

## ARBITRATION AWARD DECISION

Re: Air Canada and The International Association of  
Machinists and Aerospace Workers and its District Lodge 140

Grievance on Paragraph 15 of the Pension  
Memorandum of Understanding dated June 16, 2009.

BETWEEN:

**Chuck Atkinson for the Union (collectively "IAMAW")**

– and –

**Fred Headon for Air Canada ("AC")**

**Heard: June 27, 2011**

**Honourable James Farley, Q.C. as Arbitrator**

IAMAW and AC were agreed that the arbitrator as to this grievance should be the Honourable James Farley, Q.C. as per paragraph 29 of the Pension Memorandum Understanding dated June 16, 2009 ("Pension MOU").

"29. Any dispute as to the interpretation of this Memorandum of Understanding shall be decided by the Honourable James Farley after receiving representations forthwith or as he may be direct from the Parties hereto."

The dispute between the IAMAW and AC relates to the interpretation of paragraph 15 of the Pension MOU. The issue is what does the term "active employee" mean in the context of this Pension MOU.

"15. The company shall offer a one-time profit share incentive program pursuant to which each active employee of the company as of the date of ratification of this Pension MOU shall receive a payment of \$500 providing the company shall have achieved in respect of its 2010 fiscal year after-tax cash net income of at least \$210 million, such sum to be payable (subject to applicable withholding amounts) within 30 days of the release of the company's 2010 audited financial statements."

It was agreed that AC had achieved more than \$210 million of after-tax cash net income in its fiscal year ended December 31, 2010. AC has paid \$500 to what it considers to be the active employees as of July 14, 2009 which was the date of ratification of the Pension MOU. However, the IAMAW asserts that in the context of this situation, AC has inappropriately excluded from receipt of this payment IAMAW members who were absent from work on the date of ratification and in receipt of WSIB or Group Disability payments or on other approved leaves, including, pregnancy and parental leaves; the IAMAW does not assert that those who were on long-term disability and therefore not in a position to foreseeably return to work were eligible to receive a payment under this program. AC's stated position as per its February 22, 2011

Special Incentive Award – Pension MOU questions and answers is that eligibility for this payment is restricted to persons “on active status or a paid leave of absence prior to long-term disability (the waiting period) and who were members of the Air Canada Canadian Defined Benefit Pension Plan as of July 14, 2009 (which is the date the last group ratified the Pension MOU)”.

It is unfortunate that this issue was not avoided by the parties providing more definitive language to shut-out this question from arising. However, such a problem is not unknown in the field of labour relations: see *Re Andres Wines (B.C.) Ltd. and United Brewery and Distillery Workers*, Local 300 (1977), 16 L.A.C. (2d) 422 (B.C.L.R.B) at pp. 424-5. See also *Re Ball Packaging Products Inc. and U.S.W.A.*, Local 8995 (1991), 20 L.A.C. (4<sup>th</sup>) 179.

The IAMAW asserts that the program was essentially an incentive to union members to ratify the Pension MOU at a time when it was appreciated by both sides that this could well be a difficult “sell” given the lean years for the members since the 2003-04 restructuring pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”), particularly in light of sales of some units which were previously part of AC and several profitable years in the period 2004-2009 when the IAMAW could not reopen bargaining. AC in contrast characterized the program as essentially a reward to those it considered eligible employees (as set forth above) for contributing to financial success in the 2010 fiscal year beyond what was then expected in mid-2009. AC points to its “Sharing Our Success” program instituted in 2004 as assisting in defining the use of the term “active employee”.

Both the IAMAW and AC were agreed that the financial condition of AC in mid-2009 was exceptionally strained and that AC was incapable of making the substantial pension contributions that were required pursuant to the regime then in place arising out of the 2003-04 CCAA restructuring.

It seems to me that the better interpretation of paragraph 15 is that advanced by the IAMAW as being consistent with the fundamental purpose of the one-time profit share incentive program. There are a number of reasons for this as follows:

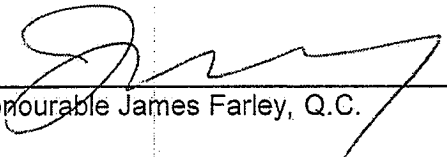
- (a) there was at the same time as the subject Pension MOU which was described as and dealt with the pension moratorium situation, another set of bargaining with the affected unions which dealt with non-pension matters, which resulted in memoranda of understanding; this bargaining was conducted on the basis of “give and take” so that there was no net additional cost to AC (that is, additional benefits had to be balanced with concessions from the workers). One would ordinarily expect a profit-sharing incentive plan in the usual course to have not been part of a memorandum of understanding dealing with the pension moratorium but rather in that dealing with non-pension benefits.
- (b) The subject program was unlike the Sharing Our Success one which was a monthly award one over an extended period of time; it was a one-shot deal.
- (c) There appears to be a lack of connectivity to the subject program and the reward to those workers who contributed to the relative financial success of AC for its 2010 fiscal year. This may be illustrated by the fact that someone who was not an active employee according to AC’s preferred definition on July 14, 2009, but who returned to work the day after, July 15, 2009, and contributed to the balance of the 2009 fiscal year and all of the 2010 fiscal year would be ineligible. In

contrast someone who was "active" according to AC's preferred definition on July 14, 2009 but became inactive on July 15, 2009 and continued to be so, would receive the \$500 without in effect contributing anything to AC's relative financial success in fiscal 2010.

- (d) The problem identified above would be somewhat be alleviated in a program designed in the same way as the Sharing Our Success one where the contribution was recognized in monthly sprints by those who from time to time met the AC preferred definition.
- (e) It should be noted that the Sharing Our Success program specifically addressed who would be eligible by stating that "Employees who are retired, on disability, maternity leave, Workers' Compensation, leave of absence, on lay-off status, or terminated on the 15<sup>th</sup> calendar day are not eligible to receive a monthly cash award." The subject program did not so qualify (or disqualify) as to "active employee".
- (f) While each union may have different criteria as to who was entitled to vote for ratification, what was important to AC so that it could avoid a financial day of reckoning in the summer of 2009 was that it needed to have all the unions ratify the Pension MOU. The potential payment of \$500 was an incentive to the union members to go along with the ratification, putting aside their extreme dissatisfaction with what they considered was another concession regarding the pension plan. (I note in passing that the union members had a choice between cratering AC and thereby crystallizing the pension deficit or giving the collective AC organization (including management and workers) the opportunity/possibility of working out that problem over an extended period of time.)

Based upon the contextual and purposive analysis above, I conclude that the \$500 payment is to be made to those additional IAMAW employees as asserted to be eligible by the IAMAW.

DATED this 28<sup>th</sup> day of June, 2011.

  
Honourable James Farley, Q.C.