

Canada Industrial Relations Board



Conseil canadien des relations industrielles

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Our Files: 28234-C, 28402-C

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BY FAX

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Dear Sirs/Madams:

In the matter of the *Canada Labour Code (Part I-Industrial Relations)* and an application for review filed pursuant to section 18.1 and an application for a declaration of sale of business pursuant to sections 44, 45 and 46 filed by Aveos Fleet Performance Inc. and Air Canada, applicants; the International Association of Machinists and Aerospace Workers and the International Association of Machinists and Aerospace Workers, Transportation District 140, certified bargaining agents. (28234-C)

In the matter of the *Canada Labour Code (Part I-Industrial Relations)* and an application for declaration of a single employer filed pursuant to section 35 of the *Code* concerning the International Association of Machinists and Aerospace Workers and the International Association of Machinists and Aerospace Workers, Transportation District 140, applicants; Aveos Fleet Performance Inc., Aveos Holding Company and Air Canada, employers. (28402-C)

I – Nature of the Applications

On June 25, 2010, Aveos Fleet Performance Inc. (Aveos) and Air Canada (collectively, the employers) filed an application with the Canada Industrial Relations Board (the Board) pursuant to sections 18.1, 44, 45 and 46 of the *Canada Labour Code (Part I-Industrial Relations)* (the *Code*) (Board file no. 28234-C), seeking a declaration of sale of business and consequential orders affecting two bargaining units at Air Canada represented by the International Association of Machinists and Aerospace Workers (the IAMAW) and the International Association of Machinists and Aerospace

Workers, Transportation District 140 (IAMAW 140) (collectively, the union). The employers requested that the Board declare and confirm that, for all purposes under the *Code*, the sale by Air Canada Technical Services Limited Partnership (ACTS LP) to Aveos of its Maintenance, Repair and Overhaul (MRO) business has had the effect and consequence of transferring the IAMAW bargaining certificates and collective agreements previously applicable to Air Canada's MRO business to Aveos. The employers also requested that the Board order the implementation of the parties' agreement with respect to matters arising from the application of sections 18.1 and 44 of the *Code*, including the process of employee transition from Air Canada to Aveos.

On October 1, 2010, the union filed an application pursuant to section 35 of the *Code* (Board file no. 28402-C) requesting that the Board declare that Air Canada, Aveos Holding Company (AHC) and Aveos are and continue to be a single employer for all labour relations purposes with respect to the MRO business. These two applications were consolidated on October 5, 2010.

Oral hearings were held on September 29, October 4-5, November 22-23, 29, 2010 and January 18, 2011. During its proceedings, the Board held numerous case management meetings and provided the parties with various opportunities to reach agreement as required by section 18.1(2) of the *Code*. Despite these opportunities, the parties were unable to reach agreement. After considering the oral and written submissions of the parties, a majority of the Board dismissed the union's section 35 application, granted the employers' section 45 application and made orders consequential to these decisions on January 31, 2011. These are the reasons for those decisions, and for the Board's January 6, 2011 decision regarding the admissibility of certain expert evidence that the union attempted to introduce.

The pleadings, documentary evidence and written submissions placed before the Board in the course of these proceedings were extensive and voluminous. The Board has considered all of the evidence and information placed before it. However, a number of the documents and submissions contain commercially sensitive information. Consequently, the parties agreed to the terms of a

Confidentiality Order, which was issued by the Board on October 4, 2010. The Board recognizes that its proceedings are public and must be as transparent as possible and that many IAMAW members are affected by and interested in these applications. For this reason, the Board arranged to videocast its proceedings, to the extent possible within the confines of the Confidentiality Order. Nevertheless, there were many occasions on which the Board was required to restrict participation in its proceedings to those persons permitted to access the protected documents pursuant to the Confidentiality Order. Ultimately, a great deal of the proceedings had to be conducted in-camera, due to the extent to which references to the confidential documents and information was required. In addition, while the Board has made every effort in these reasons to convey the basis for its decisions, the degree of confidentiality required prevents a detailed account of the extensive evidence that was placed before the Board. In this regard, the Board notes that many of the facts were not disputed, although the parties disagreed as to the interpretation they should be given and the application of the *Code* to those facts.

II-Background to the Applications

Prior to the filing of the instant applications, the Board had dealt with a number of complaints and applications involving the structure of bargaining units at Air Canada represented by IAMAW. The merger of Air Canada and Canadian Airlines International Ltd. in 2000 necessitated a restructuring of the bargaining units at Air Canada, including those represented by the IAMAW. In March 2006, the Board issued a certification order finalizing the scope of the technical, maintenance and operational support (TMOS) bargaining unit at Air Canada represented by the IAMAW. In the context of an application for a declaration of single employer filed by the IAMAW, the Board issued a replacement certification order in April 2006 to give effect to an agreement between the IAMAW and Air Canada, ACTS LP, Air Canada Cargo Limited Partnership (AC Cargo) and Air Canada Ground Handling Services Limited Partnership (ACGHS). That order confirmed that there was a single bargaining unit for employees performing the TMOS functions, and all four companies (which were all subsidiaries of ACE Aviation Holdings Inc. (ACE)), were named on the certification order.

On December 14, 2006, the IAMAW filed a complaint (Board file 26054-C), alleging that Air Canada had failed to disclose to the union, in a timely and appropriate manner, its plans to sell all or part of its MRO business (by then known as ACTS LP) to third party investors. There was no dispute that a sale of this nature would have a considerable impact on the TMOS bargaining unit represented by the IAMAW. This complaint was eventually resolved with the assistance of the Board. The resolution included an interim order for the disclosure of relevant documents and the conclusion of Minutes of Settlement dated June 29, 2007 and a Letter of Understanding dated August 7, 2007, which provided for the protection of employment conditions pending discussions between the parties with respect to the sale of ACTS LP and its consequences.

Through an Asset Purchase Agreement signed in June 2007, substantially all of ACTS LP's assets and certain of its liabilities were sold to a consortium consisting of Sageview Capital LLC and KKR Private Equity Investors LP. The transaction was completed on October 16, 2007. The resulting company operated under the name ACTS Aero Technical Support & Services Inc. (ACTS Aero) until September 23, 2008, when ACTS Aero changed its name to Aveos Fleet Performance Inc.

Air Canada, Aveos and the IAMAW entered into a Memorandum of Agreement on January 8, 2009 (the January 2009 MOA) that established a framework for the orderly transition of employees to Aveos and set out the terms and conditions of employment that would apply. The MOA provided that unresolved issues and disputes over its interpretation or application were to be settled by binding arbitration by Martin Teplitsky, Q.C. The January 2009 MOA also contemplated that the employers would make an application to the Board pursuant to section 45 of the *Code* to have the sale of business recognized. On January 22, 2009, the Board issued an order that incorporated the January 2009 MOA, declared that it constituted a full and final settlement of Board file no. 26054-C, and directed the parties to cooperate in implementing the terms of the MOA.

A number of union members filed complaints alleging that the union's actions in entering into the January 2009 MOA constituted a breach of the duty of fair representation, in violation of

section 37 of the *Code*. These complaints were considered and ultimately dismissed by the Board in *Jesse-Carl Gauthier*, 2010 CIRB 539.

In May and June 2009, Air Canada was facing serious financial difficulties. It negotiated a new MOA with the IAMAW (the June 2009 MOA), which extended the terms of the collective agreements applicable to the TMOS and clerical bargaining units by 21 months, to April 1, 2011, and amended certain provisions of the January 2009 MOA. Once again, any disputes regarding the terms of the MOA were to be referred to binding arbitration by Arbitrator Teplitsky.

A number of union members filed duty of fair representation complaints against the IAMAW with respect to the June 2009 MOA and the ratification process that was used by the union. These complaints were considered and ultimately dismissed by the Board in *Richard Vézina*, 2010 CIRB 540.

During this time period, Aveos was having financial difficulties of its own. In January 2010, Aveos reached an agreement with its lenders and equity holders on the terms of a consensual restructuring plan. The restructuring plan was finalized on March 12, 2010, and required that shareholders, including ACE, relinquish their shares. In addition, Air Canada and Aveos revised or entered into various commercial agreements. On June 16, 2010, Arbitrator Teplitsky issued a ruling indicating that the employers could proceed to file a sale of business application with the Board.

It was against this backdrop of events that the employers and the union filed their respective applications.

Decision of the Majority of the Board

III-Preliminary Issue: Admissibility of the IAMAW's Expert Evidence

In support of its position regarding the two applications, the union provided the Board with a draft report, including extensive financial materials, prepared by its expert witness (the Stehelin Report), which it sought to introduce into evidence. Air Canada, with the support of Aveos, brought a motion for a ruling declaring that all evidence pertaining to the viability of Aveos' business or of its restructuring plan, including the expert evidence contained in the Stehelin Report, was not relevant to the proceedings and should not be considered by the Board.

The Stehelin Report purported to respond to a number of questions that the union posed to its expert witness. The issue for the Board was whether any of the information and opinions contained in the Stehelin Report were relevant to the issues before the Board in file nos. 28234-C and 28402-C. Following an oral hearing held on November 29, 2010, a majority of the Board allowed Air Canada's motion to exclude the Stehelin Report in a bottom-line decision issued on January 6, 2011 (*Aveos Fleet Performance Inc.*, 2011 CIRB LD 2482).

While conceding that the Board has broad powers to admit evidence (see section 16(c) of the *Code*), Air Canada and Aveos argued that the Board has established guiding principles for the admission of evidence (see *TELUS Communications Inc.*, 2004 CIRB 277) that had not been met in this case. The employers did not argue that Mr. Stehelin was not properly qualified to give an opinion or that the evidence should be excluded on other recognized exclusionary grounds. Rather, they stated that the evidence was not relevant to the issues before the Board, was not reliable and was not necessary to assist the Board in its determination of the issues.

The employers argued that the Stehelin Report contains a considerable degree of speculation and that the expert's opinions are merely predictions as to what might happen in the future and are of no value in this case. Air Canada pointed out that the Stehelin Report admits that Aveos is

currently solvent, is meeting or exceeding its targets, and that Air Canada is meeting its obligations to Aveos. The employers argued that any concern about Aveos' fate, if certain planned actions do not occur, are speculative.

The employers suggested that the union was endeavouring to use viability as an issue for a variety of purposes: firstly, as a pre-condition to the filing of the employers' joint application under section 45 and secondly as a factor in the section 35 analysis. With respect to the former, the employers submitted that a contractual provision does not bind the Board and in any event, arbitrator Teplitsky expressly authorized the employers to file the sale of business application. With respect to the single employer application, the employers stated that all parties have obligations under the *Code*, and that the viability of a party does not change, alter or affect those obligations. The employers reminded the Board that the parties have negotiated full freedom of choice for the employees, including the right to decline a transfer to Aveos.

The union took the position that both the viability of Aveos' 2010 restructuring plan, and the viability of Aveos' Canadian business going forward, are of central relevance to the applications that are before the Board for determination. The union argued that the various Memoranda of Agreement signed by the parties contemplated that the Board would look at Aveos' viability and therefore it sought to introduce evidence concerning the financial situation of Aveos, both at the time of restructuring and since; the financial interrelationship between Aveos and Air Canada; and the business plan for AHC which formed the basis of the restructuring. In the union's submission, the issues before the Board are whether Aveos has successfully adopted a viable plan to restructure its business; whether Aveos and Air Canada remain a single employer; and whether the Board should exercise its discretion to fragment the existing single employer certificate.

The union argued that the Board must first determine a threshold question arising from the June 2009 MOA—namely, whether Aveos has successfully adopted a viable plan to restructure its business. The union maintained that this contractual precondition has not been met and stated that the evidence at issue in this motion is directly relevant to the inquiries the Board must make in order

to determine whether the contractual precondition to the employers' application has been met. The union argued that this contractual provision was central to its agreement to extend the Air Canada collective agreements in June 2009. The union argued that the Board is properly seized of this matter because it issued an order in Board file no. 26054-C, acknowledging that the January 2009 MOA between the parties, which was subsequently amended by the June 2009 MOA, constituted a full and final settlement of the unfair labour practice complaint to which that file related.

With respect to the union's application for a declaration of single employer, the union suggested that the Board should focus on the effect and not the form of the relationship between the companies when it assesses the degree of common direction and control between Air Canada and Aveos. The union suggested that Aveos' dependence on Air Canada, and Air Canada's control of Aveos, is so extensive as to make the two companies a single employer for labour relations purposes. It argued that the evidence contained in the Stehelin Report is central to the union's position and is required to allow a proper assessment of whether the restructuring plan is viable and whether the relationship between Air Canada and Aveos is such that the existing bargaining units should be severed or conversely, that the employers should remain in a single employer relationship.

In *TELUS Communications Inc.*, *supra*, the Board set out the factors that it considers when assessing whether or not to admit evidence. While not exhaustive, and recognizing that each case must be assessed according to its own facts and circumstances, the factors to be considered by the Board include the relevance of the evidence, the reliability of the evidence, the cost of allowing the evidence both in monetary terms and in terms of delay, the rights of the parties, fairness, efficiency, the objectives of the *Code*, the public interest and the necessity of the evidence in light of the Board's own knowledge and expertise. To determine whether the Stehelin Report was admissible, the Board was required to assess it in light of these factors and the issues before the Board in the section 35 and section 45 applications.

A-Is the Stehelin Report Admissible With Respect to the Issue of the Alleged Contractual Precondition to the Making of the Sale of Business Application?

The union argued that Aveos had not successfully adopted a viable plan to restructure its business as of the date that the employers filed the sale of business application with the Board, and that Aveos is still not viable going forward. It stated that it required the evidence contained in the Stehelin Report in order to prove this contention. The information and opinions contained in the Stehelin Report are clearly relevant to the case that the union seeks to make regarding the viability of Aveos' restructuring plan. However, for the reasons that follow, the Board finds that this issue is not one that is properly before it.

The January 2009 MOA provided for the orderly transition of, and terms and conditions of employment for, certain Air Canada employees who choose to accept employment with Aveos. At paragraph IX-11 of that agreement, the parties agreed that Air Canada and Aveos would file a joint application to the Board under sections 44 and 45 of the *Code*, in the form attached as Appendix A to the MOA, "in the event the Board issues an Order incorporating this Agreement." The Board issued the order contemplated in the January 2009 MOA on January 22, 2009. Paragraph IX-8 of the January 2009 MOA states that the parties agree that any issues of implementation that could not be resolved would be "referred exclusively to final and binding mediation/arbitration before arbitrator Martin Teplitsky." In March 2009, the parties agreed that Air Canada and Aveos would not file the sale of business application with the Board until they had either agreed that the filing was appropriate or a further meeting had been held before Mr. Teplitsky.

Air Canada and the union entered into the June 2009 MOA to extend, for a further 21 months, the three collective agreements between them that were scheduled to expire on July 1, 2009. Appendix A of that agreement contained the following provision:

4. The intention of the parties is to set timelines [sic] for the administrative steps to be followed under the Transition Agreement (being the Memorandum of Agreement signed by the Parties and Aveos on January 8, 2009 and its Appendix, three Schedules and Letter of Understanding (re: Transition Matters), Letter of Agreement (re: Technical Instructors), Letter of Agreement and related Letter of

Clarification (re: Sub-contracting), and as modified and completed by the March 5, 2009 Award of Martin Teplitsky) that will allow for the implementation of that Agreement such that the Selection Closure Date will occur no later than 90 days before the close of the Extension Period. In this regard the parties agree that:

- a. Air Canada and Aveos will not file their joint application pursuant to sections 18.1, 44, 45 and 46 of the *Canada Labour Code* with the Canada Industrial Relations Board (CIRB) until Aveos has successfully adopted a viable plan to restructure its business, and the specifics of that restructuring have been communicated, under the provisions of the agreed-to Non-disclosure Agreements, to the IAMAW leadership and their advisors. The statement of facts in and the exhibits to the joint application will be updated as necessary at that time, including by placing before the Board a copy of this Agreement, the restructuring plan and all current agreements between Aveos or affiliated companies and ACE, Air Canada, ACGHS and Air Canada Cargo, as set out in paragraph 16 of Appendix A to the Transition MOA. Air Canada and Aveos will also provide ongoing disclosure to the IAMAW leadership and their advisors concerning the financial situation of Aveos and the terms of all agreements between Air Canada and Aveos until the close of the Extension Period.
- b. A joint request will be made of the CIRB that it issue its decision no later than 164 days prior to the end of the Extension Period.
- c. The Transition Date for IAMAW members transitioning to Aveos, as set out in the Transition Agreement will be the last day of the Extension Period
- d. The Selection Closure Date will not be before 90 days prior to the Implementation Period.

In the Board's view, the union's alleged threshold issue is not a matter within the Board's jurisdiction. The Board is a creature of statute, empowered to interpret and enforce certain provisions of the *Code*. Parties cannot, on their own initiative, provide the Board with more authority than it has under the *Code*, nor can they fetter the Board's statutory powers. While the Board endeavours to interpret the *Code* in a manner that will encourage constructive labour management relations, the parties cannot impose a time limit on the Board's proceedings, nor can they prevent the Board from proceeding with a matter that is properly before it. For this reason alone, the Board does not consider itself bound by the alleged precondition in the parties' June 2009 MOA.

The June 2009 MOA did not amend paragraph IX-8 of the January 2009 MOA or the March 2009 agreement. Arbitration by Mr. Teplitsky remained and remains the appropriate route for resolution of differences arising from the January 2009 and June 2009 MOAs. The Board notes that,

on June 16, 2010, arbitrator Teplitsky expressly authorized the employers to make a sale of business application to the Board, as contemplated in the January 2009 MOA.

As the Board has found that the alleged contractual precondition is not an issue that is properly before it, it follows that the Stehelin Report is not admissible for the purpose of dealing with this issue.

B-Is the Stehelin Report Admissible With Respect to the Issues in the Employers' Sale of Business Application?

The union suggests that Board orders in sale of business cases are always forward looking, as they establish the basis for the collective bargaining relationship on a go-forward basis. The employers argue that the Board must make its determinations on the basis of the circumstances as they exist at the time the matter comes before the Board, and that the future viability of any entity is not guaranteed and should not be a factor.

The circumstances of this case are somewhat unusual, in that the sale of assets took place in October 2007 and, for various sound labour relations reasons, the employers are only now coming forward seeking orders to confirm the consequences of the sale. Had the sale of business application been made at the time of the sale, it is likely that the issues now raised by the union would not have been a concern. The Board cannot accept the union's argument that the Board must consider and give weight to the future viability of the purchaser when dealing with a sale of business application. Economic viability of any enterprise is never assured. The question for the Board in this case is not whether Aveos will be viable indefinitely, but whether a sale of business has occurred that has consequences for the conduct of labour-management relations. The portions of the Stehelin Report that speak to the future viability of Aveos are not relevant to the sale of business application now before the Board. Accordingly, the Board declined to admit the Stehelin Report for the purpose of determining the sale of business application.

C-Is the Stehelin Report Admissible With Respect to the Issues in the Union's Single Employer Application?

The key issues in the union's single employer application are whether Air Canada and Aveos are associated or related and whether they are subject to common control or direction and, if so, whether there is a labour relations purpose for them to be deemed a single employer. The various relationships between Aveos and Air Canada are clearly relevant to these questions. However, despite the union's arguments, the Board is of the view that the future viability of Aveos is not a relevant consideration in the analysis it must undertake. If common control or direction is found to exist, the exercise of the Board's discretion under section 35 of the *Code* will be based on its assessment of the present day labour relations purposes and consequences of a single employer declaration. While the information contained in the Stehelin Report may be highly relevant to the advice that the union gives to its members and the choices that they make, it is not evidence that is relevant or necessary to the determinations that the Board must make in the applications currently before it. Accordingly, the Board also declined to admit the Stehelin Report for the purpose of determining the union's section 35 application.

IV-The Sale of Business Application (Board file 28234-C)

The Board has consistently held that the consequences of a sale of business occur automatically, without its intervention—the *Code* provides that the bargaining agent and the collective agreement automatically follow the employees to the new employer. When a "sale of business" application is made to the Board, it is normally for the purpose of amending certification orders to reflect and confirm these consequences. However, when there are disputes, section 46 of the *Code* authorizes the Board to determine, among other things, whether a business has been sold and the identity of the purchaser. Although the obvious purpose of section 44 of the *Code* is to preserve the labour relations *status quo* when a business is sold, section 45 of the *Code* gives the Board the discretion to determine whether the employees affected constitute one or more units appropriate for collective bargaining. Applications under section 45 of the *Code* that involve

a review of the bargaining unit structure bring into play the provisions of sections 18.1(2) to (4) of the *Code*, which give the Board the necessary powers to determine questions that arise, including the amendment of bargaining unit descriptions and certification orders.

As a result of the agreement reached between the parties in April 2006 and endorsed by the Board at that time, the IAMAW is the certified bargaining agent for a unit composed of:

all employees of Air Canada, ACTS Limited Partnership, AC Cargo Limited Partnership and ACGHS Limited Partnership engaged in technical, maintenance and operational support functions, excluding those performing management functions or those employed in a confidential capacity in matters relating to industrial relations and otherwise, and excluding any employees covered by a certification order and employees in discrete positions and functions not included within the scope of bargaining units in either of the former Air Canada or Canadian Airlines International Ltd. prior to their merger.

The three limited partnerships referenced in the April 2006 Board order were created in 2004 as part of a restructuring plan approved by stakeholders and sanctioned by the Ontario Superior Court in the context of the reorganization of Air Canada under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). One consequence of that transaction was that the maintenance, repair and overhaul work, previously done in-house by Air Canada, was transferred to a separately incorporated subsidiary of ACE, known as ACTS Limited Partnership (subsequently renamed ACTS LP). As noted above, the assets of ACTS LP were sold to a consortium of investors in 2007. Air Canada, although wholly owned by ACE, had no ownership interest in ACTS LP and was not a party to the asset purchase agreement. The sale was completed on October 16, 2007. At that time, ACE retained a 23% ownership interest in the MRO business, which was subsequently renamed Aveos Fleet Performance Inc. in September 2008.

As a result of financial difficulties during 2008–2009, Aveos underwent a consensual financial restructuring and recapitalization that was completed in March 2010. During this restructuring, various stakeholders made a number of financial concessions. ACE and other shareholders relinquished their shares in Aveos. As a consequence of this restructuring, at the time of these Board proceedings, Aveos is a wholly owned subsidiary of Aero Technical Support &

Services Holdings s.a.r.l. of Luxembourg, which is itself a subsidiary of AHC, of the Cayman Islands. Air Canada currently holds a minority interest in AHC.

“Sell” is defined in section 44(1) of the *Code* as including, in relation to a business or any part of a business, the transfer or other disposition of the business. On the basis of the transactions described above, the Board is of the opinion that a sale of business has taken place within the meaning of section 44 of the *Code*. ACTS LP no longer exists. Its assets have been sold and are now part of the business operated by Aveos. Aveos is carrying out the work formerly performed by ACTS LP. Accordingly, the Board finds that Aveos is the successor employer of the employees performing the clerical and administrative support functions and the maintenance, repair and overhaul work that they formerly performed at ACTS LP. By operation of section 44(2)(a) of the *Code*, the IAMAW remains the bargaining agent for the employees who perform this work and Aveos is bound by the IAMAW collective agreements applicable to their respective bargaining units.

In the ordinary course, the determination that a sale of business has taken place would result in Board orders confirming the IAMAW’s bargaining rights for bargaining units at Aveos analogous to the ones it represents at Air Canada/ACTS LP. However, in this case, the union argues that the bargaining units, and its representation rights, should not be partitioned in this manner and has raised a question as to whether Aveos, as the successor to ACTS LP, is a single employer with Air Canada. This issue will be examined below in the context of the union’s section 35 application.

V–Single Employer Application (Board file no. 28402-C)

The union’s section 35 application requests a declaration that Air Canada, AHC and Aveos are a single employer. There are five criteria that must be met before the Board will consider issuing a declaration of single employer under section 35 of the *Code*. These criteria are:

- (1) that there be two or more enterprises (businesses);
- (2) both under federal jurisdiction;
- (3) that are associated or related;
- (4) of which at least two, but not necessarily all, are employers; and
- (5) which are under common control or direction.

If these criteria are met, the Board will then consider whether there is a labour relations purpose to be served by issuing a single employer declaration. Historically, the Board has issued such declarations when it deems it necessary to do so to protect employees, to ensure that bargaining rights are not eroded and/or to ensure sound labour relations.

As noted above, AHC is incorporated in the Cayman Islands. No evidence was presented that would permit the Board to find that AHC is in Canadian federal jurisdiction. In final argument, the union indicated that it was no longer asking that AHC be named as an employer on the certification orders. The Board is of the opinion that, even had the union wished to pursue this matter, AHC is not an employer within federal jurisdiction.

However, all parties agree that there are two enterprises involved in this matter, Air Canada and Aveos, that each is an employer and both are in federal jurisdiction. The preliminary issues for determination are whether these enterprises are associated or related and whether they are subject to common control or direction. If these criteria are met, the Board must determine whether there is a labour relations purpose for them to be deemed to be a single employer.

A-Associated or Related

To determine whether two or more enterprises are associated or related, the Board considers the similarity and differences in their activities, products or services; whether they serve similar markets; the extent to which their operations are integrated and/or the degree of interdependence in their operations; and the extent to which they have common ownership or management

(see *Prince Rupert Grain Ltd. and B.C. Terminal Elevator Operators' Association*, 2007 CIRB 389; and *Radio Acadie Ltée, CJVA-AM, and Radio de la Baie Ltée, CKLE-FM* (1994), 94 di 128 (CLRB no. 1071)).

The union argues that Air Canada and Aveos are associated and related in a myriad of ways. Air Canada is a minority shareholder in Aveos' parent company, AHC. There are numerous contractual arrangements for various services between the two. Air Canada is Aveos' landlord in various premises. Air Canada is one of Aveos' creditors. The union suggests that the fact that the business now carried on by Aveos used to be part of Air Canada, and that the service now delivered to Air Canada by Aveos requires close coordination between the two, is evidence that they are associated and related. The union urges the Board to look at all of the various links between Air Canada and Aveos, and draw the conclusion that the companies are closely related.

Aveos points out that Air Canada is an airline, engaged in the transportation industry, while Aveos is in the maintenance, repair and overhaul business. Aveos is no longer a part of Air Canada and it is not in the same business as Air Canada. While there are currently many contractual links between the parties, all or most of these are of a finite duration. For example, the various contractual arrangements between the two companies that exist because many of Aveos' employees are still on secondment from Air Canada were not intended to be permanent and will be terminated if the Board finds Aveos to be a separate employer.

Having considered all of the various relationships between Air Canada and Aveos and conducting its own analysis, the Board is unable to find that the two companies are associated or related within the meaning of section 35 of the *Code*. In the context of financial or organizational restructurings, it is not unusual for a business to focus on its own core business and to spin off non-core activities, either to subsidiaries or outside contractors. In this case, the work in question is now being done by another company, which is solely in the business of maintenance, repair and overhaul work. Air Canada and Aveos are not in the same business and serve distinctly different clientele. The

level of operational coordination required to ensure that Aveos' services are provided to Air Canada at the appropriate time is not, in and of itself, evidence that the two companies are "integrated."

Air Canada is not dependent on Aveos, and makes use of other maintenance and repair service providers. It is true that, at the present time, Air Canada is a major customer of Aveos. This is no different than the situation that exists for any supplier that has a single major customer, and is not necessarily evidence that the two employers are associated or related for the purposes of the *Code*. Even at the present time, Aveos has customers other than Air Canada and continues to seek opportunities to diversify its customer base.

B-Common Control or Direction

There are a number of factors that the Board considers in assessing whether employers are subject to common control or direction. These factors are not limited to control or direction of the workforce alone, and include the ownership structure; whether there is common decision making and shared programs, policies or services; the manner in which the businesses present themselves to the public, clients and employees; and whether their operations are coordinated or integrated. No single factor is determinative.

The IAMAW argues that Air Canada has a multi-dimensional hold over Aveos by virtue of its minority stake in AHC, its provision to Aveos of critical services under the Master Services Agreement; the companies' landlord/tenant, creditor/debtor and customer/supplier relationships; Air Canada's extensive right to information from Aveos; and various other obligations set out in the confidential documents. The union submits that, as a result of these various links, Aveos is subject to *de facto* direction and control by Air Canada and that, as the bargaining agent, it must be in a position to negotiate directly with the two companies, as a common employer, in order for its bargaining rights to have any meaning.

Aveos and Air Canada argue that they are separate and distinct entities and are not subject to common control or direction. Air Canada denies exercising any legal or *de facto* control or direction over Aveos. The two companies each hold their own certification from Transport Canada and determine their own business plans. There is no inter-company reporting relationship and Air Canada plays no role in selecting or appointing executives or other managers at Aveos.

The employers concede that Air Canada owns a minority interest in Aveos' parent company, AHC, but argue that the majority of the shares are held by parties unrelated to Air Canada. The employers confirm that Air Canada has the right to appoint one member of Aveos' Board of Directors, but point out that the other six Directors are independent of Air Canada and that the Air Canada nominee does not participate in deliberations concerning the commercial relationship between the two companies. The employers admit that Air Canada is a major customer of Aveos, but argue that this is not determinative of common control or direction. They point out that the employee secondment arrangement and concurrent service agreements between the two companies were intended to be temporary, and will terminate if and when the bargaining units are severed or shortly thereafter. The employers also argue that the fact that Air Canada may be the landlord of certain premises leased by Aveos does not constitute a factual basis on which to conclude that Air Canada controls Aveos. The rights that Air Canada has to certain information from Aveos is the *quid pro quo* for various loans and financial guarantees, but do not give Air Canada the right to control Aveos' business or its employees. Air Canada and Aveos submit that the proper characterization of their relationship is that of customer and supplier. This operating relationship is defined by contract: Air Canada stipulates its maintenance requirements and verifies satisfactory performance and Aveos determines how the work will be performed and the assignment of employees to do that work.

On the evidence that has been presented, the Board is unable to find that Air Canada and Aveos are subject to common control or direction. Air Canada is 100% owned by ACE Aviation Holdings Inc. As noted earlier, since March 2010, Aveos is a wholly owned subsidiary of Aero Technical Support & Services Holdings s.a.r.l. of Luxembourg, which itself is a subsidiary of

AHC, of the Cayman Islands. Although Air Canada currently holds a small interest in AHC, Air Canada and Aveos have separate and independent management structures and none of the executives or managers are common to the two companies. There are no inter-company reporting obligations. The sole Air Canada director on the Aveos Board of Directors does not participate in discussions or decisions involving the commercial relationship between the two companies.

Aveos has its own, independent programs and policies, which are distinct from those of Air Canada. Since the autumn of 2008, Aveos has had its own corporate branding, which makes no reference to Air Canada. Aveos and Air Canada each have their own, independent, Internet presence and there is no reference to any connection between the two companies on these Websites or in materials that are made available to clients or the public. Air Canada is in the business of operating an airline, while Aveos is in the business of maintenance, repair and overhaul for the aviation industry. The two companies are clearly in different industries serving very different clients. To the extent that Aveos coordinates its work schedules to meet Air Canada's needs, this is a factor of the customer/client relationship, not evidence of common control or direction.

There are currently some 2,542 unionized employees on secondment from Air Canada to Aveos, and there are various service agreements in place between the two companies as a result of and in support of these secondments. The secondment arrangements, and many of the service agreements, are scheduled to terminate once the transition contemplated in the parties' January 2009 MOA is complete. These arrangements are intended to be temporary and transitional, and were implemented in the interests of promoting good labour-management relations. In these circumstances, they cannot be considered as evidence of common control or direction.

As evidence of the continuing control that Air Canada exercises over Aveos, the union introduced a letter from the President and CEO of Air Canada, Calin Rovinescu, dated June 19, 2009, and addressed to "Our Employees Working at Aveos" (Exhibit 16). The content of the letter states the author's intention that "Air Canada play a significant role with respect to both AVEOS's business and its employee relations in the coming years." The letter went on to state that

the author was “committed to have Air Canada provide AVEOS with greater financial and operational support so as to ensure the airframe business is viable.”

Air Canada argued that the Board must consider the context within which this letter was written and distributed. The letter was sent at a time when Air Canada was in serious financial difficulty and shortly after the parties had reached the June 2009 MOA that extended the existing collective agreements for 21 months. It was critically important to Air Canada that the June 2009 MOA be ratified by the union membership. The letter was therefore sent to all Air Canada employees who were on secondment with Aveos, to reassure them that Air Canada would support Aveos, in the hope that this would encourage these employees to ratify the June 2009 MOA and thereby avoid the need to seek CCAA protection a second time. Air Canada argues that the letter was not an attempt to direct, control or interfere with labour relations between Aveos and these employees.

The Board accepts Air Canada’s explanation of the motive behind Exhibit 16, and finds that it does not support the union’s allegations of common control or direction. The Board also notes that, in addition to the seconded employees, there are another 458 employees directly employed by Aveos. Of these, some 257 are individuals formerly employed by Air Canada, primarily in management, who have severed their employment with Air Canada. The Board is satisfied that Aveos is responsible for its own workforce and independently manages that workforce, without direction or control from Air Canada.

Neither the creditor/debtor or landlord/tenant relationships between Air Canada and Aveos can be used as indicia of common control or direction. While the extent of the creditor/debtor relationship is perhaps unusual between unrelated companies, it is understandable in the context of the restructuring undertaken by Aveos in 2009–2010 and Air Canada’s critical interest in ensuring that an important service provider remained available to it. The Board accepts Air Canada’s contention that, while it is entitled to certain information regarding Aveos’ financial affairs as a

result of its status as a creditor, that access does not amount to control or direction of Aveos' business.

The extent of the customer/supplier relationship between Air Canada and Aveos is significant. However, in *S.V.N. Enterprises Ltd., doing business as S & K Trucking*, 2003 CIRB 219, the Board observed:

[63] If the Board were to accept CUPW's reasoning, any employer that relied upon one customer for its business would be open to a section 35 application. This would be especially so if the price paid for the product or service in question was fixed. The Board cannot accede to this point of view. Dependency upon one customer or a dominant customer is a common commercial reality. It means that, in any situation of this kind, the customer will exercise a great degree of influence over the price and the economic well-being of the supplier. This does not of itself change the parties to the agreement into common employers or create a labour relations foundation for Board intervention. It simply reflects basic laws of economics. The fact that the price for the contract is set and that, at the time in question, S & K had no other revenue streams, does not mean that there is a labour relations purpose for the declaration sought.

The Board is of the view that the analysis applied in *S.V.N. Enterprises Ltd., doing business as S & K Trucking, supra*, is equally applicable to the circumstances of this case. While Aveos is dependent on Air Canada's work for much of its current revenue, the relationship remains one of customer/supplier and does not provide a basis for the common control or direction contemplated by the *Code*.

For all these reasons, the Board finds that Air Canada and Aveos are not subject to common control or direction.

C-Labour Relations Purpose

Even had the Board found that all of the criteria identified above had been satisfied, it is of the opinion that there is no labour relations purpose for making a declaration of single employer in the circumstances of this case. At paragraph 54 of *S.V.N. Enterprises Ltd., doing business as S & K Trucking, supra*, the Board set out the principles that inform its decisions as to whether a labour relations purpose would be served by a single employer declaration:

[54] ...

“The purpose of section 35 has always guided the exercise of the Board’s discretion in these matters. That purpose is aimed at preventing the undermining or evading of bargaining rights through corporate or business arrangements. ...

Section 35 is not aimed at enhancing existing bargaining rights ... Its purpose is remedial in nature. It is designed to ensure that employers only distinct in appearance do not succeed in circumventing their obligations under the *Code* by resorting to corporate restructuring or other types of business arrangements:

...

Section 35 is not aimed at exempting a bargaining agent from having to organize an otherwise genuinely distinct group of employees. In some cases, the issuance of a declaration by the Board may have that effect, but that is not its purpose. When the Board addresses the issue of discretion, **the question ceases to be whether common control exists; it becomes whether common control contributes to the erosion of bargaining rights.**

(pages 118–119; 271; and 14,098; emphasis added)”

It is thus clear that the primary purpose of a section 35 declaration is to prevent erosion or undermining of bargaining rights through corporate or business arrangements or reorganizations (*Telus Communications Inc.*, 2004 CIRB 278). In this case, the union argues that, even if Air Canada has no interest in controlling Aveos’ operations today, it has the ability to do so at any time. This, the union suggests, is sufficient reason to find that the two companies are a single employer for the purpose of labour relations. The union states that, for its bargaining rights to be meaningful, it needs to be able to require the two companies to sit at a common bargaining table.

The Board can find no evidence that the sale of Air Canada’s MRO business to Aveos was a business arrangement intended to undermine or erode the unions’ bargaining rights. On the contrary, Aveos is ready and willing to take on its role as the true employer of the MRO employees represented by the union and to negotiate collective agreements applicable to these employees. Despite the union’s arguments, the evidence before the Board suggests that maintaining a single employer declaration would have a negative effect on collective bargaining. Aveos’ Senior Director of Labour Relations testified that during the last round of collective bargaining, which took place in the summer of 2009, Aveos was unable to have its issues dealt with at the bargaining table, as

Air Canada's concerns dominated the negotiations. While Air Canada did what it had to do to conclude a collective agreement, Aveos' interests and concerns were not dealt with.

Significant practical problems were described to the Board with respect to using a single seniority list for employees of both companies when one employer is staffing vacancies or implementing lay-offs or recalls from lay-off. These problems will persist as long as Air Canada and Aveos are bound to common collective agreements with the IAMAW for the MRO and clerical bargaining units. As noted above, Air Canada and Aveos are in clearly different businesses in different industries. Just as the Board considers community of interest among employees when fashioning a bargaining unit, it must consider whether the employers have common interests to advance in collective bargaining when deciding whether they should be declared to be a single employer. In this case, the answer to that question is clearly no. Labour and management must be free to negotiate collective agreements that meet the particular needs of the workplace and the workforce. In this case, the Board is of the opinion that a single employer declaration would impose constraints that would be detrimental to constructive labour-management relationships.

The Board is therefore not persuaded that this is a case where it should exercise its discretion in favour of a single employer declaration. Accordingly, the union's section 35 application is dismissed.

VI-Consequential Matters

The remaining issues for the Board to deal with as a result of the decisions outlined above relate to the content of the orders required to give effect to the consequences of the sale of business, as contemplated in section 18.1(3) and (4) of the *Code*.

As a result of the Board's decision to declare that a sale of business has occurred, that Aveos is the successor employer and that Air Canada and Aveos are not a single employer, it is necessary to amend the existing certification order for the TMOS bargaining unit at Air Canada (no. 9085-U)

to remove the reference to ACTS Limited Partnership, and to issue a certification in favour of the IAMAW for the new, MRO bargaining unit at Aveos. The Board has therefore issued a new certification order in respect of the MRO employees at Aveos (Order no. 9994-U) and amended the certification order applicable to the TMOS bargaining unit at Air Canada (see Order no. 9996-U). The Board was informed that AC Cargo Limited Partnership and ACGHS Limited Partnership were dissolved as of November 30, 2009, and has therefore taken this opportunity to remove the reference to these companies contained in Order no. 9085-U. Further, the Board notes that, at the present time, the TMOS bargaining unit at Air Canada does not include the positions of team leader or fleet coordinator, for reasons explained in *Air Canada*, 2008 CIRB LD 1963. As it is the Board's intention that this decision neither expand nor contract the scope of the bargaining unit that the IAMAW previously represented, the newly created MRO bargaining unit at Aveos does not include these positions either.

The Board is cognizant of the union's very sincere and serious concerns regarding the security of its members in the face of globalization and the financial problems experienced separately by both employers in the recent past. Consequently, the Board is of the opinion that the membership's concerns regarding the employment transition that has been made possible by its decisions must be addressed in the Board's Orders. During the course of the Board's proceedings, Air Canada offered the IAMAW a Heavy Maintenance Separation Program (HMSP) which addressed a number of the union's concerns. Although the union was of the view that the HMSP was deficient in certain areas, the Board is satisfied that the implementation of the HMSP, as described in the Air Canada offer of January 13, 2011, should be part of the orders issued as a result of its decision on the sale of business application, in order to settle all of the labour relations consequences of that decision and to promote sound labour relations going forward, and so orders.

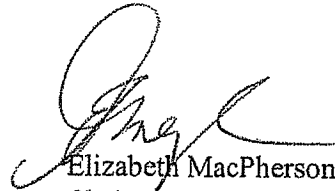
The IAMAW is also the bargaining agent for a unit of clerical and administrative support personnel (Order no. 9098-U) and a unit of finance branch personnel (Order no. 8227-U) at Air Canada. A parallel bargaining unit for the clerical and administrative support employees has been established at Aveos (Order no. 9995-U). However, rather than establishing a separate

bargaining unit for the finance branch personnel at Aveos, given the small number of employees in the finance branch bargaining unit who are affected by the sale of business, the Board finds it appropriate to include, in the clerical unit at Aveos that has resulted from the sale of business, the finance employees from Air Canada who chose to transition to Aveos. Accordingly, Order no. 9995-U should be read as including the finance branch personnel.

This is a decision of the majority of the Board.



Patrick J. Heinke
Member



Elizabeth MacPherson
Chairperson

Dissent of Mr. Daniel Charbonneau, Member

I have given considerable thought to the majority decision and, with respect, I do not concur with the decision of my colleagues.

In my view, the Board ought to have dismissed Air Canada and Aveos' application under sections 18.1, 44, 45 and 46 of the *Code* and ought to have exercised its discretion to grant the declaration of single employer as between Air Canada and Aveos. Before delving into these issues, I will briefly outline my reasoning for dissenting from the majority's decision on the admissibility of the IAMAW's expert evidence.

I-Preliminary Issue: Admissibility of IAMAW's Expert Evidence

I would have dismissed Air Canada's motion to exclude the union's expert report drafted by Mr. Stehelin.

As indicated in *TELUS Communications Inc . (277)*, *supra*, the Board has very broad discretionary powers to decide whether or not to admit evidence and is not restricted by the rules of evidence applicable to court proceedings.

Firstly, there was no question as to the reliability of the expert report and the qualifications of the expert. Mr. Stehelin is retired from his position as President of Deloitte & Touche, and Chair of its International Restructuring Committee. He has served as an advisor to Industry Canada in Air Canada's CCAA proceedings and has acted as an advisor to the Competition Bureau in cases involving Air Canada and in assessing the potential viability of a proposed merger between Pacific Western Airlines and Air Canada.

Secondly, the purpose of the expert report was to substantiate the union's claim concerning the future viability of Aveos, which, in my view, was directly relevant to the determination of both the sale of business application and the single employer application. In fact, the Board's main role in determining whether a sale of business has occurred or whether a valid labour relations purpose would be served in granting a single employer declaration is to ensure the preservation and viability of bargaining unit rights. If there is a concern about the future viability of one of the businesses affected by the applications, then the viability of the bargaining unit rights will likely be at stake. In my view, the value and necessity of Mr. Stehelin's expert report in the circumstances of this case outweighed any delays that might have incurred in the proceedings by introducing the expert evidence.

II-Sale of Business

In my view, although a number of transactions took place between Air Canada and Aveos, since 2007, the unique circumstances of this case should be considered in light of the purpose and objectives of the sale of business provisions of the *Code*.

While I agree with the majority that the effects of a sale of business occur automatically, it is important to keep in mind the remedial purpose of the sale of business provisions, which is to preserve or ensure the continuation of bargaining rights in spite of changes in ownership or control of a business (see *TELUS Communications Inc.* (278), *supra*). Therefore, with these considerations in mind, I would have dismissed Air Canada and Aveos' application pursuant to sections 18.1, 44, 45, and 46, as the orders sought would have the effect of eroding the union's bargaining rights at Air Canada. In my view, a closer look at the transactions between Air Canada and Aveos and the facts of this case reveals that Air Canada and Aveos' relationship is closer to that of a single employer.

III—Single Employer Declaration

I agree with the majority with respect to three of the five factors needed for a single employer declaration. However, I would have found the two employers in question to be associated and related, and to operate under common control or direction. In addition, I would have found a strong labour relations purpose to be served by issuing the single employer declaration in the circumstances.

A—Associated or Related

The Board has previously found that entities may be associated or related for the purposes of section 35 of the *Code*, as a consequence of a contract (see *Ottawa-Carleton Regional Transit Commission et al.* (1988), 72 di 189; and 19 CLRBR (NS) 165 (CLRB no. 670); *Air Canada et al.* (1993), 91 di 101; 18 CLRBR (2d) 295; and 93 CLLC 16,037 (CLRB no. 998); and *PLH Aviation Services Inc.*, 1999 CIRB 37).

In my view, the relationship between Air Canada and Aveos is more complex than that of a customer and a supplier. It is important to note that Air Canada once undertook the maintenance, repair and overhaul work that is now being carried out by Aveos, and most of the employees performing that work are the same.

Aside from the fact that Air Canada is Aveos' most significant customer and owns a minority stake in Aveos as a shareholder, Air Canada owns most of the locations from which Aveos operates and has various other obligations set out in the confidential documents.

The above elements suggest that Air Canada and Aveos are associated or related for the purposes of the *Code*.

B-Common Control or Direction

Though Air Canada does not have majority ownership over Aveos, the evidence suggests, in my view, that Aveos is strongly dependent on Air Canada and is subject to Air Canada's direction and control.

In assessing the question of common control or direction, the jurisprudence establishes that section 35 does not require total common control of the entities by the same group of individuals (see *Coopérative des travailleurs routiers, Trans-Coop, et al.* (1996), 101 di 159 (CLRB no. 1170); and *TELUS Communications Inc.* (278), *supra*). Moreover, common control does not necessarily require a demonstration of day-to-day control over labour relations; it may refer to longer term strategic decisions (see 2848-4848 *Quebec Inc. (carrying on business as Messagerie Quick Messenger)*, 2009 CIRB 445).

In this context, it is important to review Air Canada's central role in the restructuring of Aveos and its ongoing business. A number of elements, taken together, give Air Canada a degree of power over Aveos, which, in my view, amounts to more than simply economic control. As indicated earlier, Air Canada is a minority owner of Aveos, a major lender, a landlord, and Aveos' most significant customer. Also, Air Canada has various other obligations set out in the confidential documents. In my view, the cumulative effect of these arrangements gives Air Canada strategic control over Aveos. In addition, I have difficulty finding that these arrangements are only temporary.

While much of the day-to-day operations and the administration of employment relationships are carried out by Aveos, the letter from Air Canada's President and CEO, dated June 19, 2009 (Exhibit 16), illustrates the type of labour relations control exercised by Air Canada over Aveos. In that letter, the President and CEO of Air Canada stated the following: "I intend that Air Canada play a significant role with respect to both Aveos' business and its employee relations in the coming years" and "I reiterate my commitment to helping improve Aveos' financial stability and its labour relations. "

In my view, all of the above elements, taken together, suggest that Air Canada and Aveos operate under common control and direction.

C-Valid Labour Relations Purpose

Section 35 of the *Code* gives the Board the discretion to refuse to grant a single employer declaration, even when all of the five criteria outlined by the majority have been met. The Board's discretion is exercised only where a labour relations purpose would be served by issuing the declaration.

Traditionally, the labour relations purpose had to be remedial in nature, in order to prevent the erosion of bargaining rights or an avoidance of obligations under the *Code*. However, the Board has expanded that purpose to include the objectives of developing harmonious and effective labour relations and promoting constructive collective bargaining (see *TELUS Communications Inc. (278)*, *supra*).

I would have found a strong labour relations purpose for granting the union's single employer declaration application in this particular case, so as to preserve the existing scope of the bargaining units.

In my view, a single employer declaration would allow the union to bargain collectively with Air Canada, the entity that exercises effective strategic control over Aveos. A single employer declaration to that effect would therefore be more conducive to harmonious and effective labour relations.

IV-Conclusion

For all the above reasons, I would have dismissed Air Canada and Aveos' application under sections 18.1, 44, 45 and 46 of the *Code* and I would have granted the union's application for a declaration of single employer as between Air Canada and Aveos.



Daniel Charbonneau
Member

c.c.: Mr. Peter Suchanek (CIRB-Toronto)

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