

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *CANADA LABOUR CODE***

BETWEEN:

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS /
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 140**

-and-

AVEOS FLEET PERFORMANCE INC.

- and -

**AIR CANADA / ACTS LP / AC CARGO LIMITED PARTNERSHIP
/ ACGHS LIMITED PARTNERSHIP**

**BRIEF OF THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS**

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ARBITRATION BRIEF

TRANSITION AGREEMENT INTEREST ARBITRATION

INTRODUCTION

1. This interest arbitration deals with the procedures that will be followed and the options that are to be made available to the members of the IAMAW, in the event that the Canada Industrial Relations Board orders that IAMAW bargaining units at Air Canada be split, as a result of the 2007 sale to Aveos of Air Canada's former internal maintenance, repair and overhaul department.

2. On December 14, 2006 the IAMAW filed with the Canada Industrial Relations Board ("CIRB") an unfair labour practice complaint concerning disclosure to the Union of plans to sell Air Canada Technical Services.

3. On August 7, 2007 a "discussion period" agreement was reached with the assistance of the CIRB. Under this agreement the Union's application was put on hold while the parties met to discuss the sale and its impact on the IAMAW's members. During the discussion period the Union received disclosure under confidentiality agreements directed at the protection of financial and other commercially sensitive materials. Under the terms of the discussion period agreement the employment and pension status of IAMAW was frozen, and members were guaranteed a 60 day period in which to make whatever decisions were available to them after there had been a final determination of the rights of the parties arising from the sale of ACTS.

4. The Memorandum of Agreement ("the MOA") under which this interest arbitration is constituted was reached in the context of the discussion period agreement, and was signed on January 8, 2009. On January 22, 2009 the Canada Industrial Relations Board issued an order accepting the MOA as a settlement of the Union's December 14, 2006 unfair labour practice application.

5. The MOA requires that the sale documents, in addition to all of the current

contractual agreements between Air Canada and Aveos, be placed before the Canada Industrial Relations Board. On the basis of this material the Board will determine whether a sale of business has taken place and whether the Code requires the bargaining unit to be split as a consequence. In the event that the Board decides to split the unit, the substantive terms of the MOA will come into play.

6. The parties to this arbitration have reached agreement as to the vast majority of terms and conditions that will apply in this event. This arbitration deals with five outstanding issues on which no agreement could be reached.

BACKGROUND

7. This Arbitrator is aware of the context in which this agreement and arbitration arises. The following are among the most salient features of this context:

- a. The impact of the spin-off and sale of Air Canada's technical and maintenance division on the members of the IAMAW has been a topic of the highest controversy and profile among the Union's members since at least 2002, when the Union filed the common employer application that gave rise to the present CIRB certificate for the TMOS Unit.
- b. The members of the IAMAW made very significant personal sacrifices (with a value of between 200 and 240 million dollars per annum) to allow Air Canada to survive and to exit successfully from insolvency protection in 2004. IAMAW members agreed to changes to their collective agreements that paid them less and intensified their work, in addition to taking on significant additional risk to their pensions - all with the objective of saving Air Canada from insolvency. From the perspective of the IAMAW and its members the moral premise of these agreements was that the members would share in the airline's fortunes going forward.
- c. In 2006, at a time that the airline was profitable, an interest arbitration took place under the CCAA collective agreement. The Union's members were told, in essence, that they would have to wait at least until negotiations in 2009 to receive any compensation for the sacrifices that had allowed the airline to survive.

- d. The Union's membership is acutely aware that management employees and other stakeholders have made very substantial financial gains since exit from the CCAA. At the time of the interest arbitration Air Canada had awarded increases in annual compensation of more than 100% to some of its top executives in 2005 - not counting the very significant stock option gains enjoyed by this group, serving to more than compensate this group for cuts they took during the CCAA by 2006¹. This group has continued to make gains since that time.
- e. Recently, the press has widely reported the \$43 - \$53 million dollars made by Robert Milton personally, as well as the very substantial gains made by the key shareholders of the restructured Air Canada - gains that will include the cash proceeds of the sale of ACTS itself, given the recent announcement of the intention to distribute ACE's assets to its shareholders².

8. The result is that IAMAW's members identify very strongly as Air Canada employees. They also feel a profound sense of betrayal at the news that most of them will cease being Air Canada employees before their contributions to the airline's survival have been recognized or repaid, but after other stakeholders have benefited extensively from those contributions.

9. In addition, IAMAW members faced with the prospect of the severance of their employment relationship with Air Canada and its continuation with Aveos are deeply concerned about the impact on their job security, about the potential vitiating of their negotiated job security protections, and about the security of their pensions.

10. Among the direct symptoms of the level of anxiety on the floor concerning the sale of ACTS is the flood of transfer requests from IAM members that took place prior to the freeze that protected the discussions towards the current Agreements. Through these requests IAMAW members sought to transfer out of the heavy maintenance functions that are now carried out by Aveos, and into the line maintenance functions that remain with Air Canada.

¹ Management Proxy Circular, 2006 at 30

² Milton to reap windfall with dissolution of ACE, Globe & Mail, June 7, 2008
Ups, Downs of a Spin-Off, Toronto Star, December 27, 2007
ACE Aviation, Press Release, December 10, 2008

11. The discussions that gave rise to the Agreement under which this arbitration is constituted have therefore been premised on the recognition that there is a volatile mix at play. This is a workforce composed of a group of highly skilled employees who have a choice whether or not to work for Aveos; who are deeply loyal to the selling employer; who feel a profound sense of betrayal and who harbour considerable suspicion about their future with an unknown employer constituted from a former internal division of the airline.

12. In short, it is a workforce whose members are strongly committed to staying with Air Canada, unless they can be provided with substantive assurances and incentives that may lead them to take a different path.

The Memorandum of Agreement

13. Within this context the parties have agreed upon the following, in the event that the Board decides that the unit should be split:

1. An orderly transition process will be put in place, to be carried out in accordance with the expressed individual preferences and seniority of the members of the IAMAW;
2. Affected employees will have seventy-four days after the date of any Board order dividing the bargaining unit to make their selections.
3. Air Canada employees who accept to transition to employment with Aveos will carry their full seniority and service to Aveos;
4. Aveos employees will work under the collective agreement currently in place at Air Canada;
5. Aveos will assume responsibility for certain pension and non-pension benefits earned during employment with Air Canada;
6. Aveos will create a pension plan to mirror the existing Air Canada pension plan, with assets to be transferred from the Air Canada pension plan for those employees who accept employment with Aveos;
7. The job security of IAMAW members at Aveos is to be enhanced by Air Canada and

Aveos entering into an extension of their heavy maintenance contract to 2013 (otherwise scheduled to end in 2009);

8. Until 2013 the IAMAW will be able to use the sub-contracting provisions of its collective agreements at Air Canada and Aveos to protect the negotiated rights of its bargaining unit members to perform work on Air Canada aircraft;

9. Certain travel privileges will be extended to Air Canada employees who take employment at Aveos;

10. Employees eligible to retire who currently assigned to Aveos will be given the opportunity to retire as an Air Canada employee, and to accept employment at Aveos as a new employee;

11. Employees eligible to retire who are currently assigned to Air Canada will be given the option to retire and rehire where doing so will protect another member from lay-off from Air Canada at the point;

12. At the request of a group of employees concerned about the transfer of their pension contributions to Aveos, the MOA includes an option to resign from Air Canada and accept employment at Aveos as a new employee in the same circumstances as set out in 9. and 10. above.

OUTSTANDING ISSUES

13. The five specific issues that remain outstanding are set out in section VIII of the Transition MOA, and are as follows:

1. Whether an Eligible Employee who retires or resigns from Air Canada pursuant to Transition Options 3, 4, 6, or 7 and accepts an available position from Aveos will commence employment with or without any recognized service at Aveos for vacation entitlement;

2. Whether an Air Canada Employee on permanent lay-off on the CIRB Date whose name appears on the Seniority Lists and who holds recall rights in categories and classifications used at Aveos at points at which both Aveos

and Air Canada have operations involving those categories and classifications will be required to choose by the Selection Closure Date or other date agreed to by the parties between remaining on the Air Canada recall list or being placed on the Aveos recall list, or whether such employee will be allowed to wait and make his or her choice at the time of the first recall opportunity presented by either Air Canada or Aveos, together with the employee's rights upon recall;

3. Whether, following the severance of bargaining units Eligible Employees who become employees of Aveos in accordance with Transition Option 5, or Air Canada Employees who become employees of Aveos pursuant to Section V. B. 3., should retain their position and rights on Air Canada's recall list for a period not extending beyond thirty-six (36) months following the CIRB Date, and if so, under what terms and conditions.

4. Whether the travel privileges proposed by Air Canada in Schedule 1 will apply to Air Canada Employees transitioning to Aveos under this Memorandum of Agreement, or whether the travel privileges should be the same as those that apply at Air Canada. The parties agree that the issue of whether the arbitrator has jurisdiction to determine the scope of travel privileges provided by Air Canada or whether the travel privileges proposed by Air Canada in Schedule 1 will apply is properly before the arbitrator.

5. Whether any Air Canada Employee who accepts available employment with Aveos, or who elects laid off status with recall rights to Air Canada, pursuant to the terms of this Memorandum of Agreement, is as a result entitled, under either the applicable Collective Agreement or the Canada Labour Code, to receive severance pay.

Issue 1: Whether an Eligible Employee who retires or resigns from Air Canada pursuant to Transition Options 3, 4, 6, or 7 and accepts an available position from Aveos will commence employment with or without any recognized service at Aveos for vacation entitlement.

1. The objective of Transition Option 3 is to encourage those who are eligible to retire and currently assigned to Aveos to remain with Aveos' operation, despite the context

outlined above, including the widespread anxiety about the security of a pension held with Aveos.

2. For this reason eligible employees assigned to Aveos have been given the option of retiring from Air Canada, while also accepting a position as a new employee at Aveos.

3. Similarly, the objective of Transition Option 7 is to minimize the negative impact of the transition on employees, by allowing employees who are currently assigned to Air Canada to retire and accept a position at Aveos, in the event that their doing so will avoid a lay-off at the point of another Air Canada employee.

4. The fundamental objective of both of these options, and in large part the Agreement as a whole, is to put in place options for employees that will minimize the disruption to the lives of the Union's members and their families (and the companies' operations) that will result from the extensive bumping that will ensue if a large majority of employees elect to use their seniority to stay with Air Canada.

5. The Union's view is that, for those eligible to exercise an option to retire and take a position at Aveos, a reduction in vacation time from five to two weeks per annum will be decisive. These employees will not choose to remain or to go to Aveos on those terms. Accordingly, failing to include a provision allowing these employees to keep their company service date for the purpose of vacation entitlement will defeat the objective of including these options in the first instance.

6. In order to avoid any negative impact on co-workers, bidding for the additional three weeks of paid vacation entitlement proposed by the Union would take place after bidding for regular vacation entitlement.

7. The Union submits that such a provision will impose no or no significant financial cost on the companies. Air Canada is not affected in any way, and any cost to Aveos will be more than counterbalanced by the very significant financial advantages they will enjoy as a result of employees exercising an option to retire. This group will be paid at a level lower than their classification and seniority would otherwise allow and will not bring with them any of the significant pension obligations or liabilities that will accompany other transitioning employees.

8. The Union therefore submits that allowing employees who exercise an option to retire to keep their company service date, solely for purposes of vacation entitlement, is the outcome most consistent with common sense and the mutual objectives of these provisions and the MOA as a whole.

Issue 2. Whether an Air Canada Employee on permanent lay-off on the CIRB Date whose name appears on the Seniority Lists and who holds recall rights in categories and classifications used at Aveos at points at which both Aveos and Air Canada have operations involving those categories and classifications will be required to choose between remaining on the Air Canada recall list or being placed on the Aveos recall list, or whether such employee will be allowed to wait and make his or her choice at the time of the first recall opportunity presented by either Air Canada or Aveos, together with the employee's rights upon recall

1. The Union submits that employees on lay-off at the time of the transition ought to be placed on a joint recall list until the time of the first permanent recall opportunity, at which time they would be able to accept the recall or elect to be placed solely on the other company's recall list.

2. All of these employees currently hold rights of recall to the entire company.

3. The Union expects that the majority of its members currently on lay-off would choose to work, irrespective of the identity of the company. It submits that it is neither fair nor reasonable to ask these employees to place a life-altering bet as to which company is most likely to recall them first. Whatever choice such an employee makes will be no more than speculation, since there is no possibility of accurately predicting which company will first issue recalls at the outset of this process, even if it were otherwise possible to make accurate predictions of the economic fortunes of the two companies - which it is not.

4. The Union submits that there is no, or no significant, cost to the employers of maintaining employees on recall lists until recalls occur.

5. In fact, Air Canada has stated a preference to permit permanent laid-off employees to select their preferred option at the time of the first recall opportunity by either Air Canada

or Aveos.

6. Aveos has raised a series of concerns concerning the practical operation of a joint recall list. The IAMAW can agree that it is appropriate that, prior to recall, employees on a joint recall list should remain employees of Air Canada only.

7. However, the IAMAW takes the position that employees should not be required to make their election until the first permanent recall is issued. The Union submits that employees who choose to accept a temporary recall at Aveos should therefore remain Air Canada employees on a seconded basis until the time of any permanent recall. Only upon permanent recall to either company will an employee be required to choose either to accept the recall, or to be permanently removed from the recalling company's recall list.

8. The Union submits that Aveos' proposal to require an election on a temporary recall is inconsistent with the right in the collective agreement to refuse a temporary recall without loss of recall rights..

9. Aveos has further submitted that any joint recall list should be in place for a maximum of two years after the Selection Closure Date. The Union submits that this date is arbitrary and unfair, in light of the fact that recall rights run for seven years under this collective agreement, and given that the Companies have provided for themselves a three year period after the Transition Date in which to finalize the effects of the transition, while preserving the continuity of their own operations.

10. During this three year period the companies plan to continue to second employees back and forth as their operations require. The Union submits that it is appropriate that the Union's members also be provided with the benefit of an extended transition period of at least the same duration, and that there is accordingly no justification for limiting joint recall rights to a two year period.

11. The Union further submits that there is no merit to the Companies' suggestion that the need to split the assets of the pension plan serves to prevent the implementation of a joint recall list.

12. The current Air Canada Pension Plans in which IAMAW members participate and the Aveos pension plan in which members will participate contain identical provisions. Both plans are also regulated pursuant to the terms of the Pension Benefits Standards Act

(1985) (Canada) (the “PBSA”).

13. The IAMAW submits that it would be a simple matter for Aveos and Air Canada to amend their pension plans to permit members to transfer their accrued pensions benefit from one plan to another. Such transfers would take place on an individual basis at the election of the member. This form of transfer is expressly permitted pursuant to sub-section 26(3) of the PBSA. No regulatory approval is required for such individual transfers and the terms of the transfer can be set out in a reciprocal transfer agreement between the two plans.

14. Aveos and Air Canada have already established a mechanism to determine the appropriate actuarial methodology to employ in the liability and asset transfer that is set out in the Pension and Benefits Agreement that the parties have already entered into. The cost of setting up a reciprocal agreement would, therefore, be minimal. Given that the terms of the plans are identical, and that the parties are currently required to perform annual actuarial valuations of the plans, the existence of a reciprocal agreement would not create an undue burden for either Aveos or Air Canada.

15. The benefits of a reciprocal agreement to members would be significant, as it would allow members to move between the companies without fear of compromising their pension entitlements. Given that both plans are final average plans, if service is divided between the plans a member could receive a lesser benefit if the member were to draw benefits from both plans when the member retires instead from one plan. In other words, the sum of the pension parts would be less than what the whole would be if the benefit were paid from one plan.

16. For these reasons, then, the IAMAW submits that the creation of a reciprocal transfer agreement is both appropriate and commercially sound.

17. The fact that no such agreement is currently in existence is not, in any event, a reason to deny employees access to recall at both companies.

Issue 3. Whether, following the severance of bargaining units Eligible Employees who become employees of Aveos in accordance with Transition Option 5, or Air Canada Employees who become employees of Aveos pursuant to Section V. B. 3., should retain their position and rights on Air Canada's recall list for a period

not extending beyond thirty-six (36) months following the CIRB Date, and if so, under what terms and conditions

1. Employees taking positions at Aveos pursuant to Transition Options 5 or Section V.B.3 are those who have chosen to remain Air Canada employees, but who have accepted a position at Aveos because this was the only way for them to remain in active employment at their home base, or at all.
2. In the context outlined above, this means that some employees coming to Aveos will have done so in the face of a very strong personal preference to remain at Air Canada, and feeling that they have done so under duress.
3. At many bases employees of Air Canada and Aveos work in close proximity. In the event that Air Canada issues recalls in the period immediately following the transition, those employees who see less senior Air Canada members or hires from the street to those positions will experience an acute sense of unfairness.
4. To allow this group a 36 month period to exercise their seniority to return to Air Canada will have no impact on operations because, over this same period, the agreement allows the companies to second employees to each other.
5. Accordingly, there is a mechanism in place to address any instability that might be created by any significant movement back to Air Canada of Aveos employees. It is, however, highly unlikely that the numbers involved would rise to this level of significance, since there appears to be no immediate prospect of major expansion at Air Canada during the period in question. (see Section VI - Transition Date and Section VII B. 4).
6. Aveos has submitted that to accept this proposal would provide a disincentive to employees to select employment with Aveos as a first choice. In the Union's view this submission ignores the reality of the context of this MOA, which is that Aveos is not currently the employer of choice. The Union submits that, in the context of this reality, to provide a bridge back to Air Canada would serve to encourage a greater number of employees to select active employment with Aveos, in preference to accepting laid off status with Air Canada. Aveos would then have an opportunity it may not otherwise get to demonstrate to these employees that it should be the employer of choice.
7. In sum, therefore it is the Union's position that this provision would be of mutual

benefit to all the parties, by encouraging IAMAW members to select Aveos and allowing Aveos to meet its operational commitments, to the benefit of all concerned.

Issue 4. Whether the travel privileges proposed by Air Canada in Schedule 1 will apply to Air Canada Employees transitioning to Aveos under this Memorandum of Agreement, or whether the travel privileges should be the same as those that apply at Air Canada. The parties agree that the issue of whether the arbitrator has jurisdiction to determine the scope of travel privileges provided by Air Canada or whether the travel privileges proposed by Air Canada in Schedule 1 will apply is properly before the arbitrator.

14. Employees and retired employees of airlines enjoy access to free travel for themselves and their families, through an international interline travel pass system that flows from agreements between the airlines and that exists outside collective agreements. Many airline employees choose employment in airlines in large part based on the access to travel passes and it is difficult to overstate the importance of this privilege to employees or their level of their emotional attachment to it.

15. The Union agrees that travel privileges are not included in the collective agreement and are not part of traditional collective bargaining. The passes are, nonetheless, an important condition of employment offered to membership at the time of hiring. Further, these discussions are not collective bargaining, but rather arise in an extraordinary context and deal with the proper recognition of the past contributions the Union's members have made to Air Canada. As detailed above, the context is one in which the sacrifices of these members were instrumental in saving the airline.

16. As a privilege provided by Air Canada to its employees and to its retirees, the discussion of the continuation of the travel privilege is not only a wholly proper part of the discussions between the parties, it has been, as a matter of simple fact, fundamental to these discussions and to this agreement, both of which centre on Air Canada's willingness to recognize its ongoing connection and significant indebtedness to these employees.

17. It is submitted that this context entails that an interest arbitrator appointed under the Agreement arising from these discussions has jurisdiction to make an order on the merits of the matter, even if this might not be so in another context.

18. The Union submits that its members' contributions have been such that Air Canada should properly extend to those who continue their employment at Aveos the full range of travel privileges that Air Canada extends to its current employees.

19. The Union's concern is particularly acute with respect to the short term nature of the benefits proposed by the Company for employees with less than fifteen years of service. This proposal would see an employee who has worked for Air Canada for fourteen years lose all privileges in two years time. This is a significant concern in light of the demographics of the affected group, given that approximately 50% have less than 15 years of service. The breakdown within that group is approximately as follows:

0-1 yrs	140
1-2 yrs	110
2-3 yrs	40
3-4 yrs	60
4-5 yrs	5
5-6 yrs	1
6-7 yrs	70
7-8 yrs	80
8-9 yrs	200
9-10 yrs	95
10-11 yrs	160
11-12 yrs	135
12-13 yrs	30
13-14 yrs	70
14-15 yrs	314

20. In the past, and indeed currently, Air Canada has offered travel benefits upon severance that provide travel passes for the number of years of service of the severing employee. In the event that the arbitrator rejects the extension of full travel benefits to the entire group, the Union submits that employees should, at the very least, be given the option to select no fewer than three C2 passes per employee and eligible family members for the number of years of their continuous service, in preference to the current proposal.

21. The Union also submits that any ruling on this issue should properly include an order that affected IAMAW members should receive the benefit of any more favourable arrangement that Air Canada may subsequently extend to any group of severing employees in the context of the sale of a former internal division of Air Canada.

22. The travel privilege requested presents no cost to Air Canada, since only unsold seats are available and since the administrative mechanisms are in place and are to be paid for by employees in the form of administrative fees.

Issue 5. Whether any Air Canada Employee who accepts available employment with Aveos, or who elects laid off status with recall rights to Air Canada, pursuant to the terms of this Memorandum of Agreement, is as a result entitled, under either the applicable Collective Agreement or the Canada Labour Code, to receive severance pay.

1. This issue concerns the entitlement to severance pay of employees who, at the end of the transition process will be either without active employment, or whose employment with Air Canada will be severed.

2. The position of the Union is that all employees in these two categories are entitled to receive severance pay in accordance with the requirements of the Canada Labour Code. It is the position of Air Canada that none of these employees are entitled to receive severance pay.

Law

3. The Union's submission is that, in accordance with the *Code*, any Air Canada employee who is laid off for a term greater than 12 months, except where the *Code* specifies to the contrary, has a legal entitlement to severance pay under the collective agreement.

4. While both the Collective Agreement and the *Canada Labour Code* provide

entitlements to severance payments, it is the latter's provisions which govern. The reason for this stems from the amendments to the Collective Agreement which were implemented in 2004 in the course of the insolvency proceedings concerning Air Canada. As part of the CCAA process, as described above, the IAMAW agreed to amend its collective agreement to achieve the cost-savings necessary to allow Air Canada to emerge from bankruptcy protection and avoid windup. At that time the severance provisions were amended to specify that severance pay "would be in accordance with the Canada Labour Code.". When the agreement was reduced to writing the parties did not alter other provisions of the collective agreement that set out the preconditions to access the much higher severance payments set out in that agreement prior to the CCAA amendments.

5. As a result, even if the Collective Agreement contains a condition which might serve to deny severance pay, unless that condition is also found in the *Canada Labour Code*, it is of no force and effect.

6. This is evident from the wording of subsection 168(1) of the *Code*, which states:

168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part. *Canada Labour Code*, R.S.C. 1985, c. L-2

7. That the current Collective Agreement provisions do not provide for severance benefits which are greater than those in the *Code* was recently confirmed in a decision involving these parties by Arbitrator Teplitsky. The Union submits, therefore, that under the current Collective Agreement, an employee can only be denied an entitlement to severance pay in accordance with the legislative scheme.

Air Canada and IAMAW, Re: Severance Pay WO5183
unreported, March 19, 2005.

8. Within this framework, the relevant portions of the *Canada Labour Code* and the *Canada Labour Standards Regulations* are as follows:

Canada Labour Code, R.S.C. 1985, c. L-2:

DIVISION XI
SEVERANCE PAY

Minimum rate

235. (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

(a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and

(b) five days wages at the employee's regular rate of wages for his regular hours of work.

Circumstances deemed to be termination and deemed not to be termination

(2) For the purposes of this Division,

(a) except where otherwise provided by regulation, an employer shall be deemed to have terminated the employment of an employee when the employer lays off that employee;

Canadian Labour Standards Regulations, C.R.C., c. 986:

LAY-OFFS THAT ARE NOT TERMINATION FOR THE PURPOSES OF SEVERANCE
PAY, GROUP OR INDIVIDUAL TERMINATION OF EMPLOYMENT

[SOR/91-461, s. 30(F)]

30. (1) For the purposes of Divisions IX, X and XI of the Act and subject to subsection (2), a lay-off of an employee shall not be deemed to be a termination of the employee's employment by his employer where

(a) the lay-off is a result of a strike or lockout;

(b) the term of the lay-off is 12 months or less and the lay-off is mandatory pursuant to a minimum work guarantee in a collective agreement;

(c) the term of the lay-off is three months or less;

(d) the term of the lay-off is more than three months and the employer

(i) notifies the employee in writing at or before the time of the lay-off that he will be recalled to work on a fixed date or within a fixed period neither of which shall be more than six months from the date of the lay-off, and

(ii) recalls the employee to his employment in accordance with subparagraph (i);

(e) the term of the lay-off is more than three months and

(i) the employee continues during the term of the lay-off to receive payments from his employer in an amount agreed on by the employee and his employer,

(ii) the employer continues to make payments for the benefit of the employee to a pension plan that is registered pursuant to the Pension Benefits Standards Act or under a group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits, or

(iv) the employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the Unemployment Insurance Act; or

(f) the term of the lay-off is more than three months but not more than 12 months and the employee, throughout the term of the lay-off, maintains

recall rights pursuant to a collective agreement.

9. As is evident, subsection 235(1) mandates severance pay to employees who are terminated after having worked with an employer for 12 consecutive months. Every lay-off is deemed to be a termination, unless the regulations state otherwise.

10. There is no requirement in the Canada Labour Code that an election be made between the retention of seniority and recall rights and receipt of severance pay, and the collective agreement between these parties is one that envisages that recall and seniority rights survive the payment of severance pay.

11. We understand that Air Canada's practice has been to issue notices of indefinite lay-off, and make the severance payment at the 12 month mark, if no offer of recall has been made on or before that time. Recall with full seniority may still take place after severance has been paid.

Submissions

12. With the sale of Air Canada's former internal maintenance and overhaul division to Aveos, Air Canada must reduce its workforce by the number of employees engaged in the maintenance and overhaul operation, who are currently seconded to Aveos. Reductions in the workforce can be effected only by lay-off.

13. The Transition Memorandum of Agreement serves to allow employees to state their preference and exercise their seniority to obtain it. However, in our submission, nothing in the MOA alters the underlying fact that Air Canada will have laid off all of those who, at the close of the transition process, have had their employment with Air Canada severed, and are either working for Aveos, or are awaiting recall at Air Canada, having been unable to secure active employment there. It is submitted that it is a matter of no significance that these employees will retain their seniority, since this collective agreement has never envisaged a loss of seniority upon receipt of severance pay.

14. The Union also submits that this outcome is the only equitable one, given the

context outlined above and the considerable unpaid debt that Air Canada owes to the members of the IAMAW.

15. Air Canada has relied on jurisprudence under s.189 of the Code relating to non-unionized employees. It is submitted that this jurisprudence is no application in a unionized context governed by the successorship provisions of Part I of the Code. In our submission the proper approach is that outlined by Arbitrator Weatherill in *Silverwood Dairies*, which is also a case in which a unionized employer sold part of its business, and in which there was continuity of the bargaining rights, the collective agreement and of employment with the purchaser employer. Arbitrator Weatherill held that:

“we do not consider that the effect of s.55 [the sale of business provisions] is such as to deprive employees working in the business or part of the business which is sold from exercising rights under the collective agreement as against the original employer. In the instant case, when Silverwoods ceased to operate the home service department, employees therein were in effect laid off by Silverwoods.”³

16. In the alternative that the Board does not accept that severance is payable to the entire group who will see their employment relationship with Air Canada permanently severed or rendered inactive for a period of more than 12 months at the close of this sale and transition process, the Union submits that the Code requires, at a minimum, that severance be paid to those who, at the end of the process, find themselves laid off and without active employment for a period of 12 months.

17. The *Canada Labour Standards Regulations* relating to lay-offs make no mention of an employee’s election for laid off status with recall rights.

18. Since there is nothing in the *Regulations* to take employees who elect laid off status with recall rights out of the provision that deems all lay-offs to be terminations, and since the *Code* is indifferent to the elections made by employees in the context of severance pay, it is the Union’s submission that these employees are entitled to severance pay under

³ *Re Silverwood Dairies* (1976) 12 L.A.C. (2d) 225 at para. 13

the *Code* so long as they meet the preconditions for severance pay: that their status is laid-off, and their lay-off has lasted more than twelve months.

19. As noted above, this very issue has been grieved and decided under the Collective Agreement for the TMOS Unit as between Air Canada and the IAMAW. At issue was the Collective Agreement's exclusion of severance entitlement to an employee who received a notice of lay-off but elected layoff over the exercise of a bumping right available under the collective agreement.

20. Arbitrator Teplitsky reviewed the *Code* to determine that, while it permits regulations defining when a lay-off is not a termination, those regulations did not specify bumping or a failure to bump. He concluded that the collective agreement fell below the *Code*'s minimum standards in requiring the exercise of an option to bump, and held severance payments to be required notwithstanding an employee's decision not to exercise an option to bump.

21. The Union submits that the current issue regarding severance payments must be similarly decided. The Company cannot impose additional disqualifiers not found in the *Code* or its regulations. Once an employee has been on "laid off" status for 12 months, there is a statutory obligation to pay severance in accordance with the *Code* that is not subject to variation, even by agreement between the parties.

22. Further, it is the position of the IAMAW that the MOA cannot properly be interpreted and applied so as to take away rights from the Union's members that are recognized in the collective agreement. The MOA, as it states, sets out a process for the orderly transition of employees from one employer to another. It does not amend the collective agreement, which following the transition, will remain in place at both employers.

23. It is therefore submitted that a ruling that employees whose "end-state" at the close of the transition is laid off status are barred from receipt of severance to which they are otherwise plainly entitled under the collective agreement would be fundamentally inconsistent with the function and intended operation of the MOA, as well as contrary to the provisions of the *Code*.

24. Moreover, while the law is clear on this issue, equitable principles point to the same outcome.

25. The employees who elect to stay with Air Canada and hope for recall, rather than accept a position with a new employer are those whose attachment to Air Canada as an employer is strongest. Whatever the wisdom of such a choice, it will surely not be made in anticipation of remaining without active work at Air Canada for a 12 month period. The denial of severance under these circumstances would be a penalty added to the already significant penalty of having been without active work with Air Canada for a full year.

26. Finally, it must be remembered that this is an employer with seniority rights that span the country. Accordingly, there is an even more clear inequity in the proposal to deny severance pay to those individuals who “elect” laid off status at Air Canada in circumstances where the only other “option” they face is to move across the country, uprooting their lives and those of their families, in order to accept a position at another employer. There are a number of employees who will face this scenario. This is a very substantial burden not imposed by the *Canada Labour Code*, which in our submission is neither fair nor lawful.

27. In sum therefore, the Union’s submissions are that severance pay in accordance with the Code is payable to:

- a. Every Air Canada employee whose employment with Air Canada is severed by their acceptance of work with Aveos or who ends the transition process awaiting recall to Air Canada, having been unable to secure active employment at Air Canada;
- b. In the alternative, it is submitted that any employees who, at the end of the transition process, are on a recall list, having been unable to secure active employment with their chosen employer, are entitled to receive severance pay at the end of a 12 month period in which no recall offer has been made;
- c. In the further alternative, it is submitted that severance is payable to any employee who, having only been able to secure active employment outside

his or her home base ends the process on laid off status.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 30th DAY OF JANUARY, 2009