IN THE MATTER OF AN ARBITRATION

BETWEEN:

AIR CANADA

("the Employer")

and

CANADIAN UNION OF PUBLIC EMPLOYEES, AIR CANADA COMPONENT

("the Union")

Grievance CHQ-15-07 (Policy Grievance regarding denial of B1 Travel Passes)

Before:

Larry Steinberg, Arbitrator

For the Employer:

Douglas Gilbert, Counsel
Chris Piggot, Counsel
Jennifer Black, Counsel, Air Canada Law Branch
Michael McCrory, Director, Labour Relations
Phil Brennan, Manager, Labour Relations
Krystal Johnston, Labour Relations Advisor

For the Union:

Tim Gleason, Counsel
Adrienne Lei, Counsel
Marie-Hélène Major, CUPE, ACC
Beth Mahan, CUPE, ACC
Kevin Tyrell, CUPE National Representative AC Component
Wesley Lesosky, CUPE, ACC
Carolyn Bugnon, CUPE Local 4094
Guillaume Leduc, CUPE Local 4091
Kim Wentzell, CUPE Local 4095
Denis Montpetit, CUPE Local 4092

Hearings held in Toronto Ontario on November 10, 2017, January 12 and 19, 2018

Overview

[1] In 2011 the parties were engaged in collective bargaining for a renewal collective agreement. This round of bargaining was the first to be conducted without the constraints imposed by the employer's near-death experiences under the *Companies' Creditors Arrangement Act* ("*CCAA*") in 2003 and 2004 and the financial crisis and pension deficits challenges of 2008-2009.

[2] On the last day of collective bargaining, the parties agree that the employer made a promise to the union that it would not give travel priority to the members of another bargaining unit. Based on that representation, the union withdrew a proposal that if, during the term of the collective agreement, any other employee group received, among other things, a "benefit increase, including pass travel privileges", then the members of the union would receive an equivalent benefit.

[3] This case is about the scope and content of the employer's promise. The union asserts that the promise was expansive and included privileges, whether agreed to in collective bargaining or granted outside of that process, for personal travel of all kinds. The employer asserts that the promise was limited to bargaining a priority with another union relating to commuter travel.

[4] In 2014, after the conclusion of collective bargaining between the employer and the Air Canada Pilots Association ("ACPA"), the employer granted three B1/J10 travel passes per year for 10 years to the members of ACPA. These passes, which are for personal use, give a higher priority for personal travel (including commuting) to the members of ACPA than the members of the union. The union, relying on the promise made in collective bargaining in 2011, requested that the same passes be provided to its members. The company refused.

[5] As a result, the union filed the grievance before me claiming that the employer is estopped from refusing to provide the equivalent number of B1/J10 travel passes to its members.

[6] After hearing the evidence and argument of the parties, the grievance is denied.

Process

[7] The parties filed will-say statements in lieu of *viva voce* direct evidence. When requested by the party opposite, witnesses were produced to be cross-examined. In addition, a great many documents were introduced into evidence on consent of the parties. The parties are to be commended for proceeding in this fashion which saved many days of hearings.

[8] The union filed will-say statements for the following witnesses who were cross-examined by counsel for the employer—Daniela Scarpelli ("Scarpelli"), Robin McKenna ("McKenna"), Nick Beveridge ("Beveridge") and Paul Bouchard ("Bouchard"). Will-say statements were filed for the following witnesses who were not cross-examined—Michael Cournoyer ("Cournoyer"), Jeff Taylor ("Taylor"), John Reis ("Reis") and Merilee Pirri ("Pirri").

[9] The employer filed will-say statements for the following witnesses who were cross-examined by counsel for the union—Michael McCrory ("McCrory") and Scott Morey ("Morey"). A will-say statement was also filed for Leslie-Ann Vezina ("Vezina") who was not cross-examined.

Context

[10] This case has a particularly rich and long historical collective bargaining context that is important to a full understanding of what transpired at collective bargaining in 2011. In addition, the extensive and complex system of travel privileges and passes must be understood in order to fully appreciate the concerns of the parties. I intend to summarize the evidence of these contextual matters before reviewing the specific evidence of the facts regarding the promise which is at issue. For the most part, the evidence regarding these contextual matters is not in dispute.

Origin of the Me-too Concept at Air Canada

[11] Although not unheard of, collective agreement provisions that require the employer to extend to one bargaining unit a superior term or condition of employment negotiated with another bargaining agent are not a common part of the labour relations landscape.

[12] However, when parties are forced to bargain in an environment when the very existence of the business is at risk, different considerations apply. That is what occurred in 2003 when the employer was forced to seek the protection of the *CCAA.* In 2003 and again in 2004, the parties negotiated under a cloud of imminent demise and were required to engage in a very painful process of concession bargaining.

[13] When bargaining in such circumstances, each union had a legitimate interest to ensure that all other unions maintained their respective share of the total cost reduction target. In short, the parties needed a way to keep everyone honest.

[14] The me-too provision was designed to address this issue. The specific me-too provision agreed to is to be found in a Memorandum of Understanding dated May 29, 2003.

> If during the term of the June 1, 2003 Collective Agreement any other employee group or part thereof receives any across the board payment or benefit, or any enhanced work rule, then the members of the Union shall receive an equivalent payment or benefit or enhanced work rule, other than wage increases resulting from the wage re-opener in negotiations of 2006. However, this paragraph will not be triggered by no-cost agreement with groups participating in the CCAA restructuring program that preserves such groups' cost reduction for the term of their agreement(s) and that result in no aggregate cost increases in the payroll costs of the applicable group.

[15] The parties returned to the bargaining table in 2009; however, once again, "normal" collective bargaining was suspended as result of the financial crisis, and what Morey described as unsustainable pension deficits. As a result, the employer and all of its unions agreed to a 21-month extension of their collective agreements to March 31, 2011. The parties also agreed to a me-too provision that was similar to the 2003 me-too provision to

cover the 2009 negotiations and the term of the renewal period of the collective agreements.

[16] The 2011 round of negotiations was the first round in eight years that took place under “normal” circumstances. Each party entered the negotiations hoping to achieve improvements to the collective agreement. While the me-too provision was essential to the bargaining process under *CCAA*, it makes little labour relations sense during “normal” collective bargaining because, as noted by employer counsel, the employer would constantly be subjected to whipsawing during bargaining.

Employee Travel Program

[17] Evidence about the employee travel program was given by McCrory, currently the Director of Labour Relations and formerly Counsel, Labour and Employment and Vezina, Manager, Travel and Recognition. I agree with Vezina’s characterization of the program as extensive and complex.

[18] The travel program is structured so that access to employee travel depends on the reasons for travel, position at the employer and personal circumstances.

[19] Vezina explained that a “travel pass” or “pass” is used to describe a specific travel privilege. Each pass carries a “priority” that, together with an employee’s length of service and other factors, determines whether an employee will be allocated space on a flight.

[20] Passes can be for either business or personal purposes.

[21] Business purposes can include such things as deadheading which is when flight attendants and pilots travel as passengers to reach a location in order to operate a flight. When travelling for such purposes, the employee is guaranteed a seat. For flight attendants, the priority associated with the pass is a confirmed seat in economy class (“Y class”) with a right to upgrade to business class (“J class”) if space is available. Until 2004, first officers held the same priority as flight attendants. If there was only one J class seat available, the employee with the greater service was given the seat.

[22] In 2005, the employer and ACPA negotiated an ongoing priority for first officers so that, regardless of service, first officers were assigned to J class when space was available when deadheading. For example, a first officer with two years of service has priority for a J class seat over a flight attendant with 20 years of service. This priority is found in article 23.01.04.01 of the ACPA collective agreement.[1]

[23] It is not surprising that this has been a matter of ongoing bitterness and upset among the flight attendants. It is seen by them as an indication of a lack of respect for the work they do, a failure to recognize their contribution to the success of the employer and a failure to reward long service with the company. The feelings of the bargaining unit are well-known to the employer.

[24] With respect to travel for personal reasons, all unionized employees and some management personnel receive an unlimited number of C2 passes. These passes, which are for Y class without the right to upgrade to J class, do not guarantee an employee a seat. Whether the employee can obtain a seat is subject to space being available. These passes can be used for any number of reasons including commuting and leisure travel.

[25] In 2008, the employer closed the Halifax and Winnipeg bases. Flight attendants and pilots use these passes to commute from the city in which they live (for example, Halifax) to the base where they are assigned and from which they will operate a flight (for example, Toronto).

[26] In addition to its system-wide travel program, the employer will, from time to time, provide special personal passes or modify the terms and conditions applicable to travel passes to specific employee groups in recognition of accomplishments or superior performance.

[1] The union grieved the refusal of the employer to extend the same priority to its members. It alleged a violation of the *CCAA* me-too agreement. The grievance was dismissed. *Air Canada and Canadian Union of Public Employees Air Canada Component and Air Canada Pilots Association,* unreported decision of Arbitrator Owen Shime dated July 19, 2007 ("Shime award").

[27] Vezina provided the following examples: a) in December 2013 members of the union were issued a pass with higher priority (and upgrade privileges) than the C2 basic pass for winning an industry award as best flight attendants in North America; b) after collective bargaining in 2015, the members of the union were awarded two passes per year with higher priority (and upgrade privileges) than the basic C2 pass as a thank you for agreeing to a 10-year collective agreement; c) members of the union who work Christmas and/or New Years Day receive a pass with a higher priority (and upgrade privileges) than the C2 pass for each day worked; and d) in 2016 special passes were awarded to the employees represented by Unifor and IAMAW in recognition of the ratification of long-term collective agreements.

[28] Another example, and the one which is the subject of this dispute, was the 2014 grant of three B1 passes per year for 10 years to the members of ACPA for negotiating a 10-year collective agreement which was very important to the employer. The B1 pass has a higher priority than the basic C2 pass and, subject to space, can be upgraded to J class. These passes are normally available to management employees of a relatively senior rank.

[29] Vezina testified that in all the examples the employer did not award the same passes to all other employee groups and that the employer has always maintained that the number and nature of personal travel passes issued to any employee group is a matter entirely within its discretion which it can modify as it sees fit. McCory testified that personal travel has always been considered by the employer as a privilege and have not been subject to negotiations. His testimony reflected that of Vezina to the effect that the number and nature of personal passes is a matter within the discretion of the employer.

[30] Cournoyer, the president of the union, gave evidence that the parties have a history of negotiating the issue of travel passes and asserted that they form an integral part of the collective agreement. He referred to several provisions of the collective agreement. McCrory, in his evidence, disagreed with Cournoyer’s assertion. He testified that the references in the collective agreement to travel passes and related features are

limited and were selectively extended in support of restructuring initiatives and downsizing programs.

[31] Having reviewed the provisions of the collective agreement referred to, I agree with McCrory. The details of the travel program are not referred to anywhere in the collective agreement and the substance of the provisions referred to by Cournoyer merely extend eligibility for the program or aspects of it to employees in the two situations referred to by McCrory or, in one case, as part of a self-funded leave of absence program. There was no evidence that the substantive terms of the travel program have been negotiated.

Summary of the Context

[32] In my view, the context entering into bargaining in 2011 can be summarized as follows. The me-too culture between the parties originated in a process of *CCAA* mandated negotiations and not "normal" collective bargaining. The parties knew or ought to have known that such a provision was not suited to collective bargaining outside that process.

[33] The employer has consistently and zealously maintained over the years that the travel program for personal travel is a privilege that it views as entirely within its discretion. This is reflected in the fact that there is no evidence that the parties ever negotiated the substantive terms and conditions of the personal travel program which remain outside of the collective agreements to which the employer is bound.

[34] One aspect of the exercise of the employer's discretion is a history of awarding special personal travel passes to groups of employees which are in addition to the basic passes awarded to all employee groups. Not all employee groups receive the same special passes and not all the special passes have the same terms and conditions, including priority.

[35] With respect to travel for business purposes, the employer has negotiated provisions with ACPA which are in the collective agreement, most recently in 2005 giving

first officers priority over flight attendants for J class seats when deadheading. The employer was aware that this was the source of a great deal of upset among the members of the union.

2011 Collective Bargaining

[36] This round of collective bargaining was the first since 2003 which could be considered to be "normal". Both parties intended to seek improvements after years of either concessionary bargaining or roll-over agreements.

[37] Collective bargaining commenced in April 2011. The parties reached two tentative agreements which were not ratified ("TA1 and TA2"). The 2011-2015 collective agreement was ultimately settled by interest arbitration on November 7, 2011.[2]

[38] At or about the same time, the employer was negotiating with ACPA. A tentative agreement was reached but not ratified in March 2011. Collective bargaining resumed in Fall of 2011 but no agreement was reached. The collective agreement was settled by a process of final offer selection which concluded with the decision of the final offer selector in July 2012. Morey testified that enhanced travel privileges was not on the table during bargaining or the final offer selection process.

[39] All of the union witnesses testified that one of the union's goals in bargaining was to protect the membership from the possibility of one unionized group receiving a greater travel priority. The union witnesses testified that the rumour that was at the root of the union's concern was that the pilots "were being given a higher commuting priority" (McKenna, Beveridge Scarpelli) [emphasis added] and "that Pilots would be getting a higher travel priority than other Air Canada employees" (Bouchard). The rumour was circulating among the members of the union at or about the same time that both ACPA and the union were bargaining with the employer.

[2] *Air Canada and Canadian Union of Public Employees,* unreported decision of Elizabeth McPherson.

[40] Accordingly, one of the union's proposals presented to the employer on April 6, 2011 was Proposal #14 which read as follows:

> **Continuation of No Charge Travel Passes and Guarantee on Pass Priority**
>
> If any group receives a higher pass priority for personal use, including commuting, CUPE shall receive the same benefit.

[41] It is obvious that this proposal went farther than was necessary to address the union's concern since, as pointed out above, commuting is a sub-set of the personal use C2 pass.

[42] The parties met again on April 7, 2011 at which time the union's proposals were reviewed and clarification sought as required. With respect to Proposal #14, the employer asked "What is meant by 'Guarantee on Pass Priority'". The union responded "If another group gets a higher pass priority for personal or commuting travel, CUPE gets it too. It is a me-too."

[43] Proposal #14 is next discussed on May 25, 2011 when the union advised the employer that "Very important issues of all employees not just f/a's. We should have same privileges as every group." Proposal #14 was amended to include the waiver of service charges. The amended proposal read as follows:

> New Article 27—Service Charges and Travel Passes
>
> Service charges levied by Air Canada on travel privileges on active Air Canada personnel will be waived. All other applicable taxes and third party fees will apply.
>
> If any group receives a higher pass priority for personal use, including commuting, the members of the Union shall receive the same benefit.

[44] On May 26, 2011, the union proposed a new me-too proposal which read as follows:

> *Add New Article 5.01.01*

> 5.01.01 If, during the term of the Collective Agreement, any other employee group or part thereof receives any across the board payment or benefit increase, including pass travel privileges, or any enhanced work rule, then the members of the Union shall receive an equivalent payment or benefit, or enhanced work rule.

[45] This was obviously based on the *CCAA* me-too provision referred to earlier with the addition of a reference to "pass travel privileges".

[46] On May 27, 2011, the employer addressed Proposal #14 and indicated that "Company views Travel privilege not negotiable." There is no evidence that the union agreed with or accepted the employer's position. There was no evidence of any substantive discussion about proposed new Article 5.01.01 at this time, or indeed, at any time thereafter and no evidence of any discussion about why the union had two me-too proposals on the table.

[47] This proposal, based as it is on the *CCAA* provision, significantly expanded the proposed me-too provision well beyond personal travel to include across the board increases, benefits and enhanced work rules.

[48] On June 21, 2011, the union withdrew Proposal #14. There is no evidence of any discussions at the time explaining why it was withdrawn.

[49] On July 31, 2011, the union tabled its Final Proposal which included proposed Article 5.01.01. The parties bargained through the night, and in the early hours of August 1, 2011, two meetings took place.

[50] Scarpelli testified that "during the very early hours of the morning of August 1" she spoke with Michael Abbott ("Abbott"), Director Labour Relations for the employer, during a meeting with Morey and Taylor. Scarpelli testified that Abbott indicated that the employer "would not give another employee group better travel passes that [*sic*] flight attendants, as the Union had proposed, but that doing so on paper would cause problems for Air Canada." She testified that she understood that the employer had agreed with the

union's proposal regarding pass priority but did not want to set a precedent with the me-too language.

[51] There was no evidence that any notes were taken at or immediately after the meeting. Morey testified he had no recollection of this meeting. Abbott did not testify. Taylor, who did testify through his will-say, did not refer to this meeting.

[52] The only other evidence touching on this meeting was the hearsay evidence of Beveridge that he understood from Scarpelli that Abbott had asked her to withdraw the me-too proposal (in his will-say he incorrectly referred to it as Proposal #14) in exchange for a company promise not to give another employee group a higher priority.

[53] The union strongly asserted that Scarpelli's evidence of this meeting must be accepted since it is uncontradicted. There is some merit to that position but the fact that Taylor, the other union representative to attend the meeting, did not refer to it raises some concern. However, whether I accept Scarpelli's evidence or not, this meeting is not determinative of the issue I have to decide. The union relies on the representation made by Morey later that morning as the basis for its estoppel argument.

[54] Scarpelli testified that following that meeting she briefed the union‘s negotiation committee. She testified that the employer wanted to meet without its entire committee to discuss the me-too proposal which remained a barrier to achieving a tentative agreement. It was her evidence (supported by Beveridge) that the union decided that if the employer gave "a clear and binding promise", the union could withdraw the me-too proposal.

[55] The parties met just before 6 a.m. on August 1, 2011 at which time both parties agree that a representation was made by the employer. The union's negotiating committee and its advisors attended for the union. Evidence of the meeting was given by Scarpelli, Beveridge, Taylor, McKenna, Bouchard and Reis. In addition, notes of the meeting taken by Megan Reid ("Reid"), union counsel, were introduced on consent. The employer was represented by Morey, Abbot and Sue Welcheid. The only notes of the meeting in evidence were taken by those on the union side but there really was very little dispute about what was actually said.

[56] Scarpelli's evidence was that Morey addressed "the pilot commuter issue" [emphasis added] and stated that the rumour was not true. She testified that he further stated that "the Company would not give one unionized group higher priority than another unionized group." Her evidence was that Morey referenced the deadheading priority given to first officers in 2005, stated it was a mistake and that the employer "would not make a mistake like that again." The union's evidence was that Morey stated that he had spoken to Kevin Howlett, the employer's Senior Vice President, Labour Relations, before making the promise.

[57] Scarpelli then asked Morey two questions. First, she asked Morey if he was no longer employed by the employer would the promise still be binding. He replied that it would. Second, he was asked if the promise was a personal promise or whether it was made on behalf of the employer. He replied it was made on behalf of the employer. Scarpelli testified that she told Morey that the union was relying on the promise and that the union could not agree to withdraw the me-too proposal without the promise. The evidence of the other members of the union bargaining committee who attended this meeting was, for the most part, consistent with Sarpelli's evidence.

[58] Morey did not disagree in any material way with Scarpelli's evidence of what he said; however he testified that the promise he made was narrow in scope. He testified that, prior to making the promise, he was aware of the upset among the members of the union regarding the deadheading priority for first officers and he was aware of a rumour that ACPA was attempting to bargain priority for commuting and that the commuting issue had been raised at the bargaining table with the union. He also testified during cross-examination that the broader issue of the personal travel program and the issuance of special passes was never discussed. He therefore set out to assuage the union's concerns as he understood them.

[59] He testified that at the meeting in the early hours of August 1, 2011, he advised the union that he was aware of the rumour that ACPA was attempting to bargain a priority for commuting and stated that the rumour was not true. He testified that it was in this context that he promised that the employer would not give travel priority with to one group

of employees over another as it had done in connection with deadheading for first officers. He testified that there was no discussion of proposed Article 5.01.01, no example other than commuting was raised by either party and there was no discussion about allotments of special passes for personal travel. He testified that the discussion lasted approximately five minutes.

[60] Morey was closely cross-examined on his evidence. Morey agreed that among the purposes for which personal passes can be used is to commute. He agreed that he understood the union's me-too proposal on its face included more than commuting, but he was adamant that, regardless of the language of the proposal, the concern expressed at the bargaining table was always focused on commuting and the concern that ACPA was negotiating a priority for its members. Morey further stated that there were no union proposals on deadheading and agreed that the union never agreed to the employer's position that travel privileges were not negotiable.

[61] When asked if the me-too proposal was important, he replied that the parties did not spend a lot of time on it, and in the context of the other issues dealt with, it was a low priority. When pressed on the significance of proposed Article 5.01.01 on the last day of bargaining, he stated that there was not a lot of discussion and he viewed it as part of the "clean-up" of an outstanding proposal.

[62] The union produced notes taken at the meeting by four members of its Negotiating Committee and its legal counsel. They are all consistent that Morey positioned his promise on the rumour that the pilots were bargaining a higher priority for commuters.

[63] Reid's notes indicate that Morey stated among other things that the "Pilot bargaining rumour…that pilots trying to bargain a higher priority for commuters was factually incorrect. No proposal from ACPA and no consideration would have given by AC for such a proposal." [emphasis added]

[64] Reis' notes indicate that Morey said "situation for commuters & employee grp vs other employee grp…rumour pilots trying to bargain higher priority for commuters—not

case…commuter @ higher priority Co's intent not to give higher priority over other". [emphasis added]

[65] McKenna's notes of this meeting record Morey stating "Me too issue-priorities for commuters↑ than other groups...pilot bargaining rumour-↑priority for commuters—absolutely incorrect" [emphasis added]

[66] Scarpelli's notes indicate that Morey said "Re 'Me too', priorities for another group were given. Rumour re ACPA commuters w/a higher priority." [emphasis added]

[67] Bouchard's notes state "Priorities for commuters etc ie f/A's given lower priority—Rumour that pilots were trying to bargain a higher priority for commuters." [emphasis added]

[68] In the result, the union withdrew its me-too proposal and TA1 was agreed to. All the union witnesses testified that they doubted that a tentative agreement would have been reached without Morey's promise.

[69] The parties returned to the bargaining table on September 1, 2011 following the failure to ratify TA1. At the meeting on September 1, 2011 the union indicated that it could not make concessions on LOU 35 which had not been renewed as part of TA1. During that meeting Morey stated that there would be "no me-too".[3] In cross-examination he agreed that his statement was in reference to LOU 35 and not the me-too that the union had withdrawn on August 1, 2011. Finally, during the meeting Morey made a comment that the parties were "back at square one".

[70] There was no evidence that proposed Article 5.01.01 was referred to at all during these negotiations. There was no evidence that either party advised the other that any promises made during collective bargaining should be considered withdrawn or no longer part of the process.

[3] LOU 35 was in fact part of TA2 which was agreed to on September 20, 2011.

[71] TA2 met the same fate as TA1 and the collective agreement was finally settled by interest arbitration on November 7, 2011.

[72] The B1 passes at issue were granted to the members of ACPA by the employer in the fall of 2014, after the ratification of the 10-year collective agreement, effective January 1, 2015.

Position of the Parties

[73] Both parties made extensive submissions which can be summarized as follows.

Union

[74] The union argued that all the elements of estoppel are present in this case. The union pointed out that Morey acknowledged in cross-examination that he, on behalf of the employer, made a promise that was binding on the employer, that was intended for the union to rely on and was in fact relied on. The detrimental reliance is manifest in this case since the evidence is that the union advised Morey that but for the promise it would not withdraw proposed Article 5.01.01 and in reliance on the promise, the union proceeded to withdraw it.

[75] The union asserted that, when taken together with the priority given to first officers for deadheading, the granting of B1 passes in this case amounts to institutionalized sexism favouring the predominately male pilots over the predominately female flight attendants.

[76] The union noted the evidence that one of its primary goals in bargaining in 2011 was to protect their members against the possibility that another group would get a higher travel priority, and specifically, that the pilots would get such priority. This was clearly explained to the employer on April 7, 2011 in relation to Proposal #14 which, with one small addition of service charges, remained identical throughout until it was withdrawn and replaced by proposed Article 5.01.01.

[77] Moreover, the union asserted that the evidence was that the union never agreed with the employer's position that travel privileges were not negotiable and kept such a proposal on the table until the very end of negotiations.

[78] With respect to the critical meeting at which Morey is alleged to have made the promise on which the union relies for its estoppel argument, the union noted that all of its negotiating committee present at the meeting testified whereas only Morey testified for the company even though Abbott and Welscheid were also present.

[79] The union argued that the evidence about what was said at the meeting by the union witnesses was clear and consistent. The union also noted that in cross-examination Morey admitted that he made the promise, he intended to make the promise and intended that the promise be relied on by the union.

[80] The union addressed Morey's evidence that the promise was only in connection with commuter travel. The union argued that Morey had a selective memory and had no notes to support his position.

[81] The union noted the employer's position that, even if Morey made the promise as alleged, when the parties met after TA1 was rejected, his comment that the parties were back "to square one" and that the statement "no me-too", meant that the promise was effectively withdrawn. The union argued that there was no evidence that the employer made any statements regarding whether the promise could still be relied on and the comment about "no me-too" was in relation to LOU 35.

[82] Finally, the union noted that the union's evidence proved detrimental reliance since its me-too proposal was withdrawn based on the promise made.

[83] The union relied on numerous authorities in support of its argument including *Telus Communications Inc. v. TWU,* 2010 CarswellNat 4594 (Sims) ("*Telus*") which was also relied on by the employer.

[84] The union addressed the case of *Mill & Timber Products Ltd. v. IWA-Canada, Local 1-3567,* 1996 CarswellBC 3063 (Kinzie) relied on by the employer regarding the effect of an unratified collective agreement on a promise made at bargaining. The union noted that the promise in that case was conditional on the collective agreement being ratified. In this case the union noted that the promise was unconditional.

Employer

[85] The employer argued that there was no dispute that Morey made a representation on August 1, 2011 which it characterized as a focused response to a specific concern raised by the union that ACPA was bargaining a pass priority related to commuting. The employer argued that all the evidence shows that the promise that was made in this context.

[86] The employer asserted that the history of the travel program is an important contextual matter. That history showed that the employer has steadfastly refused to negotiate travel passes and has consistently maintained that it is entirely within management discretion. At the time of 2011 collective bargaining, there was no history of the employer bargaining an allotment of travel passes for any employee group but there was a history of rewarding employee groups by allocating such passes. The employer noted as well that there was one isolated example of the employer negotiating a specific travel priority in respect of a specific type of business travel (i.e., the deadheading priority).

[87] The employer argued that the B1 passes granted to the pilots were entirely consistent with its past practice of awarding passes for significant events, in this case the 10-year collective agreement. Although Cournoyer testified that the pilots bargained these passes, Morey's evidence was that travel priority was not an issue during bargaining with ACPA and was not discussed.

[88] The employer also emphasized that since the base closures in 2008, members of the union had the option of commuting from their homes to the new bases that they were

assigned to and personal passes are used for that purpose. Any development that could possibly reduce their chances of getting a seat to commute was of great concern.

[89] The employer observed that it was commuter priority that drove the concern of the union's bargaining committee and pointed to the evidence of Scarpelli, Beveridge and McKenna where the issue identified was a rumour about pilots negotiating a commuting priority. The employer noted that prior to making his representation, Morey communicated with Howlett to ensure that there was no intent to provide priority to pilots for commuting.

[90] The employer outlined the representation made by Morey and noted that it is entirely consistent with a restricted assurance and inconsistent with the broader assurance that the union attributed to it. More importantly, the employer noted that "there was not a lot of space" between Morey's evidence of what was said at the meeting and the union's evidence of what was said.

[91] The employer argued that the first issue that must be decided in this case is what was the promise that was made. The employer argued that the promise or representation on which an estoppel rests must be clear and unambiguous (Shime award at pp. 17-18) and asserted that Morey's representation was clear—the employer would not in collective bargaining grant a greater commuter priority to another employee group. And, in fact, the employer was true to that promise.

[92] The employer referred to the *Telus* case where at para. 137, which was also relied on by the union, Arbitrator Sims stated as follows:

> [T]he question of whether, in all the circumstances, there has been conduct that amounts to a representation that has been relied upon to the claimant's detriment is a matter of fact and judgment based on the practical realities of bargaining.

[93] The employer asserts that, based on the practical realities of collective bargaining in this case, Morey dispelled, to the satisfaction of the union, the rumour about what the pilots were attempting to achieve at collective bargaining with regard to commuting. His promise was focused on the very concern expressed by the union and nothing more.

[94] In the alternative, the employer argued that the representation was not clear and unambiguous since proposed Article 5.01.01 was so broad, and in view of the fact that there was no discussion at the bargaining table about it, there is no way of knowing which part or parts of it Morey's promise related to.

[95] In the further alternative, the employer argued that since TA1 (and subsequently TA2) was not ratified then then whatever the promise, it was spent. It was not referred to at all in the bargaining that occurred following the rejection of the TAs and was not re-tabled by the union.

Union Reply

[96] The union took issue with the employer's assertion that there was no evidence that proposed Article 5.01.01 was never explained by the union to the employer. The union asserts that the evidence that it was explained can be found in Scarpelli's will-say at para. 15 and in the evidence about the discussion with Morey when the representation was made which is confirmed in Scarpelli's notes of the meeting.

Decision

[97] The quote from Arbitrator Sims is a very useful approach in a case such as this with such long and complex context. The practical realities of collective bargaining are informed, in part, by the context of the relationship between the parties and is reflected in what they propose, in what they say and how it is to be understood.

[98] As noted at the outset of this award, context is the key to evaluating the representation that Morey made on August 1, 2011. In my view, the following are the most important aspects of the context.

[99] The union's concern was in relation to maintaining a level playing field for commuter priority. The union's concern was based on a rumour that ACPA was attempting, in their contemporaneous collective bargaining negotiations with the employer, to negotiate a higher priority for commuting for its members. This is clear from

the union's evidence referred at paragraph 39 above. In light of the deadheading priority that had previously been negotiated with the pilots and the fact that many of the union's members commuted to their bases, this concern was understandable.

[100] The fact that commuting was the central concern of the union is made clear in Proposal #14 itself which, for convenience, was as follows:

> **Continuation of No Charge Travel Passes and Guarantee on Pass Priority**
>
> If any group receives a higher pass priority for personal use, including commuting, CUPE shall receive the same benefit. [emphasis added]

[101] The reference to "personal use" includes the use of passes for commuting. The specific reference to commuting in the proposal is obviously superfluous but sheds light on the real concern of the union which is consistent with the evidence of the union.

[102] Other than a clarification about what "Guarantee on Pass Priority" meant, there was no substantive discussion about the scope of Proposal #14. On April 7, 2011, the union clarified that it meant what it said and was a me-too provision in respect of "personal or commuting travel". Consistent with its historical position, the employer indicated that its position was that travel was non-negotiable. Notwithstanding the union's evidence about the importance of this issue, there is no evidence that the matter was re-visited, other than a brief reference on May 25, 2011, prior to the withdrawal of proposal #14 on June 21, 2011.

[103] On May 26, 2011 the union tabled proposed article 5.01.01 which was a form of the me-too language used during the *CCAA* era. The only difference was the inclusion of the words "including pass travel privileges". For convenience it read as follows:

> If, during the term of the Collective Agreement, any other employee group or part thereof receives any across the board payment or benefit increase, including pass travel privileges, or any enhanced work rule, then the members of the Union shall receive an equivalent payment or benefit, or enhanced work rule.

[104] Since it was based on the *CCAA* me-too provision, this was a much broader formulation of what the union was initially seeking and extended the me-too well beyond just travel privileges to include across the board payments, benefit increases and enhanced work rules. And even with respect to travel privileges, it vastly expanded the scope of the me-too well beyond personal travel privileges to all "pass travel privileges". At no time was this proposal, with its potentially far-reaching implications, the subject of any discussion at the bargaining table. Nevertheless, it was still outstanding on August 1, 2011 when the parties were making the final push to get a collective agreement.

[105] This forms the factual foundation against which, to use Arbitrator Sims' words, the "practical realities of collective bargaining" must judged.

[106] In my opinion, Morey's view that the concern of the union was narrowly focused on the rumour that the pilots were attempting to bargain a priority for its members when commuting, was reasonable and well-founded. This was apparent from comments made at the bargaining table and Proposal #14 itself which specifically referred to commuting. Moreover, the union's evidence was very clear that this was its concern.

[107] Accordingly, in light of the fact that the parties were in the final stages of collective bargaining and proposed Article 5.01.01 remained outstanding, Morey decided to respond directly to that concern. Prior to meeting with the union, he did his due diligence by speaking to Howlett to be certain that the issue was not under consideration by senior levels of management. When he received assurances that it was not, he then spoke with the union and made his representation.

[108] There really is no dispute about what he said to the union during the meeting on August 1, 2011. One only has to look at the contemporaneous notes taken by the members of the union negotiating committee (paragraphs 63-67 above). The evidence is clear that he referenced the rumour that the pilots were bargaining a commuting priority and he indicated that the rumour was not true. All witnesses agree he referenced the deadheading issue which, it must be recalled, was a negotiated priority for first officers, as a mistake the employer would not make again. And he indicated that the employer

would not give a higher priority to one group of employees over another group. This is all consistent with Morey's understanding of the dispute. Based on this representation, the union withdrew proposed Article 5.01.01.

[109] I find that Morey's representation was narrow in scope. It was in respect of the very concerns that had been expressed by the union and the rationale for the me-too proposals. He represented that the employer would not negotiate a commuting priority with ACPA during collective bargaining and it did not do so. His promise did not extend to a representation that the employer would fetter its discretion to grant travel privileges. If the union had clarified at the time that it understood Morey's promise to extend that far, I have no doubt that TA1 would not have been agreed to.

[110] The conversation regarding this particular issue lasted no more than five minutes. In the context of the relationship between the parties on this issue, the realities of collective bargaining and the words he words he used, it is not possible to conclude that the representation was as broad as the union asserts in this case.

[111] It is a fact that the union proposal that was withdrawn was broad enough to include the passes at issue here. However, that does not, on the facts of this case, give any greater breadth to the promise that was made. Even if the union intended, by its proposals, to include the employer's historical practice of awarding passes for personal travel, the promise that made was much narrower and did not include that practice.

[112] In view of my findings it is not necessary to consider the employer's alternative arguments.

[113] The grievance is dismissed.

Dated at Toronto Ontario this 13th day of April 2018.

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Larry Steinberg