be inapplicable when placed alongside the contract language.

In my view, the distance planned and travel time factors are not enough on all the circumstances examined in evidence, or offset the lack of reasonable inquiry, to have excluded the grievor from application of art. 19.02. On balance, I must find that the special leave with pay was unreasonably denied and the grievor should be monetarily compensated. Once again, it is a matter determined on its particular factual circumstances presented in evidence. The developed line of "snow-storm" cases is helpful. The grievance is successful on this basis and I remain seized pending the implementation of the award and in the event the parties are unable to agree on the monetary compensation owing for the denied two days of special days leave with pay.

Dated this 29th day of October, 2007.



Thomas Jolliffe, Q.C.